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Russia's Aggression Against Ukraine: State Responsibility, Individual Responsibility and Accountability

Scrutinizing Ukraine's Application at the ICJ, Ukraine's Acceptance of the ICC's Jurisdiction Pursuant to Art. 12(3) of the Rome Statute and the Role of the UN Human Rights Monitoring Mission in the Context of the Ukraine Crisis

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Summary

The majority of legal practitioners and liberal democratic states hold the same opinion: Russia's annexation of Crimea and its support to the rebels in Eastern Ukraine constituted an act of aggression against the sovereign state of Ukraine. Four years have passed since fighting erupted in Ukrainian regions adjacent to Russia leaving thousands of innocent civilians dead, traumatised or homeless. Families have been torn apart. Despite a vast amount of evidence, Russia has continued to deny the facts that it breached international law by annexing a foreign territory and supporting the so-called Donetsk People's Republic and Luhansk People's Republic after the ousting of the former pro-Russian president Viktor Yanukovych at the end of the Maidan revolution in February 2014.

Most researchers expounded on the international norms Russia has put at stake and pondered over Russia's unreasonable legal justifications for its actions in Crimea. The Ukraine crisis has been dealt with extensively both from a political science and legal perspective but only a few scholars discussed the tools international law provide to establish Russia's responsibility for its wrongful conduct and to hold individuals responsible, suspected of having committed crimes against humanity and war crimes on Ukrainian territory.

Scrutinizing Ukraine's recent application at the International Court of Justice on the basis of two treaties, the International Convention for the Suppression of the Financing of Terrorism and the International Convention on the Elimination of All Forms of Racial Discrimination, and analysing Ukraine's acceptance of the ICC jurisdiction pursuant to Art. 12(3) of the Rome Statute, this author aimed to identify the tools and barriers of international law in the context of establishing state and, respectively, individual responsibility. An analysis of the role of the UN Human Rights Monitoring Mission in Ukraine complemented the former two perspectives. Whereas the ICJ and the ICC can enforce international law and hold either states (ICJ) or individuals responsible (ICC), the HRMMU was examined for the purpose of creating accountability for grave violations of international human rights law and international humanitarian law.

This research primarily found out that the tools of international law to hold Russia responsible for its illegal use of force are limited in the specific case of Ukraine at the ICJ. The vague plausibility test of the ICJ sets a high threshold for Ukraine at the preliminary stage of proceedings.

Contrary to the rather grim outlook for Ukraine's application at the ICJ, the results of the analysis of the second perspective allow for being more optimistic that serious crimes committed by individuals affiliated with the DPR/LPR or the Russian government will not go unpunished. An important question remains whether the OTP will conclude that Russia exercised overall control over the rebels. Even though there is reason to believe that the Prosecutor of the ICC will open an

investigation into the *situation in Ukraine*, one might not expect this to happen any time soon given political and institutional barriers.

The assessment of the third perspective showed that the HRMMU has helped to fill the legal void left by the actions of Russia in Crimea and the rebels in the Donbas. The HRMMU has given victims and their relatives a voice. Although the mission cannot enforce international law, it has proved helpful in gathering evidence and documenting violations of international human rights law and international humanitarian law in its reports, which had already been cited by the ICJ and the ICC.

Keywords: International Court of Justice, State Responsibility, Plausibility Test, International Criminal Court, Individual Responsibility, Overall Control Test, UN Human Rights Monitoring Mission in Ukraine, Accountability

List of Abbreviations

CERD = International Convention on the Elimination of All Forms of Racial Discrimination

DPR = Donetsk People's Republic

ECHR = European Court of Human Rights

HRC = Human Rights Council

HRMMU = UN Human Rights Monitoring Mission in Ukraine

IAC = International Armed Conflict

ICC = International Criminal Court

ICJ = International Court of Justice

ICRC = International Committee of the Red Cross

ICSFT = International Convention for the Suppression of the Financing of Terrorism

ICTR = International Criminal Tribunal for Rwanda

ICTY = International Criminal Tribunal for the Former Yugoslavia

IHL = International Humanitarian Law

IHRL = International Human Rights Law

IL = International Law

ILC = International Law Commission

LPR = Luhansk People's Republic

NIAC = Non-International Armed Conflict

OHCHR = Office of the High Commissioner for Human Rights

OTP = Office of the Prosecutor at the International Criminal Court

UDHR = Universal Declaration of Human Rights

UNC = United Nations Charter

UNGA = United Nations General Assembly

UNGA Res. = United Nations General Assembly Resolution

UNSC = United Nations Security Council

UNSC Res. = United Nations Security Council Resolution

VCLT = Vienna Convention on the Law of Treaties

Sworn Statement

''I hereby solemnly declare that I have personally and independently prepared this paper. All quotations in the text have been marked as such, and the paper or considerable parts of it have not previously been subject to any examination or assessment."

Date and Place: Signature:

10.07.2018, Heikendorf Alexander Antonov

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Chapter I – The Background

''The reality is not that we are about to incorporate a new subject into the Russian Federation but it is rather that we are on the brink of nullifying all our international obligations {…}.''[1]

1.1) Introduction to the Thesis

Who would have envisaged a permanent member of the UNSC bearing ''primary responsibility for the maintenance of international peace and security'' to annex the neighbouring state's territory in breach of core UNC obligations in the 21st century?[2] With the Ukraine crisis now in its fourth year, one wonders when to see an end to the daily abuse of people's human rights in the occupied territory of Crimea, the flagrant crimes civilians are constantly exposed to in the rebel controlled regions of the LPR and DPR and the general lawlessness prevalent in these breakaway territories. Although the Minsk Peace Agreements could halt the most intense shelling that had occurred in the period between Summer 2014 and February 2015, they have not brought back peace to Ukraine with the OSCE Special Monitoring Mission still continuing recording gross cease-fire violations on a daily base.[3] As stated in one of the last reports by the OHCHR, more than 35.000 conflict-related casualties, there under 10.300 killed and 24.700 injured, have been registered since fighting erupted in Eastern Ukraine in April 2014.[4] 2 million people have been displaced.[5] Among the worst tragedies was the downing of a civilian passenger jet with 298 civilians aboard on 17 July 2014.[6]

The call for justice, covered by the terms responsibility and accountability, will be the underlying theme of this thesis. While both terms have been frequently applied in the same context, it should be noted that there is a difference between them: Whereas the concept of responsibility only arises when a state committed an internationally wrongful act or an individual perpetrated a serious crime within the jurisdiction of the ICC, accountability covers broader, also political aspects of answerability.[7] This author intends to primarily focus on legal aspects within the analysis and distinguishes between state responsibility, individual responsibility and accountability, of which the

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[1] Andrey Zubov, ''History repeats itself'' {Это уже было: as translated into English by this author}, *Vedemosti*, 1 March 2014 (available at https://www.vedomosti.ru/opinion/articles/2014/03/01/andrej-zubov-eto-uzhe-bylo ··· cut); Zubov was one of the few Russian high-ranking scholars who officially condemned Russia's annexation of Crimea. For his critical view, he had to leave the Moscow State Institute of International Relations (MGIMO).
[2] UNC, Art. 24.
[3] See e.g.: OSCE, ''Thematic Report: Civilian casualties in eastern Ukraine,'' September 2017 (available at https://www.osce.org/special-monitoring-mission-to-ukraine/342121?download=true).
[4] OHCHR (o), ''Report on the human rights situation in Ukraine 16 August to 15 November 2017,'' *UN*, 12 December 2017, para. 30 (available at http://www.ohchr.org/Documents/Countries/UA/UAReport20th_EN.pdf).
[5] *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, ICJ, 16 January 2017, para. 4.
[6] OHCHR (o), *supra* note 4, para. 29.
[7] James Crawford, *State Responsibility: The general part*, 2013, 85.

latter covers both the conduct of states and individuals from a rather more political than solely legal perspective.

The decision by the former Ukrainian president Viktor Yanukovych to favour Russia's 15 billion loan over the Association Agreement with the EU prompted mass protests on the Maidan square in the Ukrainian capital Kyiv. A peaceful demonstration starting with a couple of hundred students on 21 November 2013 developed into a democratic mass gathering of people of all social classes tired of decade long state corruption.[8]

With a multitude of people injured by the special police forces Berkut and 108 dead, the foreign ministers of Germany, France and the special envoy of Russia met with Yanukovych and the opposition leaders on 21st January 2014 to settle the crisis.[9] However, shortly after signing a document, that would reinstate the constitution of 2004, the Ukrainian president fled to Crimea where he was flown in to Russia.[10] Reasoning that the president on the run had ''withdrawn from performing constitutional {duties}'', the Verkhovna Rada decided with a majority of 328 of 447 votes to ''remove Viktor Yanukovych from the post of president of Ukraine''.[11] Turchynov was elected as interim president with a newly formed government. Highly questioning the legitimacy of the vote calling it an ''anti-constitutional coup'', Russia continued to view Yanukovych as the sole democratically elected and acting president of Ukraine.[12]

[8] At the beginning, the movement was labelled as the ''Euromaidan''; when more people joined, it was renamed to ''pro-Maidan'': ICC, ''Report on Preliminary Examination Activities 2014,'' *OTP*, 2 December 2014**,** paras. 62-63 (available at https://www.icc-cpi.int/iccdocs/otp/OTP-Pre-Exam-2014.pdf).

[9] OHCHR (k), ''Accountability for killings in Ukraine from January 2014 to May 2016,'' *UN*, 25 May 2016, 3 (available at http://www.ohchr.org/Documents/Countries/UA/OHCHRThematicReportUkraineJan2014-May2016_EN.pdf); Auswärtiges Amt, ''Agreement on the Settlement of Crisis in Ukraine,'' Kyiv, 21 February 2014 (available at https://www.auswaertiges-amt.de/blob/260130/db4f5326f21530cad8d351152feb5e26/140221--ukr-erklaerung-data.pdf).

[10] Yanukovych did not give in to the demands of the opposition to resign as he still considered himself acting as ''the legitimate head of the Ukrainian state elected through a free vote by Ukrainian citizens'': OHCHR (d), ''Report on the human rights situation in Ukraine 15 April 2014'', 15 April 2014, para. 16 (available at http://www.ohchr.org/EN/Countries/ENACARegion/Pages/UAReports.aspx)*;* Andrey Kondrashev, ''Crimea: The Way Home {Крым. Путь на Родину:
translated into English by this author},'' *youtube*, 15 March 2015, at 8:40-12:40 (available at https://www.youtube.com/watch?v=t42-71RpRgI).

[11] OHCHR (d), *supra* note 10, para. 16.

[12] President of Russia, ''Vladimir Putin answered journalists' questions on the situation in Ukraine,'' 4 March 2014 (available at http://en.kremlin.ru/events/president/news/20366); as later explained in chapter II, Russia used this argument to justify its actions in Crimea (''intervention by invitation'': see e.g. Christian Marxsen, ''International Law in Crisis: Russia's Struggle for Recognition,'' *German Yearbook of International Law*, vol. 58, no. 1 (2015), 6; for scholars, who posited that the vote contravened the Ukrainian constitution as neither the procedures pursuant to Art. 111 nor the required 2/3 majority of votes (338 parliamentarians) were respected, see e.g.: Patrycja Grzebyk, "Classification of the Conflict between Ukraine and Russia in International Law (Ius ad Bellum and Ius in Bello)," *Polish Yearbook of International Law*, vol. 34, no. 1 (2015), 40.

With violence abating on the Maidan, Russia utilized the moment of instability within the Ukrainian state and infiltrated the Crimean peninsula with ''little green men''.[13] By closing down the roads from mainland, surrounding Ukrainian military bases and occupying media outlets, there were clear signs of a Russian aggression against Ukraine unfolding from 27 February 2014 onwards.[14]

On 1 March the Crimean Prime Minister Aksyonov appealed to Russia for the purpose of ''lend{ing} support in ensuring peace and calm in the territory of the Autonomous Republic of Crimea''.[15] The same day, the Federal Council of Russia entitled the president to legally use force in Ukraine.[16] Adding to the deterioration of the situation, Yanukovych officially called for a Russian intervention to ''protect the lives, freedom and health of the citizens of Ukraine''.[17] In contravention with the Ukrainian constitution, in astonishing pace, a referendum on the status of Crimea was held with over 96% of Crimean voters deciding to secede from Ukraine and to join Russia on 16 March.[18] The majority of UN member states condemned Russia's decision to incorporate Crimea on 18 March 2014.[19] While *de jure* remaining Ukrainian, *de facto* the Crimean peninsula has been governed by Russian authorities since its annexation. The mounting evidence of breaches of IL has not prevented the Kremlin from justifying its actions on the basis of multiple legal arguments.[20] The direct consequences for the Kremlin were *i.a.* financial sanctions by the EU and the US and Russia's suspension from the G8.[21]

Violence and lawlessness spread to the Eastern regions of Ukraine, adjacent to the Russian Federation. Especially the Donbas started to call for greater political autonomy.[22] Reminiscent of the

[13] Roy Allison, ''Russian 'deniable' intervention in Ukraine: how and why Russia broke the rules,'' *International Affairs*, vol. 90, no. 6 (2014), 1258; the Crimean annexation was a example of Russia's hybrid warfare in Ukraine: ''The Crimean operation used speed and surprise to establish fait accompli on the ground, thus making a military response from the Ukrainian side difficult'': Tor Bukkvoll, ''Russian Special Operations Forces in Crimea and Donbas,'' *parameters*, vol. 46, no. 2 (2016), 17.
[14] *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)*, *supra* note 5**,** para. 36.
[15] Vesti, ''The Prime Minister of Crimea requested Putin to help preserve peace in Crimea,'' {Премьер Крыма попросил Путина обеспечить мир на полуострове**:** translated into English by author} 1 March 2014 (available at https://www.vesti.ru/doc.html?id=1334804).
[16] Kathy Lally, Will Englund and William Booth, ''Russian parliament approves use of troops in Ukraine,'' *Washington Post*, 1 March 2014 (available at https://www.washingtonpost.com/world/europe/russian-parliament-approves-use-of-troops-in-crimea/2014/03/01/d1775f70-a151-11e3-a050-dc3322a94fa7_story.html?utm_term=.323c75ec9ea7).
[17] President of Russia, *supra* note 12.
[18] OHCHR (d), *supra* note 10, para. 22.
[19] OHCHR (d), *supra* note 10, para. 23.
[20] See e.g: Thomas D. Grant, *Aggression Against Ukraine: Territory, Responsibility, and International Law*, 2015, 44 *ff*.
[21] European Union External Action, ''EU restrictive measures in response to the crisis in Ukraine,'' *EU*, 16 March 2017 (available at https://eeas.europa.eu/headquarters/headquarters-homepage_en/8322/EU restrictive measures in response to the crisis in Ukraine).
[22] Andrew Roth, ''From Russia, 'Tourists' Stir the Protests,'' *NYT*, 3 March 2014 (available at https://www.nytimes.com/2014/03/04/world/europe/russias-hand-can-be-seen-in-the-protests.html).

Crimean annexation, more and more camouflaged soldiers equipped with heavy weapons crossed the permeable border into Ukraine.[23] Rebel groups united under the name LPR and DPR gathered support both from locals and foreign fighters, mostly Russians.[24] With innocent people illegally detained, abducted and killed by criminal gangs, fighting broke out between Ukrainian troops and the rebels.[25] As of 15th April 2014, an ''anti-terror'' operation has been underway in the Donbas to re-establish order and peace.[26] Until the end of April, Ukraine lost effective control over parts of its territory, there under the cities of Luhansk and Donetsk.[27] ''Referendums'' were held in the self-proclaimed republics with the aim of seceding from Ukraine.[28]

After Ukrainian presidential elections in May (with the exclusion of Crimea and the Donbas), Summer 2014 saw a huge intensification of fighting so that the ICRC officially classified the situation in Eastern Ukraine as a ''non-international armed conflict''.[29] Despite information surfacing that Russia was equipping and financing the rebels with the purpose of destabilizing Ukraine, for want of abundantly clear evidence, this point of crucial relevance for the legal classification of the conflict in Eastern Ukraine remained contested.[30]

Against this background, for the neutral observer it seems that Ukraine has been helpless in finding remedies to stop Russia's aggression against its territory. The UNSC is blocked by Russia's veto, Crimea remains occupied by Russia, human rights abuses, *i.a.* against the Tatar Muslim minority on the peninsula and constant violations of the Minsk II agreement became a normality. It seems we are heading towards another frozen conflict comparable to South Ossetia or Trandsnistria, serving the interest of the Russian government. If one were to believe the critics of IL as e.g. Posner or exponents of realism such as John Mearsheimer, not only the following thesis but also the role of legal remedies in establishing justice for the crimes committed in Ukraine would be put into question.[31] It is therefore important to clarify that this author espouses the idea that IL can play a

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[23] Maksymilian Czuperski *et al.*, *Hiding in Plain Sight: Putin's War in Ukraine*, 2015, 8.

[24] OHCHR (f), ''Report on the human rights situation in Ukraine,'' *UN*, 15 June 2014, para. 159 (available at http://www.ohchr.org/Documents/Countries/UA/HRMMUReport15June2014.pdf).

[25] OHCHR (f), *supra* note 24, paras. 3-5.

[26] ICC, ''Report on Preliminary Examination Activities 2015,''*OTP*, 12 November 2015, para. 86 (available at https://www.icc-cpi.int/iccdocs/otp/OTP-PE-rep-2015-Eng.pdf).

[27] ICC, ''Report on Preliminary Examination Activities 2016,'' *OTP*, 14 November 2016, para. 160 (available at https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-PE_ENG.pdf).

[28] OHCHR (f), *supra* note 24, paras. 160, 175.

[29] ICRC, ''Ukraine: ICRC calls on all sides to respect international humanitarian law,'' *ICRC-Webpage*, 23 July 2014 (available at https://www.icrc.org/eng/resources/documents/news-release/2014/07-23-ukraine-kiev-call-respect-ihl-repatriate-bodies-malaysian-airlines.htm).

[30] As *i.a.* understood from the reasoning of the ICRC that was reluctant to classify the violence in Eastern Ukraine an ''international armed conflict'': see: *ibid.*; For evidence that Russia provided support to the rebels, see e.g: OHCHR (o), *supra* note 4, para. 3.

[31] Eric Posner, ''Russia's military intervention in Ukraine: international law implications,'' *Eric Posner*, 1 March 2014 (available at http://ericposner.com/russias-military-intervention-in-ukraine-international-law-implications/): ''Russia's military intervention in Ukraine violates international law. No one is going to do

crucial part in holding perpetrators, be it an individual or a state, responsible for breaches of IL on Ukrainian territory.

As one could witness on various occasions, Russia has not been willing to find a peaceful solution to the conflict through the UNSC.[32] Therefore, one should not expect responsibility and accountability to be established by the UNSC. Alternative panels and methods have to be found.

Scrutinizing three specific cases, which might help sanctioning Russia's breach of legal obligations, the thesis's main goal is to understand the tools and barriers of IL that can hold Russia and its sponsored individuals responsible for the actions in Crimea and Eastern Ukraine.

While the analysis of Ukraine's application at the ICJ intends to address breaches of IL committed by the Russian state, the reference to the ICC serves the purpose of bringing (Russian sponsored) individuals to justice for crimes the ICC might have jurisdiction over.[33] The third perspective will look at the powers of the OHCHR, primarily assessing the HRMMU.[34] Deliberately choosing these three institutional frameworks, it is aimed to cover the most crucial legal aspects of state and individual responsibility and accountability. Although the OHCHR is not an arbitration mechanism and cannot enforce IL, its constantly updated reports on violations of human rights, especially concerning the contraventions of the ''right to life'', might be of crucial relevance as an evidence gathering mechanism which can complement the two courts' assessments of Ukraine's allegations.

While most academics pondered on the illegality of the Kremlin's policies in Ukraine without further elaborating on legal remedies IL provides in this regard[35], only a few scholars expounded on Ukraine's application at the ICJ and its acceptance of the ICC jurisdiction.[36] However, the latter did

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anything about it''; John J. Mearsheimer, ''The False Promise of International Institutions'', *International Security*, vol. 19, no. 3 (1994).

[32] UNSC Res. condemning the referendum on the Status of Crimea vetoed by Russia, UN Doc. S/2014/189, 15 March 2014; UNSC resolution on the establishment of an International Tribunal for crimes connected with the downing of MH17 vetoed by Russia, UN Doc. S/2015/562, 29 July 2015.

[33] Ukraine filed an application at the ICJ against Ukraine on the basis of the ICSFT and CERD on 16 January 2016 to which both Ukraine and Russia are parties: *Application of the ICSFT and of the CERD* (Ukraine v. Russian Federation), *supra* note 5; On 25th April 2014 the Prosecutor of the ICC opened an investigation into the situation in Ukraine after Ukraine lodged a declaration under Art. 12 (3) of the Rome Statute of the ICC on 17 April 2014; a second declaration, filed by Ukraine on 8 September 2015, extended the jurisdiction of the Court's preliminary examination activities of the situation in Ukraine; from 29 September 2015, the Court has been investigating whether any crimes in its jurisdiction have been committed on the Ukrainian territory from 21 November 2013 onwards: ICC, *supra* note 26, paras. 77-79.

[34] Upon invitation by the Ukrainian government, since 14 March 2014 the HRMMU in Ukraine has been observing the developments in the area of human rights in the country and continuously issuing public reports on breaches of individuals' fundamental freedoms, primarily occurring in Crimea and the Donbas: OHCHR (k), *supra* note 9, 3.

[35] See e.g.: Grant, *supra* note 20; Veronika Bilkova, ''The Use of Force by the Russian Federation in Crimea,'' *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht --- Heidelberg Journal of International Law*, vol. 75, no. 1 (2015); Grzebyk, *supra* note 12.

[36] See e.g. Iryna Marchuk, ''Ukraine Takes Russia to the International Court of Justice: Will It Work?,'' *EJIL*, 26 January 2017 (available at https://www.ejiltalk.org/ukraine-takes-russia-to-the-international-court-of-justice-

neither comprehensively explain the different steps of these arbitrational mechanisms nor did they establish links between the courts' interpretation of former cases and the present aggression in Ukraine. Moreover, they did not scrutinize the mandate of the OHCHR in this conflict. A broad legal assessment of the ICJ's, ICC's and the OHCHR's role in the context of the Ukraine crisis is therefore required to facilitate the neutral observer's understanding of how IL can help sanctioning breaches of international norms in Crimea and Eastern Ukraine. For this purpose, the thesis will be scrutinized under the following research question:

''Which tools does International Law provide that can hold Russia responsible for its annexation of Crimea and its illegal actions in Eastern Ukraine and what recourse is available to establish responsibility for serious crimes carried out by individuals in Eastern Ukraine and Crimea?''

Furthermore, dependent upon the above formulated problem, central parts of the thesis will be devoted to answering this sub-question:

''What are the legal barriers to establishing state responsibility for beaches of International Law perpetrated by the Russian state and to creating responsibility for serious crimes committed by individuals on Ukrainian territory?''

Despite the Russian state's denial of direct military involvement in Eastern Ukraine, this paper rests on the assumption that the Kremlin initiated and fuelled the conflict in the Donbas.[37] The fact that the Russian president confessed that his country's special intelligence officers had been present in Eastern Ukraine combined with his first denial of instructing ''little green men'' to annex Crimea, makes it difficult not to believe Russia to bear primary responsibility for the actions of the so-called DPR and LPR.[38] Nevertheless, in the course of the analysis it is expected that this crucial assumption might stand in conflict with the legal threshold for the attribution of conduct by non-state actors to states.[39]

The paper proceeds to chapter II, which aims to clarify the core international norms Russia has put at stake with its actions in Ukraine. It will be closely looked at both UN member states reactions and responses from academia.

will-it-work/); Iryna Marchuk, ''Blog Post: Ukraine and the International Criminal Court,'' *VJTL Blog*, 20 December 2016 (available at https://www.vanderbilt.edu/jotl/2016/12/blog-post-2/); Anne Peters, ''**"**Vulnerability" versus "Plausibility": Righting or Wronging the Regime of Provisional Measures? Reflections on ICJ, Ukraine v. Russian Federation, Order of 19 April 2017,'' *EJIL*, 5 May 2017 (available at https://www.ejiltalk.org/vulnerability-versus-plausibility-righting-or-wronging-the-regime-of-provisional-measures-reflections-on-icj-ukraine-v-russian-federation-order-of-19-apr/).

[37] President of Russia, ''Vladimir Putin's annual news conference,'' 17 December 2015 (available at http://en.kremlin.ru/events/president/news/50971).

[38] *Ibid.*

[39] See detailed analysis on the ''effective control'' and ''overall control'' tests in chapter V.

Chapter II – Fundamental Norms at Stake

2.1) Core Principles of IL

When state officials and scholars apply terms such as illegal use of force or even act of aggression it is helpful to remind oneself of the central norms of IL, namely the prohibition of the use of force and the principle of non-intervention, UN member states, including the founding member Russia[40], have committed themselves to upholding in the UN Charter and various UNGA Res., especially in ''Declaration on Friendly Relations'' and ''Definition of Aggression''.[41]

The prohibition of the use of force, which embodies the ''cornerstone'' of the UNC and is also governed by customary law, is laid down in Art. 2(4).[42] There it is stipulated that ''{a}ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.''[43]

Art. 2(4) is solely addressed to states, as it speaks of ''international relations''. It has been characterized as a *jus cogens* norm every state within the world community is obliged to respect and from which no derogation is permitted.[44] There is broad agreement that the terms ''territorial integrity'', ''political independence'' and ''the Purposes of the United Nations'' narrow down the use of force and render all direct applications of force by states, besides economic pressure, illegal.[45] Not only direct physical force but also its indirect application is strictly regulated.[46] On these grounds, any military support to a rebel group for the purpose of destabilizing another state on behalf of the sponsoring country contravenes the norm of the prohibition of the use of force.[47] This principle was also reiterated in UNGA Res. 2625, which was adopted by consensus.[48] The mere provision of funds

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[40] Until 1991 ''The Union of Soviet Socialist Republics''.
[41] UNGA Res. 2625, *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations,* UN Doc. A/RES/25/2625, 24 October 1970; UNGA Res. 3314, *Definition of Aggression*, UN Doc. A/RES/3314, 14 December 1974.
[42] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgement, ICJ, 19 December 2005, para. 148; *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Judgement, ICJ, 27 June 1986, paras. 34, 190.
[43] UNC, Art. 2, para. 4.
[44] ILC, *Yearbook of the International Law Commission*,Vol. II, 1966, 247, para. 1; Ademola Abass, *Complete International Law: Text, Cases and Materials*, 2012, 352.
[45] Michael Wood and Noam Lubell (eds.), *Use of Force*, Report by the Committee on Aggression and the Use of Force, International Law Association, Washington Conference, 2014, 2-3; Derek W. Bowett, *Self-Defence in International Law*, 1958, 151.
[46] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, *supra* note 42, para. 228.
[47] *Ibid.*; UNGA Res. 2625, *supra* note 41.
[48] *Ibid.*; Christine Gray, *The Use of Force and the International Legal Order*, in: Malcolm D. Evans (ed.), International Law, 2014, 623.

to a rebel group, however, would not suffice to establish a breach of the prohibition of the use of force, although it stands in conflict with the principle of non-intervention.[49]

Both in the ''Declaration on Friendly Relations'' and in various ICJ cases the customary norm of non-intervention was confirmed.[50] Together with the principle of the prohibition of the use of force, it is closely connected to the concept of sovereignty, enshrined in UNC Art. 2(1) and also considered to forming part of customary law.[51] The prohibition of intervention pertains not only to the illegal use of force against the territorial integrity of a state but extends to all areas which might impede the decision-making of a sovereign country, be it regarding the ''choice of a political, economic, social and cultural system, {or} the formulation of foreign policy.''[52] If coercive measures such as those described in Art. 2(4) or in the ''Declaration on Friendly Relations'' are applied, then the intervention can be classified as ''wrongful'' as it stands in conflict with the right to free decision-making of a sovereign state.[53]

The consensually adopted UNGA Res. 3314 reiterated the principles of the ''Declaration on Friendly Relations'' and classified aggression as the ''most serious and dangerous form of the illegal use of force'' {…} ''by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations.''[54] This concept of a customary nature is therefore to be interpreted even narrower than the prohibition of the use of force as various preconditions laid down in Art. 3 have to be fulfilled before recourse to force may amount to an ''act of aggression''.[55] Although Art. 5(2) indicates that a war of aggression is

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[49] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), supra* note 42, paras. 228, 242.

[50] *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Judgement, ICJ, 9 April 1949, page 30; *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), supra* note 42, paras. 202 *ff.*; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, *supra* note 42, para. 164; UNGA Res. 2625, *supra* note 41.

[51] UNC Art. 2, para. 1; *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), supra* note 42, para. 212.

[52] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), supra* note 42, para. 205.

[53] *Ibid*.

[54] UNGA Res. 3314, *supra* note 41, preamble, Art. 1.

[55] UNGA Res. 3314, *supra* note 41, Art. 3:

a crime against international peace on which grounds international responsibility could be established, it took the world community more than 40 years to agree on an international mechanism to this effect.[56] Drawing on the definition of an act of aggression of UNGA Res. 3314, from 17 July 2018 onwards the ICC will have jurisdiction over the crime of aggression if it could be established that a leader of an ICC member state has committed an act of aggression of such ''gravity and scale'' that it amounts to a ''manifest violation of the UN Charter''.[57] In the current understanding of the Kampala definition, the Russian president would not be able to be prosecuted because Russia is not a member of the ICC and the principle of nationality and territoriality limit the jurisdiction of the court.[58] Another reason why this thesis will not deal with the crime of aggression, is owed to the fact that a crime of such a magnitude cannot be retroactively investigated by the ICC.[59] The options of a referral by a State or proprio motu investigation by the Prosecutor, allowable in regard to genocide, crimes against humanity and war crimes, were explicitly excluded.[60]

Two exceptions to the prohibition of the use of force are provided for by the UN Charter: (1) Collective actions taken by the UNSC under a chapter VII resolution and (2) individual or collective

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Article 3

Any of the following acts, regardless of a declaration of war, shall, subject to and in accordance with the provisions of article 2, qualify as an act of aggression:

(a) The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack, or any annexation by the use of force of the territory of another State or part thereof,

(b) Bombardment by the armed forces of a State against the territory of another State or the use of any weapons by a State against the territory of another State;

(c) The blockade of the ports or coasts of a State by the armed forces of another State;

(d) An attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State;

(e) The use of armed forces of one State which are within the territory of another State with the agreement of the receiving State, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement;

(f) The action of a State in allowing its temtory, which it has placed at the disposal of another State, to be used by that other State for perpetrating an act of aggression against a third State;

(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein.

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[56] UNGA Res. 3314, *supra* note 41, Art. 5, para. 2.

[57] ICC, ''Assembly activates Court's jurisdiction over crime of aggression,'' 15 December 2017 (available at https://www.icc-cpi.int/Pages/item.aspx?name=pr1350); Resolution RC/Res. 6, *Resolution on the Crime of Aggression*, 28 June 2010, Annex I, Art. 8 *bis*, para. 1.

[58] Resolution RC/Res. 6, *supra* note 57, Art. 15 *bis*, para. 5.

[59] Resolution RC/Res. 6, *supra* note 57, Art. 15 *bis*, para. 2.

[60] Resolution ASP/16/Res. 5, *Activation of the jurisdiction of the Court over the crime of aggression*, 14 December 2017, para. 2.

self-defense pursuant to UNC Art. 51 in case of an armed attack against a member of the United Nations.[61]

Averting large-scale human suffering by force might be considered a third option to legally circumvent the prohibition of the use of force under customary law, although the legal base for humanitarian interventions remains highly contested.[62] By the same token, in spite of the fact that ICJ case law allowed interventions at the request of the government, neither invitations by regimes that lost effective control over its people nor requests by a local authority cannot grant permission for the external use of force in the territory of a sovereign state under IL.[63] Talmon corroborates this thought positing that ''recognition by the intervening State alone usually cannot suffice to legalize or justify an intervention.''[64]

2.1.1) The Annexation of Crimea

Against this legal background, Russia's actions in Crimea would clearly attest to a breach of the prohibition of the use of force and the principle of non-intervention with none of the exceptions to the use of force being applicable.

Since Russia justified its military intervention in Crimea with reference to an official invitation by the (former) Ukrainian president Yanukovych and the Prime Minister of Crimea, any discussion on whether Russia's resort to force would be subject to the principle of self-defence is rendered obsolete.[65] But even if such an argument was put forward by the Kremlin, one needs to clarify that neither was an assault planned by Ukraine nor did an armed attack against Russian territory or the Black Sea Fleet in Crimea occur.[66]

It should also be bore in mind that Russia's covered operation in Crimea was not only in clear breach of the UN Charter and customary law but also of obligations laid down in other multilateral and

[61] Wood and Lubell, *supra* note 45, 2.
[62] *Ibid*.
[63] *Ibid.*; *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America),* *supra* note 42, para. 246; Olivier Corten,''The Russian intervention in the Ukrainian crisis: was jus contra bellum 'confirmed rather than weakened?,'' *Journal on the Use of Force and International Law*, vol. 2, no. 1 (2015), 33-35; Bilkova, *supra* note 35, 42; Grigory Vaypan, ''(Un)Invited Guests: The Validity of Russia's Argument on Intervention by Invitation,'' *Cambridge International Law Journal*, 5 March 2014 (available at http://cilj.co.uk/2014/03/05/uninvited-guests-validity-russias-argument-intervention-invitation/); see also: ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts With Commentaries*, adopted by the Commission at its fifty-third session in 2001, November 2001, p. 73, para. 4.
[64] Stefan Talmon, *Recognition of Governments in International Law*, 1998, 149.
[65] Corten, *supra* note 63, 20; UNSC 7124th meeting, UN Doc. S/PV.7124, 1 March 2014, 5; UNSC 7125th meeting, UN Doc. S/PV.7125, 3 March 2014, 3-4.
[66] Bilkova, *supra* note 35, 38-39; one can therefore omit pondering on the generally contentious meaning of ''armed attack'', which constitutes a gravity threshold for the defensive use of force.

bilateral instruments.[67] For example, *the Black Sea Fleet Status of Forces Agreement (SOFA)* allowed Moscow to deploy up to 25000 soldiers in clearly defined areas in Crimea and lease military ships until 2042 after the Kharkiv Accords prolonged the period in 2010.[68] The presence of camouflaged and heavily armed Russian soldiers on the streets of Crimea or the annexation of the Crimean peninsula itself to which the Russian servicemen heavily contributed, *i.a.* with blockades of Ukrainian military facilities and critical infrastructure, clearly contravened the conditions stipulated in Art. 6(1) of the agreement.[69] Therein it is stated that "Military units shall {…} respect Ukraine's sovereignty, obey its legislation and refrain from interference with Ukraine's domestic affairs".[70]

A further Russian infringement can be identified in Art. 3 of the *Treaty on Friendship, Cooperation and Partnership between Ukraine and the Russian Federation*, specifying in 1997 that both parties undertake to ''build their relations on the basis of principles of mutual respect of sovereign equality, territorial integrity, inviolability of borders, peaceful settlement of disputes, non-use of force or threat of force, including economic and other forms of pressure, non-interference into internal affairs{…}''.[71]

Placing their signature under the non-legally binding *Budapest Memorandum*, the UK, the US and Russia ''reaffirm{ed} their commitment to Ukraine, in accordance with the principles of the Final Act of the Conference on Security and Cooperation in Europe, to respect the independence and sovereignty and the existing borders of Ukraine'' and pledged to ''refrain from the threat or use of force against the territorial integrity or political independence of Ukraine''.[72] With the annexation of Crimea, Russia broke the security assurance given to Ukraine in 1994 after the voluntary disposal of their nuclear capabilities.[73] Contrary to the common understanding of Art. 6, Russia has not been

[67] Ministry of Foreign Affairs of Ukraine, ''On Violations of Ukraine's Laws in Force and of Ukrainian-Russian Agreements by Military Units of the Black Sea Fleet of the Russian Federation in the Territory of Ukraine,'' 3 March 2014 (available at http://mfa.gov.ua/en/news-feeds/foreign-offices-news/18622-shho-do-porusheny-chinnogo-zakonodavstva-ukrajini-ta-ukrajinsyko-rosijsykih-ugod-vijsykovimi-formuvan-nyami-chf-rf-na-teritoriji--ukrajini).
[68] Spencer Kimball, ''Bound by treaty: Russia, Ukraine and Crimea,'' *DW*, 11 March 2014 (available at http://www.dw.com/en/bound-by-treaty-russia-ukraine-and-crimea/a-174876329); Bilkova, *supra* note 35, 31-32).
[69] Grzebyk, *supra* note 12, 42; Ministry of Foreign Affairs of Ukraine, *supra* note 67.
[70] Ministry of Foreign Affairs of Ukraine, *supra* note 67.
[71] *Ibid*.
[72] Letter by Russia, Ukraine, the UK, and the US containing text of 1994 Budapest Memorandum, *Letter dated 7 December 1994 from the Permanent Representatives of the Russian Federation, Ukraine, the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations addressed to the Secretary-General*, UN Doc. S/1994/1399, 19 December 1994, Annex I, paras. 1-2.
[73] Ministry of Foreign Affairs of Ukraine, ''Pavlo Klimkin made it clear which provisions of Budapest Memorandum have been violated by Russia,'' 1 February 2016 (available at http://mfa.gov.ua/en/press-center/news/44392-glava-mzs-ukrajini-proponuje-provesti-konsulytaciji-za-uchasti-vsih-storin-budapeshtsykogo-memorandumu).

willing to consult with the UK, the US and Ukraine as it denied having broken any clause of the agreement.[74]

Of no less importance is the breach of another non-legally binding document, to wit, the *Helsinki Final Act*. In 1975 thirty-five countries, including the Soviet Union affirmed the principles of the inviolability of borders, territorial integrity and non-interference in domestic affairs.[75]

Together with the UN Charter, all previously referred documents were also recalled by UNGA Res. 68/262, which was approved by 100 states with 58 abstentions and 11 dissenting votes.[76] Since Russia vetoed any attempt of resolving the crisis in Crimea in the UNSC, the UNGA provided the next best platform for Ukraine to condemn Russia's aggression by the UN member states.[77] Although its resolutions are not binding, practise has shown that the UNGA has served as a highly important panel to debate questions of self-determination.[78] The voting outcome and discussions by states around the resolution can indicate whether an act that altered international borders was considered legitimate by the world community or not.[79]

Looking into Art. 3 of the ''Definition of Aggression'', three conditions can be identified on which the argument can be made that Russia committed an ''act of aggression''. Although the threshold for an act of aggression remains contested, the scale and effect of Russia's military operation in Crimea exceeded the established criteria of a ''mere frontier incident'' or ''less grave forms of the use of force''.[80]

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[74] *Ibid.*; Russian Embassy in Washington DC, ''Sergey Lavrov's remarks and answers to media questions at a news conference on Russia's diplomacy performance in 2015,'' 26 January 2015 (available at http://www.russianembassy.org/article/sergey-lavrov's-remarks-and-answers-to-media-questions-at-a-news-conference-on-russia's-dipl).

[75] Martin D. Brown and Angela Romano, ''Forty years later, the signing of the Helsinki Final Act continues to have an impact on European security,'' *EUROPP,* 13 August 2015 (available at http://blogs.lse.ac.uk/europpblog/2015/08/13/forty-years-later-the-signing-of-the-final-act-of-the-conference-on-security-and-cooperation-in-europe-continues-to-have-an-impact-on-european-security/).

[76] All EU-member states, the US, Canada, Ukraine *et al.* voted yes; Russia, Syria, North Korea, Iran, Belarus *et al.* rejected the resolutions; China, Brazil, South Africa, India *et al* abstained: UNGA Res. 68/262, *Territorial integrity of Ukraine*, UN Doc. A/RES/68/262, 27 March 2014.

[77] 13 yes votes, Russia vetoed, China abstained: UNSC Res. condemning the referendum on the Status of Crimea vetoed by Russia, *supra* note 32; on 13 March, Ukraine requested the GA to ''examine the situation'' pursuant to UNC Art. 11 (2) and invoked the right of self-defense under UNC Art. 51 after its efforts of utilizing UNC Art. 34 and 35 amid the ''deterioration of the situation in the Autonomous Republic of the Crimea, Ukraine'' went to no avail due to Russia's veto: Grant, supra note 20, 71-73.

[78] Grant, *supra* note 20, 78.

[79] As deduced from: *Ibid*.

[80] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, *supra* note 42, paras. 191,195; Aurel Sari, ''Ukraine Insta-Symposium: When does the Breach of a Status of Forces Agreement amount to an Act of Aggression? The Case of Ukraine and the Black Sea Fleet SOFA,'' *Opinio Juris*, 6 March 2014 (available at http://opiniojuris.org/2014/03/06/ukraine-insta-symposium-breach-status-forces-agreement-amount-act-aggression-case-ukraine-black-sea-fleet-sofa/).

Pursuant to Art. 3(a), one can speak of (1) a (covered) ''invasion {…} by the armed forces of {Russia} of the territory of {Ukraine}'', (2) a ''military occupation'' by Russia of Ukrainian territory and (3) even an ''annexation'' of the Crimean Peninsula by Russia.[81] An invasion is to be understood as an ''instance of invading a country or region with an armed force''.[82] This is clearly applicable to the situation in Crimea. Military occupation and annexation have occurred without doubt as Russian soldiers acted outside the international legal framework by providing military assistance to the Crimean self-defense force, by accepting the result of the referendum and, consequently, approving the request of the Crimean authorities to be incorporated into the Russian Federation.[83] The ''referendum'' and the subsequent actions also qualify as an annexation on the grounds that the Ukrainian constitution prohibits any alteration of the territorial status without an ''All-Ukrainian referendum''.[84]

Both UNGA Res. 71/205 and 72/190, adopted by 70 votes in favour with 26 against and 76 or, respectively, 77 abstentions, ''condemn{ed} the temporary {…} occupation of part of the territory of Ukraine {…} by the Russian Federation, and reaffirm{ed} the ''non-recognition of its annexation''.[85] These documents also recalled the initial UNGA Res. 68/262, which firstly omitted classifying Russia's acts as an occupation and annexation.[86] UNGA Res. 68/262 determined that the referendum had ''no validity'' and ''cannot form the basis for any alteration of the status of {.....} Crimea''.[87] Its last paragraph that ''calls upon all States {…} not to recognize any alteration of the status of {…} Crimea'' embodies the principle of non-recognition of a serious breach of IL.[88]

Given the fact that the preamble of UNGA Res. 68/262 also ''recall{ed}'' Art. 2(4), one could confirm that a peremptory norm had been broken.[89] Art. 41(2) of the Articles on State Responsibility calls on states to abstain from recognizing any situation arising in the context of the breach of a *jus cogens* norm and prohibits lending support for sustaining such a situation.[90] It is backed by state practise

[81] UNGA Res. 3314, *supra* note 41, Art. 3 (a).
[82] Oxford Living Dictionary, 6 April 2018 (available at https://en.oxforddictionaries.com/definition/invasion).
[83] President of Russia, ''Address by President of the Russian Federation,'' 18 March 2014 (available at http://en.kremlin.ru/events/president/news/20603).
[84] Constitution of Ukraine, *Government Portal*, 28 June 1996, Art. 73 (available at http://www.kmu.gov.ua/document/110977042/Constitution_eng.doc).
[85] All EU-member states, the US, Canada, Ukraine *et al.* voted yes; Russia, China, Syria, North Korea, Iran, Belarus *et al.* rejected the resolutions; Brazil *et al.* abstained: UNGA Res. 71/205, *Situation of human rights in the Autonomous Republic of Crimea and the city of Sevastopol (Ukraine)*, UN Doc. A/RES/71/205, 19 December 2016; UNGA Res. 72/190, *Situation of human rights in the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine*, UN Doc. A/RES/72/190, 19 December 2017.
[86] UNGA Res. 68/262, *supra* note 76.
[87] *Ibid*.
[88] *Ibid.*; UNGA Res. 56/83, *Responsibility of States for internationally wrongful acts*, UN Doc. A/RES/56/83, 28 January 2002, Art. 41.
[89] *Ibid*.
[90] UNGA Res. 56/83, *supra* note 88, Art. 41, para. 2.

with countries rejecting the independence of Rhodesia, Iraq's annexation of Kuwait or the South African occupation of Namibia.[91]

As Russia helped Crimea to secede and later incorporated the peninsula in contravention of the prohibition of the use of force, these actions could be classified as a breach of a norm universally applicable to the world community. On the other hand, since a considerable amount of countries abstained and some even voted against, it is difficult to uphold the assumption that the community as a whole considered the annexation of Crimea a breach of a *jus cogens* norm. Therefore, the rather average support for such an essential resolution adds to the controversy around the applicability of a *jus cogens* norm in IL.[92]

Russia's blockades of Ukrainian ports, *i.a.*, by deliberately sinking a Russian military vessel testifies to another aggressive act falling into the scope of Art. 3(c) of the ''Definition of Aggression''.[93] One should consider the breach of the bilateral agreement on the status of the Black Sea in a similar vein, as it infringes upon Art. 3(e) where it is determined that a mandate provided to a foreign country to deploy troops on another state's territory should not be overstepped.[94]

Having gone through the list of Art. 3, the conclusion can be drawn that Russia's actions in Crimea constituted an act of aggression. Various legal scholars and states would confirm this.[95] Putin's biased

[91] UNSC Res. 216, *Resolution 216 (1965)*, UN Doc. S/RES/216, 12 November 1965; UNSC Res. 662, *Resolution 662 (1990)*, UN Doc. S/RES/662, 9 August 1990; *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, ICJ, 21 June 1971, para. 126.

[92] For a positive interpretation of the content of the resolution because the phrase ''or other unlawful means'' would broaden the narrow understanding of the prohibition of the threat or use of force and prohibit any illegal method employed to disrupt Ukraine's national unity and territorial integrity, see: Grant, *supra* note 20, 74 *ff*: ''The phrase ''or other unlawful means'' is not often found in adopted UN texts concerning armed aggression; resolution 68/262 seems to be the first General Assembly resolution to have used it.''; for a negative opinion on the voting outcome, see: Heike Krieger and Georg Nolte, ''The International Rule of Law – Rise or Decline? Points of Departure,'' *KFG Working Paper Series*, vol. 1, no. 1 (2016), 11: ''The lack of a forceful UN General Assembly reaction to Russia's attempt to annex Crimea is another indication for a loss of normative certainty.''.

[93] Ministry of Foreign Affairs of Ukraine, *supra* note 67; Cheryl K. Chumley, ''Russia accused of sinking own cruiser to block Ukrainian navy,'' *The Washington Times*, 7 March 2014 (available at https://www.washingtontimes.com/news/2014/mar/7/russia-accused-sinking-own-cruiser-block-ukrainian/); UNGA Res. 3314, *supra* note 41, Art. 3 (c).

[94] Ministry of Foreign Affairs of Ukraine, *supra* note 67; Bilkova, *supra* note 35, 32; UNGA Res. 3314, *supra* note 41, Art. 3 (e).

[95] For scholars, see: Malcolm N. Shaw in: Scott Appleton and Victoria Ivanova, ''Ukraine: breaches of international law as crisis continues,'' *IBA*, 4 April 2014 (available at https://www.ibanet.org/Article/NewDetail.aspx?ArticleUid=00ddd015-1bc2-4c9e-a88b-a2b06f27890d); Sari, supra note 80; Grant, supra note 20, 6 ff; Robin Geiß, ''Russia's Annexation of Crimea: The Mills of International Law Grind Slowly but They Do Grind,'' *International Law Studies*, vol. 91, no. 1 (2015), 432; Harold Koh in: *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)*, Verbatim Record, ICJ, 8 March 2017, para. 35; Grzebyk, *supra* note 12, 43; Umut Öszu, ''Ukraine, International Law, and the Political Economy of Self-Determination,'' *German Law Journal*, vol. 16, no. 3 (2015), 440; Bilkova, *supra* note 35, 27; Allison, *supra* note 13, 1263; Lauri Mälksoo, *Russian Approaches to*

reasoning that any previously concluded bilateral treaty with Ukraine became invalid because the Maidan revolution created ''a new state with which {Russia has} signed no binding agreements'' does not find any support in IL.[96] It depicts rather a political concept, which the Russian president tried to legitimize Russia's illegal actions with.[97] Nevertheless, the majority of Russian academia and a few Western scholars have supported the Kremlin's position that the people in Crimea were allowed to determine their own future by a referendum.[98]

According to Crawford, "secession is neither legal nor illegal in international law, but a legally neutral act the consequences of which are regulated internationally.''[99] In the case of Crimea, the use of force in assistance to self-determination would be subject to two conditions: The people of Crimea would only be granted the permission to hold a referendum in conformity with IL, (1) if Ukraine would have oppressed the Russian majority and denied their political rights in Crimea.[100] The imposition of the language law, which was shelved by the Ukrainian authorities, would certainly not suffice to claim that the Russian people had been oppressed.[101] (2) Secondly, one needs to take the *opinio juris* of UN member states into account.[102] By reiterating the ''Declaration on Friendly Relations'', UNGA Res. 68/262 attests to the fact that the Crimean referendum was in breach with the principle of self-determination.[103]

International Law, 2015, 134; for States, see: US: John Kerry in: CBS, ''Russia invading Ukraine is "an incredible act of aggression," *youtube --- Face the Nation*, 2 March 2014 (available at https://www.youtube.com/watch?v=goARQz-SbUg); US: UNSC 7253rd meeting, UN Doc. S/PV.7253, 28 August 2014, 9; Ukraine: UNSC 7124th meeting, *supra* note 65, 3; UK: UNSC 7124th meeting, *supra* note 65, 6; Lithuania: UNSC 7253rd meeting, *supra* note 95, 4.

[96] President of Russia, *supra* note 12; Christian Marxsen, ''The Crimean Crisis: An International Law Perspective,'' *Heidelberg Journal of International Law*, vol. 74, no. 1 (2014), 371.

[97] Marxsen, *supra* note 96, 371.

[98] Anatoly Y. Kapustin, ''CIRCULAR LETTER TO THE EXECUTIVE COUNCIL OF THE INTERNATIONAL LAW ASSOCIATION ON BEHALF OF THE EXECUTIVE BOARD OF THE RUSSIAN ASSOCIATION OF INTERNATIONAL LAW,'' *MGIMO*, 6 June 2014 (available at https://mgimo.ru/about/news/departments/252984/); Prof. Stanislav Chernichenko, Dr. Elena Konnova, Prof. Oleg Khlestov, Prof. Georgiy Velyaminov, Prof. Ivan Kotlyarov and Prof. Tatyana Neshataeva in: Anton Moiseinenko, ''Guest Post: What do Russian Lawyers Say about Crimea?,'' *Opinio Juris*, 24 September 2014 (available at http://opiniojuris.org/2014/09/24/guest-post-russian-lawyers-say-crimea/); for Western scholars, see e.g.: Eric Posner, ''Would Russia's annexation of Crimea violate international law?'', *Eric Posner*, 8 March 2014 (available at http://ericposner.com/would-russias-annexation-of-crimea-violate-international-law/).

[99] James R. Crawford, *The Creation of States in International Law*, 2nd edition, 2006, 390.

[100] Robert McCorquodale, ''Ukraine Insta-Symposium: Crimea, Ukraine and Russia: Self-Determination, Intervention and International Law,'' *Opinio Juris*, 10 March 2014 (available at http://opiniojuris.org/2014/03/10/ukraine-insta-symposium-crimea-ukraine-russia-self-determination-intervention-international-law/.

[101] Oleksiy Stolyarenko*,* ''Ukrainian vs. Russian – The Ban That Never Was,'' *euromaidan* press, 25 May 2014 (available at http://euromaidanpress.com/2014/05/25/ukrainian-vs-russian-the-ban-that-never-was/).

[102] McCorquodale, *supra* note 100.

[103] UNGA Res. 68/262, *supra* note 76, preamble: ''*Recalling also* its resolution 2625 (XXV) of 24 October 1970, in which it approved the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, and reaffirming the principles contained therein that the territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force, and that any attempt aimed at the partial or total disruption of the national unity and territorial integrity of a State or country or at its political independence is incompatible with the

As a last point, drawing upon the ICJ's advisory opinion on the legality of Kosovo's declaration of independence, Putin's argumentation does not render a referendum staged in the context of an illegal use of force legal.[104] Putin's recourse to the highest court's rationale therefore is to be seen in the light of the principle *ex injuria, ius non oritur*. As elaborated in the course of the previous paragraphs, the recognition of the alteration of international borders that was preceded by an illegal use of force is prohibited in IL.

2.1.2) The Conflict in the Donbas

While the Crimean annexation undoubtedly comprises an international dimension, the characterization of the conflict in Eastern Ukraine has been more complicated. So far, a legal distinction has been made between the occupation of Crimea, which is directly attributable to the state of Russia and therefore classifies as an ''international armed conflict'', and the situation in the Donbas, where the ''level of organisation of {the} armed groups'' LPR and DPR has confirmed that they are ''parties to a non-international armed conflict''.[105] Although Putin alluded to the presence of Russian intelligence services in the Donbas, the Kremlin has constantly denied any direct military involvement.[106] A vast amount of evidence such as the capture of Russian paratroopers in the territory of Ukraine or satellite imagines proving the incursion of Russian weapons and soldiers into Russian territory, suggests the opposite.[107] It can be deduced from the opinion of the US, UK, France, Ukraine, Lithuania, Australia and New Zealand, that Russia's support for the rebels in the Donbas would qualify an aggression within the meaning of UNGA Res. 3314, Art. 3(e) and give rise to international responsibility.[108]

However, it should be bore in mind, that the evidence at hand might not suffice to make Russia responsible for its support to the rebels. Looking into the judgement by the ICJ in the Nicaragua case in 1986, one can understand the rationale behind Russia's strategy of denial. The Court decided that the US could not be made liable for all actions of the Contras whom the US supported in the fight

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purposes and principles of the Charter''; for another crucial paragraph forbidding the use of force for self-determination, see: UNGA Res. 2625, *supra* note 41: ''Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.''.

[104] President of Russia, *supra* note 83; McCorquodale, *supra* note 100; *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)*, *supra* note 5, para. 5.

[105] As confirmed by the ICC in: ICC, *supra* note 27, paras. 158, 168.

[106] President of Russia, *supra* note 37.

[107] UNSC 7253rd meeting, *supra* note 95, 3 *ff*; see also: OHCHR (k), *supra* note 9, 3.

[108] *Ibid.*; UNSC 7384th meeting, UN Doc. S/PV.7384, 17 February 2015, 4 *ff*; *UNGA* Res. 3314, *supra* note 41, Art. 3 (e).

against the Nicaraguan government.[109] The financing, organizing, training, supplying, equipping and planning of the Contras' operation by the US did not trigger the ''effective control'' threshold, set out by the ICJ.[110] Whether it is true that Russia's denial of facts will help preventing the ICJ from making Russia responsible for its support to the DPR and LPR will be analysed in chapter V.[111]

For the sake of clarity, only if the conduct of the pro-Russian insurgents can be clearly attributed to the Russian state, the conflict in the Donbas would become international. For now, one has to deal with two different legal situations: an international armed conflict in Crimea in parallel to a non-international armed conflict in Eastern Ukraine.[112] The legal difference inherent in both classifications will become clearer during the analysis of the ICC's role in the crisis.

The most crucial document for the resolution of the conflict in the Donbas presents UNSC Res. 2202 that ''endorse{d}'' the ''Package of Measures for the Implementation of the Minsk Agreements' adopted by 15 yes votes of all UNSC members states after the heaviest fighting period in Eastern Ukraine.[113] It is worth mentioning that the UNSC therein ''welcome{d} the Declaration by the President of the Russian Federation, the President of Ukraine, the President of the French Republic and the Chancellor of the Federal Republic of Germany in support of the "Package of measures for the Implementation of the Minsk Agreements".''[114] The Declaration clearly states that the President of Russia and the other three respective leaders ''reaffirm their full respect for the sovereignty and territorial integrity of Ukraine.''[115]

2.2) Summary --- The Use of Force in Perspective

With hundreds of wars being led by states after the adoption of the UN Charter, it should be stressed that the regulation of the use of force constitutes one of the most contentious areas of IL.[116] States have been reluctant to condemn their own recourse to force and have defended their actions on different legal grounds.[117] The fact that force has been illegally employed by permanent members of

[109] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, *supra* note 42, para. 115.
[110] *Ibid*.
[111] William W. Burke-White, "Crimea and the International Legal Order," *University of Pennsylvania Law School --- Faculty Scholarship Paper* 1360 (2014), 4.
[112] Marchuk, *supra* note 36; Grzebyk, *supra* note 12, 59.
[113] UNSC Res. 2202, UN Doc. S/RES/2202, 17 February 2015, preamble.
[114] *Ibid*.
[115] UNSC Res. 2202, *supra* note 113, annex II.
[116] Gray, *supra* note 48, 618; see also: Corten, *supra* note 63; Gerry Simpson, *Law and force in the twenty-first century*, in: David Armstrong (ed.), Routledge Handbook of International Law, 2011; Thomas M. Franck, "Who Killed Article 2(4) or: Changing Norms Governing the Use of Force by States," *American Journal of International Law*, vol. 64, no. 4 (1970).
[117] Gray, *supra* note 48, 618.

the UNSC various times before the Crimean annexation, however, should not relativise Russia's illegal conduct. ''The wrongdoing of one state does not justify the wrongdoing of another.''[118]

The annexation a sovereign state by a permanent member of the UNSC in the 21st century can never be considered legitimate and should not be recognized by the international community. Although 69 of 169 states participating in the voting on UNGA Res. 68/262 did not approve the resolution, so far, only a few states such as Syria, North Korea, both known for its gross violations of IL, or Afghanistan and Venezuela have actually recognized the Crimean annexation.[119] On the opposite, the largest majority of UN member states have continued the soft coercive policy of non-recognition and most Western democracies have also imposed economic sanctions.[120] The fact that the tool of non-recognition has been applied bears witness to the gravity of the situation in Ukraine.[121] As cited by the ILC, according to Tomuschat, non-recognition forms ''an essential legal weapon in the fight against grave breaches of the basic rules of international law''.[122]

Before the Ukraine crisis, Russia had constantly employed the argument that Kosovo's independence was illegal under IL.[123] Amid the Crimean referendum, however, Russia suddenly changed its reasoning by drawing a parallel between Kosovo and the Crimean declaration of independence.[124] Since Kosovo has been recognized by 112 states today, this analogy is wrong.[125] The amount of states affirming its statehood and the absence of any resolution similar to UNGA Res. 68/262 corroborate the thought that a general policy of non-recognition has not been applied in the case of Kosovo and therefore a grave breach of IL cannot be identified in Kosovo. Different to Russia's understanding, one is allowed to conclude that Russia's annexation of Crimea has to be seen in the light of an attempt to abrogate the most fundamental principles the international system has actually been build upon.[126]

The crucial question remains unanswered how Russia can actually be hold responsible under IL as all previously listed breaches of treaties and customary law in this chapter do not provide Ukraine

[118] Mary Ellen O'Connell, ''Ukraine Insta-Symposium: Ukraine Under International Law'', *Opinio Juris*, 7 March 2014 (available at http://opiniojuris.org/2014/03/07/ukraine-insta-symposium-ukraine-international-law/); see similar thought in: Allison, *supra* note 13, 1295.

[119] Matthew Rosenberg, ''Breaking With the West, Afghan Leader Supports Russia's Annexation of Crimea,'' *NYT*, 23 March 2014 (available at https://www.nytimes.com/2014/03/24/world/asia/breaking-with-the-west-afghan-leader-supports-russias-annexation-of-crimea.html?ref=asia&_r=0); Lenta, ''North Korea Recognizes Crimean Annexation {translated by author}'', *Lenta.ru*, 30 December 2014 (available at https://lenta.ru/news/2014/12/30/crimea/).

[120] Corten, *supra* note 63; Geiß, *supra* note 95, 448.

[121] Grant, *supra* note 20, 10; Geiß, *supra* note 95, 427, 447.

[122] Christian Tomuschat cited in ILC*, supra* note 63, p. 114, para. 5.

[123] Mälksoo, *supra* note 95, 180.

[124] *Ibid.;* President of Russia, *supra* note 83.

[125] Thank you from the Kosovar people, ''Kosovo Thanks You,'' 12 April 2018 (available at https://www.kosovothanksyou.com/).

[126] Grant, *supra* note 20, 7.

recourse to an international arbitration mechanism. In this regard, Grant is right that although international norms are clearly stipulated in legal documents, there might be no direct mechanisms to enforce them and fully prove the perpetrator's guilt, especially in cases where an aggressor invaded the territory of another sovereign state.[127] It is explained by the fact that powerful states are reluctant to consent to treaties that allow International Courts to intervene into a state's sovereign decision-making and overrule national Courts with regard to such imminent questions as the application of the use of force.

This thesis, however, will try to demonstrate that there are distinct mechanisms in IL that might enable Ukraine as a state to vindicate its rights and those of its citizens, which were infringed by Russia and its proxies in Eastern Ukraine, at an International Court.

Chapter III – Legal Framework and Methodology

3.1) The Three Different Perspectives

For the purpose of answering the research and sub-question, three different legal perspectives will be scrutinized:

In chapter IV and V, it will be closely looked at (1) **Ukraine's application at the ICJ**, (2) **Ukraine's referral of a situation to the ICC** and, as a supplementary mechanism, (3) **the role of the HRMMU** will be put under scrutiny.

It is worth stressing here that the focus is set on real-life sub-themes that represent three possibilities of addressing Russia's illegal actions in Crimea and the Donbas from the viewpoint of IL. Since Ukraine has taken recourse to these mechanisms, it is also this author's goal to assess both the prospect of their success and their limitations in holding Russia responsible and, respectively, accountable for its conduct in Crimea and Eastern Ukraine. The temporal scope is primarily limited to illegal actions taken by Russia at the end of February 2014 in the context of the Crimean annexation until present day in the war in the Donbas. Hence, the ICC's examination activities regarding the Maidan crimes will be left out. Whereas the analysis of the first perspective is confined to the preliminary stage of the proceedings at the ICJ, the second analytical point of view is limited to the preliminary examination activities of the OTP at the ICC. Nevertheless, in both cases this author aims to provide a future outlook, where the further procedure of each Court will be briefly assessed with a view to cover the most relevant aspects in regard to the research and sub-question.

[127] Thomas D. Grant, ''The Budapest Memorandum and Beyond: Have the Western Parties Breached a Legal Obligation?,'' *EJIL*, 18 February 2015 (available at https://www.ejiltalk.org/the-budapest-memorandum-and-beyond-have-the-western-parties-breached-a-legal-obligation/).

As pointed out in chapter I, an important distinction should be made between the terms ''responsibility'' and ''accountability''. Whereas the former legal concept will play a crucial part in the analysis of Ukraine's application at the ICJ and its referral of a situation to the ICC, the third perspective will primarily cover questions of accountability.

Although one could have focused on individual complaint procedures[128] or other legal platforms, the state of Ukraine tries to hold Russia responsible at[129], given the limited space available, efforts will be devoted to scrutinizing only the three mentioned mechanisms. The thesis will also leave out the question of ''universal jurisdiction'' as such and will not consider possible national proceedings.[130]

3.2) Legal Personality and Responsibility in IL

On the international plane one can identify multiple actors: states, corporations or natural persons (individuals). This thesis is limited to the conduct of states and individuals. It is predicated on the understanding that not only states but also individuals are granted the status of *persona* under IL.[131] This is especially pertinent to the area of International Criminal Law. Without the crucial concept of personality, states could neither take legal action nor would institutions such as the ICJ or the ICC be able to adjudicate legal cases. Legal personality does therefore determine both the legal rights and responsibilities of a subject under IL.[132] Whereas in private municipal law the legal subjects are unambiguously defined so that their rights are also clearly enforceable, different suggestions have been put forward by scholars in the debate on how to extend legal personality beyond states in IL.[133]

It has become more and more apparent that IL has evolved from a state-centric system to one, which does also afford rights to individuals and, more importantly for this thesis, confer responsibility on

[128] See e.g.: Individual communications under the Human Rights Treaty body system; individual complaints with the European Court of Human Rights.

[129] See: Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. the Russian Federation) at the Permanent Court of Arbitration; Ukraine's inter-State application at the European Court of Human Rights no. 20958/14, Ukraine v. Russia.

[130] On universal jurisdiction, see e.g.: Maria Elena Vignoli, ''These are the Crimes we are Fleeing: Justice for Syria in Swedish and German Courts,'' *HRW*, 3 October 2017 (available at https://www.hrw.org/report/2017/10/03/these-are-crimes-we-are-fleeing/justice-syria-swedish-and-german-courts): ''The principle of "universal jurisdiction" allows national prosecutors to pursue individuals believed to be responsible for certain grave international crimes such as torture, war crimes, and crimes against humanity, even though they were committed elsewhere and neither the accused nor the victims are nationals of the country.''; see further: Christopher Staker, *Jurisdiction*, in: Malcolm D. Evans (ed.), International Law, 2014, 322-323.

[131] See: *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, *ICJ*, 11 April 1949, 178-179, 8-9; Robert McCorquodale, *The Individual and the International Legal System*, in: Malcolm D Evans (ed.), International Law, 2014, 282: ''{The Advisory Opinion} certainly indicates that there can be subjects of the international legal system that are not States.''.

[132] Dapo Akande, *International Organizations*, in: Malcolm D. Evans (ed.), International Law, 2014, 251.

[133] See e.g.: Roland Portman, *Legal Personality in International Law*, 2010, 8; see also: McCorquodale, *supra* note 131, 283-284.

them.[134] Different from public international law, international criminal law has developed to such a degree that also illegal conduct of individuals may give rise to responsibility under IL.[135] The evident example here is the establishment of the ICC. On the one hand, nationals of countries that ratified the Rome Statute of the ICC are now also protected from genocide, crimes against humanity, war crimes and the crime of aggression committed by individuals on the international level, on the other, given the principle of nationality and territoriality, nationals of parties to the ICC and those who perpetrated the first three mentioned crimes on the territory of a state party to the ICC, can be made liable for the most serious crimes under IL.[136]

With that said, all issues of responsibility deal with the rules of consequences of breaches of IL. A distinction is made between breaches of international obligations owed to individuals and those pertaining to states. Norms related to individual, criminal responsibility can be inferred from the Rome Statute of the ICC. For the interpretation of breaches of IL committed by states it is rather more complicated. After four decades of codification, the ILC ''commend{ed the Draft Articles on the Responsibility of States for Internationally Wrongful Acts} to the attention of Governments without prejudice to the question of their future adoption or other appropriate action''.[137] In the following years, three other UNGA resolutions (Res. 59/35, Res. 62/61, Res. 65/19) had been endorsed in a similar vein.[138] This proves that the concept of state responsibility is a highly sensible and controversial issue within IL. It also implies that, so far, no general treaty has been agreed on that sets out criteria on how to interpret the consequences of breaches of IL committed by the prime subjects of IL. Nonetheless, despite the soft law, non-binding character of the Draft Articles, certain principles in the document have been reiterated by the ICJ and were considered to be forming part of customary law after their conclusion.[139]

Against the aforementioned background, James Crawford, the former Special Rapporteur on the subject of state responsibility who was responsible for the last drafting process of the Articles, holds the opinion that they have been ''very widely approved and applied in practise''.[140] It is not ruled out that the status of other principles in the document could be elevated in the future. Measures necessary to that end are (1) state practise and (2) *opinio juris*. Generally, the ''Draft Articles'' are

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[134] Andrea Bianchi, *Looking ahead: international law's main challenges*, in: David Armstrong (ed.), Routledge Handbook of International Law, 2011, 393.
[135] Malcolm N. Shaw, *International Law*, 7th edition, 2014, 189.
[136] Rome Statute, Art. 12, paras 1-2, Art. 13, para. 1; not to forget about the power of the UNSC that can refer situations to the Prosecutor acting under a chapter VII resolution of the UNSC: Rome Statute, Art. 13, para. 2.
[137] UNGA Res. 56/83, *supra* note 88, para. 3.
[138] James Crawford, ''Articles on Responsibility of States for Internationally Wrongful Acts,'' *UN Audiovisual Library of IL*, 2012, 2.
[139] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ, 9 July 2004, p. 147 *ff*.; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia)*, Judgement, ICJ, 26 February 2007, paras. 385, 398, 407, 431.
[140] Crawford, *supra* note 138, 2.

classified as a legal source of a secondary nature which ''determine whether obligation{s contained in treaties have} been violated and what should be the consequence of the violation.''[141]

The fundamental principle of the concept of state responsibility is enshrined in Art. 1 of the ''Draft Articles'' stipulating that ''{e}very internationally wrongful act of a State entails the international responsibility of that State''.[142]

Art. 2 of the ''Draft Articles'' lays out two conditions on which a wrongful conduct either out of action or the inaction of a state may give rise to state responsibility: (1) It is attributable to the state under IL and, (2) it contravenes an international obligation of the State.[143] Only if both elements have been proved, can a ''wrongful conduct'' be established.[144] It should be said that one of the goals of the thesis is also to scrutinize the legal elements that need to be present before Russia can be held responsible for its actions in Ukraine by the ICJ.

In the commentaries on the Draft Articles, the ILC elaborated that the parameters of a ''wrongful conduct'' had existed in IL before Art. 1 had been written.[145] This conclusion is of particular importance for this thesis because it implies that ''wrongful conduct'' gives rise to state responsibility without the UN member states' endorsement of the Draft Articles. Therefore, the controversy around the Draft Articles will not present an obstacle to the following thesis because ''wrongful conduct'' could be established in this case based on breaches of treaties both Ukraine and Russia have ratified. In this regard, the ICSFT and the CERD will be the guiding conventions Ukraine's application at the ICJ relies on. The Draft Articles may serve as a helpful guide within the analysis of the actions perpetrated by the DPR and LPR. There, the main question will be whether the conduct of both non-state groups could be attributed to Russia and a wrongful act established in the context of the ICSFT.

Moreover, under IL every state that committed a wrongful act is obliged to ''make full reparation for the injury caused'' if a Court deemed the state responsible for the conduct.[146] The Draft Articles contain clauses related to forms of ''Reparation for injury''.[147] Although going into detail into the

[141] Roberto Ago cited in ILC, *supra* note 63, p. 31, para. 2.
[142] ILC, *Yearbook of the International Law Commission*, Vol. II, Part Two, 2001, p. 26, Art. 1.
[143] ILC, *supra* note 142, p. 26, Art. 2.
[144] ILC, *supra* note 142, p. 34, para. 1.
[145] ILC, *supra* note 142, p. 33, para. 3.
[146] ILC, *supra* note 63, p. 91, Art. 31, para. 1; see also: *Factory at Chorzów*, Jurisdiction, Judgement No. 8, Ser A, No. 9, PCIJ, 26 July 1927, p. 21: ''It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself. Differences relating to reparations, which may be due by reason of failure to apply a convention, are consequently differences relating to its application.''; for authors debating the question of reparations as regards Russia's obligations under IL, see e.g.: Grant, *supra* note 20, 10; see also: Grzebyk, *supra* note 12, 48.
[147] ILC, *supra* note 142, Art. 34-39; for an example of the most common sought form of reparation, compensation, see: *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgement, ICJ, 25 September 1997,

different forms of reparation would help grasp the hypothetical options for redress available to Ukraine if the ICJ confirmed Russia's liability on the basis of a breach of the ICSFT and/or CERD in the merits stage, this thesis will limit itself to dealing with the preliminary stage of proceedings at the ICJ where the question of reparations is not the prime concern.

3.3) The General Procedure

Chapter IV will delineate the embedded institutional differences of the ICJ, ICC and the OHCHR and analyse the tools of these mechanisms. Relevant primary sources such as UN treaties, which Ukraine claims the ICJ had jurisdiction over Russia's actions in Crimea and Eastern Ukraine with, as well as the OTP's legal guidelines for instituting preliminary examinations will be scrutinized based *i.a.* on the Policy Paper on Preliminary Examinations (2013) by the ICC and the Rome Statute. By the same token, an understanding of the HRMMU's rationale, objectives and the methodology will be given. All these steps are aimed to help identifying the legal remedies and tools the three selected institutions provide in the context of establishing state responsibility, individual responsibility and, respectively, accountability in the overall case ''Russia's Aggression Against Ukraine: State Responsibility, Individual Responsibility and Accountability''.

The analysis of the arbitration mechanisms of the ICJ and ICC will be conducted in accordance with the generally recognized principles of treaty interpretation, enshrined in Art. 31 till Art. 33 of the VCLT.[148] This implies that mainly primary sources, to wit, relevant conventions (the ICSFT, CERD and the Rome Statute of the ICC) and other applicable documents (Memorandum between the OHCHR and the Ukrainian state, OHCHR reports cited by the ICJ as sources of evidence in the adjudication process and by the ICC in its preliminary-examination activities) are consulted. The methodology applied on the third perspective differs from the former, as the HRMMU is not an arbitration mechanism but a monitoring mission. Still, the mandate allowing the OHCHR to operate on Ukrainian territory is based on a memorandum the OHCHR entered into with the Ukrainian state. Therefore, it is contemplated to identify the rationale of the HRMMU also by means of treaty interpretation.

para. 152: "It is a well-established rule of international law that an injured State is entitled to obtain compensation from the State which has committed an internationally wrongful act for the damage caused by it.''.

[148] VCLT, Art. 31-32 also form part of customary law as various times reiterated by the ICJ: see e.g. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* note 139, para. 94; *LaGrand* (Germany v. United States of America), Judgement, 27 June 2001, para. 99; see also Robert Jennings and Arthur Watts (eds.), *Oppenheim's International Law*, 9th edition, 1996, 1271; furthermore, since taking force on 27 February 1980, based on the work of the ILC, the VCLT codifies the definition of legal terms such as ''treaty'', ''reservation'' or ''party'': see VCLT, Art. 2.

3.4) Sources of IL and Treaty Interpretation

The identification of primary sources is carried out pursuant to Art. 38 of the ICJ Statute, which outlines the sources the ICJ is instructed to use. It provides guidance for classifying them either as a) ''international conventions'', b) an ''international custom'' or c) ''the general principles of law recognized by civilized nations''.[149] As subsidiary means for the determination of rules of law, recourse may be had to d) ''judicial decisions and the teachings of the most highly qualified publicists of the various nations''.[150]

Also defined as the secondary and formal rules of IL, they give orientation to Courts, States and legal practitioners in disputes arising between countries.[151] Whereas primary rules constrain state actions by obligations, secondary rules settle how these norms should be construed and what negative effects result from contraventions.[152] Despite controversy that Art. 38 was not representing the current state of IL, as for example resolutions, declarations, or regulations of a soft law, quasi-legal character were difficult to be included into the list of sources, given a lack of new practise by states, the traditional approach has been maintained.[153] It should be noted that states primarily lean toward legitimizing their conduct with reference to treaties and international customs before drawing upon sources mentioned under c) and d), even though, officially, a general hierarchy between legal rules does not exist.[154]

Against this background, without doubt, both the International Convention for the Suppression of the Financing of Terrorism and International Convention on the Elimination of All Forms of Racial Discrimination, which Ukraine and Russia have ratified without making any reservations to it, fit into category a) of the sources listed in Art. 38 of the ICJ Statute.[155] Before outlining how the general principles of treaty interpretation relate to these two conventions, it is worth mentioning that the process of discerning the applicability of rules in different legal contexts has been considered rather as an art than a science.[156] It means that conventions are not always interpreted according to the book. Within the constraints of rules laid down in treaties, intellectual freedom allows the legal practitioner to shape the Court's decision.

[149] Statute of the ICJ, Art. 38, para. 1.
[150] *Ibid*.
[151] Hugh Thirlway, *The Sources of International Law?*, in: Malcolm D. Evans (ed.), International Law, 2014, 91-93.
[152] *Ibid*.
[153] Thirlway, *supra* note 151, 95, 116.
[154] Thirlway, *supra* note 151, 93, 109.
[155] See: UNTS, ''Status of Treaties, Multilateral Treaties Deposited with the Secretary-General,'' 28 March 2018 (available at https://treaties.un.org/Pages/ParticipationStatus.aspx?clang=_en).
[156] ILC, *supra* note 44, p. 218, para. 4; for a different view, see Ulf Linderfalk, ''Is Treaty Interpretation an Art or a Science? International Law and Rational Decision Making,'' *EJIL*, vol. 26, no. 1 (2015), 188-189.

Both the ICSFT and CERD contain a clause, which enables each of the parties to these treaties to refer a dispute to the ICJ. Pursuant to Art 24 of the ICSFT, ''{a}ny dispute between two or more States Parties concerning the interpretation or application of this Convention {…} shall {…} be submitted to arbitration {...). {A}ny one of those parties may refer the dispute to the International Court of Justice, by application, in conformity with the Statute of the Court''.[157] Likewise, Art. 22 of the CERD contains the following: ''Any dispute between two or more States Parties with respect to the interpretation or application of this Convention, {...} shall, at the request of any of the parties to the dispute, be referred to the International Court of Justice for decision.''[158]

The wording ''interpretation {…} of this Convention'' allows for the application of Art. 31 of the VCLT on both ratified agreements. There are mainly three aspects to look at in order to glean the meaning from a convention: 1. The wording (based on a textual approach), 2. the context (relying on a systematic scheme) and 3. the object and purpose (pertaining to teleological methodology) of a treaty.[159] All three elements are governed by the overall principle of good faith (*bona fide*). They are not hierarchically but logically ordered and can be identified in Art. 31(1).[160] To give a more profound understanding of the legal methodology of treaty interpretation, Art. 31(1) will be divided into three different parts, each provided with a brief explanation:

1. ''A treaty shall be interpreted in good faith in accordance with the ordinary meaning {…}
2. {…} to be given to the terms of the treaty in their context {…}
3. {…} and in the light of its object and purpose.''[161]

In the first paragraph the core principle of treaty interpretation is formulated, to wit, that parties to a convention are obliged to interpret the rules in the most honest and sincere manner possible.[162] Requesting each state under a treaty obligation to carry out its duties with a good intent, this foundation can also be found in a separate article of the VCLT: ''Every treaty in force is binding upon the parties to it and must be performed by them in good faith''.[163] Whereas Art. 26 is solely addressed to states, Art. 31 is directed to anybody interpreting provisions stipulated in a treaty. Closely linked to the *bona fide* interpretation is the principle of *pacta sunt servanda*, which means that agreements, states consented to, have to be fulfilled by them.[164] The wording ''in accordance

[157] ICSFT, Art. 24.
[158] CERD, Art. 22.
[159] Ian McTaggart Sinclair, *The Vienna Convention on the Law of Treaties*, 1984, 114-115.
[160] Malgosia Fitzmaurice, *The Practical Working of the Law of Treaties*, in: Malcolm D. Evans (ed.), International Law, 2014, 179; VCLT, *General rule of interpretation*, Art. 31, para. 1.
[161] *Ibid.*
[162] Oxford Living Dictionary, 16 March 2018 (available at https://en.oxforddictionaries.com/definition/good_faith).
[163] VCLT, Art 26.
[164] Oxford Living Dictionary, 16 March 2018 (available at https://en.oxforddictionaries.com/definition/pacta_sunt_servanda).

with the ordinary meaning'' refers to the *objective* school of interpretation. It starts form the assumption that the determining factor for the understanding of the meaning of a norm is the actual wording contained in a treaty.[165] In this regard, it is worth mentioning that exponents of the *subjective* school of interpretation read conventions by solely focusing on the intent of the parties.[166]

Secondly, the *systematic* approach takes not only the preamble and annexes of the treaty under scrutiny but also ''(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty {and} (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.''[167] VCLT. Art. 31 (3) touches upon a sub-dimension of treaty interpretation based on the contextual methodology as can be inferred from the wording: '''shall be taken into account, together with the context'', namely (a) ''subsequent agreement'', (b) ''subsequent practice'' and (c) ''relevant rules of international law''.[168] The analysis of state action *post* endorsement of the treaty is twofold: 1. It forms a part of treaty interpretation and 2. might help indentifying the evolution of the original norm contained in the treaty.[169]

As to the last paragraph, exponents of the *teleological* methodology, mainly legal practitioners, are inclined to the view that the inherent meaning of norms should be discerned by looking at the main goal the convention seeks to attain.

If all these approaches have been to no avail, VCLT. Art. 32 stipulates that ''recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty'' to either ''confirm'' the sense of a norm or ''determine'' it.[170] This option can be classified as the *historical* approach, because it allows for an analysis of preparatory work (*travaux préparatoires*) when the meaning of the treaty remains ''ambiguous or obscure'' or the interpretation ''lead to a result which is manifestly absurd or unreasonable''.[171] However, the effectiveness of this provision should not be overestimated as the drafting of a treaty is a highly politicised process. It is for this reason why the ICJ adopted a textual interpretation of treaties, highlighting that ''interpretation must be based above all upon the text of the treaty''.[172]

There must be borne in mind that all elements of treaty interpretation complement each other in the process of reaching a legally reasonable understanding of a treaty or a norm contained in a

[165] Fitzmaurice, *supra* note 160, 179.
[166] Fitzmaurice, *supra* note 160, 179.
[167] VCLT, Art. 31, para. 2.
[168] VCLT, Art. 31, para. 3.
[169] Shaw, *supra* note 135, 677.
[170] VCLT, Art. 32.
[171] *Ibid*.
[172] *Territorial Dispute (Libyan Arab Jamahiririya/Chad)*, Judgement, ICJ, 1994, para. 41.

convention.[173] Here lies the central argument for why it is considered to be rather an art than a science. Although the ILC attempted to provide orientation with Art. 31, the thought lingers on that objectivity remains in the eye of the beholder. On the one hand, Art. 31 sets out a comprehensive guideline, on the other, this comprehensiveness does not answer the question which of the above-mentioned methods is the most applicable one to discern the actual meaning of a treaty. Attempting to diminish this scepticism, it helps to consider the approach taken by the ICJ.[174] Its choice for a scientifically oriented methodology, which is grounded on *positivism*, will help comprehending the legal reasoning of the Court's decision on indicating preliminary measures in the case *Ukraine v. Russian Federation*.

In addition, this author has sympathy for the dynamic (evolutive) approach, which has been adopted by the European Court of Human Rights.[175] Although viewing treaties as a ''living instrument'' is considered to be highly controversial in the process of treaty interpretation, some support for this methodology can be found in the Draft Articles on the Law of Treaties by the ILC.[176] In its commentaries, the ILC elaborated on the difficult drafting process of (today's) Art. 31(3)(c). Whereas the initial version of Art. 31(3)(c) included a temporal element (''in the light of the general rules of international law in force at the time of its conclusion''), the ILC opened up this narrow stipulation since some of its members and states raised concerns that such a wording ''failed to deal with the problem of the effect of an evolution of the law on the interpretation of legal terms''.[177] The ILC, therefore, omitted reference to any temporal dimension and stated that the ''correct application of the temporal element'' could be deduced from ''the interpretation of the term in good faith''.[178] Furthermore, the ILC submitted, that whether a norm has evolved could be best understood if one took the ''intention of the parties'' into account.[179]

Two conclusions can be made: 1. Whereas the ILC's commentaries do not generally rule out the application of the dynamic (evolutive) approach, one cannot draw clear inferences from the wording of today's Art. 31(3)(c) that such an approach was applicable. 2. Every suggestion that a norm might have evolved from the time of its conclusion is pendent upon (a) the traditional approach utilized by the specific Court and (b) the argumentation or intent of the parties that concluded the treaty. Therefore, although sympathy is shared for the dynamic evolutive approach, this author considers it with caution, especially in the light of the ICJ's traditional focus on textual interpretation of treaties.

[173] Shaw, *supra* note 135, 676.
[174] *Territorial Dispute (Libyan Arab Jamahiririya/Chad)*, *supra* note 172, para. 41.
[175] Fitzmaurice, *supra* note 160, 183.
[176] *Ibid.*; ILC, *supra* note 44, p. 222, para. 16.
[177] ILC, *supra* note 44, p. 222.
[178] *Ibid*.
[179] *Ibid.*

3.4.1) Treaty Interpretation and the ICSFT

Against this background, a teleological approach would read the ICSFT as a document that obliges parties to it to ''{suppress} the financing of terrorism''. Already in the title, the jurisdictional scope of the ICSFT is narrowed down. The ICSFT is not about the suppression of terrorism in general but the obligation to suppress the financing of terrorism. In this regard, three terms require further clarification: What is the meaning of ''suppression'' and ''financing'' and how to discern the elements of the noun ''terrorism'' to which states have not found a generally applicable definition yet?[180] Looking into the articles of the convention, the textual methodology might help answer these questions:

First of all, Art. 2(1) clarifies that, in this treaty, ''terrorism'' can be understood either as (a) ''an act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex[181] or (b) ''{a}ny 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, 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''.[182] A state can also be hold responsible for not having suppressed the financing of actions by a person who either (a) ''{p}articipates as an accomplice in an offence as set forth in paragraph 1 or 4 of this article; (b) {o}rganizes or directs others to commit an offence as set forth in paragraph 1 or 4 of this article; {or} (c) {c}ontributes to the commission of one or more offences as set forth in paragraphs 1 or 4 of this article by a group of persons acting with a common purpose''.[183]

Secondly, ''suppression'' can be understood as the ''prevention of the offences set fourth in article 2''.[184] Art. 18(1) makes also use of the wording ''to prevent and counter preparations in {the state parties'} respective territories for the commission of those offences''.[185] Articles 18(1)(b)(i-iv), 18(2) and 18(3)(b)(ii) go on to determine various different provisions on how the State Parties shall, by ''cooperat{ing}'' with each other, prevent the acts laid down in Art. 2(1). Whereas the articles 18(1)(b)(i-iv) are to be read together with the wording ''{m}easures requiring financial institutions and other professions involved in financial transactions'' set forth in Art. 18(1)(b), the provisions in Art. 18(3)(b)(ii) related to the prevention of the financing of terrorism are dependent upon Art.

[180] Ben Saul, *Defining Terrorism in International Law*, 2008, 21.
[181] Nine treaties, coming into existence prior to the ICSFT, are listed in the Annex of the ICSFT: e.g. Convention for the Suppression of Unlawful Seizure of Aircraft or International Convention for the Suppression of Terrorist Bombings.
[182] ICSFT, Art. 2, para. 1.
[183] ICSFT, Art. 2, para. 5.
[184] ICSFT, Art. 18, para. 1.
[185] *Ibid*.

18(3)(b) and Art. 18(3). Taken altogether, the meaning of the terms ''suppression'', ''financing'' and ''terrorism'' can be best discerned in combination of Art. 2(1) and Art. 18.

Furthermore, the systematic approach allows for considering the ''subsequent practise in the application of the treaty'', which is relevant bearing in mind the tremendous increase of terrorist attacks after the conclusion of the ICSFT in 1999. One of the most tragic incidents was 9/11 after which the UNSC consensually adopted resolution 1373, *i.a.*, deciding that states should ''prevent and suppress the financing of terrorist acts'' and establish the Counter-Terrorism Committee.[186] Additionally, in September 2006, the UNGA endorsed the ''United Nations Global Counter Terrorism Strategy'' which for the first time defined terrorism as ''{...} one of the most serious threats to international peace and security''.[187] This statement has been reiterated in a recent resolution mainly dealing with the suppression of the financing of terrorism concerning terrorist activities in Syria and Iraq.[188] Although the ICSFT is now being applied before the ICJ for the first time, the relevance of the provisions stipulated in the Convention has grown, as demonstrated by the application of the contextual approach.

One of the principle objectives of chapter IV and V is to gain a comprehensive understanding of the legal framework underlying the remedies and tools Ukraine took recourse to. To achieve this goal, the main arguments of both conflict parties, specifically of Ukraine, enunciated at four public sittings in The Hague as well as the reasoning the ICJ explained its order on instituting provisional measures with will be scrutinized and discussed. For the legal assessment to be more profound, it is helpful to compare former ICJ decisions in other cases bearing Art. 59 of the ICJ Statute in mind.[189] In this regard, separate opinions by judges, appended to the order, will also be conducive to the understanding of how the Russian state can be hold responsible for its actions. Both former Court decisions and opinions by judges can be considered as sources under Art. 38(d) of the ICJ Statute.

3.4.2) Treaty Interpretation and the CERD

While the foundation of international human rights law, the UDHR, can be attributed to soft law, the CERD forms part of nine core international human rights conventions that afford special legal protection to an individual.[190] If a State has signed and ratified one of these conventions, it is provided with a legal remedy in case it finds another state in breach of its obligation under the same

[186] UNSC Res. 1373, UN Doc. S/RES/1373, 28 September 2014, paras. 1,6.
[187] UNGA Res. 60/288, *The United Nations Global Counter-Terrorism Strategy*, UN Doc. A/RES/60/288, 20 September 2006.
[188] UNSC Res. 2253, UN Doc. S/RES/2253, 17 December 2015.
[189] Rome Statute, Art. 59: ''The decision of the Court has no binding force except between the parties and in respect of that particular case.''.
[190] OHCHR (q), ''The Core International Human Rights Instruments and their monitoring bodies,'' 20 March 2018 (available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/CoreInstruments.aspx).

treaty it consented to. Generally, state parties are only fully bound by a treaty if they do not make any reservation to it.[191] Although CERD was ratified 14 years before the VCLT entered into force, Art. 4 of the VCLT, that deals with the ''Non-retroactivity of the present Convention'', does not prevent legal practitioners from applying the general principles of treaty interpretation on this convention.[192] As previously stated in this paper, the rules laid down in Art. 31 and Art. 32 of the VLCT form part of customary law and are applicable on that basis alone.[193]

According to the teleological reading, the protection of individual rights of a human being is at the centre of all human rights conventions. In this regard, the title of the CERD speaks of the ''Elimination of all Forms of Racial Discrimination''. Looking at the wording in Art. 1, racial discrimination is defined as ''any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life''.[194] The meaning of the strong term ''elimination'' can be, *i.a.*, inferred from Art. 2 where the ''fundamental obligations'' of the State Parties are laid down, stipulating that ''States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races {…}''.[195] Making use of the contextual approach, Art. 2 should be read together with Art. 5, the central provision, where all rights, State Parties to this Convention are obliged to provide to human beings, are listed.

The systematic approach allows for looking at the preamble where reference is made to the UNC, that is ''based on the principles of dignity and equality inherent in all human beings'', and the UDHR, which stipulates ''that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set out therein, without distinction of any kind, in particular as to race, colour or national origin''.[196] Furthermore, it is stated that ''all human beings are equal before the law and are entitled to equal protection of the law against any discrimination and against any incitement to discrimination.''[197] Generally, the preamble of the treaty facilitates the understanding of why the CERD forms part of the core international human rights instruments because it reiterates central human rights principles and codifies individual liberties in a specific, legally binding treaty.

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[191] Since Ukraine and Russia are parties to the CERD without any reservation and both ratified the convention, one can omit the general debate on whether reservations would contravene the object and purpose of human rights treaties.
[192] VCLT, Art. 4.
[193] See information in footnote 148.
[194] CERD, Art. 1.
[195] CERD, Art. 2, para. 1.
[196] CERD, preamble.
[197] *Ibid*.

Taking note of the ''subsequent practise in the application of the treaty'', the CERD is being applied before the ICJ for the second time. Therefore it helps to look at the ICJ's previous reading of the treaty in the case *Georgia v. Russian Federation*.

3.4.3) Treaty Interpretation and the Rome Statute

Despite some criticism among academia that the VCLT should neither be totally nor partially applicable on criminal tribunals, this paper will rest on the decision by the Special Tribunal for Lebanon that although the VCLT ''referred only to treaties between States {...} those rules of interpretation must {...} be held to be applicable to any internationally binding instrument, whatever its normative source.''[198]

The analysis of the second perspective that is mainly confronted with aspects of individual responsibility will be based on the Rome Statute of the ICC and the Court's reasoning in former cases. The ''Applicable law'' is determined in Art. 21 of the Rome Statute, which is basically a modification of Art. 38 of the ICJ Statute made applicable on International Criminal Law with a specified hierarchy in between the following steps:

In the first paragraph, it is stipulated that the Court shall primarily utilize its (a) ''Statute, Elements of Crimes and its Rules of Procedure and Evidence''.[199] The Elements of Crimes are listed in Art. 6 (Genocide), 7 (Crimes against humanity), 8 (War crimes) and 8 *bis* (Crime of aggression). Subsequently, if needed and applicable, the Court can draw on (b) ''treaties and the principles and rules of international law, including the established principles of the international law of armed conflict''.[200] The latter paragraph allows for the application of the VCLT and the Geneva Conventions I-IV (plus Additional Protocols I, II and III.)

Paragraph (c) speaks of ''general principles of law derived by the Court from national laws of legal systems of the world {…} provided that those principles are not inconsistent with this Statute and with international law''.[201] Additionally, the Court's reasoning in previous cases can be consulted.[202]

In order to better comprehend the ICC's interpretation of situations either referred to it by States or initiated by the Prosecutor, it should be noted, that the principal purpose of the Rome Statute, as

[198] Dov Jacobs, ''Why the Vienna Convention should not be applied to the ICC Rome Statute: a plea for respecting the principle of legality,'' *Spreading The Jam*, 24 August 2013 (available at https://dovjacobs.com/?s=why+vienna+convention+should+not+be); Dapo Akande, ''Treaty Interpretation, the VCLT and the ICC Statute: A Response to Kevin Jon Heller & Dov Jacobs,'' *EJIL*, 25 August 2013 (available at https://www.ejiltalk.org/treaty-interpretation-the-vclt-and-the-icc-statute-a-response-to-kevin-jon-heller-dov-jacobs/); *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, Before the Appeals Chamber, Special Tribunal for Lebanon, 16 February 2011, para. 26.
[199] Rome Statute, Art. 21, para. 1(a).
[200] Rome Statute, Art. 21, para. 1(b).
[201] Rome Statute, Art. 21, para. 1(c).
[202] Rome Statute, Art. 21, para. 2.

outlined in Art. 1, is ''the exercise {of} its jurisdiction over persons for the most serious crimes of international concern''.[203] Based on teleological reading, this implies that the Treaty sets boundaries to crimes that do not reach the ''gravity'' threshold.[204] For the Court to determine whether a crime falls into its jurisdiction, Art. 53 provides the necessary legal framework. Since no definition of the term ''gravity'' can be found in the Rome Statute, the textual approach is rendered implausible in this regard. Recourse has therefore to be had to the systematic methodology. It helps to look at the preamble of the Rome Statute where it is affirmed ''that the most serious crimes of concern to the international community as a whole must not go unpunished{…}.''[205] Furthermore, it is recognized by the state parties and signatories of the Convention that ''such grave crimes threaten the peace, security and well-being of the world.''[206] In view of the above, relevant ICC cases, specifically the *situation in Georgia*, will be consulted to identify the legal factors, which might either impede or lead to an initiation of an investigation in the present *situation in Ukraine*.

It should also be bore in mind that the Statute reaffirms the ''Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations''.[207] Similarly, the Rome Statute ''emphasises'' that the core principles of IL prohibit ''any State Party to intervene in an armed conflict or in the internal affairs of any State''.[208] Although Russia recently unsigned the Rome Statute, which implies that it ceases accepting the text of the Statute and stops cooperating with the organisation, the withdrawal of its signature does not prevent the ICC from having jurisdiction over crimes within Art. 6, 7 and 8 perpetrated by Russian nationals on Ukrainian territory.[209]

Art. 25(4) of the Rome Statute stipulates that ''{n}o provision in this Statute relating to individual criminal responsibility shall affect the responsibility of States under international law''.[210] Herein, the Statute distances itself from the concept of state responsibility.[211] By looking into the Draft Articles on State Responsibility one can find the opposite provision to state responsibility in Art. 58: ''These

[203] Rome Statute, Art. 1.
[204] Rome Statute, Art. 17 (d), Art. 53, para. 1 (c).
[205] Rome Statute, Preamble.
[206] *Ibid*.
[207] *Ibid*.
[208] *Ibid*.
[209] President of Russia, ''Распоряжение Президента Российской Федерации от 16.11.2016 № 361-рп "О намерении Российской Федерации не стать участником Римского статута Международного уголовного суда" {translated by author: "On the Russian Federation's intention not to become a party to the Rome Statute of the International Criminal Court"},'' *Официальный интернет-портал правовой информации (*translated by author: *Legal Services and Assistance --- Government Information Portal*), 16 November 2016 (available at http://publication.pravo.gov.ru/Document/View/0001201611160018); nor does it provide Russia leeway regarding the interpretation of core International Principles enshrined in the UN Charter.
[210] Rome Statute, Art. 24, para. 4.
[211] UNGA Res. 56/83, *supra* note 88, para. 3: ''{…} commends them to the attention of Governments without prejudice to the question of their future adoption or other appropriate action.''.

articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State.''[212] Therefore, as identified by the ICJ, one does also speak of the ''duality of responsibility''.[213]

3.4.4) The Memorandum of Understanding Between the OHCHR and Ukraine

The mandate of the Human Rights Monitoring Mission in Ukraine is laid down in a memorandum of understanding signed between the Office of the High Commissioner for Human Rights and the government of Ukraine.[214] Whereas in the beginning, it had to be renewed every three months in form of a letter sent by the foreign minister of Ukraine to the UN Secretary General, now, the mandate of the HRMMU expires only every half a year before being extended again for the next period of six months.[215] It is worth mentioning that the OHCHR was invited to Ukraine, which implies that the Ukrainian government voluntarily and deliberately permitted independent human rights observers to be deployed on its territory.

As confirmed in the Draft Articles on the Law of Treaties by the ILC, a Memorandum of Understanding falls under the legal category of a ''treaty'', defined in Art. 2(1)(a) of the VCLT.[216] Therefore, the general principles of treaty interpretation do apply to this international agreement. The main difference between a treaty and a memorandum of understanding is that the latter ''could not appropriately be called {a} formal'' single instrument.[217] Its ''informal'' nature, however, does not mean that the parties are not obliged to follow the rules and conditions stipulated in the mutually signed legal document since it still constitutes one form of a treaty for which VCLT Art. 26, the principle of *pacta sunt servanda*, applies.

In the view of this author, the course of events in Ukraine necessitated rapid action, where a memorandum of understanding proved to be a sufficient form of an international agreement. In contrast to a convention, no ratification by the Ukrainian parliament was required. Since the agreement has neither been published by the Secretariat of the UN nor by the Foreign Ministry of Ukraine, this author can only speculate about the legal content of the document.[218] For this reason,

[212] ILC, *supra* note 63, Art. 58.
[213] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Yugoslavia)*, *supra* note 139, para. 173.
[214] Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Ukraine, UN Doc. A/HRC/27/75, 19 September 2014, 4.
[215] This information is based on a phone conversation and email correspondence with Polina Levina Mahnad, former Human Rights Officer of the HRMMU (28 March 2018).
[216] ILC, *supra* note 63, p.188, para. 2-3.
[217] *Ibid*.
[218] The Foreign Ministry of Ukraine did not reply to a request on how to access either the Memorandum of Understanding or the letters sent to the Secretary General that extended the mandate; the OHCHR could not grant me permission to look into the original documents; instead, the former Human Rights Officer of the

the main focus will be set on the reports of the HRMMU. Chapter IV will especially draw on the annex of the first report on the human rights situation in Ukraine since it is the only available document where the OHCHR explains the concept of the HRMMU, including the rationale, goals, objectives and activities. Its legal status, however, is not comparable with the memorandum of understanding as HRMMU reports are considered primary sources falling outside the scope of ICJ Statute, Art. 38.

The following two chapters constitute the core elements of the thesis. Before delving into the assessment of Ukraine's recourse to three IL mechanisms, the next part is geared to analyse the legal steps necessary for an initiation of a case at the ICJ, a situation at the ICC and the establishment of a mission such as the HRMMU. Chapter IV will also elucidate the tools of these mechanisms with regard to the research question.

Chapter IV – Analysis – The Three Mechanisms and Their Tools

4.1) The ICJ and the Statute of the Court

4.1.1) The Principal Judicial Organ of the UN

UNC Art. 92 sets forth that the ICJ is the ''principal judicial organ of the United Nations''.[219] As an arbitration mechanism for the peaceful settlement of disputes between states it is governed by the UNC and the ICJ Statute.[220] Different to the ICC, which works outside the UN body system and primarily focuses on individuals, the ICJ solely provides access to states and is concerned with inter-state contentious cases.[221] All UN member states are *ipso facto* parties to the ICJ, including Russia and Ukraine.[222] However, this does not imply that the ICJ has universal jurisdiction and can hear every case brought to it by a state party. The principal requirement for the Court to be able to consider a filed application valid is that the parties have provided their consent in a treaty prior to the commencement of the case.[223] The ICJ can only hear a case, when both parties to a dispute have equally accepted the Court's jurisdiction. In this regard, reciprocity forms an essential part.

HRMMU, Polina Levina Mahnad, referred to the annex of the first report on the human rights situation in Ukraine during a phone conversation and by email correspondence (28 March 2018).

[219] UNC, Art. 92.

[220] Hugh Thirlway, *The International Court of Justice*, in: Malcolm D. Evans (ed.), International Law, 2014, 589, 595.

[221] ICJ Statute, Art. 35, para. 1.

[222] UNC, Art. 93.

[223] *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America)*, Judgement, ICJ, 15 June 1954, 32: ''{…} a well-established principle of international law embodied in the Court's Statute {…} the Court can only exercise jurisdiction over a State with its consent.''.

4.1.2) Basis of the ICJ's Jurisdiction --- Part 1

Art. 36(1) and (2) provides for three specific ways by which a state can give its consent to the ICJ:[224]

First, states can refer to the ICJ in a bilateral treaty both parties are bound by. For example, if Ukraine and Russia would have agreed in the *Treaty on Friendship, Cooperation and Partnership between Ukraine and the Russian Federation* that in case of disagreement about the interpretation of the clauses provided for by the convention, a party to the treaty may refer the dispute to the ICJ, then the ICJ would have jurisdiction only on the basis of this agreement. However, no such referral can be found in any bilateral agreement between Ukraine and Russia. Therefore, the ICJ does not have jurisdiction by a *special agreement*.

The second option relates to ''matters specifically provided for in the {UNC} or in treaties and conventions in force''.[225] This is also known as the *compromissory clause* system. Both the ICSFT and CERD, on which Ukraine's application at the ICJ relies on, contain such clauses. While in the ICSFT it is Art. 24(1) which allows ''any one of those parties {to} refer the dispute to the International Court of Justice'', the CERD makes reference to the ICJ in Art. 22.[226] It is for this reason, why Ukraine could file an application at the UN Court. Still, one has to distinguish between both conventions because they entail different procedural steps that need to be gone through before the ICJ can ascertain that it has jurisdiction on the basis of the treaty invoked.

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[224] ICJ Statute, Art. 36

Article 36

1. The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.

2. The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

a. the interpretation of a treaty;

b. any question of international law;

c. the existence of any fact which, if established, would constitute a breach of an international obligation;

d. the nature or extent of the reparation to be made for the breach of an international obligation.

3. The declarations referred to above may be made unconditionally or on condition of reciprocity on the part of several or certain states, or for a certain time.

4. Such declarations shall be deposited with the Secretary-General of the United Nations, who shall transmit copies thereof to the parties to the Statute and to the Registrar of the Court.

5. Declarations made under Article 36 of the Statute of the Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms.

6. In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

[225] ICJ Statute, Art. 36, para. 1.

[226] ICSFT, Art. 24, para. 1; CERD, Art. 22.

4.1.3) The Different Procedural Steps During Preliminary Examinations

As regards the ICSFT, in case of a dispute, Art. 24(1) makes it obligatory for the applying party to (1) negotiate with the accused state for a ''reasonable time'' before filing an application.[227] (2) If negotiations went to no avail, one of the parties shall contend the issue at a Court. (3) Only if after six months, the parties could not find agreement on the ''organization of the arbitration'', the issue can be referred to the ICJ.[228]

Art. 22 of the CERD speaks of two conditions which might need to be satisfied prior to submitting an application to the ICJ on the basis of the treaty: (1) The first is that ''negotiation{s}'' between both parties ought to have been led and (2) secondly, ''the procedures expressly provided for in this Convention'', laid out in Art. 8 till 16, pertaining to the CERD Committee, might need to be respected.[229]

The closest example to the dispute between Ukraine and Russia at the ICJ is provided by Georgia's application at the court regarding Russia's ''actions on and around the territory of Georgia in breach of CERD''.[230] Comparable to Ukraine's application, Georgia contended that Russia ''violated its obligations under CERD'' from the beginning of the occupation of South Ossetia and Abkhazia until the end of the Five-Day War in Summer 2008.[231]

In *Georgia v. Russian Federation* the ICJ confirmed the above-mentioned preconditions of Art. 22 and decided that ''neither requirement contained in Article 22 has been satisfied''.[232] Of importance for Ukraine's application are the Court's elaborations on the term ''negotiation''. The ICJ enunciated that the understanding of negotiations is different from that of a dispute, of which the latter was described by the Court as a ''plain opposition of legal views or interests between two parties, or the existence of a series of accusations and rebuttals, or even the exchange of claims and directly opposed counter-claims''.[233] Negotiations have to be ''genuine{ly} attempt{ed} by one of the disputing parties''.[234] Only in case of failure of negotiations, which implies that they became ''futile or deadlocked'', can the Court have jurisdiction.[235] Since the negotiations between Russia and

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[227] ICSFT, Art. 24, para. 1.
[228] *Ibid*.
[229] CERD, Art. 22.
[230] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Overview of the Case, ICJ, 16 April 2018 (available at http://www.icj-cij.org/en/case/140).
[231] *Ibid*.
[232] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Judgement, ICJ, 1 April 2011, paras. 141, 184.
[233] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, *supra* note 232, para. 157.
[234] *Ibid*.
[235] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, *supra* note 232, para. 159.

Georgia were dominated by issues pertaining to the armed conflict between both parties and not, as necessary for the ICJ's jurisdiction in this application, by subject-matter aspects specifically linked to the CERD, the ICJ ruled that ''Georgia did not attempt to negotiate CERD-related matters with the Russian Federation'' and decided to discontinue the case on lack of jurisdiction.[236]

For the sake of argument, even if Russia would have been in breach of the obligations under Art. 2 (1)(a), 2(1)(b), 2(1)(d), 3 and 5 of the CERD, which Georgia claimed, the final judgement by the ICJ in this case implies, that for the Court to proceed to the merits stage, all preconditions of Art. 22 have to be met.[237] This is an important caveat for Ukraine's application as Russia denied the conditions of Art. 22 being fulfilled by Ukraine and held that both were cumulative.[238] In *Georgia v. Russian Federation* the ICJ left an important question unanswered, namely whether the requirements contained in Art. 22 are either ''cumulative or alternative''.[239] It did not avail itself of the opportunity to elaborate on this issue because Georgia refrained from utilizing the CERD Committee.[240] Since the first precondition of Art. 22 was not satisfied, the Court did not think it was necessary to further pronounce on this matter.[241]

It should be bore in mind, that in *Georgia v. Russian Federation* the ICJ introduced preliminary measures against Russia in its first order pursuant to Art. 41(1) of the ICJ Statute, as it considered the requirements of (1) *prima facie* jurisdiction, (2) plausibility and (3) risk of irreparable damage and urgency to being fulfilled.[242] Only after Russia recorded preliminary objections concerning the jurisdiction of the Court, the ICJ decided to reconsider the case based on Russia's claims and stopped from continuing its work on the merits.[243] Against this background, the decision by the ICJ to introduce preliminary measures in regard to CERD in *Ukraine v. Russian Federation* has therefore to be seen as not final as it could be revoked at another point on grounds of lack of jurisdiction.[244]

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[236] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, *supra* note 232, paras. 182-184.

[237] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, *supra* note 232, para. 17.

[238] *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)*, Request for the Indication of Provisional Measures, Order, ICJ, 19 April 2017, paras. 57-58.

[239] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, *supra* note 232, para. 183.

[240] *Ibid*.

[241] *Ibid.*

[242] *Application of the International Convention of the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation)*, Order, ICJ, 15 October 2008, paras. 145 *ff*.

[243] *Application of the International Convention of the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation),* Press Release, ICJ, 15 March 2011 (available at http://www.icj-cij.org/files/case-related/140/16346.pdf).

[244] *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)*, *supra* note 238, paras. 99 *ff*.

In addition, a preliminary measure cannot be enforced, different to the final judgement of the Court.[245] It should not be left out, however, that the revolutionary ICJ's ruling in the *LeGrand* case established an obligation to all parties in a dispute to comply with a preliminary order based on Art. 41 of the ICJ Statute.[246] This implies that if Russia did not respect the ICJ's order of introducing preliminary measures in regard to CERD, Ukraine could claim a right for reparations due to Russia's breach of an international obligation unrelated to the claims of the disputing parties regarding the initial conflict.[247]

The procedure of the ICJ from requesting preliminary measures to rendering a final judgement is quite extensive and takes often various years. In this regard, one makes a distinction mainly between two stages of the Court: 1) the preliminary phase and 2) the merits stage.

In the preliminary phase the Court needs only to ''determine whether the circumstances require the indication of provisional measures for the protection of rights under {the applicable instrument}'' and ''cannot make at this stage definitive findings of fact''.[248] The latter procedure stands open to the Court at the merits stage only.[249] Hence, the preliminary measures invoked by the Court under Art. 41 of the ICJ Statute are sought alone to ''preserve {…} the rights'' of a party, which brought up the case.[250]

Before the merits stage, the ICJ is not required to ascertain whether the party's rights do really exist.[251] At the preliminary stage, the Court's primary duty lies in analysing whether 1) it holds *prima facie* (Latin, ''at first sight'') jurisdiction.[252] This process is governed by the principle of *competénce de*

[245] Thirlway, *supra* note 220, 615; in general, all final judgements by the ICJ are binding on the disputing parties in the single case alone and may not be appealed: ICJ Statute, Art. 59, 60; UNC Art. 94 (1) sets forth that any UN member state party to a case of the ICJ has to obey the final judgement and if a state did not abide by it, recourse may be had to the UNSC, that can ''make recommendations or decide upon measures to be taken to give effect to the judgment'': UNC, Art. 94, paras. 1-2.
[246] *LaGrand (Germany v. United States of America)*, *supra* note 148, paras. 98-109.
[247] Thirlway, *supra* note 220, 603.
[248] *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)*, *supra* note 238, para. 90.
[249] *Ibid*.
[250] ICJ Statute, Art. 41, para. 1; see also: Yoshiyuki Lee-Iwamoto, *The ICJ as a Guardian of Community Interests? Legal Limitations on the Use of Provisional Measures*, in: Andrew Byrnes, Mika Hayashi, and Christopher Michaelsen (eds.), International Law in the New Age of Globalization, 2014, 80.
[251] See e.g.: *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)*, *supra* note 238, paras. 64,90; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Request for the Indication of Provisional Measures, Order, ICJ, 23 January 2007, para. 25.
[252] See e.g: *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)*, *supra* note 238, para. 17; *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Request for the Indication of Provisional Measures, Order, ICJ, 7 December 2016, para. 31; *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Request for

la competénce (French, ''jurisdiction to decide jurisdiction'') set forth in Art. 36(6) of the ICJ Statute.[253] Having established this fact by affirming (a) the existence of a dispute between both parties and (b) declaring that genuine negotiations have failed, the Court can proceed with answering the question of whether the case warrants the indication of preliminary measures.[254] This entails two further examinations: 2) The rights claimed by the party have to be plausible and a link between the rights claimed and the provisional measures requested by the party has to be established; 3) additionally, a risk of irreparable prejudice and urgency has to be found by the Court.[255]

4.1.4) The Plausibility Test

The plausibility test is a relatively new threshold in the preliminary phase, which was firstly introduced by the ICJ in *Senegal v. Belgium*.[256] It basically sets out two conditions: i) the rights of the party which tries to vindicate them at the Court have to ''exist in the abstract'' and ii) it has to be established that the party has ''such rights'' in the context of the case.[257] Judge Greenwood declared in a separate opinion in *Costa Rica* v. *Nicaragua* that ''{w}hat is required is something more than assertion but less than proof; {...} the party must show that there is at least a reasonable possibility that the right which it claims exists as a matter of law and will be adjudged to apply to that party's case''.[258] On the other hand, Judge Sepúlveda-Amor felt less sure to make such a clear statement but rather rhetorically asked in a separate opinion, which level of evidence is required to satisfy the plausibility threshold: ''Does it suffice to demonstrate the possibility or reasonableness of the evidence of a right, or is probability the relevant standard?''[259]

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the Indication of Provisional Measures, Order, ICJ, 10 July 2002, para. 58; *Legality of Use of Force (Serbia and Montenegro vs. Belgium)*, Request for the Indication of Provisional Measures, Order, ICJ, 2 June 1999, para. 21.

[253] ICJ Statute, Art. 36, para. 6; Thirlway, *supra* note 220, 601.

[254] See procedure in: *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)*, *supra* note 238, paras. 22-62.

[255] See e.g.: *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)*, *supra* note 238, paras. 64, 89; *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, *supra* note 252, paras. 72,78,83; *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Request for the Indication of Provisional Measures, Order, ICJ, 28 May 2009, paras. 56-57, 62; *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Request for the Indication of Provisional Measures, Order, ICJ, 8 March 2011, paras. 53-54, 63-64.

[256] *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)*, Separate Opinion of Judge Bhandari Appended to Order, ICJ, 19 April 2017, p. 8, para. 16; *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, *supra* note 255, para. 57.

[257] *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)*, *supra* note 256, p. 8, para. 16.

[258] *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)*, Declaration of Judge Greenwood Appended to Order, ICJ, 8 March 2011, p. 47, para. 4.

[259] *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua),* Separate Opinion of Judge Sepúlveda-Amor Appended to Order, ICJ, 8 March 2011, p. 37, para. 12.

It is obvious that serious disagreement among legal scholars and judges at the ICJ exist around the applicability of this threshold, which underscores that further elaborations on this important element are needed.[260] So far, the Court has deemed it unnecessary to clarify the matter. The Judges Abraham and Pocar corroborate this thought claiming that the Court has ''never clearly defined the standard to be reached for rights to be deemed plausible''.[261] The ''lack of clarity'' entailed serious consequences for the procedure of the Court, as the party filing the application was unaware about the character and amount of evidence needed for the ICJ to consider it valid to introduce preliminary measures.[262] Both Sepúlveda-Amor and Pocar submit that the ICJ might be even ''overburden{d}'' with facts forwarded to it by the parties in the preliminary phase.[263] There is the general danger of conflating the preliminary stage with the merits, of which the latter should be mainly concerned with the evidence and facts. In addition to that, as criticised by Pocar, the Court would then be unable to ''indicate, promptly measures of an urgent nature''.[264] The fact that the elements of the plausibility test remain obscure leads to ''delays'' and hinders the effectiveness of the Court in the indication of preliminary measures.[265]

A clear message can be deduced from the vivid debate among judges at the ICJ regarding the plausibility test: The Court has to pronounce its opinion on the evidence required to satisfy the threshold.[266] The critics do not question the general introduction of the test but its vagueness. This confirms the validity of such a mechanism. It is a valid point that the party, which filed the application, has to provide the Court evidence supporting its own claims. However, this author concurs with the criticism shared because the vagueness persisting around the mechanism is neither conducive to the procedure of the Court nor to the applicant party trying to halt an aggression against its own territory, as it happened in the case of Ukraine on the basis of the ICSFT. To put it

[260] See also: Iryna Marchuk, ''Ukraine's Dashed High Hopes: Predictable and Sober Decision of the ICJ on Indication of Provisional Measures in Ukraine v Russia,'' *EJIL*, 24 April 2017 (available at https://www.ejiltalk.org/ukraines-dashed-high-hopes-predictable-and-sober-decision-of-the-icj-on-indication-of-provisional-measures-in-ukraine-v-russia/).

[261] *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)*, Separate Opinion of Judge Ad Hoc Pocar Appended to Order, ICJ, 19 April 2017, p. 2, para. 6; *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay),* Separate Opinion of Judge Abraham, ICJ, 13 July 2006, p. 140, para. 10.

[262] *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)*, *supra* note 261, pp. 2-3, paras. 7-8.

[263] *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)*, *supra* note 261, p. 3, para. 9; *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), supra* note 259, p. 38, para. 15.

[264] *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)*, *supra* note 261, p. 3, para. 9.

[265] *Ibid*.

[266] See also: Marchuk, *supra* note 260.

bluntly, the test is too important not to be elaborated upon by the Court as it might decide about the death or survival of vulnerable victims. One could even go a step further and posit that if too much evidence was required at such an early phase of the proceedings, it is believed that the merits stage is rendered almost obsolete. What difference can then be made between the preliminary stage and the merits if the parties had already presented most facts in the first phase? Additionally, given the current workload of the ICJ, clarifying the threshold should be considered as one strategy to increase the effectiveness of the Court.[267]

4.1.5) The Requirement of Urgency

If the Court deemed the arguments put forward by the applicant party plausible, it has to ascertain whether irreparable prejudice exists and how real and imminent the risk of irreparable prejudice really is as the last requirement for the indication of preliminary measures.[268] To prove the urgency of a case, the plaintiff is required to provide evidence suggesting that a final order of the Court would be too late for the protection of its rights enshrined in the convention.[269] The plaintiff has to convince the Court that an immediate action, to wit the indication of preliminary measures, is warranted.[270] In its first order in *Georgia v. Russian Federation*, the Court was satisfied that the risk of irreparable damage would exist. However, it was solely based on Art. 5(b) and (d)(i) of the CERD.[271] It declared that the ''Georgian population in the areas affected by the recent conflict remains vulnerable'' and that the ''situation in South Ossetia, Abkhazia and adjacent areas in Georgia is unstable and could rapidly change''.[272] In the same vein, the Court stated that due to the ''ongoing tension and the absence of an overall settlement to the conflict in this region'' the people in Abkhazia and South Ossetia ''remain vulnerable''.[273]

The case *Georgia v. Russian Federation* demonstrates that the Court does not need to indicate measures regarding all claims made by the applicant party but can render an order on the basis of the request where it sees the urgency criteria to being actually satisfied.[274] Furthermore, it showed

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[267] UN, ''Speakers Say International Court of Justice Needed More than Ever, as General Assembly Considers Its Annual Report,'' *UN Press*, 27 October 2016 (available at https://www.un.org/press/en/2016/ga11847.doc.htm).

[268] See e.g.: *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)*, *supra* note 238, paras. 88-89; *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, *supra* note 252, paras. 82-83.

[269] Thirlway, *supra* note 220, 605.

[270] *Ibid*.

[271] *Application of the International Convention of the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation)*, *supra* note 242, paras. 142-143.

[272] *Ibid*.

[273] *Ibid*.

[274] *Application of the International Convention of the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation)*, *supra* note 242, para. 146.

that the aspect of ''vulnerability'' of a population linked to the ''instability'' of the situation might trigger the urgency threshold for the indication of preliminary measures.

In view of the above, chapter V will primarily scrutinize the Court's rationale for indicating preliminary measures in the case *Ukraine v. Russian Federation*.

4.1.6) Basis of the ICJ's Jurisdiction --- Part 2

Returning to the initial question of how a state can provide its consent to the Court, the last option, stipulated in Art. 36(2) – (5) of the ICJ Statute, is the *ipso facto* recognition of the Court's jurisdiction.[275] This takes place in form of a unilateral declaration by which a state recognizes the jurisdiction of the ICJ as compulsory.[276] Although 73 UN member states have made use of the *optional clause* system, many declarations are subject to reservations.[277] It implies that states retain some rights they consider imminent and which the ICJ is barred from adjudicating on. Since neither Russia nor Ukraine have made such a declaration, one can conclude that the only possible option for Ukraine to vindicate certain rights breached by Russia in Crimea and Eastern Ukraine is provided for by the *compromissory clause* system.

4.1.7) The Advisory Jurisdiction of the ICJ

The second function of the Court pertains to the advisory jurisdiction. UNC Art. 96 allows the UNGA, UNSC, other organs of the UN and specialized agencies, that gained the permission by the UNGA, to ''request advisory opinions of the Court on legal questions''.[278] Despite their non-binding character, the ICJ's pronouncement on a crucial legal matter bears great significance.[279] In parallel to the Court's task to settle inter-state disputes, its judgements and opinions do also shape the rule of law at the international stage and contribute to the evolution of IL.[280] It implies that states, which do not respect an advisory opinion, directly contravene an international obligation the ICJ was requested to clarify.

Although Ukraine has not taken recourse to an advisory opinion yet, this option could be considered as an alternative tool if Ukraine's current application at the ICJ was to be dismissed on lack of jurisdiction at a later stage of the proceedings. Since Russia's consent would not be required, e.g. the

[275] ICJ Statute, Art. 36, paras. 2-5.
[276] *Ibid*.
[277] ICJ, ''Declarations recognizing the jurisdiction of the Court as compulsory,'' *ICJ-Webpage*, 18 April 2018, (available at http://www.icj-cij.org/en/declarations); Thirlway, *supra* note 220, 615.
[278] UNC, Art. 96.
[279] Thirlway, *supra* note 220, 610-611.
[280] UNGA Res. 68/963, *Letter dated 24 July 2014 from the Permanent Representative of Switzerland to the United Nations addressed to the Secretary-General*, UN Doc. A/68/963, Annex to the letter - Handbook on accepting the jurisdiction of the International Court of Justice: model clauses and templates, 19 August 2014, p. 9: ''The Court promotes the rule of law at the international level.''.

UNGA could request an advisory opinion on a question similar to the following: ''What are the legal consequences for states arising from the incorporation of Crimea by Russia, the occupying power, in consideration of the rules and principles of IL.''[281] Bearing in mind that the CERD cannot hold Russia responsible for the annexation of Crimea, it can be said that ''an advisory opinion on Crimea would carry great legal weight and moral authority''.[282]

The paper proceeds to the second perspective and analyses the tools the ICC provides in the context of the Ukraine crisis.

4.2) The ICC and the Rome Statute System

4.2.1) The Court of Last Resort

The ICC is an independent international judicial body established with the goal to investigate, prosecute and try individuals that might have perpetrated the most serious crimes of concern to the international community as a whole, to wit genocide, crimes against humanity and war crimes (and the crime of aggression).[283] Different to the ICJ, the ICC is not an organ of the UN, but it maintains a working relationship with the organisation, which allows the UNSC to refer cases to the ICC or defer them for a period of 12 months acting under a chapter VII resolution.[284] While the previous criminal tribunals ICTY and the ICRC were established by the UNSC under a chapter VII resolution and were only of a temporary character, the ICC is a permanent body that operates under the principle of complementarity and is a Court of last resort.[285]

The complementarity principle, enshrined in the preamble of the Rome Statute and a central guideline for the Court, can render a case inadmissible when the OTP decided during its preliminary examination of a situation that the particular case had already been scrutinized by a State which

[281] This question applies the wording of two requested advisory opinions: *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), supra* note 91, para. 1: ''What are the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970)''; and: *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, *supra* note 139, para. 1: ''What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem {...}.''.

[282] Grant, *supra* note 127.

[283] Rome Statute, Preamble, Art. 5; on discussion regarding the crime of aggression see page 9 of this thesis; on Individual criminal responsibility: Rome Statute, Art. 25.

[284] Rome Statute, Art. 2; Art. 13 (b); has occurred twice: in a referral of situation in (1) Darfur and (2) Libya: Thirlway, *supra* note 220, 773; see also: Lawrence Moss, ''The UN Security Council and the International Criminal Court – Towards a More Principled Relationship,'' *Friedrich Ebert Stiftung – International Policy Analysis*, vol. 1, no. 1 (2012), 5-6, 9; power of deferral: Rome Statute, Art. 16; the UNSC declined to defer the Kenyan Investigation by the Prosecutor, requested by the Kenyan government: see: Moss, *supra* note 284, 10-11.

[285] UNSC Res. 827, *Resolution 827 (1993)*, UN Doc. S/RES/827, 25 May 1993; UNSC Res. 955, *Resolution 955 (1994)*, UN Doc. S/Res/955, 8 November 1994; Rome Statute, Art. 17; on Court of last resort, see: ICC, ''About,'' *ICC – Webpage*, 27 April 2018 (available at https://www.icc-cpi.int/about).

holds jurisdictional powers over the instance expect for the fact when the State has been ''unwilling or unable genuinely'' to investigate or prosecute a case which might fall into the jurisdiction of the ICC.[286]

4.2.2) The Difference Between a Situation and a Case

Generally, the Court makes a legal distinction between a situation and a case.[287] Since the Rome Statute does not define both terms, it is difficult to find the relevant criteria, which distinguishes a situation from a case. To solve this problem, the elaborations of the Pre-Trial Chamber in the *Situation in the Democratic Republic of the Congo* prove to be helpful.[288] This understanding is highly important for the functioning of the ICC as both classifications determine the ''assumption of jurisdiction, admissibility, the challenges regime, victims participation, and judicial assistance''.[289]

4.2.3) The Initiation of a Preliminary Examination

Before a situation can be examined in the preliminary stage one of three mechanisms of Art. 13 of the Rome Statute have to be triggered. This can be done by (1) a referral of a situation by a State Party to the ICC, (2) a referral of a situation by the UNSC under UNC Chapter VII or (3) a *proprio motu* initiation of an investigation by the Prosecutor, who heads the independent organ of the ICC, the OTP.[290] The third option allows not only states, but also UN organs, NGOs and even individuals to send information to the Prosecutor who, based on an analysis of the collected data, might open a preliminary examination on her/his own volition.[291]

Not a trigger mechanism but a jurisdictional provision is provided by another possible choice to open a preliminary examination into a situation, to wit by lodging a declaration under Art. 12(3) of the Rome Statute at the Registrar.[292] In this case, either the Prosecutor will set off the preliminary

[286] Rome Statute, Preamble; Art. 17; Art. 53, para. 1(b); see also: Iryna Marchuk, ''Ukraine and the International Criminal Court: Implications of the Ad Hoc Jurisdiction Acceptance and Beyond,'' *Vanderbilt Journal of Transnational Law*, vol. 49, no. 323 (2016), 329.

[287] ICC, *Policy Paper on Case Selection and Prioritisation*, OTP, 2016, para. 4.

[288] *Situation in the Democratic Republic of the Congo*, Decision on the Applications for Participation in the Proceedings of VPRS 1, VPRS 2, VPRS 3, VPRS 4, VPRS 5 and VPRS 6, ICC – Pre-Trial Chamber I, 17 January 2006, para. 65: ''{T}he Rules of Procedure and Evidence and the Regulations of the Court draw a distinction between situations and cases in terms of the different kinds of proceedings, initiated by any organ of the Court, that they entail. *Situations* {emphasis added}, which are generally defined in terms of temporal, territorial and in some cases personal parameters {…} entail the proceedings envisaged in the Statute to determine whether a particular situation should give rise to a criminal investigation as well as the investigation as such. *Cases*, which comprise specific incidents during which one or more crimes within the jurisdiction of the Court seem to have been committed by one or more identified suspects, entail proceedings that take place after the issuance of a warrant of arrest or a summons to appear.''.

[289] Rod Rastan, ''What is a 'Case' for the Purpose of the Rome Statute,'' *Criminal Law Forum*, vol. 19, no. 1 (2008), 436.

[290] Rome Statute, Art. 13; Art. 42, paras. 1-2.

[291] Rome Statute, Art. 15, paras. 1-2.

[292] Rome Statute, Art. 12, para. 3.

examination activities of the OTP *proprio motu* or a State Party will refer a situation to the Prosecutor after a declaration under Art. 12(3) of the Rome Statute had been lodged.[293] As stated in the Policy Paper on Preliminary Examinations, a declaration under Art. 12(3) allows the Court to open a preliminary examination ''at hand'' which means that a lodged declaration will be triggered automatically by the Prosecutor or a State Party.[294] Nevertheless, similar to the trigger mechanisms presented above, the OTP has to examine the situation according to Art. 53(1)(a-c) of the Rome Statue in the preliminary stage before it may proceed to the investigation phase after the Prosecutor received an approval from the Pre-Trial Chamber .[295]

The main criteria by which the OTP analyses a situation at the preliminary stage are laid down in Art. 53(1)(a-c).[296] Only if the Prosecutor established pursuant to Art. 53(1)(a-c) that (a) there was a ''reasonable basis'' for the jurisdictional criteria to be satisfied, that (b) nothing would speak against a case to be admissible under Art. 17 of the Rome Statute and that (c) the alleged crimes committed were of such gravity that they were in the interest of justice, can the Prosecutor ask the Pre-Trial Chamber for permission to advance to the investigation phase.[297] Each of these different hierarchical

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[293] ICC, *Policy Paper on Preliminary Examinations*, OTP, 2013, para. 40 (also in the Policy Paper's footnote 25): ''It should be noted that article 12(3) is a jurisdictional provision, not a trigger mechanism. As such, declarations of the sort should not be equated with referrals, but will require a separate triggering by the Prosecutor proprio motu or by a State Party.''.

[294] ICC, *supra* note 293, para. 76: ''Upon receipt of a referral or a declaration pursuant to article 12(3), the Office will open a preliminary examination of the situation at hand.''.

[295] *Ibid.*: ''However, it should not be assumed that a referral or an article 12(3) declaration will automatically lead to the opening of an investigation {…} The Office's approach to considering the factors set out in article 53(1)(a)-(c) will be the same irrespective of the way in which the preliminary examination is initiated.''; Rome Statute, Art. 53, para. 1 (a-c):

Article 53
Initiation of an investigation

1. The Prosecutor shall, having evaluated the information made available to him or her, initiate an investigation unless he or she determines that there is no reasonable basis to proceed under this Statute. In deciding whether to initiate an investigation, the Prosecutor shall consider whether:

(a) The information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed;

(b) The case is or would be admissible under article 17; and

(c) Taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice.

If the Prosecutor determines that there is no reasonable basis to proceed and his or her determination is based solely on subparagraph (c) above, he or she shall inform the Pre-Trial Chamber.

; Art. 15, paras. 3-4.

[296] Rome Statute, Art. 53, para. 1 (a-c).

[297] Rome Statute, Art. 53, para. 1 (a-c); Art. 15, paras. 3-4.

steps are further divided into categories that need to be satisfied before the Prosecutor can request the commencement of investigations.[298]

Whereas Art. 53(1)(a) requires the temporal, material and either territorial or personal jurisdiction to be fulfilled, Art. 53(1)(b) on admissibility obliges the OTP to examine the complementarity and gravity principles.[299] Different to the latter two positive preconditions, Art. 53(1)(c) pertains to the interest of justice criteria which presents a countervailing requirement undefined by the Rome Statute.[300] Considering the object and purpose of the Rome Statute and also looking into the preamble of the same document, it is highly ''exceptional'' that an opening of an investigation into a situation would not serve the interests of justice.[301] Hence, this criteria has to be analysed by the Prosecutor only if ''there are specific circumstances which provide substantial reasons to believe it is not in the interests of justice {to investigate} at that time''.[302]

So far, no example can be recalled where the Prosecutor declared that there is no reasonable basis to proceed with the initiation of an investigation under Art. 53(1)(c) because (i) the situation was not grave enough, (ii) did not serve the interests of the victims or (iii) the age or infirmity of the potential suspect and his or her role in the alleged crime would have contravened with the principle of the interest of justice.[303] It underscores that in all cases in which the Court initiated an investigation, both the Prosecutor and the Pre-Trial Chamber decided the initiation served the protection of the rights of the victims of the most serious crimes. Moreover it indicates that the Court determined that the prevention of such crimes would neither interfere with other institutions' mandates of mediation for the interests of peace nor even exacerbate the armed conflict on the ground.

[298] ICC, *supra* note 293, paras. 34 – 71.

[299] Rome Statute, Art. 53, para. 1 (a-b); on jurisdiction, see: ICC, *supra* note 293, paras. 36-41; on admissibility, see: ICC, *supra* note 293, paras. 42-66; on complementarity, see also: Rome Statute, Art. 17, para. 1 (a-c); on gravity, see also: Rome Statute, Art. 17, para. 1 (d).

[300] ICC, *supra* note 293, para. 67; ICC, *Policy Paper on the Interests of Justice*, OTP, 2007, 2-3.

[301] Rome Statute, Preamble; ICC, *supra* note 293, para. 71; ICC, *supra* note 300, 3-4.

[302] ICC, *supra* note 300, 3.

[303] See e.g. *Situation in Georgia*, Decision on the Prosecutor's Request for authorization of an investigation, ICC – Pre-Trial Chamber I, 27 January 2016, para. 58: ''Since the Prosecutor has not determined that initiating an investigation in the Georgia situation "would not serve the interests of justice" and also taking into account the representations of victims, received under article 15(3) of the Statute, which overwhelmingly speak in favour of the opening of an investigation, the Chamber considers that there are indeed no substantial reasons to believe that an investigation would not serve the interests of justice.''; *Situation in the Republic of Burundi*, Public Redacted Version of "Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Burundi", ICC -01/17-X-9-US-Exp, 25 October 2017, ICC-Pre-Trial Chamber III, 9 November 2017, para. 190: ''Since the Prosecutor has not determined that initiating an investigation in the Burundi situation "would not serve the interests of justice" and, importantly, taking into account the views of the victims which overwhelmingly speak in favour of commencing an investigation, the Chamber considers that there are indeed no substantial reasons to believe that an investigation would not serve the interests of justice.''; ICC, *supra* note 300, 4: ''The Prosecutor has not yet made a decision not to investigate or not to proceed with a prosecution because it would not serve the interests of justice.''.

In this regard, it is worth mentioning that the ICC has been criticised by various scholars for its narrow understanding of the principle of interest of justice.[304] Some have also blamed the Court for making a distinction between the concepts of interest of justice and interest of peace, positing that ''it would transform a prosecutorial mandate into one that risks being as much about politics, as it is justice''.[305]

For now, it is important to keep in mind that the Court's resolve of ending impunity prevails over the criticism that the ICC's intervention might politicise the conflict whenever the previous two conditions of Art. 53(1)(a-b) of the Rome Statute had been satisfied. The Court has stressed that the interest of justice provision did not conflict with or replace the attempts of other institutions to mediate in a war.[306] It made specific mention of Art. 16 of the Rome Statute, which empowers the UNSC to defer investigations or prosecutions.[307]

If the Pre-Trial Chamber concluded, that there is ''a reasonable basis to proceed with an investigation'' and all jurisdictional criteria of ''the case'' seem to be satisfied, the OTP is allowed to investigate the situation.[308] The chronologic order of these steps has been confirmed by the Pre-Trial Chamber on various occasions.[309]

4.2.4) The Remits of the OTP in the Preliminary Examination and Investigation Phase

Before the investigatory stage, the OTP can only receive evidence from different agencies, be it states, NGOs or individuals, analyse its seriousness and travel to the country where the crimes had or have been allegedly committed provided that the state permits the OTP to do so.[310] At the later stage, however, the Prosecutor would be empowered to establish the ''truth'' by investigating perpetrators, victims and witnesses.[311] Then, the issuing of arrest warrants would be subject to pre-approval of the Pre-Trial Chamber.[312] The OTP would also not lack anymore the permission to send

[304] See e.g.: Barrie Sander, ''Is the ICC Reconsidering its Policy on the ''Interests of Justice'','' *Justice in Conflict*, 29 September 2016 (available at https://justiceinconflict.org/2016/09/29/is-the-icc-reconsidering-its-policy-on-the-interests-of-justice/); Priscilla Hayner, ''Does the ICC Advance the Interests of Justice?,'' *openDemocracy*, 4 November 2014 (available at https://www.opendemocracy.net/openglobalrights/priscilla-hayner/does-icc-advance-interests-of-justice).
[305] Richard Dicker, ''Throwing Justice Under the Bus is not the Way to go,'' *openDemocracy*, 11 December 2014 (available at https://www.opendemocracy.net/openglobalrights/richard-dicker/throwing-justice-under-bus-is-not-way-to-go).
[306] ICC, *supra* note 293, para. 69.
[307] *Ibid*.; Rome Statute, Art. 16.
[308] Rome Statute, Art. 15, paras. 3-4.
[309] *Situation in Georgia*, *supra* note 303, para. 4; *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC – Pre-Trial Chamber II, 31 March 2010, paras. 20-25; *Situation in the Republic of Cóte D'Ivoire*, Corrigendum to ''Decision Pursuant to Articles 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Cóte d'Ivore'', ICC – Pre-Trial Chamber III, 15 November 2011, paras. 17-18.
[310] ICC, supra *note* 293, para. 85.
[311] Rome Statute, Art. 54, para. 1 (a); Art. 54, para. 3 (b).
[312] Rome Statute, Art. 57, para. 3 (a); 58, para. 1.

requests to all states for international cooperation and judicial assistance, stipulated in Part 9 of the Rome Statute.[313]

For the sake of argument, if the Prosecutor decided that a non-member state of the ICC whose national is suspected of having committed a crime on the territory of another country, which referred the situation to the ICC or accepted the jurisdiction on the basis of a declaration pursuant to Art. 12 (3), might assist the Court in its investigations, then the ICC can suggest the third state to go into an ad hoc agreement or enter into any other relationship with the Court that would facilitate its current investigations.[314] Should a (non-member) state of the ICC refuse to cooperate with the ICC, which has happened various times before, then the Court will primarily rely on the testimony of witnesses and contact other cooperative states for the provision of intelligence.[315] It goes without saying, that cooperation with states forms a central element of the Rome Statue on which the Court's effective functioning depends, especially if one were to consider that it lacks a police force or military units to arrest any alleged perpetrator.[316]

With this in mind, it is important to note that the non-member state Russia, which recently unsigned the Rome Statue and sent a signal to the ICC that it would reject any cooperative relationship with the Court, would certainly not assist the ICC by extraditing suspects should the *situation in Ukraine* reach the investigatory phase.[317]

4.2.5) Ukraine's Acceptance of the ICC's Jurisdiction

Against the aforementioned background, Ukraine lodged two declarations with the Registrar of the ICC in accordance with Art. 12(3) of the Rome Statue.[318] Due to the fact that the country was not a

[313] Rome Statute, Part 9. International Cooperation and Judicial Assistance, paras. 86-102.
[314] Rome Stature, Art. 87, para. 5 (a).
[315] E.g. for the lack of cooperation both by Russia and Georgia in the Georgian case, see: Natia Gogolashvili and Nino Tsagareishvili, ''Getting Full Cooperation From the Georgian Side Will be one of the Challenges for ICC,'' *Coalition for the International Criminal Court*, 2 May 2017 (interview with Gunnar Ekeløve-Slydal); see also: The Worldwide Human Rights Movement, ''Georgia: the International Criminal Court has the potential to be a game changer in the region,'' *FIDH*, 20 April 2018 (available at https://www.fidh.org/en/region/europe-central-asia/georgia/georgia-the-international-criminal-court-has-the-potential-to-be-a); for the lack of cooperation regarding Darfur, see: Göran Sluiter, ''Using the Genocide Convention to Strengthen Cooperation with the ICC in the Al Bashir Case,'' *Journal of International Criminal Justice*, vol. 8, no.1 (2010), 368.
[316] Courtney Hillebrecht and Scott Straus, ''Who Pursues the Perpetrators?: State Cooperations with the ICC,'' *Human Rights Quarterly*, vol. 39, no. 1 (2017), 162-163; Rita Mutyaba, ''An Analysis of the Cooperation Regime of the International Criminal Court and its Effectiveness in the Court's Objective in Securing Suspects in its Ongoing Investigations and Prosecutions,'' *International Criminal Law Review*, vol. 12, no. 1 (2012), 953, 962.
[317] President of Russia, *supra* note 209.
[318] Verkhovna Rada of Ukraine (Parliament of Ukraine), ''*Declaration of the Verkhovna Rada of Ukraine to the International Criminal Court by Ukraine over crimes against humanity, committed by senior officials of the state, which led to extremely grave consequences and mass murder of Ukrainian nationals during peaceful protests within the period 21 November 2013 – 22 February 2014 (English translation}*,'' *ICC*, 25 February 2014 (available at https://www.icc-cpi.int/itemsDocuments/997/declarationVerkhovnaRadaEng.pdf); Minister for Foreign Affairs of Ukraine, ''Declaration by Ukraine lodged under Art. 12(3) of the Rome Statute,'' *ICC*, 8

member of the ICC because its constitutional Court ruled that a full acceptance of the ICC jurisdiction would contravene the Ukrainian constitution, it utilized this alternative option.[319] After the Government of Ukraine lodged the first declaration on 17 April 2014 narrowing down the temporal scope of the crimes allegedly committed during the Maidan protests from 21 November 2013 to 22 February 2014 on its territory, the Prosecutor opened a preliminary examination of the situation at hand.[320] On 8 September 2015, Ukraine lodged a second declaration extending the temporal jurisdiction of the ICC to an indefinite date and allowing the ICC to examine all alleged crimes committed from 21 November 2013 onwards in the context of the Maidan protests, Russia's annexation of Crimea and the fuelling of unrest by Russia's support to the rebels in Eastern Ukraine.[321] The main focus of this thesis is placed on the second declaration.

Ukraine's acceptance of the ICC jurisdiction pursuant to Art. 12(3) presents a possibility of holding individual perpetrators for the most serious crimes on the territory of Ukraine (including Crimea) responsible and can be considered in line with the Court's primary goals of ending impunity and preventing serious crimes from reoccurring.[322] The fact that Ukraine lodged two declarations under Art. 12(3) grants the country the status of a Party to the Rome Statue and allows the ICC to examine under Art. 53(1)(a-c) of the Rome Statute all serious crimes that are listed by Ukraine and that have been allegedly committed by individuals of a non-member state on its territory.[323]

In this regard, it is helpful to explain the main advantage of utilizing Art. 12(3), which relates to the *ratione temporis* of the ICC's jurisdiction. Normally, when a country accepts the jurisdiction of the ICC by ratifying the Rome Statute, the Court may not retroactively examine the alleged crimes, which either occurred on the territory of the State Party or were committed by its national on another country's territory.[324] Only 60 days after the ratification of the ICC Statute, either the State would be allowed to refer a situation to the ICC or the Prosecutor could initiate investigations on its own

September 2015 (available at https://www.icc-cpi.int/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf---search=ukraine).

[319] Конституційний Суд України (Constitutional Court of Ukraine), Висновок Конституційного Суду України у справі за конституційним поданням Президента України про надання висновку щодо відповідності Конституції України Римського Статуту Міжнародного кримінального суду (translated from Ukrainian: Ruling on the Submission of the President of Ukraine Regarding Conformity of the Constitution of Ukraine with the Rome Statute of the International Criminal Court), Case No 1-35/2001, 11 July 2001; see also: Tom Buitelaar and Aaron Matta, ''Guest Post: Do All Roads Lead to Rome? Why Ukraine Resorts to Declarations Rather than Ratification of the Rome Statute,'' *Opinio Juris*, 14 October 2015 (available at http://opiniojuris.org/2015/10/14/guest-post-do-all-roads-lead-to-rome-why-ukraine-resorts-to-declarations-rather-than-ratification-of-the-rome-statute/).

[320] Verkhovna Rada of Ukraine (Parliament of Ukraine), *supra* note 318; ICC, *supra* note 26, paras. 77-78.

[321] Minister for Foreign Affairs of Ukraine, *supra* note 318; ICC, *supra* note 26, paras. 79, 81.

[322] These goals are outlined in: Rome Statute, Preamble.

[323] Verkhovna Rada of Ukraine (Parliament of Ukraine), *supra* note 318; Minister for Foreign Affairs of Ukraine, *supra* note 318.

[324] Rome Statute, Art. 12, paras. 1-2; Art. 11, paras. 1.

volition.[325] In the case of Ukraine, however, an examination of crimes that had allegedly been perpetrated prior to the lodgement of a declaration becomes possible for the Court ''with respect to the crime in question''.[326] It explains why the ICC possesses the legal mandate to examine all potential serious ''crimes committed in the context of the Maidan protests since 21 November 2013 and other events in Ukraine since 20 February 2014''.[327]

With a vast amount of evidence proving that Russian soldiers had been fighting in Eastern Ukraine, the provision contained in Art. 12(2) of the Rome Statute provides a crucial tool to bring the Russian fighters for serious crimes within Art. 7 or 8 of the Rome Statute to justice, although Russia has not ratified the Rome Statute.[328] However, in case the necessary facts for a trial were established after a long procedure, not every individual but only those with the ''greatest responsibility'' could be hold to account.[329] The case of *the Prosecutor v. Thomas Lubanga Dyilo* confirmed this principle since the leader of a military group (here: Lubanga, president of the Union des Patriotes Congolais) was sentenced as a co-perpetrator for a war crime under Art. 8(2)(e)(vii) and Art. 25 (3) (a) of the Rome Statute.[330] The same applies to the case of *The Prosecutor v. Germain Katanga* where a leader of the Force de résistance patriotique en Ituri was found guilty under Art. 25(3)(d) of the Rome Statute for helping *i.a.* to commit a murder classified as a crime against humanity pursuant to Art. 7(1)(a) of the Rome Statute and as a war crime under Art. 8(2)(c)(i) of the Rome Statute.[331]

If one were to apply this principle on the alleged crimes committed in Eastern Ukraine and hypothetically argued that all necessary evidence had been gathered for an arrest warrant by the Pre--Trial-Chamber, it seems that only the leaders of the rebel groups such as the Russian citizen Igor Girkin (also known as ''Strelkov''), who established the DPR and was the head of the rebel group until his removal by Russia in August 2014, or Alexander Zakcharchenko, the current leader of the DPR, could be investigated.[332] It is obvious that one has to question the enforceability of such a potential

[325] Rome Statute, Art. 126.

[326] Rome Statute, Art. 11, para. 2; Art. 12, para. 3.

[327] ICC, ''Preliminary examination – Ukraine,'' *ICC-Webpage*, 25 April 2018 (available at https://www.icc-cpi.int/Ukraine); besides the crime of aggression, as explained on page 9 of this thesis.

[328] *Ibid.*; information on evidence, see e.g. footnote 95 (''for States'').

[329] ICC, *supra* note 293, para. 103; ICC, *Understanding the International Criminal Court*, 2018, p. 17, para. 37.

[330] *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo*, Judgement Pursuant to Article 74 of the Statute, ICC – Trial Chamber I, 14 March 2012, para. 1358; Michael E. Kurth, ''The *Lubanga* Case of the International Criminal Court: A Critical Analysis of the Trial Chamber's Findings on Issues of Active Use, Age, and Gravity,'' *Goettingen Journal of International Law*, vol. 5, no. 2 (2013), 433.

[331] *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Germain Katanga*, Judgement Pursuant to Article 74 of the Statute, ICC – Trial Chamber II, 7 March 2014, pp. 658-659; Kurth, *supra* note 330, 432 (in footnote no. 4).

[332] For information on the first leader of the DPR, Igor Girkin, see: Noah Sneider, ''Shadowy Rebel Wields Iron First in Ukraine Fight,'' *NYT*, 10 July 2014 (available at https://www.nytimes.com/2014/07/11/world/europe/russian-seizes-authority-over-ukraine-rebels.html); during Girkin's leadership, the Malaysian airplane MH17 was shot down in the area hold by the rebels in the Russian proxy separatist region DPR: Andrew E. Kramer and David M. Herszenhorn, ''Officials Pull Back From Crash Site as the Army Puts Pressure on Rebels,'' *NYT*, 28 July 2014 (available at

arrest warrant, as any leader of the rebel groups could easily hide on Russian territory, knowing that Russia under the Putin regime would not extradite their soldiers.

In the OTP's strategy plan 2012-2015, however, the Court elaborated that in cases where states would refuse to cooperate and the investigations came to a dead end, the OTP would take a different strategy, namely ''the strategy of gradually building upwards''.[333] This approach would start from investigating and prosecuting only the few available suspects, which would include both low-level and mid-level soldiers fighting for the DPR and LPR provided that Ukraine could not capture the pro-Russian belligerents and was therefore unable to investigate their crimes.[334]

Analysing the last years of the conflict, however, Ukraine and the rebel groups have periodically exchanged hostages pursuant to Art. 5 of the ''Package of Measures for the Implementation of the Minsk Agreements''.[335] Granting amnesties to the pro-Russian soldiers would certainly complicate the ICC's investigations, as Ukraine could not extradite the suspects to The Hague anymore with them returning to the lawless rebel held areas or Russia. On the other hand, since Ukrainian Courts would not be able to investigate those criminals due to the pardons granted to them, the *situation in Ukraine* could be rendered admissible by the ICC. Hence, It could be in Ukraine's interest not to prosecute the pro-Russian fighters so that the ICC would be allowed to step in as a Court of last resort.

The question of who is actually meant by the term ''the most responsible for the most serious crimes'' in the context of the Ukraine crisis is highly relevant.[336] Does it cover Russian state officials such as the close Putin advisor Surkov, who is believed to have been tasked by Putin to oversee and appoint the leaders of the LPR and DPR, the Russian defence minister Shoigu, who equipped the rebels with Russian weapons, or the Russian president Vladimir Putin himself, the mastermind

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https://www.nytimes.com/2014/07/29/world/europe/malaysian-plane-ukraine.html?mtrref=www.google.com&assetType=nyt_now); in an interview with *The Insider*, Girkin confessed that Russia wanted him being replaced with Alexander Zakcharchenko because Girkin was considered less loyal to Russia than Zakcharchenko, see article (in Russian): The Insider, ''Игорь Гиркин (Стрелков): «К власти и в Донецкой, и в Луганской республике Сурков привел бандитов»'' (translated by author: ''Girkin said: ''Surkov appointed thugs to rule over the LPR and DPR''),'' *The Insider – Interview*, 8 December 2017 (available at https://theins.ru/politika/83281); parts of this interview were translated into English and can be found on the webpage of the Atlantic Council's Digital Forensic Research Lab: Digital Forensic Research Lap, ''Igor ''Strelkov'' Girkin's Revealing Interview – Partial Translations of Illuminating Interview With Former Russian-Separatist Leader,'' *Atlantic Council*, 28 December 2017 (available at https://medium.com/dfrlab/igor-strelkov-girkins-revealing-interview-acf44b22b48).

[333] ICC, *Strategic Plan June 2012-2015*, 2013, para. 22.

[334] *Ibid*.

[335] See e.g.: Kharkiv Human Rights Protection Group, ''73 Ukrainian Hostages Welcomed Home – Over 160 Still Held in Donbas, Crimea & Russia,'' *KHPG*, 28 December 2017 (available at http://khpg.org/en/index.php?id=1514414277); UNSC Res. 2202*, supra* note 113, annex II.

[336] ICC, *supra* note 293, para. 103.

behind the war in Eastern Ukraine, or does the term primarily refer to Russian controlled leaders of the LPR and DPR?[337]

Based on the current preliminary examinations of the ICC, a link between the Russian state and the actions of the soldiers of the rebel-held republics has not been established yet.[338] For want of abundantly clear evidence that Russia controlled the LPR's and DPR's actions, the term ''the most responsible for the most serious crimes'' could currently only refer to the actions of the leaders of the pro--Russian republics, e.g. Zacharchenko, and not Russian state officials. However, provided that the conduct of the DPR and LPR was imputable to the Russian state, the OTP would be forced to deal with the question of whether high-ranking Russian officials were responsible for the crimes that have been committed by the Russian controlled rebels in Eastern Ukraine. Even if Russia's president cannot be prosecuted for the crime of aggression, theoretically, as a Russian national in command of the Russian armed forces (including soldiers who participated in the fighting in Eastern Ukraine) he could still be prosecuted for war crimes perpetrated on his orders on Ukrainian territory. Nevertheless, apart from the fact that the ICC would certainly enter a ''political minefield'' if it considered individuals of the Russian government as perpetrators in a potential investigatory stage of the *situation in Ukraine*, for the OTP it would be difficult to prove, that with its support to the rebels the Russian president had the intent and knowledge that the crimes of the DPR and LPR will be perpetrated.[339]

4.2.6) Preface to Chapter V --- Overall Control Test/Effective Control Test

With that said, in the course of the next chapter the focus will be set on assessing the OTP's preliminary examination procedure regarding the *situation in Ukraine* in accordance with Art. 53(1)(a--c) of the Rome Statute. One important aspect, which can broaden the jurisdictional scope of the Court, relates to the question of whether the war in Eastern Ukraine can be classified as an international armed conflict. Should the Court establish a link between the actions of the rebel groups and Russia, the ICC would not only be permitted to investigate crimes within Art. 7, 8(2)(c)

[337] The Insider, *supra* note 332; Digital Forensic Research Lap, *supra* note 332.

[338] ICC, ''Report on Preliminary Examination Activities 2017,'' *OTP*, 4 December 2017, para. 95 (available at https://www.icc-cpi.int/itemsDocuments/2017-PE-rep/2017-otp-rep-PE_ENG.pdf).

[339] The term ''political minefield'' was used by Pierre Thielbörger, professor of International Law at the Institute for International Law of Peace and Armed Conflict (IFHV), in an interview with Deutsche Welle: Roman Goncharenko, ''Was steckt hinter Russlands ICC-Rückzug,'' {translated by author: ''Why did Russia Unsign the Rome Statute?''} *DW*, 17 November 2016 (available at http://www.dw.com/de/was-steckt-hinter-russlands-icc-rückzug/a-36429979); for the mens rea of a crime within the jurisdiction of the ICC, see: Rome Statute, Art. 30; the term ''perpetrator'' was defined by the Trial Chamber in the case *The Prosecutor v. Germain Katanga* and ''(1) encompasses those persons who perform the acts which constitute the material elements of the crime and those who intentionally determine its course through the control which they wield; and (2) does not impede application of article 30 of Statute, where the mental element is unspecified, that is, at least in the scenarios contemplated by articles 25(3)(a) and (b)''.: *Situation in the Democratic Republic of the Congo in the Case of The Prosecutor v. Germain Katanga*, *supra* note 331, para. 1393.

and 8(2)(e) of the Rome Statute, to wit crimes against humanity and war crimes committed in an non--international armed conflict, but could also extend its jurisdiction to crimes perpetrated during an international armed conflict as defined in Art. 8(2)(a) and 8(2)(b) of the Rome Statute.[340] It is for this reason why chapter V will also require an analysis of the so--called ''overall control test'' which was first adopted by the Appeals Chamber of the ICTY and later reaffirmed by the ICC in its judgement on the *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo*.[341]

In *The Prosecutor v. Dusko Tadic* the ICTY was initially tasked to reconsider a previous decision by the Trial--Chamber, which on grounds of the effective control test established by the ICJ in the case *Nicaragua v. The United States* failed to prove that the actions of the Bosnian Serb rebel group (Republica Srbska), Tadic was a member of, could be attributed to the state of the Federal Republic of Yugoslavia (FRY).[342] Only if the Appeals Chamber determined that the conflict, Tadic took part in, was international, the individual could be made liable for grave breaches of the Geneva Conventions pursuant to Art. 2 of the ICTY Statute.[343] The Court reasoned that since ''International humanitarian law'' did not provide any guidelines on how conduct of a group of individuals could be attributed to a State, rendering them *de facto* State officials, it had to rely on the ''general international rules on State responsibility''.[344] To ascertain whether a State acted through organised and hierarchically structured groups such as armed bands of irregulars or rebels, the Court enunciated that the right control test was that of overall control and not, as propounded by the ICJ, the ''stringent'' effective control test.[345] Hence, on the basis of the overall control test the Court concluded that the conduct

[340] Rome Statute, Art. 7, 8.

[341] *Prosecutor v. Dusko Tadic*, Judgement, ICTY – Appeals Chamber, Case No. IT--94--1--A, 15 July 1999, para. 131; *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo*, *supra* note 330, para. 541: ''As regards the necessary degree of control of another State over an armed group acting on its behalf, the Trial Chamber has concluded that the "overall control" test is the correct approach. This will determine whether an armed conflict not of an international character may have become internationalised due to the involvement of armed forces acting on behalf of another State.''; see also: *Situation in Georgia*, *supra* note 303, para. 27.

[342] Antonio Cassese, ''The Nicaragua and Tadic Tests Revisited in Light of the ICJ Judgement on Genocide in Bosnia,'' *EJIL*, vol. 18, no. 4 (2007), 655; see also: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia--Herzegovina v. Yugoslavia)*, *supra* note 139, para. 404: ''Insofar as the "overall control" test is employed to determine whether or not an armed conflict is international, which was the sole question which the Appeals Chamber was called upon to decide, it may well be that the test is applicable and suitable.''; see further: Stefan Talmon, ''The Responsibility of Outside Powers for Acts of Secessionist Entities,'' *ICLQ*, vol. 58, no. 1 (2009), 504; see also: *Prosecutor v. Dusko Tadic*, *supra* note 341, para. 147.

[343] As deduced from: *Ibid*.

[344] *Prosecutor v. Dusko Tadic*, *supra* note 341, paras. 98, 105.

[345] *Prosecutor v. Dusko Tadic*, *supra* note 341, para. 120: ''One should distinguish the situation of individuals acting on behalf of a State without specific instructions, from that of individuals making up an organised and hierarchically structured group, such as a military unit or, in case of war or civil strife, armed bands of irregulars or rebels. Plainly, an organised group differs from an individual in that the former normally has a structure, a chain of command and a set of rules as well as the outward symbols of authority. Normally a member of the group does not act on his own but conforms to the standards prevailing in the group and is subject to the

of the Bosnian Serb rebel group was imputable to the FRY.[346] As a result, Tadic could be made liable for his breach of Art. 2 as an individual in an international armed conflict.[347]

In view of the above, it can be said that the overall control test sets out conditions on how actions of ''a military or paramilitary group'' in an armed conflict could be attributed to a State and how an internal armed conflict could become international.[348] It differs from the ''effective control test'' as it is deemed to be ''less strict''.[349] When it comes to the assessment of the ICC, one should bear in mind that the ICC applies the overall control test for the sole purpose of determining whether a non-international armed conflict could be characterised as an international one.[350] Its jurisdiction does not extend to questions of state responsibility and therefore the fierce criticism the ICTY Appeals Chamber was confronted with by the ICJ in *Bosnia and Herzegovina v. Serbia and Montenegro* is

authority of the head of the group. Consequently, for the attribution to a State of acts of these groups it is sufficient to require that the group as a whole be under the overall control of the State.''; as regards the term ''stringent'', see: *Prosecutor v. Dusko Tadic*, *supra* note 341, para. 112; the ICTY indirectly describes the effective control also as a ''high threshold'': see: *Prosecutor v. Dusko Tadic*, *supra* note 341, para. 117: ''The Appeals Chamber fails to see why in each and every circumstance international law should require a high threshold for the test of control.''.

[346] *Prosecutor v. Dusko Tadic*, *supra* note 341, paras. 162: ''The Appeals Chamber therefore concludes that, for the period material to this case (1992), the armed forces of the Republika Srpska were to be regarded as acting under the overall control of and on behalf of the FRY. Hence, even after 19 May 1992 the armed conflict in Bosnia and Herzegovina between the Bosnian Serbs and the central authorities of Bosnia and Herzegovina must be classified as an international armed conflict.''.

[347] *Prosecutor v. Dusko Tadic*, *supra* note 341, paras. 235 *ff*: ''In light of the Appeals Chamber's finding that Article 2 of the Statute is applicable, the Appellant is found guilty on Count 29 (grave breach in terms of Article 2(a) (wilfulkilling) of the Statute) and Article 7(1) of the Statute.''.

[348] As deduced from: *Prosecutor v. Dusko Tadic*, *supra* note 341, para. 131: ''In order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity. Only then can the State be held internationally accountable for any misconduct of the group. However, it is not necessary that, in addition, the State should also issue, either to the head or to members of the group, instructions for the commission of specific acts contrary to international law.''; see also: ICC, *supra* note 338, para. 95: ''For the purpose of determining whether the otherwise non-international armed conflict involving Ukrainian armed forces and anti-government armed groups could be actually international in character, the Office continues to examine allegations that the Russian Federation has exercised overall control over armed groups in eastern Ukraine. The existence of a single international armed conflict in eastern Ukraine would entail the application of articles of the Statute relevant to armed conflict of an international character for the relevant period.''.

[349] For authors, see e.g: Talmon, *supra* note 342, 506; Grzebyk, *supra* note 12, 57; for cases, see e.g.: *Prosecutor v Zejnil Delalic et al*, Judgement, ICTY – Appeals Chamber, Case No. IT-96-21-A, 20 February 2001, para. 20: ''The Appeals Chamber, after considering in depth the merits of the Nicaragua test, thus rejected the "effective control" test, in favour of the less strict "overall control" test.''; for elaborations on the legal differences between both tests, see subsequent chapters 5.1 on the ICJ and 5.2 on the ICC.

[350] For the question of whether an armed conflict could be determined as an international one, even the ICJ enunciated that the ''overall-control test'' was ''applicable and suitable'' which attest to the fact that the ICC is right in applying the overall control test for this sole purpose: see: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgement, ICJ, 26 February 2007, para. 404: ''Insofar as the "overall control" test is employed to determine whether or not an armed conflict is international, which was the sole question which the Appeals Chamber was called upon to decide, it may well be that the test is applicable and suitable.''.

irrelevant for the analysis of the ICC's role in the context of the Ukraine crisis.[351] In other words, should the ICC establish that Russia was in overall control over the actions of the DPR and LPR, it would only allow the ICC to investigate war crimes committed in an international armed conflict by individuals but not to rule on matters of state responsibility.

A critical assessment of how the effective control test might influence the further procedure of the ICJ or which role the overall control test plays during the preliminary examination activities of the OTP is vital for the analysis of the research question and sub-question.

4.3) The OHCHR's Engagement in Ukraine

4.3.1) The Rationale and Methodology of the HRMMU

Since its deployment on 14 March 2014, the HRMMU has been working for the purpose of (1) monitoring the human rights situation in Ukraine, (2) recommending policies to solve the problem of human rights abuses in Ukraine and addressing those both to local, national and international stakeholders, (3) establishing facts and events that occurred during the Maidan revolution from November 2013 till February 2014 and (4) ascertaining the facts and events as regards possible human rights abuses perpetrated in the course of the mission's work in Ukraine.[352] Established by the OHCHR on the request of the Ukrainian government, the HRMMU has also cooperated with the OSCE and supported both the UN Country Team and the UN Resident Coordinator in Ukraine.[353]

Since the seven human rights officers and 25 national Ukrainians have been deployed to fulfil their duties on the ground with a presence at six different offices throughout Ukraine (Kyiv, Odesa, Kharkiv and three offices close to or in the conflict zone: Kramatorsk, Donetsk, Luhansk), the HRMMU can be attributed to the (i) Field Operations and Technical Cooperation Division, which stands in parallel to the (ii) Research and Right to Development Division, the (iii) Human Rights Treaty Division and the

[351] As regards the ICJ's criticism of the ICTY for equally applying the overall control test on matters of state responsibility: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, *supra* note 350, paras. 404, 406: ''On the other hand, the ICTY presented the "overall control" test as equally applicable under the law of State responsibility for the purpose of determining — as the Court is required to do in the present case — when a State is responsible for acts committed by paramilitary units, armed forces which are not among its official organs. In this context, the argument in favour of that test is unpersuasive {...} It must next be noted that the "overall control" test has the major drawback of broadening the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility : a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf {…} n this regard the "overall control" test is unsuitable, for it stretches too far, almost to breaking point, the connection which must exist between the conduct of a State's organs and its international responsibility.''.

[352] OHCHR (e), ''Annex to Report on the Human Rights Situation in Ukraine,'' *UN*, 15 April 2014, 1 (available at http://www.ohchr.org/EN/Countries/ENACARegion/Pages/UAReports.aspx).

[353] OHCHR (e), *supra* note 352, 2.

(iv) Human Rights Council and Special Procedure Division of the OHCHR.[354] All departments are overseen by the High Commissioner for Human Rights who represents the UN as its main human rights official.[355] In general, the OHCHR forms part of the UN Secretariat, which constitutes one of six main bodies of the UN.[356]

Located either in close proximity to the conflict zone or directly in the secessionist regions of the DPR and LPR, the HRMMU is advantaged to collect first-hand accounts and testimonies from victims and witnesses of gross human rights abuses. Although UNGA Res. 71/205 and 72/190 ''urge'' Russia to ''cooperate fully and immediately with the Office of the United Nations High Commissioner for Human Rights {...} on the situation of human rights in Crimea'', the HRMMU has still been denied access to the peninsula by Russia.[357] The Kremlin holds the opinion that the mandate allowing the OHCHR to operate on Ukrainian territory did not extend to the incorporated Crimean peninsula.[358] For now, the HRMMU has therefore monitored the situation in Crimea from its offices in Ukraine.[359] The officials of the HRMMU have travelled to the Administrative Boundary Line (ABL) to gather facts by interviewing witnesses from Crimea.[360]

For the purpose of determining crimes committed in Crimea and the DPR and LPR, identifying the alleged perpetrators and holding them to account with the HRMMU's documentations, the monitoring mission primarily relies on interviews with witnesses, relatives of victims and their advocates.[361] Additionally, its reports are based on sensitive, ''corroborating'' evidence provided by different informants the name of which the HRMMU withhold to mention.[362] Since throughout the whole period of the conflict in Ukraine false news have been purposefully applied especially by Russia and its proxies to question the truth of facts, there is good reason for the HRMMU to carefully

[354] For HRMMU office locations in Ukraine, see e.g.: OHCHR (p), ''Report on the human rights situation in Ukraine 16 November 2017 to 15 February 2018,'' *UN*, 19 March 2018 (available at http://www.ohchr.org/Documents/Countries/UA/ReportUkraineNov2017-Feb2018_EN.pdf); OHCHR (c), ''OHCHR Organizational Chart,'' *UN*, 2014 (available at http://www.ohchr.org/Documents/AboutUs/OHCHR_orgchart_2014.pdf); on the composition of the HRMMU, see: OHCHR (e), *supra* note 352, 2.
[355] *Ibid.*; OHCHR (a), ''Who we are,'' *UN*, 31 December 2013 (available at http://www.ohchr.org/EN/AboutUs/Pages/WhoWeAre.aspx).
[356] OHCHR (c), *supra* note 354; UN ''Main Organs,'' *UN-Website*, 30 April 2018 (available at http://www.un.org/en/sections/about-un/main-organs/).
[357] OHCHR (p), *supra* note 354, para. 152 (a); see also: OHCHR (k), *supra* note 9, para. 58; UNGA Res. 71/205, *supra* note 85, para. 2 (h); UNGA Res. 72/190, *supra* note 85, para. 3 (l).
[358] OHCHR (n), ''Situation of human rights in the temporarily occupied Autonomous Republic of Crimea and the city of Sevastopol,'' *UN*, 25 September 2017, para. 33 (available at http://www.ohchr.org/Documents/Countries/UA/Crimea2014_2017_EN.pdf).
[359] OHCHR (n), *supra* note 358, para. 35
[360] *Ibid*.
[361] OHCHR (k), *supra* note 9, para. 2.
[362] *Ibid*.

analyse all information they receive.[363] In this highly politicized situation in which fake news proliferate, an objective opinion by a UN mission is indispensable and presents an effective mechanism to establish the truth. Despite the small composition of the HRMMU's team and the high intensity of the conflict in the DPR and LRP, the various reports of the UN can still display crucial patterns from which conclusions can be drawn that potentially might be consulted by Courts at later proceedings. In this regard, it is worth mentioning that all sources undergo a test by which the OHCHR distinguishes between evidence that warrant to be included in its reports and those information that do not provide ''reasonable grounds to believe'' that they constituted true facts.[364]

4.3.2) HRMMU and *Ius in Bello*: A Mechanism to Monitor Violations of IHRL and IHL

In the UN Charter, the member states ''reaffirm{ed} faith in fundamental human rights, in the dignity and worth of the human person {…}'' and have purposed to ''encourage{…} respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion''.[365] Also in Art. 55 of the UNC, it is stipulated that ''stability and well-being {…} are necessary for peaceful and friendly relations among nations'' and can be achieved if the UN promoted ''universal respect for, and observance of, human rights and fundamental freedoms for all without distinction.''[366] All UN member states, including Ukraine and Russia, have promised to commit themselves to assisting the UN in achieving the above-mentioned goals.[367] It is for this reason, why human rights and human dignity form a centrepiece of the UN system and other bodies, which is also exemplified in various international and regional treaties and other documents Ukraine and Russia have pledged to uphold.[368] In this regard, the Universal Declaration of Human Rights constitutes the most important human rights instrument laying the foundation of IHRL principles and stipulating the civil, political, economic, social and cultural rights of human beings.[369]

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[363] Neil MacFarquhar, ''A Powerful Russian Weapon: The Spread of False Stories,'' *NYT*, 28 August 2016 (available at https://www.nytimes.com/2016/08/29/world/europe/russia-sweden-disinformation.html?login=email&auth=login-email); see an example of the information war, where the DPR was accused of anti-Semitism but the Jewish community told it was fake news: Alec Luhn, ''Antisemitic flyer 'by Donetsk People's Republic' in Ukraine a hoax,'' *The Guardian*, 18 April 2014 (available at https://www.theguardian.com/world/2014/apr/18/antisemitic-donetsk-peoples-republic-ukraine-hoax).

[364] OHCHR (k), *supra* note 9, para. 2.

[365] UNC, preamble and Art. 1, para. 3.

[366] UNC, Art. 55 (c).

[367] UNC, Art. 56.

[368] See, the most important document for IHRL, where the principle of a ''right to life'' is stipulated: *The International Bill of Human Rights*, Art. 3 (''right to life'': the Universal Declaration of Human Rights) and Art. 6 (''inherent right to life'': the International Covenant of Civil and Political Rights) (available at http://www.ohchr.org/Documents/Publications/Compilation1.1en.pdf; for regional treaties, see e.g.: *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, Rome, 4 November 1950, Art. 2 (''Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally'') (available at https://www.echr.coe.int/Documents/Convention_ENG.pdf).

[369] UN, ''The Foundation of International Human Rights Law,'' *UN*, 4 May 2018 (available at http://www.un.org/en/sections/universal-declaration/foundation-international-human-rights-law/index.html).

Since the OHCHR's principal duty is to protect and promote human rights, the HRMMU is guided by two main complementary bodies of IL, namely International Human Rights Law and International Humanitarian Law.[370] Whereas IHRL is applicable in times of peace as well as in war, principles of IHL lie beyond the domain of IHRL and govern the conduct of states and non-state actors only in an armed conflict.[371]

IHRL encompasses also universal principles such as the protection of freedom of press, rights to free assembly, equal treatment and non-discrimination of human beings.[372] Relevant to this thesis is also the principle of accountability, which can be deduced from Art. 2(3) of the International Covenant on Civil and Political Rights, both Ukraine and Russia ratified.[373] It binds both states to provide legal remedies to its citizens and state officials in case the state breached any of its obligations under the same instrument.[374] Additionally, norms of IHRL are governed by customary law.[375] The fact that both Ukraine and Russia are bound by IHRL implies that the HRMMU can report any violations of IHRL committed by the Ukrainian state on Ukrainian territory and by Russia as an ''occupying Power'' holding ''effective control'' over Crimea.[376] Moreover, as today's wars are mainly fought between states and non-state actors, exemplified by the conflict in Eastern Ukraine between the pro-Russian non-state parties LPR and DPR, IL has developed to such a point where non-state actors are bound by IHRL and IHL if they perform functions similar to those of a state government.[377] Hence, the HRMMU can also document breaches of IHRL and IHL by the DPR and LPR.

[370] OHCHR (k), *supra* note 9, paras. 6-15.

[371] ICRC, ''International Humanitarian Law and International Human Rights Law: Similarities and Differences,'' *ICRC-Webpage*, 2003 (available at https://www.icrc.org/eng/assets/files/other/ihl_and_ihrl.pdf); OHCHR (n), *supra* note 358, para. 37.

[372] *Ibid*.; *The International Bill of Human Rights*, *supra* note 368; See also: Sir Nigel Rodley, *International Human Rights Law*, in: Malcolm D. Evans (ed.), International Law, 2014, 799-804.

[373] Rodley, *supra* note 372, 804; *The International Bill of Human Rights*, *supra* note 368, Art. 2 (3) (the International Covenant of Civil and Political Rights); Human Rights Committee, UN Doc. CCPR/C/21/Rev.1/Add. 13, *General Comment No. 31 {80}*, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 26 May 2004, paras. 15, 18; on status of ratification, see: OHCHR (r), ''Ratification of 18 International Human Rights Treaties,'' *UN*, 4 May 2018 (available at http://indicators.ohchr.org/).

[374] *The International Bill of Human Rights, supra* note 368, Art. 2 (a-c) (of the International Covenant of Civil and Political Rights).

[375] Rodley, *supra* note 372, 788-789.

[376] For the classification of Russia as an ''occupying Power'', see: UNGA Res. 71/205, *supra* note 85, para. 2 (a): ''Urges the Russian Federation: (*a*) To uphold all of its obligations under applicable international law as an occupying Power.''; UNGA Res. 72/190, *supra* note 85, para. 3 (a): ''Urges the Russian Federation: (a) To uphold all of its obligations under applicable international law as an occupying Power.''; ICC, *supra* note 27, para. 158: ''The law of international armed conflict would continue to apply after 18 March 2014 to the extent that the situation within the territory of Crimea and Sevastopol factually amounts to an on-going state of occupation.''; as regards the criteria of ''effective control'', see: *Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land*, the Hague Regulations, 18 October 1907, Art. 42: ''Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.''; OHCHR (n), *supra* note 358, para. 38.

[377] As regards the obligations of non-state actors, see: The UN Committee on the Elimination of Discrimination against Women confirmed that ''under certain circumstances, in particular where an armed group with an identifiable political structure exercises significant control over territory and population, non-State actors are

As an authoritative body of the UN, the HRMMU has determined that IHRL is applicable throughout the conflict in Ukraine.[378] Additionally, the ICRC ascertained that the laws of war apply in regard to the armed conflict in Eastern Ukraine.[379] Furthermore, the ICC confirmed that Russia's occupation of Crimea triggered the laws of an international armed conflict.[380]

IHL obliges states to respect the principles of distinction, proportionality and precaution during the conduct of war as laid down in Additional Protocol I of the Geneva Conventions and forming part customary law.[381] It has as its goal to protect civilians in an armed conflict balancing military necessity against humanity.[382] Since the conflict in Ukraine entails both an international and non-international dimension, the OHCHR has to take different standards as regards its observations of the international armed conflict in Crimea and the non-international armed conflict in Eastern Ukraine between Ukrainian armed forces and the LPR and DPR. Whereas the Geneva Conventions I-IV and Additional Protocol I are applicable on the situation in Crimea, the armed conflict in Eastern Ukraine

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obliged to respect international human rights''. It also emphasised ''that gross violations of human rights and serious violations of humanitarian law could entail individual criminal responsibility, including for members and leaders of non-State armed groups and private military contractors.": Convention on the Elimination of All Forms of Discrimination against Women, *General recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations*, UN Doc. CEDAW/C/GC/30, 18 October 2013; furthermore, the UNSC deplored "the continued violations of international humanitarian law and the widespread human rights violations and abuses, perpetrated by armed groups" in the Central African Republic: UNSC RES. 2127, UN Doc. S/RES/2127 (2013), 5 December 2013, para.17; concerning the conflict in the DRC, the UNSC recalled that "in Uvira and in the area {the conflict parties} must abide by international humanitarian standards and ensure respect for human rights in the sectors they control": UNSC, *Statement by the President of the Security Council*, UN Doc. S/PRST/2002/27, 18 October 2002; the UNSC president also said that "the RCD-GOMA must {…} ensure an end to all violations of human rights and to impunity in all areas under its control.":UNSC, *Statement by the President of the Security Council*, UN Doc. S/PRST/2002/22, 23 July 2002; generally, non-state actors are not allowed to enter into a human rights treaty relationship. However, Art. 4(1) of the Optional Protocol on the Rights of the Child on the Involvement of Children in Armed Conflict constitutes an exception here, as it stipulates that ''{a}rmed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years'': OHCHR (b), ''*Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict*,'' 12 February 2002 (available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPACCRC.aspx); OHCHR (k), *supra* note 9, para. 12.

[378] OHCHR (k), *supra* note 9, para. 8.

[379] ICRC, *supra* note 29.

[380] ICC, *supra* note 27, para. 158.

[381] As regards the principle of distinction, see: ICRC, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, General Protection of Civilian Objects, 8 June 1977, Art. 52, para. 2; as regards the principle of proportionality, see: ICRC, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, Protection of the civilian population, 8 June 1977, Art. 51, para. 5 (b); as regards the principle of precaution, see: ICRC, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, Precautions in attack, 8 June 1977, Art. 57; as regards customary law, see: ICRC, ''ICRC, IHL and the Challenges of Contemporary Armed Conflicts: 28th International Conference of the Red Cross and Red Crescent,'' *ICRC-Webpage*, 2-6 December 2003 (available at https://casebook.icrc.org/case-study/icrc-ihl-and-challenges-contemporary-armed-conflicts).

[382] Nils Melzer, ''Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities,'' *International Law and Politics*, vol. 42, no. 831 (2010), 833.

is governed by Additional Protocol II, Ukraine has ratified and is bound by during its military operation against the LPR and DPR.[383] On the other hand, the rebels have to abide by the customary law principles of distinction, proportionality and precaution, and Common Art. 3 of the Geneva Conventions, which, *i.a.*, requires from them and also from Ukraine human treatment of prisoners and hors de combat.[384] ''Indiscriminate shelling'' such as the attacks on the Malaysian Airline MH17, a bus with innocent civilians in Volnovakha and the shelling of resident areas in Mariupol and Kramatorsk are among the gravest examples that demonstrate the rebels' flagrant disregard of its obligations under IHL.[385]

In view of the above, the third perspective can be considered as complementary to the analysis of the ICC's role in the context of the Ukraine crisis, because the HRMMU helps to report serious crimes that might fall under Art. 7 of the Rome Statute (crimes against humanity), Art. 8(1), 8(2)(a-b) for war crimes committed within an international armed conflict as in Crimea and Art. 8(2)(c) and (e) for breaches of obligations of the non-state actors LPR and DPR in the non-international armed conflict in Eastern Ukraine. Chapter V will specifically scrutinize the effectiveness of the HRMMU in holding Russia and its sponsored individuals in Eastern Ukraine to account.

4.3.3) HRMMU in Perspective to Other Mechanisms of the OHCHR

It is interesting to observe that Ukraine circumvented the Human Rights Council before the UN Human Rights Monitoring Mission was established. The main argument, which legitimizes and supports Ukraine's approach can be found in UNGA Res. 68/262 that ''welcomes the efforts of the United Nations {...} to assist Ukraine in protecting the rights of all persons in Ukraine, including the rights of persons belonging to minorities''.[386] It is believed that Ukraine wished to see immediate action by the UN and was reluctant to have a discussion and vote in the HRC on the decision of whether a UN monitoring mission would be allowed to operate in Ukraine. Any phrase in the document, which would have described the framework of the mission, would have been open to debate by the member states of the HRC if Ukraine tabled a resolution on the composition and tasks of the mission at the UN institution. One should not omit mentioning that, at that time, Russia was a

[383] Status of ratification, see: ICRC, ''Status of Ratification of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977,'' *ICRC-Webpage*, 4 May 2018 (available at https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=470).

[384] ICRC, *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949*, Conflicts not of an International Character, 12 August 1949, Art. 3 (available at https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/WebART/365-570006?OpenDocument).

[385] As regards indiscriminate shelling against the bus in Volnovakha and resident areas, see: OHCHR (h), ''Report on the human rights situation in Ukraine 1 December 2014 to 15 February 2015,'' *UN*, 15 February 2015, para 6 (available at http://www.ohchr.org/Documents/Countries/UA/9thOHCHRreportUkraine.pdf).

[386] UNGA Res. 68/262, *supra* note 76, para. 4.

member of the HRC.[387] Ukraine steered clear of a potential controversial debate at the HRC, which could have negatively shaped the voting outcome of the HRC members on the resolution. Moreover, Ukraine would have always relied on the decision of the HRC when it came to the question of prolonging the mandate of the HRMMU. Signing a bilateral memorandum of understanding with the UN, Ukraine is much more flexible to decide the parameters of the mission and now holds the decision in its own hands to either prolong or discontinue the HRMMU.

Since Ukraine has cultivated a cooperative relationship with the UN and voluntarily requested the UN to dispatch an independent monitoring team on its territory, mechanisms of the HRC such as the ''International Commission of Inquiry'', ''Commissions on Human Rights'' or ''Fact-Finding Missions'' became irrelevant in the context of the Ukraine crisis. These tools are created for the purpose of documenting human rights abuses and violations of IHL, holding the perpetrators to account and fighting impunity in countries where governments refrained from cooperating with the UN human rights bodies.[388] Examples of such mechanisms created by the HRC are e.g. the ''Independent International Commission of Inquiry on the Syrian Arab Republic'' which worked for a temporary mandate of 7 years to *i.a.* ''investigate all alleged violations of international human rights law since March 2011 in the Syrian Arab Republic {...} ensuring that perpetrators of violations, including those that may constitute crimes against humanity, are held accountable''.[389] These evidence-gathering mechanisms have a similar purpose as the HRMMU since the collected facts could be used to prove violations of IL by individuals or even state officials. As will be shown in chapter V, monitoring missions such as the HRMMU can influence the decision of international Courts and vindicate the rights of victims of human rights abuses.

4.4) Brief Note on Preliminary Results of Chapter IV

This chapter provided an analysis of the specific tools inherent in the three mechanisms Ukraine took recourse to with a view to holding Russia and its sponsored individuals in Eastern Ukraine responsible and accountable. What is obvious is that the legal procedures at the ICJ and ICC take various years before a final order is rendered given the legal complexity of each case. The present example of Ukraine would support this argument. It is therefore helpful to see the third mechanism,

[387] OHCHR (s), ''Membership of the Human Rights Council 1 January --- 31 December 2014 by year when term expires,'' *UN*, 8 May 2018 (available at http://www.ohchr.org/EN/HRBodies/HRC/Pages/Year2014.aspx).
[388] OHCHR (t), ''International Commissions of Inquiry, Commissions on Human Rights, Fact-Finding missions and other Investigations,'' *UN*, 8 May 2018 (available at http://www.ohchr.org/EN/HRBodies/HRC/Pages/COIs.aspx).
[389] HRC Res. S-17/1, *Resolution adopted by the Human Rights Council at its seventeenth special session*, UN Doc. A/HRC/RES/S-17/1, 23 August 2011, para. 13; for other cases where the mechanism of a ''Commission of Inquiry'' was applied, see e.g.: HRC Res. 33/24, *Situation of human rights in Burundi*, UN Doc. A/HRC/RES/33/24, 5 October 2016, para. 23; for ''Fact Finding Mission'', see e.g.: HRC Res. 34/22, *Situation of human rights in Myanmar*, UN Doc. A/HRC/RES/34/22, 3 April 2017, para. 11; for other mechanisms of the HRC, see e.g.: HRC Res. 36/31, *Human rights, technical assistance and capacity-building in Yemen*, UN Doc. A/HRC/RES/36/31, 3 October 2017, para. 12.

namely the HRMMU as an evidence-gathering tool to operate in parallel to the ICJ and ICC. Since the HRMMU records and updates all violations of IHRL and IHL, it is assumed that the Courts might draw on the evidence of the monitoring mission and explain its reasoning based on the HRMMU's collected facts.

The paper proceeds to the assessment of the three mechanisms and will scrutinize whether Russia and its sponsored individuals in Eastern Ukraine can be hold responsible and, respectively, accountable. In the following elaborations, the barriers of holding Russia and the individuals responsible for their illegal actions will be identified.

Chapter V – Assessment of Ukraine's Recourse to the Three IL Mechanisms

5.1) The ICJ: *Ukraine v. Russian Federation*

5.1.1) CERD and ICSFT: The Court's Order

By 13 to 3 votes the ICJ decided to indicate preliminary measures on the basis of the CERD and obliged Russia to ''{r}efrain from maintaining or imposing limitations on the ability of the Crimean Tatar community to conserve its representative institution, including the *Mejlis*''.[390] In addition, by common consent the judges concluded that Russia must ''{e}nsure the availability of education in the Ukrainian language'' and that ''{b}oth Parties shall refrain from any action which might aggravate or extend the dispute before the Court or to make it more difficult to resolve''.[391]

This decision covers three of five points of Ukraine's request for the indication of provisional measures of protection in regard to CERD since the Court did neither rule on point (b) nor (d) of Ukraine's application, which *i.a.* asked the ICJ to oblige Russia to prevent the abductions of certain Crimean Tatar people and to immediately commence investigations in this regard.[392] Similar to the case *Georgia v. Russian Federation* it demonstrates that the Court does not indicate measures on all claims of the applicant party but only in regard to those where it ascertained that the urgency criteria was satisfied. In *Ukraine v. Russian Federation* the ICJ considered that Russia's actions

[390] *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)*, *supra* note 238, para. 106 (1) (a).

[391] *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)*, *supra* note 238, para. 106 (1) (b), (2).

[392] *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)*, Request for the Indication of Provisional Measures of Protection Submitted by Ukraine, 16 January 2017, p. 7, para. 24.

prejudiced the principles of Art. 5 (c), (d) and (e) of the CERD and are ''capable of causing irreparable harm'' to them.[393]

To the detriment of Ukraine, although the ICJ confirmed that Ukraine fulfilled all pre-requirements (1. existence of a dispute concerning the interpretation of the treaty and 2. negotiations), for the Court to have *prima facie* jurisdiction pursuant to Art. 24(1) of the ICSFT, it refused to indicate preliminary measures on the basis of the same convention because Ukraine did not satisfy the plausibility test in view of this specific treaty ''at this stage of the proceedings''.[394] Art. 2(1) of the ICSFT requires Ukraine to prove that by providing and collecting funds within the meaning of the ICSFT, persons linked to Russia (1) had the intent to cause acts within the scope of Art. 2(1)(a) of the ICSFT, (2) knew that those acts would be committed due to its financial support to the rebels in Eastern Ukraine under Art. 2(1)(a) of the ICSFT and additionally (3) ''in a situation of armed conflict'' had the knowledge and intent to carry out acts as defined in Art 2(1)(b) of which the purpose was to ''intimidate a population or compel a government''.[395] Ukraine's evidence did not provide ''sufficient basis to find it plausible'' that those persons committed acts within the meaning of Art. 2(1) of the ICSFT.[396] Hence, one could deduce from the Court's reasoning that the ICJ deemed the arguments of Ukraine's legal agent, Ms Cheek, on the plausibility test in the oral proceedings insufficient (or it considered the elaborations of the Russian legal agent, Mr. Wordsworth, on the same criteria convincing).[397]

5.1.2) ICSFT: The *Mens Rea* of a ''Terrorist Act''

Marchuk takes issue with Ms Cheek's presentation at the ICJ, because the legal agent felt short of substantiating the claims that individuals linked to Russia provided or collected funds with the intent and knowledge that they were used by the DPR and LPR to commit acts within the scope of Art.

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[393] *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)*, *supra* note 238, paras. 96, 98.

[394] *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)*, *supra* note 238, paras. 54, 75.

[395] These principles were also reaffirmed by the ICJ in: *Ibid.*; ICSFT, Art. 2, para. 1 (a); Art. 2, para. 1 (b).

[396] *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)*, *supra* note 238, para. 75.

[397] For arguments of the legal agent of Ukraine Ms Cheek who elaborated on the plausibility test, see: Marney Cheek in: *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)*, Verbatim Record, ICJ, 8 March 2017, pp. 35-50, paras. 1-49; for the reasoning of Russia's legal counsel Mr. Wordsworth, see: Samuel Wordsworth in: *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)*, Verbatim Record, ICJ, 7 March 2017, pp. 22-36, paras. 1-43.

2(1)(b) of the ICSFT.[398] Positing that ''{t}he attacks (here: of the rebel groups in Eastern Ukraine} would naturally intimidate Ukrainian civilians'' was not supported with enough evidence, Marchuk argued.[399] What can be deduced from her criticism is that from today's perspective, the counsel should have further elaborated on the *mens rea* criteria giving evidence that the persons linked to Russia who supplied the funds to the DPR and LPR had the knowledge (*dolus eventualis*) and intention (normally: *dolus directus;* for Marchuk, here: *dolus specialis*) that the LPR and DPR would commit acts of terrorism within the meaning of Art. 2(1) of the ICSFT.[400] Especially in regard to Art. 2(1)(b) which defines the context of the acts prohibited by the ICSFT as a ''situation of an armed conflict'' and is distinct from acts committed during a situation of peace described in Art. 2(1)(a), the counsel could have given more evidence that demonstrated that the DRP and LPR had the purpose to ''intimidate'' the population.[401]

As can be inferred from the ICJ's order on *Ukraine v. Russian Federation*, only if Ukraine satisfied the plausibility requirement the ICJ could ascertain whether Russia did not cooperate in the prevention of those offences stipulated in Art. 2(1) and was therefore in breach of its obligations under Art. 18 of the ICSFT.[402] However, since the Court did not see that the plausibility test was fulfilled, the prospects that Russia could be held responsible for not having prevented the financing of terrorism that (allegedly) caused actions, such as ''{t}he shoot-down of Malaysian Airlines Flight MH17, b) {t}he attack on a passenger bus {…} near Volnavakha, c) {t}he assault on a densely-populated residential area in Mariupol {…}, d) {t}he bombardment of a residential area in Kramatorsk {…} and e) {…} {a} string of {…} bomb attacks in Ukrainian cities {…} including a deadly bombing {…} in Kharkiv'', look grim at the merits stage.[403]

Despite Marchuk's criticism, Ukraine's legal counsel can be defended on two grounds. 1) Since the ICSFT is applied before the Court for the first time, Ukraine did not know how much evidence was actually required by the Court to prove that the persons linked to Russia had the intent and knowledge that its funds will be used by the DPR and LPR to carry out acts within Art. 2(1)(a) and 2(1)(b) or that the purpose of those acts were to commit offences within Art. 2(1)(b). 2) Moreover,

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[398] Iryna Marchuk, ''Ukraine v Russia at the ICJ Hearings on Indication of Provisional Measures: Who Leads?,'' *EJIL*, 16 March 2017 (available at https://www.ejiltalk.org/ukraine-v-russia-at-the-icj-hearings-on-indication-of-provisional-measures-who-leads/); see also: Marchuk, *supra* note 260.

[399] *Ibid.*; Marney Cheek in: *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)*, *supra* note 397, p. 41, para. 20.

[400] Marchuk, *supra* note 398.

[401] ICSFT, Art. 2, para. 1(b); Marchuk, *supra* note 398.

[402] *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)*, *supra* note 238, para. 74.

[403] For the facts listed by Ukraine in its request, 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)*, *supra* note 392, p. 2, para. 7 (a-e).

the measures Ukraine referred to in its request for the indication of provisional measures of protection in regard to the ICSFT do all pertain to ''acts of terrorism'' to which no generally applicable definition besides the specific phrase outlined in Art. 2(1)(b) of the ICSFT has been established yet.[404] Without the ICJ's practise in regard to this treaty and without a general definition of the term ''terrorism'', it was almost impossible for Ukraine to know which parameters were required to proof that the persons linked to Russia provided the funds with the intent that such acts will be committed. Whereas the mental elements of genocide, crimes against humanity and ethnic cleansing were reiterated and therefore clarified by the ICJ in *Bosnia and Herzegovina v. Serbia and Montenegro*, no such elaborations on the *mens rea* of an ''act of terrorism'' perpetrated by persons within the scope of the ICSFT can be found.[405] In consequence, given the lack of the ICJ's practise in interpreting the ICSFT and the ambiguity around the correct reading of the *mens rea* of Art. 2(1) of the ICSFT, the counsel could be defended against the criticism mentioned above.

Still, although there is no such definition of the *mens rea* of acts of terrorism due to the lack of practise, Marchuk identified the mental element of Art. 2(1)(b) and was convinced that it consisted of two parts requiring that: 1) ''an act intended to cause death or serious bodily injury to a civilian'' occurred and 2) ''the purpose of such act {…} {was} to intimidate a population or to {pursue certain

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[404] For the measures requested by Ukraine in regard to the ICSFT, 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*)*, *supra* note 392, p. 6, para. 23 (a-d).

[405] For the ''Question of Intent to Commit Genocide'', see: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, *supra* note 350, paras. 186-188: ''"Killing" must be intentional, as must "causing serious bodily or mental harm". Mental elements are made explicit in paragraphs (c) and (d) of Article II by the words "deliberately" and "intended", quite apart from the implications of the words "inflicting" and "imposing" ; and forcible transfer too requires deliberate intentional acts {...} In addition to those mental elements, Article II requires a further mental element. It requires the establishment of the "intent to destroy, in whole or in part, . . . [the protected] group, as such {...} It is often referred to as a special or specific intent or dolus specialis; in the present Judgment it will usually be referred to as the "specific intent (dolus specialis) {...} in the case of genocide that intent must be accompanied by the intention to destroy, in whole or in part, the group to which the victims of the genocide belong. Thus, it can be said that, from the viewpoint of mens rea, genocide is an extreme and most inhuman form of persecution. To put it differently, when persecution escalates to the extreme form of wilful and deliberate acts designed to destroy a group or part of a group, it can be held that such persecution amounts to genocide."; for the question of intent to commit crimes against humanity, see: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, *supra* note 350, para. 188: ''The specificity of the intent and its particular requirements are highlighted when genocide is placed in the context of other related criminal acts, notably crimes against humanity and persecution {...} the mens rea requirement for persecution is higher than for ordinary crimes against humanity, although lower than for genocide''; for the question of intent to commit ethnic cleansing, see: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, *supra* note 350, para. 190: ''{W}hether a particular operation described as "ethnic cleansing" amounts to genocide depends on the presence or absence of acts listed in Article II of the Genocide Convention, and of the intent to destroy the group as such. In fact, in the context of the Convention, the term "ethnic cleansing" has no legal significance of its own. That said, it is clear that acts of "ethnic cleansing" may occur in parallel to acts prohibited by Article II of the Convention, and may be significant as indicative of the presence of a specific intent (dolus specialis) inspiring those acts.''.

political objectives}''.[406] She postulates that Ukraine's counsel was wrong to solely focus on the recklessness (*dolus eventualis*) of the DPR's and LPR's actions in Eastern Ukraine to proof the first element of the above outlined *mens rea* of Art. 2(1)(b).[407] By the same token, Marchuk disagrees with Ms Cheek's interpretation of the second part of the *mens rea* because the counsel ''could have made more effort to demonstrate the existence of *dolus specialis* with respect to the alleged acts of terrorism''.[408]

The *dolus specialis* criteria pertains to the crime of genocide which elements are stipulated in Art. 2 of the Genocide Convention.[409] The specific requirement of the crime of genocide, *dolus specialis*, was firstly established in *Prosecutor v. Akayesu* by the ICTR and later reaffirmed by the ICJ in its interpretation of the genocide convention in *Bosnia and Herzegovina v. Serbia and Montenegro*.[410] It came into being through practise of the Courts. What is important about the *dolus specialis* is that it sets out a specific condition for the Court to ascertain whether a person committed a crime of genocide.[411] It is therefore distinct from other crimes as the crime against humanity, where the mental element of the crime is broader.[412] The Court's judgement in the case *Kupreskic et al.* corroborates this thought: ''{T}he *mens rea* requirement for persecution is higher than for ordinary crimes against humanity, although lower than for genocide.[413] Given the gravity of the crime of genocide it makes it also more difficult to establish a *dolus specialis* or respectively to prove that ''the perpetrator clearly seek{ed} to produce the act charged''.[414]

In view of the above, it can be said that Marchuk is mistaken to apply the concept of *dolus specialis* analogously to the ICSFT. Although terrorist acts as those understood within the meaning of Art. 2(1)(b) of the ICSFT could amount to a serious crime that might lie within the ambit of the ICC jurisdiction (which is not up to discussion in this part of this thesis) it is believed that the *mens rea* of terrorist acts in general is not comparable to the *mens rea* of genocide. To put it differently, in spite of the fact that the ICJ has not pronounced on the mental element of Art. 2(1) of the ICSFT, it would

[406] ICSFT, Art. 2, para. 1 (b); Marchuk, *supra* note 398.
[407] Marchuk, *supra* note 398.
[408] *Ibid*.
[409] *Convention on the Prevention and Punishment of the Crime of Genocide*, 9 December 1948, Art. 2.
[410] *The Prosecutor v. Jean-Paul Akayesu*, Judgement, ICTR, Case No. 96-4-T, 2 September 1998, para. 498; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, *supra* note 350, paras. 187 *ff*.
[411] Katherine Goldsmith, ''The Issue of Intent in the Genocide Convention and Its Effect on the Prevention and Punishment of the Crime of Genocide: Toward a Knowledge-Based Approach," *Genocide Studies and Prevention: An International Journal*, vol. 5, no. 3 (2010), 241.
[412] As can de deduced from: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, *supra* note 350, para. 188.
[413] *Prosecutor v. Kupreskic et al*, Judgement, ICTY, Case No. 95-16-T, 14 January 2000, para. 636; reiterated by the ICJ in: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, *supra* note 350, para. 188.
[414] *The Prosecutor v. Jean-Paul Akayesu*, *supra* note 410, para. 498.

be revolutionary if the ICJ considered terrorist acts as ''an extreme and most inhuman form of persecution'' from the viewpoint of *mens rea* and treated terrorist acts as equal to genocide.[415]

5.1.3) ICSFT: Plausibility Test as a Barrier

It is unfortunate that the Court deemed the evidence submitted by Ukraine implausible in regard to the ICSFT because at the preliminary stage it could have clarified the necessary *mens rea* requirement of an act of terrorism within the meaning of Art. 2(1)(a) of the ICSFT or Art. 2(1)(b) for a ''situation of armed conflict''.[416] An option to satisfy the plausibility test at a later stage of the proceedings could be to draw the right conclusions from the terms ''sufficient basis to find it plausible'' in the last sentence of §75 of the Court's order.[417] Since the ICJ did not pronounce on what is required for the Court to decide that it had ''sufficient basis'' to deem the evidence submitted plausible, Ukraine can solely apply a method of elimination in order to satisfy the plausibility test in regard to Art. 2(1) of the ICSFT.

Based on the Court's order and this author's elaborations, one could start from the premise that neither *dolus eventualis* pertaining to knowledge or recklessness nor *dolus specialis* are the applicable criteria to prove the plausibility test. Consequently, the only element left to satisfy the *mens rea* of Art. 2(1)(b) remains the *dolus directus* which refers to the intent of the person who provided to or collected funds for the rebels. Ukraine would therefore be required to prove its allegation that persons as Sergei Shoigu, Vladimir Zhirinovsky, Sergei Mironov and Gennadiy Zyugankov provided or collected funds with the general intent that acts of terrorism as those articulated in Ukraine's application had been committed by the rebels in Eastern Ukraine.[418]

However, since the ICJ's methodology in interpreting treaties is grounded on positivism, it can be expected that the plausibility threshold for intent will only be satisfied if *sine dubio* Ukraine established that these persons financed the rebels with the intent (and knowledge) that terrorist acts will be committed. The plausibility test presents a high threshold and a barrier for Ukraine, because it is almost impossible to give evidence that by financing the rebels these persons had the direct intention that e.g. the Malaysian Airline will be shoot down by the rebels or that the population will

[415] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, *supra* note 350, para. 188.
[416] ICSFT, Art. 2, para. 1(b).
[417] *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)*, *supra* note 238, para. 75.
[418] *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)*, *supra* note 5, para. 136 (e).

be intimidated by other terrorist acts as bombardments of residential areas in Ukrainian cities.[419] It is also for this reason why this author makes the conclusion that the prospects of the ICJ to rule on the merits of the case in regard to the ICSFT are grim.[420]

5.1.4) ICSFT: Additional Barrier After the Plausibility Requirement --- Effective Control Test

Only if the plausibility test was satisfied, the ICJ could ascertain whether a link between the persons (allegedly) financing the rebels and the Russian state or even a relationship between the DRP/LPR's actions and Russia can be established. The following two analytical steps are therefore hypothetical, but they serve the purpose of providing a comprehensive answer to the sub-question of this thesis.

In its application instituting proceeding, Ukraine ''request{ed} the Court to adjudge and declare that the Russian Federation, {1} through its State organs, State agents, and other persons and entities exercising governmental authority, {2} and through other agents acting on its instructions or under its direction and control, has violated its obligations under the Terrorism Financing Convention''.[421]

Generally, a state can only be held responsible for an internationally wrongful act when its conduct, which constituted either an action or omission, was also imputable to the State under IL.[422] The ''Draft Articles'' provide a helpful guide to understand the legal category of persons Ukraine refers to.[423] As regards the first legal category of persons, it can be said that the broad definition of an organ of a state in Art. 4 would include Sergei Shoigu (Russia's defence minister), Vladimir Zhirinovsky (Vice-Chairmen of the State Duma), Sergei Mironov (member of the State Duma) and Gennadiy Zyugankov (member of the State Duma).[424] Also on the basis of the ICJ's advisory opinion

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[419] *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)*, *supra* note 5, para. 135; with regard to the argument that the plausibility test presented a huge barrier to Ukraine, see also: Peters, *supra* note 36: ''By asking Ukraine to make plausible even the elements of "intention" or "knowledge" (of individuals), the Court in para. 75 of its order of 19 April 2017 almost asks the impossible.''.

[420] As also deduced from: *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)*, Separate Opinion of Judge Owada Appended to Order, ICJ, 19 April, p. 3, para. 10: ''A negative determination that the rights in question would not be plausible, could suggest a conclusion at this stage that the asserted rights could not exist under the Convention, leading to a conclusion, in fact if not in law, that the Court would be prevented, from embarking upon further examination of the legal validity of the asserted rights under the Convention in question.''.

[421] *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)*, *supra* note 5, para. 134.

[422] ILC, *supra* note 63, p. 34, Art. 2(a).

[423] ILC, *supra* note 63, pp. 40-49, Art. 4-8.

[424] ILC, *supra* note 63, p. 40, Art. 4, paras. 1-2: ''1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.'' ''2. An organ includes any person or entity which has that status in accordance with the internal law of the State.''; see also commentaries in: ILC, *supra* note 63, p. 40, para. 6: ''the reference to a State organ in article 4 is intended in the most general sense. It is not limited

on *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, where the Court stated that {a}ccording to a well-established rule of international law, the conduct of any organ of a State must be regarded as an act of that State {and that} {...t}his rule {...} {was} of a customary character'', it could be argued that each of these four persons' actions triggered Russia's responsibility under IL.[425] Given the fact that these persons *de jure* do all hold the status of an organ of the Russian state under municipal law, their actions could be attributed to the Russian state and hence Russia could be hold responsible for not having prevented the financing of terrorism as understood under Art. 2 and 18 of the ICSFT.[426] However, It should be bore in mind, that Ukraine has to satisfy the plausibility test first.

As regards the second legal category, one recognizes that Ukraine oriented itself by the case *Nicaragua v. United States of America*.[427] Although Nicaragua accused the US of being responsible for the violations of human rights and humanitarian law by the *Contras*, the ICJ still ruled that ''it would in principle have to be proved that {the US} had effective control of the military and paramilitary operations in the course of which the alleged violations were committed''.[428] The question of whether the actions of the DPR and LPR could be attributed to the Russian state, would therefore depend on the *effective control* test.[429] Applying the parameters of the test established by the ICJ in *Nicaragua v. United States of America*, Ukraine would have to prove that Russia organized the actions of the rebel groups, trained and equipped them, planned the operations of the DPR and LPR,

to the organs of the central government, to officials at a high level or to persons with responsibility for the external relations of the State. It extends to organs of government of whatever kind or classification, exercising whatever functions, and at whatever level in the hierarchy, including those at provincial or even local level. No distinction is made for this purpose between legislative, executive or judicial organs.''.

[425] *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion, ICJ, 29 April 1999, para. 62.

[426] This reasoning was mainly deduced from the ICJ's judgement in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, *supra* note 350, para. 393: ''{S}o to equate persons or entities with State organs *when they do not have that status under internal law* must be exceptional, for it requires proof of a particularly great degree of State control over them, a relationship which the Court's Judgment quoted above expressly described as "complete dependence.''.

[427] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, *supra* note 42, paras. 242. 292 (3).

[428] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, *supra* note 42, paras. 115.

[429] It should be noted that in *Nicaragua v. United States of America*, the Court first applied the ''strict control test'', which constitutes an even higher threshold for the attribution of conduct of the actions of a *de facto* organ to a state than the effective control test. Since the strict control test was answered in the negative, the next applicable criteria was the effective control test, which constitutes a supplementary test and explains a ''partial dependency'' of a rebel group to the state: see: Stefan Talmon, *supra* note 342, 498-502; for cases where the strict control test was answered in the negative by the ICJ, see e.g.: *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, *supra* note 42, paras. 109-110; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, *supra* note 350, paras. 391-394; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, *supra* note 42, para. 160.

chose the targets, gave specific instructions and directives and provided operational support.[430] As Talmon posited ''the outside power must be able to control the beginning of the operation, the way it is carried out, and its end'', which is ''extremely difficult to establish''.[431]

Hence, even if Ukraine satisfied the plausibility test, the next barrier in regard to holding Russia responsible specifically for the actions of the rebel groups, DPR and LPR, constitutes the effective control test. It should be noted that the ICJ reaffirmed the effective control test in its recent judgement on *Bosnia and Herzegovina v. Serbia and Montenegro*.[432] There it also cited Art. 8 of the ''Draft Articles'' which is part of customary law and stipulates that ''{t}he conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct''.[433] Art. 8 does not speak of an organ of a state but pertains to the partial dependency test of effective control. Therefore, the DPR and LPR would not be considered as *de facto organs* of the Russian state but as groups of persons commanded and controlled by the Kremlin.

5.1.5) ICSFT: Overcoming the Problem of Attribution

Putting the control tests into perspective and relating them to the thousands of victims to human rights abuses by the DPR and LPR in Eastern Ukraine, one wonders why the ICJ could set such high thresholds for the attribution of conduct of groups to states, such as the DRP's and LPR's actions to Russia. However, in this regard, it is highly important to recall the judgements of the ICJ in the cases *Nicaragua v. The United States of America* and in *Bosnia and Herzegovina v. Serbia and Montenegro* which both demonstrate how a state can still incur responsibility for its own conduct related to the actions of rebel groups even though the outside power did not exercise effective control over them. Whereas in the first mentioned instance, the ICJ held the US responsible for the breach of the

[430] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, *supra* note 42, paras. 112.
[431] Talmon, *supra* note 342, 503.
[432] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, *supra* note 350, para. 406.; on the discussion of the ''overall control test'', see next subchapter on the ICC; it should be noted that the ''effective control test is less strict than the ''strict control test'' which requires that the rebels under control of the outside power are de facto organs. If the strict control test was negative, then the effective control test is the applicable test: see: Talmon, *supra* note 342, 501; see also: *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, *supra* note 42, para. 111: ''adequate direct proof {...} has not been, and indeed probably could not be, advanced in every respect''; see also: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, *supra* note 350, paras. 393-394: ''However, so to equate persons or entities with State organs when they do not have that status under internal law must be exceptional, for it requires proof of a particularly great degree of State control over them, a relationship which the Court's Judgment quoted above expressly described as "complete dependence" {...} The Court can only answer this question in the negative.''.
[433] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, *supra* note 350, paras. 398 *ff*; ILC, *supra* note 63, pp. 47-49, Art. 8.

principle of non-intervention given the ''training, arming, equipping, financing and supplying {of} the *contra* forces or otherwise encouraging, supporting and aiding military and paramilitary activities in and against Nicaragua'' by the US, although the effective control test was not satisfied, in the second case the Court ruled that Serbia (previously: FRY) perpetrated a wrongful act because it did not prevent the actions of the VRS (Army of the Republika Srpska) that committed genocide against the Bosnian Muslim community in Srebrenica.[434] Citing Dixon, it can be said that ''irrespective of the question of attributability, a state may incur primary responsibility because of a breach of some other international obligation, even though this obligation arose of the situation created by a non-attributable act''.[435]

Contrary to Ukraine's application on the basis of the ICSFT, in both previous cases the ICJ had jurisdiction based on the treaties invoked by the plaintiffs and therefore could hold the accused parties responsible for the above mentioned breaches of IL. For Russia to incur responsibility for its own conduct related to the DPR and LPR, the plausibility test still presents the main barrier.

It could be interesting to see the ICJ's further procedure as regards the ICSFT, especially on the question of whether an obligation to prevent the financing of terrorism extends also to a state obligation not to commit a terrorist act as understood under Art. 2(1) of the ICSFT through its *de jure* state organs. This argument rests on Ukraine's legal counsel's reasoning who cited the ICJ's procedure in *Bosnia Herzegovina v. Serbia and Montenegro*, where the Court ruled that ''the obligation to prevent genocide necessarily implies the prohibition of the commission of genocide''.[436]

5.1.6) ICSFT: Vulnerability Against Plausibility

The ICJ's pronouncement that the plausibility test failed in regard to the ICSFT was met with criticism by various judges adding to the debate that the same requirement remained vague.[437] A thought-

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[434] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, *supra* note 42, paras. 116, 292 (3); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, *supra* note 350, para. 471 (5).

[435] Martin Dixon, *Textbook on International Law*, 6th edition, 2007, 252.

[436] Marney Cheek in: *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)*, Verbatim Record, ICJ, 6 March 2017, p. 39, para. 19: ''It would be equally antithetical to the text and purpose of the Terrorism Financing Convention if a State that has an obligation to co-operate to prevent the financing of terrorism, was considered free to finance terrorism directly.''; see also: Marchuk, *supra* note 260.

[437] See debate on plausibility test covered in chapter ''4.1.4. Plausibility Test''; specifically as regards the ICJ's order in *Ukraine v. Russian Federation*, see criticism enunciated by Judge Owada: *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)*, *supra* note 420, pp. 3,5, paras. 10, 20: ''In light of this jurisprudence, and in light of the nature of this requirement of so-called "plausibility" as discussed above, it is my considered view that the standard of plausibility is, and must be, fairly low. The question to be asked should therefore be that of whether an asserted right is "possible" or "arguable" that it exists. {...}''; see also arguments by Judge *ad hoc* Pocar: *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All*

provoking alternative to the test was given by Judge Trindade. For him, the Court should have primarily focused on the rights of the victims to the flagrant atrocities in Eastern Ukraine and therefore the ICJ ought to have replaced the undefined plausibility test with a ''test of human vulnerability''.[438] It would have saved the life of innocent human beings, which still remained vulnerable since their ''fundamental rights to life and {their} security and integrity'' have been put at stake.[439] Although this author takes sympathy for Trindade's postulation that ''rights protected in the *cas d'espéce* are rights ultimately of human beings {…}, to a far greater extent than the rights of States'', one should not expect the Court to completely deviate from its previous procedure as regards the application of the plausibility test.[440]

It should also be reiterated that the ICJ has interpreted treaties based on the textual approach.[441] Hence, this author posits, that it could not indicate preliminary measures as the Court ascertained during the process of treaty interpretation that the ICSFT's jurisdictional scope did not extend so far that the criteria of ''human vulnerability'' could be considered in parallel to the requirements of intent and knowledge of the plausibility test of the ICSFT, which was requested by Peters, or that ''human vulnerability'' would even override both intent and knowledge, which was hoped by

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Forms of Racial Discrimination (Ukraine v. Russian Federation), *supra* note 261, p. 1, para. 3: ''The Court's conclusion that the rights claimed by Ukraine under the ICSFT are not plausible is the consequence of a brief reasoning which I have difficulties to share in light of the elements present in the record of this case. In my view, it is plausible that the indiscriminate attacks alleged by Ukraine are intended to spread terror, and that the persons providing funds to those who conducted these attacks had knowledge that such funds were to be used for that purpose.''; see also Judge Bhandari: *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)*, *supra* note 256, p. 20, para. 47: ''The preliminary examination of the entire evidence on record affords a sufficient basis to arrive at a plausible view that all elements under Article 2 ICSFT are satisfied in this case. Therefore, the Court ought to have indicated provisional measures in relation to the ICSFT.''; the only judge to concur with the ICJ's decision in regard to the ICSFT in his separate opinion was the Russian Judge *ad hoc* Skotnikov: *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)*, Separate Opinion of Judge *Ad Hoc* Skotnikov Appended to Order, ICJ, 19 April, p. 1, para. 1: ''Ukraine has indeed failed to show that the rights it seeks to protect under the ICSFT are at least plausible. It has not demonstrated that either of the crucial elements set out in Article 2, paragraph 1 (namely the requisite purpose, intention or knowledge) are present (see paragraphs 75 and 76 of the present Order). Consequently, I support the Court's decision not to indicate provisional measures on the basis of the ICSFT.''.

[438] *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)*, Separate Opinion of Judge Cancado Trindade Appended to Order, ICJ, 19 April, p. 13, para. 36.

[439] *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)*, *supra* note 438, p. 13, para. 42.

[440] In line with Anne Peter's argumentation who holds the opinion that ''to be legally consistent and on ground of the law as it stands, the Court's strictness at this point could not be mitigated by simply skipping the test of plausibility'': Peters, *supra* note 36; *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)*, *supra* note 438, p. 13, para. 41.

[441] *Territorial Dispute (Libyan Arab Jamahiririya/Chad)*, *supra* note 172, para. 41.

Trindade above.[442] Moreover, as explained in chapter V, the Court does analyse the issue of vulnerability, namely the protection of victims from irreparable damage, only after it deemed the plausibility test to be satisfied.[443]

In view of this author, given the tragic situation in Eastern Ukraine, there is reason to believe that the ICJ ought to have taken the criteria of human vulnerability already in its analysis of the plausibility test into consideration which might have eased the indication of preliminary measures on the basis of the ICSFT. From a radical point of view, the ICJ's negative determination of the plausibility requirement could be even interpreted as protecting the Russian state, because evidence showed that Russia had been supplying weapons to the rebels in Eastern Ukraine.[444] However, the Court's jurisdiction does only extend to those issues it was assigned by states with the authority to adjudicate on in cases of disputes on the interpretation of the treaty in question. As a result, the ICJ is bound by the provisions of the treaty.

One should also bore in mind that the general functioning of the ICJ relies on the consent of states, which implies that its legitimacy stems from the acceptance of its jurisdiction by states. Any decision, which was in contravention of the Court's traditional reading of conventions, could have a direct impact on the legitimacy of the Court as states might feel less inclined to ratify treaties that could allow the ICJ to adjudicate future disputes, especially as regards issues pertaining to the use of force. As a Court for the peaceful settlement of disputes between states and based on the fact the ICSFT is not a human rights treaty, the ICJ took a pragmatic decision not to indicate preliminary measures on the basis of the ICSFT. The ICJ was obliged to apply the plausibility test as it understood it from the plain meaning of the provisions in the ICSFT, independent of moral or ethical questions. What it should have done, however, was to clarify the elements that need to be satisfied before the Court can deem Ukraine's argumentation plausible on the basis of the ICSFT.

The *in dubio pro hominem* argument applied by Trindade is not applicable in regard to the ICSFT. Looking into the decision of the European Court of Human Rights in the case *Ilascu v. The Republic of Moldova and Russia*, where the ECHR held Russia responsible for an omission, namely for not having prevented the torture of pro-Romanian activists by the Russian sponsored rebels, the MRT, in the secessionist region Trandsnistria, Trindade's argumentation would rather find more support by the

[442] As regards Peters's claim, see: Peters, *supra* note 36: ''But indeed, the "vulnerability" of the victims of international terrorism, as "plausibly" committed in the regions of Eastern Ukraine, can and should be taken into account when examining whether violations of provisions of the ICSFT are plausible and whether there is a danger of irreparable harm *to them* (not only to Ukraine as a state).''.

[443] By submitting that ''the "vulnerability" of the victims of international terrorism, as "plausibly" committed in the regions of Eastern Ukraine, can and should be taken into account when examining whether violations of provisions of the ICSFT are plausible and whether there is a danger of irreparable harm *to them*'', Peters mixes up the different stages of the ICJ, namely the plausibility and the urgency requirement, which present two separate steps: Peters, *supra* note 36.

[444] See e.g.: OHCHR (o), *supra* note 4, para. 3.

ECHR, which interprets treaties based on the dynamic evolutive approach.[445] In general, this author asserts, that the ECHR provides a better platform to address breaches of human rights law committed by the DPR and LPR and to find Russia responsible either for having failed to prevent or directly sponsored actions of the rebels that led to grave infringements of human rights law; not to mention the fact that the Court applies the least strict test to attribute conduct of non-state actors to states with the ''effective overall control test''.[446]

5.1.7) CERD and ICSFT: Summary and Future Outlook

Since the ICJ introduced preliminary measures in regard to the CERD, the main focus of this chapter was set on the ICSFT to illuminate and discuss the barriers of IL. Also, it should be stressed that different to the role of the CERD, which does not address the annexation of Crimea, Ukraine has indirectly been seeking to hold Russia responsible for its illegal use of force through its proxies in Eastern Ukraine by taking recourse to the ICSFT. This gave this author another reason to devote more efforts to assessing the ICSFT.

In spite of the fact that Russia was found responsible for discriminating against the Crimean Tatar community, it has not abided by the ICJ's order, which further underscores Russia's blatant disregard for IL.[447] Taking the arguments of Russia's legal agents into account who refused to accept that the

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[445] *Case of Ilascu and Others v. Moldova and Russia*, Application No. 48787/99, Judgement, ECHR, 8 July 2004, paras. 392-393; see also authors, who mentioned the judgement: Talmon, *supra* note 342, 509; Mälksoo, *supra* note 95, 161-162.

[446] See examples, where the ECHR applied the effective overall control test and attributed the actions of a secessionist group to its sponsoring outside power: *Loizidou v. Turkey*, Application No. 15318/89, Judgement, 18 September 1996, paras. 52, 56: ''Of particular significance to the present case the Court held, in conformity with the relevant principles of international law governing State responsibility, that the responsibility of a Contracting Party could also arise when as a consequence of military action --- whether lawful or unlawful --- it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration {…} It is not necessary to determine whether, as the applicant and the Government of Cyprus have suggested, Turkey actually exercises detailed control over the policies and actions of the authorities of the "TRNC". It is obvious from the large number of troops engaged in active duties in northern Cyprus that her army exercises *effective overall control* {emphasis added} over that part of the island. Such control, according to the relevant test and in the circumstances of the case, entails her responsibility for the policies and actions of the "TRNC". Those affected by such policies or actions therefore come within the "jurisdiction" of Turkey for the purposes of Article 1 of the Convention (art. 1). Her obligation to secure to the applicant the rights and freedoms set out in the Convention therefore extends to the northern part of Cyprus.''; see also: *Cyprus v. Turkey*, Application No. 25781/94, Judgement, 10 May 2001, para. 77; see further: *Case of Ilascu and Others v. Moldova and Russia, supra* note 445, paras. 392-395; it should be noted that the effective overall control test has been applied by the ECHR to avoid ''a regrettable vacuum in the system of human-rights protection in the territory in question by removing from individuals there the benefit of the Convention's fundamental safeguards and their right to call a High Contracting Party to account for violation of their rights in proceedings before the Court'': see: *Cyprus v. Turkey*, *supra* note 446, para. 78; the latter ruling also attests to the fact that the ECHR has interpreted treaties based on the dynamic evolutive approach.

[447] As can be inferred from UNGA Res. 72/190, which urges Russia to ''{t}o fully and immediately comply with the order of the International Court of Justice of 19 April 2017 on provisional measures in the case concerning the *Application of the International Convention for the Suppression of the Financing of Terrorism and of the*

Court had jurisdiction in the case on the basis of the ICSFT and the CERD, one can grasp the Kremlin's rationale of disrespecting the ICJ's order.[448] It will be interesting to see whether Ukraine will take up this issue in its pleadings and will not only ask for reparations for the general contraventions of the CERD, but also for the fact that Russia had not been abiding by the ICJ's preliminary order.[449]

Generally, it is hoped that the ICJ will maintain its position that it has jurisdiction on the basis of the CERD. Different to Georgia in the case *Georgia v. Russian Federation*, Ukraine can prove that it attempted genuine negotiations with Russia before filing its application. When it will come to the question of whether the preconditions of negotiations and the procedures expressly provided for in CERD are cumulative or alternative, this author asserts, that the Court will not change its opinion that it had jurisdiction in spite of the fact that Ukraine did not consult the CERD Committee.

In view of the ICJ's decision not to indicate preliminary measures, the Court took a shrewd approach by ''remind{ing} the Parties'' of the Minsk Agreements and ''expect{ing}'' from them ''to work for the full implementation {…} in order to achieve a peaceful settlement of the conflict in the eastern regions of Ukraine''.[450] The reference to the Minsk Agreements can be seen as a sagacious

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International Convention on the Elimination of All Forms of Racial Discrimination (*Ukraine v. Russian Federation*)'': UNGA Res. 72/190, *supra* note 85, para. 3(b); one should also not forget mentioning that Russia has an obligation to refrain from aggravating or extending the conflict or make it more difficult to resolve: *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)*, *supra* note 238, para. 106 (2).

[448] See e.g.: Roman Kolodkin in: *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)*, Verbatim Record, ICJ, 7 March 2017, p. 12, para. 3: ''The goal is twofold: first, to involve the Court in adjudicating, even if only at the margins, the issues between Ukraine and Russia that are clearly beyond the Court's jurisdiction in this case, i.e., issues relating to the legality of the alleged use of force, State sovereignty, territorial integrity and self-determination''; specifically as regards the ICSFT, see e.g: Andreas Zimmermann, in: *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)*, Verbatim Record, ICJ, 7 March 2017, pp. 36-49, paras. 1-74; see further: Samuel Wordsworth in: *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)*, Verbatim Record, ICJ, 9 March 2017, p. 28, para. 64: ''If account is to be taken of the entirety of the JIT material on which Ukraine relies, which must be taken as containing Ukraine's factual allegations, the Court also lacks jurisdiction prima facie. On that basis, the facts, even as alleged by Ukraine do not fall within the Convention.''; specifically as regards the CERD, see: Roman Kolodkin in: *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)*, Verbatim Record, ICJ, 9 March 2017, p. 68, para. 19: ''As demonstrated in our pleadings today and on Tuesday, Ukraine's allegations under the CERD are not plausible. Nor does the Court have even prima facie jurisdiction.''.

[449] As was set out by the Court, the next deadline for the filing of initial pleadings is fixed for 12 June 2018 for Ukraine and 12 July 2019 for a Counter-Memorial by Russia: *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)*, Fixing of time-limits for the filing of the initial pleadings, ICJ, 14 June 2017.

[450] *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)*, *supra* note 238, para. 104.

compromise. With this decision the Court can defend itself against the critics, who would argue that the ICJ failed as a dispute settlement mechanism by refusing to indicate preliminary measures on the basis of the ICSFT in spite of the great suffering of innocent civilians in Eastern Ukraine, because the Court demonstrated that it was mindful of its main task to settle disputes between states peacefully.

One can draw the conclusion from the ICJ's decision in regard to the ICSFT that it adds to the debate that there was no treaty that can directly hold an aggressor state, such as Russia, responsible for its (indirect) illegal use of force in Eastern Ukraine. Whereas the ICJ did not generally dismiss Ukraine's application on the basis of the ICSFT on the lack of jurisdiction as it happened in the case *Yugoslavia v. Belgium* in the preliminary phase, where Serbia and Montenegro took recourse to the *Genocide Convention* to hold various NATO countries for their (allegedly) illegal use of force responsible and the ICJ refused to adjudicate on the matter because such a treaty did not cover the use of force, the conclusion can still be drawn that the ICSFT cannot provide redress to the Ukrainian state in the context of Russia's aggression as the prospects for Ukraine to satisfy the strict plausibility test are grim.[451]

It is for this reason, why most hope to address crimes committed by the Russian sponsored individuals of the DPR and LPR during their illegal use of force in Eastern Ukraine is placed in the ICC now.

5.2) The ICC: The Situation in Ukraine

5.2.1) Preliminary Examination: Subject – Matter Jurisdiction

Although it has already been elaborated upon the various requirements of preliminary examination activities, one should not leave out to say that the OTP further distinguishes between four different phases, described as a ''filtering process''.[452] Besides the first phase, which basically assesses whether the evidence submitted under Art. 15 of the Rome Statute is relevant for the Court's further assessment of the situation, the other three phases are analogous to the procedure outlined in Art. 53(1) of the Statute.[453]

Analysing the reports of the ICC on its preliminary examination activities, the Court's current task is to scrutinize the condition stipulated in Art. 53(1)(a) of the Rome State, namely whether ''{t}he

[451] *Legality of Use of Force (Serbia and Montenegro vs. Belgium)*, *supra* note 252, para. 40: ''{W}hereas the threat or use of force against a State cannot in itself constitute an act of genocide within the meaning of Article II of the Genocide Convention; and whereas, in the opinion of the Court, it does not appear at the present stage of the proceedings that the bombings which form the subject of the Yugoslav Application "indeed entail the element of intent, towards a group as such, required by the provision quoted above''.''.
[452] ICC, *supra* note 293, para. 77 *ff*.
[453] As regards the first phase, see: ICC, *supra* note 293, paras. 78-79; concerning the second phase, see: ICC, *supra* note 293, paras. 80-81; for requirements of the third phase, see: ICC, *supra* note 293, para. 82; for the fourth phase, see: ICC, *supra* note 293, paras. 83-84.

information available to the Prosecutor provides a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed''.[454] For the last four years, the situation in Ukraine has remained in Phase 2 (subject-matter jurisdiction) of the OTP's preliminary examinations.[455] These activities take a considerable amount of time because the OTP has to scrutinize a multitude of evidence provided to it by Ukraine, international organisations and individuals pursuant to Art. 15(2) of the Rome Statute, which further require ''complex factual and legal assessments''.[456] Specifically as regards the situation in eastern Ukraine the OTP has complied a file with around 1200 events that might potentially fulfil the jurisdictional criteria of ''reasonable basis'' of the ICC.[457] One should not omit mentioning that the OTP's examinations do also cover the evidence propounded by Ukraine and Russia at the ICJ.[458] In light of Russia's choice to stop cooperating with the ICC, Russia's arguments at the ICJ present a valuable source.[459] It demonstrates that the ICJ's decision not to indicate preliminary measures on the ICSFT might not prevent the ICC from reconsidering the facts based on its own jurisdictional procedure, namely with the focus on holding individual perpetrators of serious crimes (linked to Russia) responsible and not the state. The ''duality of responsibility'' becomes apparent already in the beginning of the preliminary examination activities.

It should be said that the OTP examines all information based on the reasoning that ''the post-February 2014 developments in Crimea and Donbas {...} {are} viewed as a continuation of the situation of crisis which commenced with the Maidan protest movement''.[460] Nevertheless, the Court made clear that it takes ''separate determinations on specific conduct or incidents within the

[454] See e.g: ICC, *supra* note 27, para. 184: ''The Office has continued to conduct a thorough factual and legal analysis of information received in relation to the conflict in order to establish whether there is a reasonable basis to believe that the alleged crimes fall within the subject-matter jurisdiction of the Court.''; Rome Statute, Art. 53, para. 1(a).

[455] See e.g.: ICC, *supra* note 27, p. 1, table of contents.

[456] ICC, *supra* note 27, para. 185; ICC, *supra* note 338, para. 114.

[457] ICC, *supra* note 338, para. 113.

[458] ICC, *supra* note 338, para. 115: ''In its analysis, the Office is also considering the relevance of information presented by both parties to the proceedings that Ukraine initiated before the ICJ against the Russian Federation for 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.''.

[459] President of Russia, *supra* note 209; it should be noted, that whereas in relation to the situation in Georgia, Russia was committed to cooperating with the ICC in the preliminary examination phase, as regards the situation in Ukraine, Russia gave a sign that it will not assist the International Criminal Court in the evidence gathering process (or at any later stages, such as potential investigations); for Russia's cooperation with the ICC as regards the situation in Georgia, see: Gleb Bogush, ''Russia and International Criminal Law,'' *Baltic Yearbook of International Law*, vol. 15, no. 1 (2015), 177; see also: Alex Whiting, ''The Significant Firsts of an ICC Investigation in Georgia,'' *Just Security*, 14 October 2015 (available at https://www.justsecurity.org/26817/icc-investigation-georgia/).

[460] ICC, *supra* note 26, para. 107.

relevant period''.[461] As a result, the Court drew different conclusions as regards the ''Maidan events'' and the ''events occurring after 20 February 2014''.[462]

Whereas in relation to the Maidan events, the OTP ascertained that crimes against humanity were not committed by the former Ukrainian authorities since ''there {was} limited information at this stage to support the conclusion that the alleged attack carried out in the context of the Maidan protests was either widespread or systematic'', no such determination has been made with regard to the events after 20 February 2014.[463] For the OTP to determine that the evidence provided ''reasonable basis to believe'' that crimes against humanity or war crimes occurred in Ukraine, it primarily focuses on the question of whether these alleged crimes were perpetrated (i) ''on a large scale, (ii) as part of a plan or {iii} pursuant to a policy''.[464]

5.2.2) Alleged Crimes in Crimea and Eastern Ukraine

As previously mentioned, the focus of this part of the thesis is set on the events after 20 February 2014, namely on the crimes that occurred during and after the Crimean annexation or were perpetrated by the pro Russian DPR and LPR in Eastern Ukraine.

The alleged crimes, the ICC has reported so far, are *i.a.* disappearances and killings, ill-treatment and harassment of Crimean Tatars in relation to situation in Crimea.[465] In contrast to that, the ICC does not use the term ''alleged'' in regard to the crimes committed in Eastern Ukraine, which proves that the evidence submitted to the Court by e.g. the OHCHR makes the ICC believe that these crimes had actually been committed.[466] Nevertheless, the ICC has to determine that *i.a.* killings (as for example of the innocent civilians aboard MH17), detention, torture/ill-treatment or disappearances had been committed on a large scale, as part of a plan or pursuant to a policy.

Even prior to ascertaining whether the above-mentioned crimes fall into its jurisdiction, the OTP had to examine first the legal nature of the conflict[467], namely

[461] ICC, *supra* note 26, para. 108.
[462] See term ''Maidan events'' applied by the Court, in e.g.: ICC, *supra* note 338, para. 111; for the term ''events occurring after 20 February 2014'', see e.g.: ICC, *supra* note 26, para. 110.
[463] As regards the OTP's conclusion on the ''Maidan events''', see: ICC, *supra* note 26, para. 95.
[464] ICC, *supra* note 293, para. 81.
[465] ICC, *supra* note 338, paras. 97-103.
[466] ICC, *supra* note 338, paras. 105-110; For an assessment of the role of the HRMMU in Ukraine, see next sub-chapter 5.3.
[467] As can be inferred from: ICC, *supra* note 27, para. 154: ''In situations involving crimes allegedly committed in the context of armed hostilities, an assessment of the Court's jurisdiction entails analysis of whether the alleged crimes occurred in the context of an international or a non-international armed conflict. With regard to the situation in Ukraine the Office is therefore required to undertake a detailed factual and legal assessment of the relevant events, including analysis of the applicability of the law of armed conflict to the situation in Ukraine from 20 February 2014 onwards in order to determine whether there is a reasonable basis to open an investigation into the situation.''.

1) whether Russia's ''assumption of control over Crimea'' gave rise to an international armed conflict and allows to speak of an ''occupation'' making it possible to extend the scope of the Court's jurisdiction to also analyse war crimes that have been allegedly committed after the annexation of Crimea until present day[468],

and 2) whether the actions of the DPR and LPR reached ''a minimum level of intensity'' and the rebel groups were organized under a certain command structure making them ''parties to the conflict'' and triggering the laws of war.[469]

In both cases, based on the OTP's assessment of the information received, the ICC determined that the laws of war are applicable.[470] Whereas in regard to the situation in Crimea, the OTP starts from the assumption that it could have jurisdiction from the latest of 26 February 2014 until present to analyse whether the alleged crimes committed in an international armed conflict fell into its ambit, in relation to the crimes in Eastern Ukraine, the ICC has to scrutinize an additional allegation,

namely 3) whether the evidence proved that Russia held ''overall control'' over the DPR and LPR in Eastern Ukraine and therefore the ICC could extend its jurisdiction to articles covering war crimes committed during an international armed conflict.[471]

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[468] As deduced from: ICC, *supra* note 27, paras. 155-158; see also: ICC, *supra* note 338, para. 88: ''In 2016, the Office made public its assessment that the situation within the territory of Crimea and Sevastopol would amount to an international armed conflict between Ukraine and the Russian Federation which began at the latest on 26 February 2014, and that the law of international armed conflict would continue to apply after 18 March 2014 to the extent that the situation within the territory of Crimea and Sevastopol factually amounts to an ongoing state of occupation. This assessment, while preliminary in nature, provides the legal framework for the Office's ongoing analysis of information concerning crimes alleged to have occurred in the context of the situation in Crimea since 20 February 2014.''.

[469] The criteria of ''minimum level of intensity'' and ''parties to the conflict'' were deduced from: ICC, *supra* note 27, para. 168: ''Based on the information available it seems that by 30 April 2014 the level of intensity of hostilities between Ukrainian government forces and anti-government armed elements in eastern Ukraine reached a level that would trigger the application of the law of armed conflict. This preliminary analysis is based on information that both sides used of military weaponry, resources of the armed forces including airplanes and helicopters were deployed by the Ukrainian Government, and there were casualties to military personnel, non-government armed elements and civilians. Furthermore, information available indicates that the level of organisation of armed groups operating in eastern Ukraine, including the "LPR" and "DPR", had by the same time reached a degree sufficient for them to be parties to a non-international armed conflict.''.

[470] As regards the OTP's determination in relation to Eastern Ukraine, see: ICC, *supra* note 27, para. 169; concerning Crimea, see: ICC, *supra* note 27, para. 158.

[471] On Crimea, see: ICC, *supra* note 338, para. 88; the reason for why Russia's military occupation of Crimea triggered the laws of an international armed conflict can also be understood from: *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo*, *supra* note 330, para. 542: ''Moreover, footnote 34 of the Elements of Crimes stipulates that the term "international armed conflict" includes a "military occupation'' {...} It follows that {...} "international armed conflict" includes a military occupation.''; as to Eastern Ukraine and the overall control test, see: ICC, *supra* note 27, paras. 169-170: ''Additional information, such as reported shelling by both States of military positions of the other, and the detention of Russian military personnel by Ukraine, and *vice-versa*, points to direct military engagement between Russian armed forces and Ukrainian government forces that would suggest the existence of an international armed conflict in the context of armed hostilities in eastern Ukraine from 14 July 2014 at the latest, in parallel to the non-international armed conflict. For the purpose of determining whether the otherwise non-international armed conflict could be actually international in character, the Office is also

5.2.3) The Overall Control Test as a Barrier?

The OTP outlined the elements of the overall control test that need to be satisfied before the actions of the DPR and LPR in Eastern Ukraine such as torture, killings of innocent civilians or destruction of property due to indiscriminate shelling might fell within the scope of grave breaches of the Geneva Conventions of 12 August 1949:

''In conducting its analysis, the Office must assess whether the information available indicates that Russian authorities have provided support to the armed groups in the form of equipment, financing and personnel, and also whether they have generally directed or helped in planning actions of the armed groups in a manner that indicates they exercised genuine control over them.''[472]

Different to the effective control test, the overall control test of the ICC does not require to prove that the foreign State controlled every action of the rebels.[473] It suffices to give evidence that Russia ''generally directed or helped'' the DPR and LPR, equipped and financed them and supported them with personnel. This implies that the actions of the DPR and LPR might be imputed to Russia and therefore ''internationalise'' the conflict in the Donbas even if the rebels pursued a course of conduct that the foreign power did not envisage to happen, as e.g. the downing of flight MH17.[474] On the other hand, if one could only establish that Russia provided economic and military support and sent

examining allegations that the Russian Federation has exercised overall control over armed groups in eastern Ukraine. The existence of a single international armed conflict in eastern Ukraine would entail the application of articles of the Rome Statute relevant to armed conflict of an international character for the relevant period. In conducting its analysis, the Office must assess whether the information available indicates that Russian authorities have provided support to the armed groups in the form of equipment, financing and personnel, and also whether they have generally directed or helped in planning actions of the armed groups in a manner that indicates they exercised genuine control over them. The Office is currently undertaking a detailed factual and legal analysis of the information available of relevance to this issue.''; see also: ICC, *supra* note 338, para. 95: ''For the purpose of determining whether the otherwise non international armed conflict involving Ukrainian armed forces and anti-government armed groups could be actually international in character, the Office continues to examine allegations that the Russian Federation has exercised overall control over armed groups in eastern Ukraine. The existence of a single international armed conflict in eastern Ukraine would entail the application of articles of the Statute relevant to armed conflict of an international character for the relevant period.''; it should be noted that the laws of war of a non-international armed conflict in Eastern Ukraine would apply from 30 April 2014 onwards: see: ICC, *supra* note 27, para. 168: ''Based on the information available it seems that by 30 April 2014 the level of intensity of hostilities between Ukrainian government forces and anti-government armed elements in eastern Ukraine reached a level that would trigger the application of the law of armed conflict.''.

[472] ICC, *supra* note 27, para. 170; see also: ICC, *supra* note 338, para. 95: ''For the purpose of determining whether the otherwise non-international armed conflict involving Ukrainian armed forces and anti-government armed groups could be actually international in character, the Office continues to examine allegations that the Russian Federation has exercised overall control over armed groups in eastern Ukraine.''; as regards the few listed alleged crimes in Eastern Ukraine, see: ICC, *supra* note 27, paras. 178-179, 182.

[473] Talmon, *supra* note 342, 506; Grzebyk, *supra* note 12, 56.

[474] As also deduced from: Jens David Ohlin, ''Control Matters: Ukraine & Russia and the Downing of Flight 17,'' *Opinio Juris*, 23 July 2014 (available at http://opiniojuris.org/2014/07/23/control-matters-ukraine-russia-downing-flight-17/): ''On the other hand, if the Overall Control test applies, then there is a plausible argument that the shooting of Flight 17 can be attributed to Russia because their operatives probably helped train and equip, and coordinate, the activities of the pro-Russian militia.''.

soldiers to Donbas but not generally directed or helped planning the actions of the armed groups, the overall control test would fail.[475] Each element of the less strict control test has to be fulfilled, before the laws of war for an international armed conflict are also applicable on the crimes allegedly committed by individuals of the DPR and LPR.

Nevertheless, it should be mentioned that the ''reasonable basis'' criteria under Art. 53(1)(a), elaborated by Pre-Trial Chamber II, ''has a different object, a more limited scope, and serves a different purpose'' in comparison to other higher criteria set forth in the Rome Statute.[476] This implies that the information relevant to ascertaining whether the criteria of the overall control test can be satisfied is ''neither expected to be 'comprehensive' nor 'conclusive''' at the preliminary examination phase.[477] For one thing, It corroborates the thought that Russia's overall control over the DPR and LPR could be confirmed by the OTP at the beginning of the ICC's procedures regarding

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[475] *Prosecutor v. Dusko Tadic*, *supra* note 341, para. 137: ''By contrast, control by a State over subordinate armed forces or militias or paramilitary units may be of an overall character (and must comprise more than the mere provision of financial assistance or military equipment or training). This requirement, however, does not go so far as to include the issuing of specific orders by the State, or its direction of each individual operation.''; see also: *Prosecutor v Zejnil Delalic et al*, *supra* note 349, para. 15; taking the highly complex *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo* with ''a number of simultaneous armed conflicts {…} involving different groups'' as a comparison to the *Situation in Ukraine*, one can mainly discern that every element of the overall control test has to be proven before an internal armed conflict involving protracted violence can become an international armed conflict: see, e.g: *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo*, *supra* note 330, para. 553: ''As to the role of the DRC, there is some evidence that Kinshasa sent trainers and weapons to the APC. The UN Special Report on the events in Ituri contains allegations that in the last three months of 2002, "some military supplies may have also been sent directly to the Lendu militia" in Rethy, within the Djugu territory. However, the limited support provided by the Congolese government to the RCDML and potentially to Lendu militias during this time is insufficient to establish the DRC government's overall control over these armed groups. Critically, there is no sustainable suggestion that the DRC had a role in organising, coordinating or planning the military actions of the UPC/FPLC during the period relevant to the charges.''; see further: *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo*, *supra* note 330, para. 561: ''With regard to Rwanda, although P-0055 gave evidence that the UPC/FPLC wanted to take the town of Mongbwalu because it had been directed to do so by Rwanda, this statement has not been corroborated by other evidence and it is insufficient, taken alone or together with the other evidence above, to prove that Rwanda had overall control of the UPC/FPLC and the latter acted as its agent or proxy. Thus, there is insufficient evidence to establish (even on a prima facie basis) that either Rwanda or Uganda exercised overall control over the UPC/FPLC.''; for final conclusion of the Trial Chamber, see: *Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Thomas Lubanga Dyilo*, *supra* note 330, paras. 565, 567: ''In any event, the existence of a possible conflict that was "international in character" between the DRC and Uganda does not affect the legal characterisation of the UPC/FPLC's concurrent non-international armed conflict with the APC and FRPI militias, which formed part of the internal armed conflict between the rebel groups.{...} The Trial Chamber therefore finds that the armed conflict between the UPC/FPLC and other armed groups between September 2002 and 13 August 2003 was non-international in nature.''.

[476] ICC, *supra* note 338, para. 11; for the Pre-Trial Chamber's elaboration on the ''reasonable basis'' criteria, see: *Situation in the Republic of Kenya*, *supra* note 309, para. 35: ''in evaluating the available information provided by the Prosecutor, the Chamber must be satisfied that there exists a sensible or reasonable justification for a belief that a crime falling within the jurisdiction of the Court "has been or is being committed".''; see further: *Situation in the Republic of Kenya*, *supra* note 309, para. 27: ''As for the "reasonable basis to believe" test referred to in article 53(l)(a) of the Statute, the Chamber considers that this is the lowest evidentiary standard provided for in the Statute.''.

[477] ICC, *supra* note 338, para. 11; *Situation in the Republic of Kenya*, *supra* note 309, para. 27.

the *situation in Ukraine* given the ''low evidentiary standard''.[478] For the other, due to the fact that the OTP cannot make conclusive statements in the preliminary examination phase, a hypothetical determination that Russia could have exercised overall control over the DPR and LPR would only constitute a *prima facie* decision and might be proven wrong at a later stage of the proceedings as the investigatory phase, where the OTP would be authorized by the Pre-Trial Chamber to ''establish the truth'' enjoying investigatory powers provided for by Art. 54 of the Rome Statute.[479]

Analysing the decision of the Pre-Trial Chamber I to open investigations into *the situation in Georgia*, an example, which, related to the crimes that had allegedly been perpetrated by Russian controlled South Ossetian militants, Russian soldiers and Georgian armed forces, seems to be similar to the *situation in Ukraine*, especially if one considers the fighting between the Russian controlled South Ossetian forces and the Georgian armed forces prior to Russia's official intervention in Georgia, it is believed that the overall control test will be satisfied by the OTP in the preliminary examination phase of *the situation in Ukraine*.[480] In *the situation in Georgia*, the Pre-Trial Chamber held that ''at this stage, {...} there {was} sufficient indication that the Russian Federation {had} exercised overall control over the South Ossetian forces, meaning that also the period before the direct intervention of Russian forces {might} be seen as an international armed conflict''.[481] As a result, this author is of the opinion that the alleged war crimes committed by the DPR and LPR will be probably scrutinized pursuant to Art. 8(2)(a-b) of the Rome Statute.[482]

Irrespective of the fact that the potential breaches of the laws of war in *the situation in Ukraine* ''exist{ed} equally in international and non-international armed conflicts'', it is still important to

[478] Situ*ation in Georgia*, Decision on the Prosecutor's Request for authorization of an investigation, ICC – Pre-Trial Chamber I, Separate Opinion by Judge Peter Kovacs, 27 January 2016, para. 11: ''It just means that the assessment should be carried out against a low procedural standard ("reasonable basis to proceed") and a low evidentiary standard ("reasonable basis to believe") on the basis of the request, the available material and the victims' representations.''.

[479] Regarding the argument that any determination of the OTP in the preliminary examination phase presents only a *prima facie* decision, see: *Situation in Georgia*, *supra* note 478, paras. 11-12: ''In conclusion, I do not believe that the role of the Pre-Trial Chamber at the article 15 stage is merely to make an overall prima facie finding or a marginal assessment as the reasoning of the Majority suggests.''; as regards the OTP's investigatory powers, see: Rome Statute, Art. 54.

[480] *Situation in Georgia*, *supra* note 303, para. 65: ''For these reasons, the chamber hereby authorizes the Prosecutor to proceed with an investigation of crimes within the jurisdiction of the Court, committed in and around South Ossetia, Georgia, between 1 July and 10 October 2008''; as regards the alleged crimes committed during the international armed conflict in Georgia, see: *Situation in Georgia*, *supra* note 303, para. 7: ''(i) the war crimes of wilful killing (article 8(2)(a)(i)) or murder (article 8(2)(c)(i)), destruction of property (article 8(2)(b)(xiii) or 8(2)(e)(xii)) and pillage (article 8(2)(b)(xvi) or 8(2)(e)(v)), and intentionally directing attacks against peacekeepers (article 8(2)(b)(iii)); and (ii) the crimes against humanity of murder (article 7(1)(a)), deportation or forcible transfer of population (article 7(1)(d)) and persecution (article 7(1)(h)).''; for more information on the *Situation in Georgia*, see: ICC, ''Georgia – Situation in Georgia – ICC-01/15,'' *ICC- Webpage*, 24 May 2018 (available at https://www.icc-cpi.int/georgia).

[481] *Situation in Georgia*, *supra* note 303, para. 27.

[482] Rome Statute, Art. 8, para. 2(a-b).

testify that Russia exercised overall control over the LPR and DPR:[483]

Firstly, there is ample evidence suggesting that Russia provided equipment to the rebels, financed and reinforced them.[484] As regards the latter requirement, Russia has supported the DPR and LPR by sending Russian soldiers to Eastern Ukraine.[485] And secondly, various sources confirm that Russia generally directed or helped in planning actions of the rebels by *i.a.* training them and sending secret

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[483] Citing the Prosecutor, the wording ''exist equally in international and non-international armed conflicts'' was used by the Pre-Trial Chamber for the purpose to explain that an internationalisation of the armed conflict in Georgia would not significantly change the proceedings of the Court as regards the interpretation of the crimes based on the Rome Statute: *Situation in Georgia*, *supra* note 303, para. 28: ''The Chamber observes, at the same time, that this last point is actually irrelevant at the present stage, as, as correctly pointed out also by the Prosecutor (Request, para. 81), the war crimes under consideration exist equally in international and non-international armed conflicts.''.

[484] As regards the fact, that Russia provided military equipment to the rebels, see detailed analysis in: Czuperski *et al*, *supra* note 23, 8 *ff*; specifically concerning the downing of MH17, it was confirmed by Wilbert Paulissen, a criminal investigator with the Dutch national police and part of the Joint Investigation Team, tasked to identify the suspects behind the attack, that the plane was shot down by a Russian-made BUK missile system belonging to the Russian armed forces. Additionally, he stated that the system had been provided by Russia's 53rd anti-aircraft brigade in Kursk: ''All the vehicles in a convoy carrying the missile were part of the Russian armed forces'': BBC, ''MH17 missile owned by Russian brigade, investigators say,'' *BBC-Website*, 24 May 2018 (available at http://www.bbc.com/news/world-europe-44235402); see further facts on Russian involvement in the downing of MH17: Andrew E. Kramer, ''Russian Military Supplied Missile That Shot Down Malaysian Jet, Prosecutor Say,'' *NYT*, 24 May 2018 (available at https://www.nytimes.com/2018/05/24/world/europe/russia-malaysia-airlines-ukraine-missile.html); see further: Alan Cowell, ''Russia ''Accountable'' for Downed Airlines, Australia and Netherlands Say,'' *NYT*, 25 May 2018 (available at https://www.nytimes.com/2018/05/25/world/europe/netherlands-australia-russia-mh17.html?rref=collection%2Fsectioncollection%2Fworld&action=click&contentCollection=world®ion=rank&module=package&version=highlights&contentPlacement=9&pgtype=sectionfront); see also research by bellingcat: Bellingcat Investigation Team, ''MH17 – Russian GRU Commander ''Orion'' Identified as Oleg Ivannikov,'' *bellingcat*, 25 May 2018 (available at https://www.bellingcat.com/news/uk-and-europe/2018/05/25/mh17-russian-gru-commander-orion-identified-oleg-ivannikov/); for evidence that Russia covertly financed the DPR and LPR, see: Julian Röpcke, ''How Russia finances the Ukrainian rebel territories,'' *Bild*, 16 January 2016 (available at https://www.bild.de/politik/ausland/ukraine-konflikt/russia-finances-donbass-44151166.bild.html): ''According to intelligence service information, the money for the "terrorists" – as Ukraine calls them – or the "United Forces of New Russia", respectively – as they are called in the occupied territories – mainly comes from two sources: From "Non-Government Funds" of the Russian Federation that, upon close inspection, turn out to be very close to the government in Moscow. From former Ukrainian politicians and oligarchs who fled to Russia after the downfall of the pro-Russian President Viktor Yanukovych, and who are now working to destabilize Ukraine. "Individual persons or organizations pay for their preferred units". These funds are coordinated and topped up by the Kremlin or the local Russian intelligence in the {…} controlled east of Ukraine.''; see further evidence on Russia financing the rebels: Jo Becker and Steven Lee Myers, ''Russian Groups Crowdfund the War in Ukraine,'' *NYT*, 11 June 2015 (available at https://www.nytimes.com/2015/06/12/world/europe/russian-groups-crowdfund-the-war-in-ukraine.html): "Anyone in Russia who wants to provide assistance to the D.P.R. and the L.P.R. is encouraged by and gets support from the Russian government, said John E. Herbst a former American ambassador to Ukraine''; for sources, proving that Russia sent soldiers to Donbas, see: Mark Urban, ''How many Russians are fighting in Ukraine,'' *BBC-Website*, 10 March 2015 (available at http://www.bbc.com/news/world-europe-31794523): ''{I}nitially deniable, in the summer of 2014, with perhaps a few hundred special forces organising locals and Russian volunteers {…} large-scale escalation, during August 2014, when several Russian regular army battalion tactical groups (numbering up to 1,000 each) were sent in to save the separatists from defeat by the Ukrainian military {…} a period of withdrawal and retrenchment, late in 2014, following September's Minsk ceasefire agreement, in which Russian troop numbers dropped {…} the reintroduction of several formed battalions and numerous specialist troops during renewed fighting, this January and February, allowing the capture of Debaltseve and a good deal of other territory from the Ukrainians.''; see also: Czuperski *et al*, *supra* note 23, 15 *ff*.

[485] See e.g: Urban, *supra* note 484.

service agents to the Donbas, who held a command role.[486]

Based on the facts at hand, it would be rather unreasonable if the OTP declined the truth, namely that Russia held overall control over the DPR and LPR, and did not characterise the armed conflict in the Donbas as an international one. Furthermore, it is asserted that the multitude of evidence would even confirm the ''reasonable grounds criteria'' at the investigatory stage of proceedings where the evidentiary standard is set higher.[487]

An additional question the OTP has to scrutinize pertains to the time period during which Russia held overall control over the rebels. Given the fact that Ukraine's acceptance of the ICC jurisdiction set no end date for the OTP to ascertain alleged crimes by individuals in Ukraine and due to the varying intensity of the conflict in Eastern Ukraine, it will be interesting to follow whether the ICC will characterise the situation as an international armed conflict from one given date in the past till today or whether it will establish Russia's overall control over the rebels only for (a) temporary period(s) of the conflict. The latter approach would certainly complicate the proceedings of the ICC but owing to the complex nature of the armed conflict in the Donbas one may consider such an option as not unrealistic. Generally, it is hoped that the OTP will speak of one international armed conflict in Ukraine from the beginning of Russia's annexation in Crimea at the end of February 2014 until as long as Russia continues to occupy Crimea, has not stopped from commanding the rebels and supporting them financially, militarily and logistically and prevented Ukraine from controlling its own territorial borders adjacent to Russia.

5.2.4) After the Control Test --- Summary and Future Outlook

As regards the question of whether the alleged crimes pertaining to the *situation in Ukraine* fall within the ICC's subject matter jurisdiction, the OTP enunciated that it would finish its examination ''within a reasonable time frame''.[488]

Should the Court proceed to the third phase of its preliminary examination activities, namely to the

[486] As regards the fact that Russia trained fighters of the DPR and LPR, see: Czuperski *et al*, *supra* note 23, 13-14; for sources attesting to the fact that Russia generally directed or helped in planning the actions in the Donbas, see further: Reuters, ''Russians present in Ukraine in specialist roles: U.S. envoy,''*Reuters-Website*, 4 February 2015 (available at https://www.reuters.com/article/us-ukraine-crisis-nato-usa/russians-present-in-ukraine-in-specialist-roles-u-s-envoy-idUSKBN0L81S220150204): ''The U.S. ambassador to NATO said on Wednesday that Russian soldiers were present in eastern Ukraine in a command role and to operate advanced military equipment.''; see also Vladimir Putin answering a question of a Ukrainian journalist whether Russian servicemen were present in the Donbas: President of Russia, *supra* note 37: ''Regarding exchanges. We've never said there are no people there who deal with certain matters, including in the military area, but this does not mean that regular Russian troops are present there.''; see also: Bellingcat Investigation Team, *supra* note 484.

[487] As deduced from: *Situation in the Republic of Kenya*, *supra* note 309, para. 34: ''{…} bearing in mind that the "reasonable basis" standard under article 15 of the Statute is even lower than that provided under article 58 of the Statute{...}.''; Rome Statute, Art. 58, para. 1(a).

[488] ICC, *supra* note 338, para. 120.

question whether the case regarding the alleged crimes in Eastern Ukraine would be admissible in terms of the complementarity and gravity principles pursuant to Art. 53(1)(b) and Art. 17 of the Rome Statute, this author hopes that the OTP will act along the same lines as in *the situation in Georgia* where it deemed the above-mentioned requirements to being satisfied. In this case, In accordance with Art. 15(4) of the Rome Statute, the Pre-Trial Chamber authorized the commencement of an investigation confirming that ''all the requirements of article 53(1) of the Statute {were} met'' after the Prosecutor submitted a request for authorization pursuant to Art. 15(3) of the Rome Statute.[489] It implies that the complementarity and gravity principles were satisfied at the preliminary examination phase.[490]

Comparing both *situations* with each other and taking the gravity of the incidents in Eastern Ukraine and the factor of interest of justice into account, it seems to this author that the Prosecutor is obliged to request the Pre-Trial Chamber to authorize an initiation of an investigation.[491] With all hope being placed in the ICC to hold the leaders of the DPR/LPR and its individual Russian sponsors responsible for crimes against humanity and war crimes in Ukraine, another decision than an authorization of an investigation would appear to be at odds with the main goal of the ICC, namely ''to put an end to impunity for the perpetrators of {the most serious crimes of concern to the international community}''.[492] As regards the complementarity principle, it is posited that this requirement ought not to prevent the Prosecutor from requesting an initiation of an investigation, because the high-ranking suspects of the DPR/LPR and individuals of the Russian government remain beyond the reach of the Ukrainian legal authorities.

Other more crucial questions pertaining to the mental element of a crime, e.g. whether a Russian individual committed a war crime within the meaning of Art. 8(2)(b)(ii) by intentionally destroying the civilian object, the plane MH17 with 298 civilians aboard, have to be answered at a later stage of the proceedings.[493] Specifically with regard to this alleged crime, the Prosecutor can draw on the findings of the Dutch Joint Investigation Team and the Dutch Safety Board and establish a reasoning that might satisfy the requirements of ''intent'', set forth in Art. 30(2), and ''knowledge'', stipulated

[489] *Situation in Georgia*, *supra* note 303, paras. 59, 65.
[490] As regards the requirement of ''complementarity'', see: *Situation in Georgia*, *supra* note 303, paras. 39-50; concerning the condition of ''gravity'', see: *Situation in Georgia*, *supra* note 303, paras. 51-57.
[491] For the additional requirement of ''interest of justice'', see: *Situation in Georgia*, *supra* note 303, para. 58.
[492] Rome Statute, preamble.
[493] Two individuals suspected of bringing down MH17 were identified by the Bellingcat Investigation Team. Their names are Oleg Vladimirovich Ivannikov and Nikolai Fedorovich Tkachev, see: Bellingcat Investigation Team, *supra* note 484; see further: Hall G., Kevin, ''Russian general ID'd in activity around shootdown of Malaysian passenger jet,'' *McClatchy*, 8 December 2017 (available at http://www.mcclatchydc.com/news/nation-world/world/article188720184.html); as regards the provision of Art. 8(2)(b)(ii), see: Rome Statute, Art. 8, para. 2(b)(ii): ''Intentionally directing attacks against civilian objects, that is, objects which are not military objectives''.

in Art. 30(3).[494]

Although it took the Prosecutor more than seven years to request the Pre-Trial Chamber to initiate investigations into *the situation in Georgia*, which *i.a.* Marchuk criticised her heavily for, this author posits that ''time'' should not be considered as the determining factor that impedes the process of justice.[495] One can share Marchuk's criticism that the Prosecutor ought to have made use of Art. 15(4) earlier than after the period of seven years, especially given the gravity of the armed conflict in Georgia, the lower evidentiary standard required at the examination phase and the opportunity to leave the ''African bias''.[496] However, justice delayed is not justice denied in general terms, particularly as regards such important criminal proceedings where individuals of a permanent UNSC member state are suspected to have committed crimes falling under the purview of the ICC.[497] Practise in international criminal law as the yearlong proceedings at the ICTY or the judgements at the Extraordinary Chambers in the Courts of Cambodia demonstrated that justice is independent from time.[498] It is hoped that the former high official of the ICC, Whiting, proves wrong that the Prosecutor will not request the Pre-Trial Chamber to open an investigation into the *situation in Ukraine* anytime soon due to the OTP's current investigations into the *situation in Georgia*.[499]

5.3) The OHCHR: The UN Human Rights Apparatus

In the context of the Ukraine crisis, IHRL obliges the Ukrainian state to respect the right to life, no one is allowed to derogate from, not even during public emergencies as the Maidan revolution or the

[494] For information on the Joint Investigation Team, see: Dutch Safety Board, *Crash of Malaysia Airlines flight MH17*, October 2015 (available at https://www.onderzoeksraad.nl/uploads/phase-docs/1006/debcd724fe7breport-mh17-crash.pdf?s=678D995FE7E3080B6256880A456CED959FE4ECBC), 18 : ''Parallel to and separately from the work of the Dutch Safety Board, the Joint Investigation Team is conducting a criminal investigation into the crash in order to gather evidence and to bring the perpetrators to justice.''; for the Dutch Safety Board, see: Dutch Safety Board, *supra* note 494, 7 *ff*; as regards the mental element of a crime within the jurisdiction of the ICC, see: Rome Statute, Art. 30, paras. 2-3.

[495] Marchuk, *supra* note 286, 337.

[496] Marchuk, *supra* note 286, 337, 370; see also: Whiting, *supra* note 459.

[497] The argument that ''justice delayed is justice denied'' was used by Marchuk to suggest that the longer the Prosecutor examined the facts the worse for the victims. See: Marchuk, *supra* note 286, 370: ''While it took long seven years to request the authorization of an investigation in the situation in Georgia, it is hoped that the Prosecutor would be able to decide much sooner on how to proceed with the second Ukraine's declaration, as it holds true that "justice delayed is justice denied.".

[498] For cases at the ICYT, see: ICTY, ''The Cases,'' *ICTY – Webpage*, 29 May 2018 (available at http://www.icty.org/en/action/cases/4); as regards the trial of the chief executioner of the Khmer Rouge regime at the Cambodian genocide tribunal, the Extraordinary Chambers in the Courts of Cambodia, which receives international assistance through the United Nations Assistance to the Khmer Rouge Trials (UNAKRT), see: Sybille Golte, ''Justice delayed is not justice denied,'' *DW*, 7 February 2012 (available at http://www.dw.com/en/justice-delayed-is-not-justice-denied/a-15724684).

[499] Whiting, *supra* note 459: ''The Georgia case also tells us something about what is likely to happen in some of the other sensitive cases that are still in the preliminary examination phase at the ICC (Afghanistan, Palestine, Ukraine), all of which also involve non-State Parties. Now that the Prosecutor has moved on Georgia, it is not likely that she will open any of these other situations anytime soon.''.

war in Eastern Ukraine.[500] The right to life is the principal human right from which all other human rights obligations derive because ''the enjoyment of the right to life is a necessary condition of the enjoyment of all other human rights''.[501] It is comprised of two dimensions, a material and a procedural one: The first makes it obligatory for Ukraine, Russia and the non-state actors DPR and LRP to assure the right of people living under its authority not to be killed, which constrains the application of force.[502] If reasonable evidence showed that an individual was deprived of her/his life, which has occurred multiple times e.g. during the Maidan protests and especially in the war in Eastern Ukraine, under IHRL the state of Ukraine, Russia as an occupying power in Crimea and the DPR and LPR in Eastern Ukraine have to guarantee an independent and impartial investigation into the death of any individual on the territory they are in control of.[503]

One of the central tasks of the HRMMU is therefore to observe the situation in the conflict zones, gather facts that attest to breaches of obligations under IHRL and IHL of the Ukrainian government, the occupying Power Russia and the LPR or DPR and continuously address the conflict parties to uphold its international obligations.[504]

Raising awareness of breaches of IHL, the HRMMU has helped to give victims from both sides of the armed conflict a voice to disclose the suffered war crimes as torture, abductions and other ill-treatment, be it Ukrainian soldiers who were held captive in the rebel area and then released, combatants of the conflict party LPR and DPR who were interrogated by Ukrainian special services, or ordinary citizens living close to or in the conflict zone.[505] Conducting interviews with these victims can be considered as a tool to identify the perpetrators, to send a clear signal that (war) crimes that have been committed throughout the armed conflict in Eastern Ukraine do not go unpunished and generally, to hold the powerful to account.

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[500] OHCHR (k), *supra* note 9, para. 6.

[501] Franciszek Przetacznik, "The Right to Life as a Basic Human Right,"*Revue des droits de l'homme/Human Rights Journal*, vol. 9, no.1 (1976), 589,603; OHCHR (k), *supra* note 9, para. 6.

[502] HRC, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns*, UN Doc A/HRC/26/36, 1 April 2014, para. 46; OHCHR (k), *supra* note 9, paras, 7,12; as regards the obligations of non-state actors, see: footnote 377 in this paper.

[503] HRC, *supra* note 502, para. 46; OHCHR (k), *supra* note 9, para. 7; in its Advisory Opinion on *Restriction to the Death Penalty*, the Inter-American Court distinguished between a ''substantive principle'' and a ''procedural principle''. Whereas the first stipulates that ''every person has the right to have his life respected'', the second encompasses the principle that ''no one shall be arbitrarily deprived of his life'': *Restrictions to the Death Penalty (Arts. 4(2) and 4(4) American Convention on Human Rights)*, Advisory Opinion OC-3/83, Inter-American Court of Human Rights, 8 September 1983, para. 53.

[504] See the latest report of the HRMMU, where the OHCHR made recommendations to the different conflict parties to respect IHR. For Recommendations to the Ukrainian authorities, see: OHCHR (p), *supra* note 354, paras. 150 (a-b); for recommendations to the DPR and LRP, see: OHCHR (p), *supra* note 354, para. 151 (d); for recommendations to Russia, see: OHCHR (p), *supra* note 354, para. 152 (d).

[505] For interviews with different actors, see: OHCHR (p), *supra* note 354, para. 3; OHCHR (o), *supra* note 4, para. 2; OHCHR (i), ''Report on the human rights situation in Ukraine 16 February to 15 May 2015,'' *UN*, 1 June 2015, paras. 31-32, 36-38, 45-49 (available at http://www.ohchr.org/Documents/Countries/UA/10thOHCHRreportUkraine.pdf).

Three arguments corroborate the thought that the reports of the HRMMU submitted to the High Commissioner for Human Rights and published on the OHCHR's website on a quarterly basis play a key role as an evidence gathering mechanism in the context of the Ukraine crisis: 1) In its application to institute proceedings against Russia at the ICJ, the Ukrainian government drew on the reports of the UN monitoring mission to prove that Russia was in breach of its obligations laid down in the ICSFT and CERD.[506] 2) Also, both the legal agents of both countries and judges of the ICJ in their opinion appended to the ICJ's order cited the observations of the HRMMU to underpin their argumentation.[507] 3) And in the latest report on its preliminary examination activities, the ICC referred to the OHCHR, which identified the amount of soldiers and civilians that had been killed or injured during the armed conflict in Eastern Ukraine.[508]

Furthermore, under the authority of the UN, as an independent and objective mechanism, the HRMMU has ''elevated'' the legal status of the rebel groups because it has directly referred to their obligations under IL.[509] For example, in many of its reports it spoke of the ''responsibility'' or ''accountability'' of the DPR and LPR for infringements of IHRL and IHL.[510] The reports officially state

[506] For Ukraine's reference to the reports of the HRMMU as a proof for Russia's breach of the ICSFT, 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)*, *supra* note 5, p. 10, paras. 40-41, p. 21, paras. 69, 72; For Ukraine's reference to the reports of the HRMMU as a proof for Russia's breach of the CERD, 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)*, *supra* note 5, pp. 25-26, paras. 88-89, pp. 27-28, paras. 95, 97 *ff*.

[507] For the legal agent representing the Russian Federation at the ICJ, see e.g.: Samuel Wordsworth in: *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)*, *supra* note 397, p. 25, para. 13 *ff*; for the legal agent representing Ukraine at the ICJ, see e.g.: Marney Cheek in: *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)*, *supra* note 397, pp. 43-44, para. 28; for judges at the ICJ, see: e.g. Cancado Trindade in: *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)*, *supra* note 438, pp. 9-12, paras. 27-35; Judge Bhandari in: *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)*, *supra* note 256, pp. 13-15,18, paras. 29-30, 32, 44; see also Judge Crawford in: *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)*, Separate Opinion of Judge Crawford Appended to Order, ICJ, 19 April, p. 2, paras. 4,6.

[508] ICC, *supra* note 338, para. 105.

[509] OHCHR (i), *supra* note 505, paras. 9,129; OHCHR (j), ''Report on the human rights situation in Ukraine 16 August to 15 November 2015,'' *UN*, 9 December 2015, paras. 6, 129 (available at http://www.ohchr.org/Documents/Countries/UA/12thOHCHRreportUkraine.pdf); OHCHR (l), ''Report on the human rights situation in Ukraine 16 February to 15 May 2016,'' *UN*, 3 June 2016, para. 213 (available at http://www.ohchr.org/Documents/Countries/UA/Ukraine_14th_HRMMU_Report.pdf) (together with this 14th report of the OHCHR, in all subsequent reports the DPR and LPR have been directly addressed by the OHCHR for the purpose of implementing the OHCHR's policy recommendations: see, e.g: OHCHR (p), *supra* note 354, para. 151 (d).

[510] *Ibid*.

that individuals of the DPR and LPR together with the commanders should be brought to account for crimes under IL.[511]

A similar approach to render the conflict parties aware of their obligations under IL has been applied to Russia. In the beginning of the reporting, the HRMMU made recommendations to the ''de facto governing authority of the Russian Federation'' requesting Russia to act in line with UNGA Res. 68/262.[512] After the adoption of UNGA Res. 71/205, which officially calls Russia ''an occupying Power'', the OHCHR has omitted mentioning other authorities in regard to the occupation of Crimea than the Russian Federation in its reports.[513] Moreover, in its most recent account on the situation in Ukraine, the OHCHR recalled the latest adopted UNGA Res. 72/190 urging Russia to implement the resolution and to finally allow the HRMMU to operate in the occupied territory of Crimea.[514]

Looking into the reports, a connection between the actions of the UNGA and the HRMMU becomes apparent. With every adopted UNGA resolution on Ukraine, the HRMMU could utilize the legal documents to directly address Russia regarding its obligations under IL as an occupying Power. It supports the argument that the HRMMU has served the purpose of constantly trying to hold Russia for its occupation in Crimea to account. The HRMMU has also been addressing Russia's breaches of human rights obligations especially in regard to the Tatars and other activists, who had been resisting the Russian occupation.[515] Since Russia has not complied with the ICJ's preliminary order and still pursues discriminative policies against the Tatar minority, the HRMMU remains important in addressing Russia's obligations under IL. It is for this reason why the mission asked Russia to implement UNGA Res. 72/190 which *i.a*. urged the Kremlin ''{t}o fully and immediately comply with the order of the International Court of Justice of 19 April 2017 on provisional measures''.[516]

In view of the ICJ's indication of preliminary measures in regard to the CERD, at this stage of proceedings, it can be said, that the HRMMU's reports have helped to vindicate the rights of the Ukrainian state and its citizens, breached by Russia under the CERD. In its order, the ICJ consulted documents of the OHCHR to explain its indication of preliminary measures in regard to Art. 5(c), (d)

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[511] *Ibid*.

[512] See e.g.: OHCHR (f), *supra* note 24, para. 331 (o-w); OHCHR (g), ''Report on the human rights situation in Ukraine 17 August 2014,'' *UN*, 29 August 2014, para. 178 (available at http://www.ohchr.org/Documents/Countries/UA/UkraineReport28August2014.pdf).

[513] UNGA Res. 71/205, *supra* note 85, para. 2 (a); as regards the OHCHR's reports, see e.g.: OHCHR (n), *supra* note 358, para. 226 (a); OHCHR (m), ''Report on the human rights situation in Ukraine 16 November 2016 to 15 February 2017,'' *UN*, 15 March 2017, para. 169 (available at http://www.ohchr.org/Documents/Countries/UA/UAReport17th_EN.pdf); OHCHR (o), *supra* note 4, para. 174.

[514] OHCHR (p), *supra* note 354, para. 152 (a).

[515] See e.g.: OHCHR (n), *supra* note 358, para. 226 (p-q,t); OHCHR (f), *supra* note 24, para. 331 (s,u-v); OHCHR (p), *supra* note 354, para. 13.

[516] UNGA Res. 72/190, *supra* note 85, para. 3(b); OHCHR (p), *supra* note 354, para. 152 (a).

and (e) of the CERD.[517] The Court ''{took} note'' of two reports of the OHCHR on the human rights situation in Ukraine and considered parts of the previously established facts by the HRMMU as evidence in support of Ukraine's claim that Russia was, *prima facie*, in breach of its obligations under Art. 5(c), political rights, (d), other civil rights, and (e), economic, social and cultural rights.[518] Hence, one can posit that the HRMMU's reports have played an important part in holding Russia responsible for banning the representative body of the Tatar minority, the Mejlis, and denying their political rights. It should be mentioned, however, that the ICJ could only apply the relevant evidence where it supported the Court's reasoning based on its own jurisdictional procedure in the context of Ukraine's application of the CERD. In this specific case, the OHCHR's elaborations on the ban of the Mejlis helped satisfying the ICJ's plausibility and urgency criteria as regards to the specific legal requirements laid down in the CERD.

On the contrary, the ICJ's order not to indicate preliminary measures in regard to the ICSFT shows the limits of the HRMMU's reports. Even though Ukraine's legal agent at the ICJ cited the documents of the OHCHR to prove these elements, she could not convince the Court because (1) the OHCHR has never applied the term ''terrorism'' to describe the violations of IHL by the LPR and DPR and (2) one cannot infer from the reports that Russia should have known or had the intent that the financing of the DPR and LPR by persons linked to Russia would have led to acts within the scope of Art. 2(1)(a) and (b) and therefore breached the ICSFT.[519] In conclusion, the OHCHR reports reach their limits in holding Russia responsible on the basis of the ICSFT.

Examining the arguments of Russia's legal agent, Mr. Woordsworth, and the later order of the ICJ not to indicate preliminary measures concerning the ICSFT, one could raise the issue that the reports of the OHCHR even weakened Ukraine's legal position. As pointed out by Woordsworth, in various documents the OHCHR did actually identify indiscriminate attacks from both sides of the conflict.[520] This would suggest that parts of the Ukrainian armed forces might have committed war crimes requiring accountability. Nevertheless, in regard to Ukraine's request to indicate preliminary

[517] *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)*, *supra* note 238, para. 97.

[518] *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)*, *supra* note 238, paras. 83, 96–97; CERD, Art. 5 (c–e).

[519] Marney Cheek in: *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)*, *supra* note 397, p. 44, para. 28.

[520] Samuel Wordsworth in: *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)*, *supra* note 397, pp. 25–27, paras. 13–17; for OHCHR reports, see e.g.: OHCHR (k), *supra* note 9, para. 33: ''As noted by the United Nations Special Rapporteur on extrajudicial, summary or arbitrary executions, instead of responding to, investigating or prosecuting cases of indiscriminate shelling by their own military forces, "each side is dedicating its time to documenting in laudable detail the violations of the other side with a view to continuing their confrontation in national or international courtrooms.''.

measures on the basis of the ICSFT, the question of whether Ukraine was itself in breach of its obligations under IHL ought not to have influenced the ICJ's legal assessment of the case. However, it poses a danger to the strength of Ukraine's general legal position having allegedly committed war crimes during the complex, highly politicised armed conflict in Eastern Ukraine. One wishes to see all perpetrators of any indiscriminate attacks to be brought to justice, as recommended by the OHCHR.[521]

Chapter VI – Reflections on The Tools and Barriers of IL

6.1) Results of the First Perspective: ICJ

First and foremost, one needs to recall that this thesis has focused on the current stage of the proceedings at the ICJ and the ICC. In consequence, the answers to the research question are not exhaustive.

Reflecting upon the results of chapter IV and V, Ukraine's application at the highest Court on the basis of the treaties of the ICSFT and CERD demonstrate the difficulties in establishing state responsibility in cases where an aggressor committed the ''most serious and dangerous form of the illegal use of force''. Based on the analysis and assessment of the first perspective, one has no other option but to conclude that the tools of IL to hold Russia directly responsible for its aggression are limited in the specific case of Ukraine at the ICJ.

Whereas in *Nicaragua v. United States of America* the US could be held liable for breaches of customary law such as the prohibition of non-intervention in the internal affairs of another state, the prohibition of the use of force or the violation of the sovereignty of a foreign State (and even had to pay reparation to the Nicaraguan government) owed to the fact that it had accepted the ICJ's jurisdiction *ipso facto* pursuant to Art. 36(2) of the ICJ Statute, in *Ukraine v. Russian Federation* the Court's jurisdictional scope is confined to the provisions stipulated in the ICSFT and CERD based on the *compromissory clause system*.[522]

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[521] See e.g.: OHCHR (k), *supra* 9, para. 69 (c): ''Facilitate the investigation and prosecution by the competent authorities of any person allegedly responsible for human rights' violations or abuses and violations of international humanitarian law, including wilful killings and executions, notably by ensuring that relevant information and evidence are preserved.''; see also: OHCHR (i), *supra* note 505, para. 178(e): ''To the Government of Ukraine: Investigate all violations of human rights and international humanitarian law committed in the east, including by the Government forces.''.

[522] As regards the Court's decision in the *Nicaragua v. United States of America*, see: *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, *supra* note 42, paras. 292(3), 292(4), 292(5); for US's acceptance of the ICJ's jurisdiction *ipso facto* prior to its withdrawal from the Court's general jurisdiction in 1986, see: *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction of the Court and Admissibility of the Application, Judgement, ICJ, 26 November 1984, para. 13: ''Article 36, paragraph 2, of the Statute of the Court provides that: {…} The United States made a declaration, pursuant to this provision, on 14 August 1946, containing certain reservations {…}.''.

One can generally reason that the main barriers for Ukraine to vindicate its rights at the ICJ lay both within the instruments the state took recourse to and in the procedural steps of the ICJ that are required to be satisfied based on the ICJ's scientifically orientated approach of treaty interpretation. One should take into account that the adoption of a convention requires the consent of a state. Bearing in mind, that especially powerful states are reluctant to give up legal sovereignty to other Courts, the sceptical reasoning of states leads to provisions heavily characterised by various clauses (or here: barriers) that need to be satisfied before a state can be hold responsible for a wrongful act on the basis of the treaty. This point is also reflected in Art. 2(1) of the ICSFT, where it has to be proved first that a person provided funds with the intent and knowledge that they will be used to perpetrate terrorist acts, before a state may become liable for the fact that it did not cooperate in the prevention of the financing of terrorism. Adding these different aspects together, the plaintiff has to fulfil high legal requirements, which find their main expression in the ICJ's plausibility test regarding the ICSFT.

Even if from a moral point of view one might have the impression that rather the rights of the aggressor than those of the victim state have been vindicated, this perspective demonstrated that the ICJ ''is a Court of law {that} can take account of moral principles only in so far as these are given a sufficient expression in legal from.''[523] In other words, it can only enforce the norms accepted by states and stipulated in specific conventions in the light of its own institutional and procedural constraints, which are heavily shaped by a state-centric reasoning.

6.2) Results of the Second Perspective: ICC

Contrary to the rather grim outlook for Ukraine's application at the ICJ, the results of the analysis of the second perspective allow for being more optimistic that serious crimes committed by individuals affiliated with the DPR/LPR or the Russian government will not go unpunished. Even though Russia as a state cannot be hold responsible at the ICC, on the basis of the results of this thesis, it seems to be quite realistic that the OTP will establish that Russia exercised overall control over the DPR and LPR.

This author holds the opinion that the overall control test does not constitute a barrier at the preliminary examination phase. For the first time in this yearlong war instigated by Russia, an international institution of a high authority could officially determine that Russia equipped and financed the rebels, sent Russian soldiers to the Donbas and generally directed the conduct of the

[523] *South West Africa (Liberia v. South Africa)*, Judgement, ICJ, 18 July 1966, para. 49: ''The Court must now turn to certain questions of a wider character. Throughout this case it has been suggested, directly or indirectly, that humanitarian considerations are sufficient in themselves to generate legal rights and obligations, and that the Court can and should proceed accordingly. The Court does not think so. It is a Court of law, and can take account of moral principles only in so far as these are given a sufficient expression in legal form. Law exists, it is said, to serve a social need; but precisely for that reason, it can do so only through and within the limits of its own discipline. Otherwise, it is not legal service that would be rendered.''.

DPR and LPR. If such a determination was to be made by the OTP, one could describe Ukraine's acceptance of the ICC's jurisdiction as a strategically shrewd choice. At the preliminary examination stage this would be a symbolic win to Ukraine from a political point of view.[524]

Based on the analysis of the second perspective, it is also believed that neither the gravity, nor the admissibility, nor the interest of justice requirements constitute a barrier for the initiation of an investigation. What might rather prevent the Prosecutor from requesting the Pre-Trial Chamber to open an investigation are factors that this author would not have envisaged prior to the commencement of the thesis. The main barrier to try individuals for the most serious crimes in the context of the Ukraine crisis are (1) the Court's capacity limits and (2) Ukraine's domestic political situation.

A crucial barrier that attests to the Court's capacity limits pertains to the issue of a possible arrest warrant or a summons to appear. As briefly touched upon in this paper, potential suspects of the DPR/LPR or Russian armed soldiers that participated in the war in the Donbas are outside the reach of the ICC and Ukraine, as they either fight in the rebel held areas or live on Russian territory. There is small reason to believe that Russia would cooperate with the ICC and extradite its soldiers who are *i.a.* suspected of downing flight MH17.[525]

Irrespective of Ukraine's potentially symbolic win at the preliminary stage of proceedings, the fact that the OTP is not only allowed to examine alleged crimes committed by individuals either affiliated with the separatists or the Russian government but also by the Ukrainian armed forces poses a risk to the political survival of the current Ukrainian government. If one were to imagine that the Prosecutor requested the Pre-Trial Chamber to open an investigation into the *situation in Ukraine* and the Pre-Trial Chamber confirmed the Prosecutor's examination results, then the OTP could independently investigate war crimes or crimes against humanity committed by all individuals taking part in the armed conflict in Ukraine. It is difficult believe that the Ukrainian legal authorities would investigate alleged serious crimes of its soldiers to ''shield' them from a possible trial at the ICC, especially if one considers that mainly voluntary battalions helped defend Ukraine's sovereignty against the aggressor state Russia. Nor is it realistic that Ukraine would accept the ICC to issue an arrest warrant for any high-ranking soldier linked to the influential Azov regiment.

In view of the analysis and the aforementioned arguments, one can therefore conclude that even if an investigation into *the situation in Ukraine* would be opened, significant barriers remain for holding

[524] The symbolic element plays a significant role in international disputes; see: James Crawford and Simon Olleson, *The Character and Forms of International Responsibility*, in: Malcolm D. Evans (ed.), International Law, 2014, 470: ''Although international tribunals have gradually been moving towards a more realistic appreciation of issues of compensation {…} – and of remedies more generally – it remains the case that many international disputes have a distinctly symbolic element. The claimant {…} may seek vindication more than compensation.''.
[525] Not suspected by the ICC, but by the international community.

individuals responsible for the most serious crimes. Although the Rome Statute provides Ukraine far more tools to vindicate the rights of its citizens than any treaty the ICJ could adjudicate on the basis of Ukraine's application, the results of this thesis demonstrate that other institutional factors of the ICC and political barriers irrespective of the wide provisions of the Rome Statute might shape the further procedure of the Court to the detriment of the victims to the most serious crimes In Ukraine.

The establishment of the ICC has given hope that justice might be achieved at the international level when states are either unable or unwilling to investigate ''the most serious crimes of concern to the international community''.[526] As regards the *situation* in Ukraine, one should not lose hope that criminals of the DPR/LPR and criminal individuals of the Russian state will stand trial at a court in the future. Whether it will take place at The Hague, at a Ukrainian or any other national court[527], one will probably learn in several years when not decades (after the Putin regime collapsed). However, justice delayed is not justice denied.

6.3) Results of the Third Perspective: HRMMU

The UN monitoring mission in Ukraine has served an extremely valuable purpose, namely to gather evidence and establish the facts in a chaotic situation where false news, specifically produced by Russian state media, proliferate. It gave thousands of victims of violations of IHRL and IHL and their relatives a voice. Based on these collected facts, the HRMMU's report became an often-cited source by the ICJ (and the ICC) and considerably shaped the outcome of the ICJ's decision in introducing preliminary measures with regard to the CERD. Especially the recommendations addressed to the Ukrainian government, the DPR/LPR and the Russian state as an occupying power of Crimea can be

[526] Rome Statue, preamble.

[527] Here, a thought is given to the principle of universal jurisdiction: Similar to a case where the Public Prosecutor General of the German Federal Court of Justice, Peter Frank, has initiated an investigation against a high-ranking official of the Assad regime, Jamil Hassan, chief of the Syrian air force secret service, who has committed crimes against humanity against Syrian citizens during the Syrian civil war, countries, which national jurisdiction allows for the initiation of a case related to heinous crimes, could open an investigation against Russian officials identified to have committed war crimes failing within the purview of universal jurisdiction. The downing of MH17 could be such a case. The Prosecutor, however, would still depend on the other state's cooperation as regards the question of extradition. For trials to take place in countries as the Netherlands or Australia, which both lost nationals in the MH17 plane crash, the suspect has to be present on the country's soil: Human Rights Watch, ''The Legal Framework for Universal Jurisdiction in the Netherlands,'' *HRW*, 5 July 2018 (available at https://www.hrw.org/sites/default/files/related_material/IJ0914Netherlands_0.pdf): ''There are limitations on Dutch courts' jurisdiction over grave international crimes. Most importantly, the suspect must be present on Dutch territory before criminal justice authorities can carry out an investigation.''; see further: The Permanent Mission of Australia to the United Nations, ''Australian Views on the Scope and Application of the Principle of Universal Jurisdiction,'' *UN*, 3 May 2016 (available at http://www.un.org/en/ga/sixth/71/universal_jurisdiction/australia_e.pdf): ''Australia has an established framework for ensuring that perpetrators of serious crimes of international concern are brought to justice. {…} Trials in Australia will generally only be conducted in the presence of the accused.''; for the German investigation into the crimes in Syria, see: Jörg Diehl, Christoph Reuter, Fidelius Schmid, ''Die Jagd,'' {translated by author: ''The Hunt''}, *Der Spiegel*, no. 24 (9 June 2018), 40-42.

considered as a tool, that holds the conflict parties to account for any violation of IHRL and IHL. Even though the resources and the capacity of the mission are limited, its cooperation with local activists and NGOs has helped to fill the legal void in Crimea and the Donbas by reminding the conflict parties about their obligations under international law.

The limits of the HRMMU lie in the nature of its mandate. It cannot enforce international law as the ICC or the ICJ. An additional limit of the mission became apparent when the ICJ refused the indication of preliminary measures on the basis of the ICSFT. Although a considerable amount of facts proved Russia's involvement in Donbas, the evidence in the reports of the HRMMU could not satisfy the ICJ's plausibility test. This shows that any fact collected by the monitoring mission can only be used by the ICJ if it helps to fulfil the relevant provision of the treaty. In regard to the ICSFT, this was not the case.

Nevertheless, all in all, the HRMMU sends an important sign that crimes, which the perpetrators have not yet been hold responsible for, will not go unpunished in the future and that the victims should remain hopeful to receive redress for the sufferings they had to endure. Justice will be done as the facts are at hand thanks to the voluntary decision of the Ukrainian government to request the OHCHR to dispatch a monitoring mission on its territory.

Chapter VII – Concluding Remarks

The Russian historian, Andrey Zubov, rightfully warned of the legal consequences Russia's annexation of Crimea would entail for the Kremlin and the international system. February 2014 marked the beginning of an armed conflict between Russia and Ukraine nobody would have imagined to occur in Europe after the end of the Cold War. With Russia's actions ''put{ting} values that form the foundation of the international system at stake'', critics of IL as Posner believed that ''{n}o one {was} going to do anything about it''.[528]

Whereas the results of this thesis showed that various legal barriers indeed complicate the process of enforcing IL and holding Russia and its sponsored individuals responsible for their illegal conduct, Posner's statement ought not to be passed without comment. His sentence resembles the pessimistic views of both the Hobbesian rationalistic logic, which rests on the assumption that states did only follow IL when it was compatible with their self-interest, and even the Austinian School, that argued that IL was not law at all.[529] It might be true that the international system is still heavily shaped by a state-centric thinking in which powerful countries as Russia or the US can significantly influence the discourse of IL. However, the general results of this thesis proved realists wrong that IL did not provide *any* helpful tools, which could hold Russia or its sponsored individuals responsible, or

[528] Grant, *supra* note 20, x (preface); for Posner's criticism, see: Posner, *supra* note 31.

[529] As regards the different ways of thinking about IL, see: Harold Koh, "Review Essay: Why Do Nations Obey International Law?,'' *The Yale Law Journal*, vol. 106, no. 1 (1997), 2611.

accountable for their actions. By ''{r}ecognizing the strength and weakness of IL and pointing out what it can achieve and what it cannot'' one could understand the tools and barriers of the discipline.[530]

The ''Draft Articles on Responsibility of States for Internationally Wrongful Acts'' will further develop the concept of state responsibility. Irrespective of the fact that there is no world constitution, IL has evolved in other areas as in international criminal law and human rights law. With the adoption of various human rights law treaties and the creation of the ICC, the tools of IL have grown. IL is not static but it gradually evolves to the better. It is believed that closer cooperation between cooperative governments will further benefit the development of IL and enhance its enforcement tools in the future. In the words of Geiß: ''The mills of international law grind slowly but they do grind.'' [531]

[530] Shaw, *supra* note 135, 9.
[531] Geiß, *supra* note 95, 427.

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Annex

Concept Note --- UN Human Rights Monitoring Mission in Ukraine

Concept Note
UN human rights monitoring in Ukraine

Introduction

This concept note proposes the objectives and activities of enhanced OHCHR engagement in Ukraine through the immediate deployment of a human rights team.

Rationale for OHCHR's engagement

OHCHR has been closely following developments in the country with the High Commissioner for Human Rights publicly voicing concerns regarding human rights violations, including the restrictive legislation adopted by the Parliament on 16 January, urging inclusive and sustainable dialogue, and calling for investigations into cases of killings, disappearances and other violations. On 21 February, the Special Procedures of the UN Human Rights Council also issued a press release condemning the excessive use of force and calling for proper and impartial investigation into the reported incidents of human rights violations. To date OHCHR's engagement in Ukraine has been through its Human Rights Adviser within the UN Resident Coordinator and UN Country Team, supported by its geographical desk team in Geneva.

The deployment of an OHCHR team to Ukraine is fully consistent with, the requirements of the Secretary-General's Rights Up Front Plan of Action. The Plan of Action also aims to ensure that UN Country Teams are provided with the support they require to respond to the human rights context, including through the deployment of human rights expertise. OHCHR's engagement, and provision of information and analysis of the human rights situation, will further allow the UN to undertake further steps to respond to an emerging crisis in Ukraine as set out in the Plan of Action.

Objectives

- Monitor the human rights situation in the country and provide regular, accurate and public reports by the High Commissioner on the human rights situation and emerging concerns and risks;
- Recommend concrete follow-up actions to relevant authorities, the UN and the international community on action to address the human rights concerns, prevent human rights violations and mitigate emerging risks;
- Establish facts and circumstances and conduct a mapping of alleged human rights violations committed in the course of the anti-government demonstrations and ensuing violence between November 2013 and February 2014;
- Establish facts and circumstances related to potential violations of human rights committed during the course of the deployment.

Activities

Monitoring, reporting and advocacy – The submission of regular updates and analysis to the High Commissioner on the human rights situation and principal concerns, with a specific focus on, and

identification of, issues likely to have an impact on the overall security situation in Ukraine. This shall include recommendations for action to be taken by the relevant authorities, the international community and the UN in the country, and steps necessary to provide protection for persons at risk.

Coordination and collaboration with other human rights monitoring activities – The team will actively coordinate and collaborate with other human rights monitoring capacity within the country and deployments by other international organisations (including OSCE-ODIHR, CoE).. More detailed working arrangements with these actors on the ground will have to be further elaborated, especially with respect to public reporting.

Advisory role to the RC and UNCT – The team, with the support of the Human Rights Advisor, will provide advice and recommendations to ensure the integration of a response to the key human rights concerns within the strategy of the UNCT. This will include advice to the Resident Coordinator (RC) on advocacy measures to be undertaken with key national actors in relation to human rights concerns, and may undertake direct advocacy with specific partners and stakeholders, in coordination with the RC and OHCHR. The team will also provide guidance to relevant members of the UNCT, and input to UNCT meetings.

Composition and deployment of the mission

The mission will be conducted by a team of seven human rights officers, headed by one P5 team leader, and made up of six P4/P3 human rights officers, security and administrative support staff, and supported by 25 national staff.

The head of the team will be based in Kiev and be responsible for the staff in five other locations of the country: initial planning has identified Lviv, Odessa, Simferopol, Donetsk and Kharkiv. OHCHR will aim to co-locate OHCHR team members within UN premises in these locations, if available, or at the offices of other international organisations, including OSCE-ODIHR.

Security

OHCHR Safety and Security Section will assist the team in coordinating its activity with UN DSS and will provide advice on security related aspects. A security officer will be included as a member of the team.

Dates of the mission

The suggested timeline for this mission is from mid-March, ensuring continuity of an increased human rights presence after ASG Simonovic's departure, and for a period of up to three months.

Funding

Funding will initially be provided from the Secretary-General's unforeseen and extraordinary expenses, with additional funding sources to be sought.

Email Correspondence With Polina Levina Mahnad, OHCHR, Geneva:

From: Alexander Antonov [mailto:alant13@student.sdu.dk]
Sent: 28 March 2018 10:56
To: LEVINA Polina <plevina@ohchr.org>
Subject: Questions Regarding the Memorandum of Understanding between the OHCHR and the Government of Ukraine

Dear Ms. Levina

As agreed in our recent conversation on telephone, please find below my original request:

"As a student of the Master Degree Programme in "M.Sc. International Security and Law" at the University of Southern Denmark, I am currently writing on my master thesis which deals with the topic "International Law and Russia's Aggression Against Ukraine". The main goal of the final paper is to understand the legal tools International Law provides for establishing state responsibility and individual accountability. For this purpose, I assess (1) Ukraine's application at the ICJ, (2) Kyiv's referral of a situation to the ICC and (3) the role of the Human Rights Monitoring Mission (HRMMU) in the context of the crisis in Ukraine.

Initially deployed at the invitation of the Government of Ukraine for a period of three months, on the basis of a **Memorandum of Understanding signed between OHCHR and the Government of Ukraine**, the mandate of the Human Rights Monitoring Mission has been extended various times. Inferring from the website of the Ukrainian Ministry of Foreign Affairs, Pavlo Klimkin, Ukraine's Foreign Minister, has sent various **letters** to the UN Secretary requesting him to extend the mandate of the Monitoring Mission for Human Rights for certain periods of time.

In the course of the preparations to my thesis, I have tried to gather all necessary primary sources, including for the third case (the role of the Human Rights Monitoring Mission in Ukraine), and have searched for the documents that gave the OHCHR a legal mandate to deploy a Human Rights Monitoring Mission to Ukraine. Unfortunately, drawing on, *i.a.*, the UNBISnet, other UN sources and the Ukrainian Ministry of Foreign Affairs, I could neither find the **Memorandum of Understanding between the OHCHR and the Government of Ukraine** nor the **letters** sent by Pavlo Klimkin to the Secretary General extending the HRMMU mandate.

Against this background, I was wondering whether you could provide some advice on how to access these documents.

I would greatly appreciate your help!

With kind regards

Alexander Antonov"

RE: Questions Regarding the Memorandum of Understanding between ...

Löschen Ist Werbung Antworten An alle Weiterleiten Drucken Aufgabe

Von: LEVINA Polina
Betreff: **RE: Questions Regarding the Memorandum of Understanding between the OHCHR and the Government of Ukraine**
Datum: 28. März 2018 15:07:30 MESZ
An: Alexander Antonov

Dear Alexander,

Thank you for your email. I have contacted colleagues to assist with your request and hope to get back to you soon.
Until then, I would like to draw your attention to the 15 April 2014 Report on the human rights situation in Ukraine, which in para. 33 sets out that:

In the meantime, OHCHR deployed a Human Rights Monitoring Mission in Ukraine (HRMMU) as of 14 March, upon the invitation of the Government of Ukraine. The objectives of the HRMMU are to: monitor the human rights situation in the country and provide regular, accurate and public reports by the High Commissioner on the human rights situation and emerging concerns and risks; recommend concrete follow-up actions to relevant authorities, the UN and the international community on action to address the human rights concerns, prevent human rights violations and mitigate emerging risks; establish facts and circumstances and conduct a mapping of alleged human rights violations committed in the course of the demonstrations and ensuing violence between November 2013 and February 2014 and to establish facts and circumstances related to potential violations of human rights committed during the course of the deployment.

Moreover, the annex to that report contains a concept of operations for HRMMU:
http://www.ohchr.org/Documents/Countries/UA/AnnexReport.doc

I hope that is helpful for your research.

Very best,
Polina