The Netherlands/Ukraine, Classification of the Situation and Combatant Status (2014)

On 17 July 2014, flight MH17 crashed on the territory of Ukraine, resulting in the death of all 298 people on board. Eight years later, the Hague District Court delivered a judgement in which it examined the classification of the situation in Eastern Ukraine at the time, and whether the people accused of attacking the MH17 plane could benefit from combatant's immunity from prosecution.

Acknowledgments

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THE HAGUE DISTRICT COURT, JUDGEMENT

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1. FOREWORD

1.1 Introduction

On 17 July 2014, flight MH17 crashed in Ukraine, resulting in the death of all 298 people on board. In the MH17 criminal case, the Dutch Public Prosecution Service prosecuted four persons accused of involvement in the crash of this aeroplane, namely I.V. Girkin, S.N. Dubinskiy, O.Y. Pulatov and L.V. Kharchenko. The court has rendered simultaneous judgments in the cases of these four accused, each of whom is hereinafter referred to by his last name. This judgment relates to the accused Kharchenko.
The judgments in the four cases are phrased as similarly as possible, both owing to their interrelated nature and in order better to inform the reader about the court's assessment of the cases of all four accused. […]

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2. THE TRIAL

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3. THE INDICTMENT

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4. PRELIMINARY MATTERS

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4.4 Right of the prosecutor to prosecute

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4.4.3 Is there a limitation on jurisdiction under international law (immunity)?

4.4.3.1 Combatant immunity

[1] The court has already considered above that the Netherlands has jurisdiction with respect to the charges under Sections 5 and 8b(1) DCC. Under Section 8d DCC, jurisdiction may nevertheless be limited by exceptions recognised in international law. As the case file indicates that the set of acts referred to in the indictment occurred in the context of a conflict, the question arises as to whether so-called combatant immunity may apply. This matter was not raised by the accused, and certainly not by defendant Pulatov. If combatant immunity does apply, however, it follows that the prosecutor does not have the right to prosecute. That might then apply to the cases of all the accused. For this reason, the court will address this issue in more detail.

[2] Combatant immunity is an immunity relevant to the accused's possible status as a combatant in an armed

conflict. Whether a person has combatant status is governed by international humanitarian law, also known as the law of war. Under international humanitarian law, persons who have combatant status are authorised to participate in hostilities and thus to conduct combat operations (combatant privilege). If these acts are performed in accordance with international humanitarian law, those persons cannot be prosecuted under criminal law for those acts, acts which in peacetime might be considered a crime. This is combatant immunity.

[3] As indicated, combatant privilege is part of international humanitarian law. Therefore, combatant privilege - and the related combatant immunity - can only apply if international humanitarian law applies. International humanitarian law applies in the event of armed conflict.

[4] International humanitarian law differentiates between international armed conflicts (traditionally conflicts between nations) and non-international (also called internal) armed conflicts. The provisions regulating combatant privilege apply only to international armed conflict and not to non-international armed conflict.

[5] Therefore, the court must first determine whether an armed conflict existed at the time of the crash of flight MH17 and also whether it was international or non-international in nature. If the court finds that the conflict was non-international in nature, the accused are simply not entitled to this immunity. In this regard, the court notes that a non-international armed conflict must nevertheless be considered an international armed conflict if another country appears to be so heavily involved with the group with which a given country is fighting that the other country actually has overall control over that group. If the court finds that there was an international armed conflict, it must then ascertain whether the accused fall into the category of persons entitled to combatant privilege and, if so, whether they also meet the other conditions for it. The latter includes ascertaining whether the acts were carried out in accordance with international humanitarian law.

[6] The court recalls expressly that the question of possible combatant immunity must be answered in the light of the facts and circumstances pertaining to the indictment period. Therefore, what is considered below refers to that period in 2014, unless expressly stated otherwise.

[7] In order to make sense of those facts and circumstances, the court will first briefly outline the situation in that period in the area in which, according to the indictment, the offences charged occurred.

4.4.3.1.1 The situation in eastern Ukraine in July 2014

[8] When flight MH17 crashed in eastern Ukraine on 17 July 2014, the situation in the region was far from calm. There had been conflict there since around April 2014, with fighting between the Ukrainian army on the one side and armed groups on the other. One of the main goals of those groups was to achieve some type of separation, or self-government within, the Ukrainian state, for Ukrainian territory or parts thereof. The court will refer to these groups as ‘separatists’, as this reflects their aims while avoiding any judgement regarding

their origins or regarding the conflict itself. One such group consisted of several armed militia groups fighting under the name of the Donetsk People's Republic, the DPR.

[9] Ukraine was fighting against the separatists under the name Anti-Terrorism Operation (ATO). On 11 May 2014, the separatists in the Donetsk and Luhansk oblasts in eastern Ukraine actually declared independence, making the Donetsk People's Republic and the Luhansk People's Republic a reality for them. From that point onwards, the fighting between Ukraine and the separatists became more intense, with both sides using increasingly heavy weaponry.

[10] Partly as a result of international pressure, a ceasefire was declared unilaterally by Ukraine on 20 June 2014, ushering in a brief period of relative calm in eastern Ukraine. The Ukrainian military resumed the ATO when that ceasefire expired on 1 July 2014. This led to fighting on two fronts: in the northeast and southeast of Ukraine. In the northeast, the Ukrainian army was able to advance successfully, and the separatists were driven southward in the first half of July 2014. Fighting in the southeast was much heavier however. Fighting there was long and fierce from the start of July, and was still ongoing on 15, 16 and 17 July 2014. This is the area where Pervomaiskyi is located, the site from which flight MH17 is alleged to have been shot down on 17 July 2014.

4.4.3.1.2 Was there an armed conflict?

[11] The court must first assess whether the conflict between the Ukrainian army and the separatists may be characterised as an armed conflict.

[12] In the Tadić case, the International Criminal Tribunal for the former Yugoslavia (ICTY) provided a generally accepted definition of the two types of armed conflict mentioned above:

‘[…] an armed conflict exists whenever there is a resort to armed force between States [court: international armed conflict] or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State [court: non-international armed conflict].’

[13] Since the accused all held positions inside the DPR and stand accused of committing the alleged actions in their capacity as holders of those positions as part of the conflict between the Donetsk People's Republic and the Ukrainian armed forces, the court will have to assess whether the conflict between the DPR - which was not a State - and the Ukrainian armed forces can be characterised as "protracted armed violence between governmental authorities and organised armed groups."

Duration and intensity of the violence

[15] In order to make that determination, the court must, first of all, consider the question of whether there was ongoing armed violence of a certain intensity - in the sense of protracted armed violence - on the

territory of Ukraine when flight MH17 crashed, and during the period prior to that. In order to answer that question, the court considers the following factors which are apparent from the case file.

[16] From April 2014 onwards, three battle fronts developed in eastern Ukraine, together covering a considerable area. Clashes between the Ukrainian armed forces (both air and ground forces) and the separatist groups, or members thereof, occurred almost daily, ranging from shooting incidents to aerial attacks.

[17] The parties to the conflict both used firearms, including hand-held weapons, mortars, anti-tank mines, anti-personnel mines, portable air defence systems, missile launchers, tanks, armoured vehicles and artillery systems, inter alia in combat. International organisations have estimated that, between mid-April and mid-July 2014, these hostilities resulted in some 1,000 casualties, including both civilian and military. Most of the civilian casualties reportedly were so-called collateral damage from fighting that took place in populated areas. Over 86,000 people, most of them women and children, were displaced and fled the region. According to international and non-international governmental and non-governmental organisations, numerous human rights violations also took place. The conflict in eastern Ukraine was a subject of repeated discussion in the UN Security Council.

[18] Based on these factors alone, the court finds that the violence in eastern Ukraine, which began in April 2014 and was ongoing when flight MH17 crashed on 17 July 2014, lasted for such a prolonged period and was so intense that it can be said to be protracted armed violence between Ukrainian armed forces on the one hand and separatist groups, including the DPR, on the other.

Organisation of the DPR

[19] The next question facing the court is whether the DPR was sufficiently well organised at that time to be described as an ‘organised armed group’, as the above definition requires. In answering that question, the court considers the following factors.

[20] The DPR was proclaimed as early as 7 April 2014 by armed individuals who were occupying the regional administrative building in Donetsk. Separatists in the Donetsk and Luhansk oblasts then declared independence on 11 May 2014 following referendums that were not recognised by Ukraine, making the DPR and the LPR a reality as far as they were concerned. Both of these republics appointed leaders and governments, and adopted their own constitution.

[21] These constitutions set out the command structure and the assignment of duties within the organisation. They state, for example, that the Minister of Defence had direct responsibility for the armed forces at the operational level. Several militia groups, each with its own commander, operated under the banner of the Donetsk People's Republic. Interviews and intercepted telephone conversations indicate that most of these

militia groups did indeed fall under the authority of the Minister of Defence, particularly as time went on, with the exception of the occasional militia group. Although it is not always clear how the different militia groups related to one another, and they did not always appear to share the exact same objectives, in the court's opinion it is possible to state in general terms that all the militia groups were using weapons to fight for independence, or a greater degree of independence, from Ukraine. It is clear that, as soon as the DPR was founded, the organisation adopted the strategy of asserting its authority over a number of cities in eastern Ukraine - including Sloviansk, Kramatorsk and Donetsk - using armed force, and of setting up headquarters in those cities, such as in the building of the Ukrainian Security Service (SBU) in Sloviansk and, later, in Donetsk.

[22] What is more, it is clear from decisions delivered by the so-called Military Field Tribunal of the DPR that the organisation adopted martial law. On several occasions, the DPR also cooperated, which similarly indicates a certain degree of organisation and of involvement in armed violence.

[23] The court finds that, taking all these factors together, in the period prior to and during the crash of flight MH17, the DPR was organised in such a way that it can be said to have been an organised armed group.

[24] The fighting between the Ukrainian army and the Donetsk People's Republic can therefore be characterised as an armed conflict.

4.4.3.1.3 The nature of the armed conflict

[25] As the court has established that, prior to and at the time of the crash of flight MH17, there was intense fighting between Ukrainian armed forces on the one hand and organised armed groups including the DPR on the other hand, the criteria for characterising the situation as a non-international armed conflict have been met.

[26] Next, the court turns to the question of whether there is any reason to believe that the role of any other country in the conflict between the DPR and Ukraine was such that this armed conflict, which was non-international in geographical terms, can be characterised as a conflict that was in fact of an international nature (internationalised) during the period in question. This may be the case if a certain degree of involvement by another country can be established. In this case, that would refer to a significant degree of involvement by the Russian Federation. In this case – due to the position and/or role of the accused within the DPR – the issue is not whether the Russian Federation may have used violence directly against Ukraine separately from the armed conflict between the DPR and Ukraine (direct involvement by the Russian Federation), but rather whether the Russian Federation was involved in the DPR to such an extent that it can be characterised as having had overall control over the DPR. If the latter is the case, the non-international armed conflict between the DPR and the Ukrainian armed forces should actually be characterised as an international armed conflict and the question of combatant immunity may also arise. For that matter, in assessing whether the Russian authorities had overall control over the DPR, the court may also consider

facts and circumstances that indicate direct involvement of the Russian Federation in hostilities, as will be discussed below.

[27] In assessing the question of overall control, the court considers the following factors.

The background of members of the DPR

[28] Several of the leaders of the DPR at the time were Russian nationals, and a number of them also had a background in the Russian armed forces. For example, the accused Girkin, at the time Minister of Defence of the DPR, is a Russian national, served in the Russian intelligence agency (FSB) and took part in the wars in Chechnya, Transnistria and Bosnia. His deputy in the DPR and 'head of intelligence' in the DPR, the accused Dubinskiy, is also a Russian national, has a background in the Russian military intelligence agency (GRU) and took part in the wars in Afghanistan, North Ossetia and Chechnya. It is not always clear, however, in what capacity the leaders within the DPR were involved in the DPR. Although several of them indicate that they were retired (reservists) in the Russian Federation and came to Ukraine independently and voluntarily, it is not clear whether this is actually the case or whether they were sent there by the authorities of the Russian Federation. Based on intercepted conversations, at least some of them appear to have had a close connection with the Russian Federation. For example, there was communication between the leaders of the DPR and Surkov, who was then the closest adviser to the Russian President Vladimir Putin, regarding appointments to several ministerial posts within the DPR. In an intercepted conversation recorded on 16 May 2014, Borodai said that the government (of the DPR) was about to be announced, that Moscow had surprised him, and that he would be appointed Prime Minister, much to the disappointment of another individual who had arrived in eastern Ukraine from Moscow. Borodai was indeed appointed Prime Minister of the DPR shortly after this intercepted conversation took place. On 15 May 2014, a conversation was intercepted between Borodai and the Chairman of the Supreme Council of the DPR regarding the appointment of a named individual to the post of Minister of the Interior; during that conversation, it was said that the candidate in question "suits Moscow" and that the "Moscow Generals" agreed. In another conversation later that day in which the same Chairman of the Supreme Council took part, he also said that the list of government posts for "the hero city" should not be made longer and that one named individual would certainly not sit on the Security Council because he had not been approved by Moscow. Furthermore, the person who at that time was Minister of Culture of the DPR stated in a witness interview that the Deputy Prime Ministers of the DPR came from Moscow and had significant influence over the functioning of the DPR.

[29] Around the period to which the charges relate, several of the leaders of the DPR maintained ties with individuals from Russian intelligence agencies, the President's office, and Kremlin advisers. Intercepted conversations regularly contain references to contacting "Moscow". One example is a conversation between Dubinskiy and Bezler on 4 July 2014, in which Dubinskiy says that Girkin has been in touch with Moscow, and that Moscow does not want Sloviansk to be surrendered. The court also refers to a conversation that

Girkin had on 10 July 2014 in which he told Dubinskiy that he was constantly on the telephone trying to get in touch with Moscow to report on the situation. Contact was maintained with various high-ranking individuals in the Russian Federation, sometimes using special communication channels (“the Glass”) and secure telephones supplied by the Russian Federation. For example, Borodai, the leader of the DPR, was in almost daily contact with Surkov between 20 June 2014 and August 2014. In an interview on 16 June 2014, Borodai referred to Surkov as “our man in the Kremlin”.

[30] It is the opinion of the court that these references to “Moscow” and “the hero city” cannot be interpreted in any way other than as references to the seat of government, and are therefore understood to refer to the authorities of the Russian Federation.

Support

[31] In their communications with senior figures within the Russian Federation, the leaders of the DPR regularly requested support such as the manpower, military equipment and requisite training. This support was indeed provided.

[32] Statements made by representatives and reports by organisations such as NATO, the UN Security Council, the US State Department, the OSCE, and Human Rights Watch all mention the supplies and arms provided to the separatists from the Russian Federation. There are also references to convoys of military weapons which were said to have been brought across the border. This is consistent with what can be heard in intercepted conversations. For example, in one conversation intercepted on 12 June 2014, Dubinskiy says that it has become clear that Russia will provide support, including heavy weapons; in another conversation on 20 June 2014, Kharchenko tells Dubinskiy that the second convoy that came across the border is not what they were expecting; and on 15 July 2014, Girkin mentions expecting a shipment – a big thing that will be very good for “us” and which will need to be received at the border. Although intercepted conversations do not always reveal whether the weapons and supplies mentioned came from private providers or from the Russian government, the Minister of Culture of the DPR stated that Borodai forwarded requests for weapons from the Council of Ministers of the DPR to the GRU. Following approval by the GRU, the weapons were brought into Ukraine via the “Black Zero” (by which the court understands: illegal border crossing). The court also notes that NATO repeatedly called on the Russian Federation to stop providing support and weapons to the Ukrainian separatists.

[33] Witness statements also mention funding for the DPR provided by the Russian Federation. For example, the person who at that time was Minister of Labour and Welfare of the DPR stated that the person who arranged the funding received it with the cooperation of the Russian President’s office and that the Russian Federation had been funding the DPR since at least the summer of 2014. Support coming from the Russian Federation is also mentioned in intercepted conversations. For example, in a conversation on 13 July 2014, one fighter for the DPR complained about the situation with kit and salaries, to which the response was that “they” are going to Rostov today for a shipment. The intercepted conversations do not generally mention the

source of funding within the Russian Federation directly, other than to state that this was often routed via Rostov. The court concludes that this is a reference to the Russian city of Rostov.

[34] Several witness statements mention military training programmes for DPR fighters which took place in the Russian Federation. This often involved training in Rostov (again, the Russian city). Intercepted conversations also include references to training programmes and a training camp. In one conversation that was intercepted on 2 July 2014, separatists talked about their urgent need for manpower and when the “men from the camp” will arrive, and on 3 July 2014, a fighter from the DPR said that the guys went “across the river” to train. Again, it is not always clear whether this training was provided privately or organised by or on behalf of the Russian authorities. However, one conversation by the person who at that time was Minister of Defence of the LPR, with which the DPR was cooperating, makes a clear reference to the role of the Russian GRU in this. In that conversation on 15 July 2014, the Minister was told about a training programme that was being provided for ten persons, to which the Minister replied that this should be done through the GRU. Some of the witness statements also reveal the involvement of Russian bodies in training programmes. For example, witness M58, who will be discussed later, stated that he was taken to the FSB and then to a camp in Rostov, Russia, where he received training. After that he was taken to the Donbas region.

Coordination and instructions

[35] Of particular relevance to the question of whether there was overall control – regardless of the background of the members of the DPR and the Russian Federation’s support for the DPR – is whether the Russian Federation assumed a coordinating role and issued instructions to the DPR. It is the opinion of the court that the case file contains abundant evidence for this. As indicated previously, many intercepted conversations include reports to “Moscow” or people working for “Moscow” regarding the situation on the ground, such as setbacks and successes. A number of intercepted conversations also attest to planning on the part of the authorities of the Russian Federation. […] Additionally, on 10 July 2014, a leader of the DPR called to say that he had received an order in Moscow to form the first Cossack Regiment of Novorossiya.

[36] Intercepted conversations also mention Moscow’s role in specific operations. In a conversation regarding Sloviansk intercepted on 4 July 2014, a DPR commander says there has been communication with Moscow, but that Moscow does not want Sloviansk to be surrendered. The DPR’s Minister of Defence, the accused Girkin, stated in an interview given in July 2014 that this order was not followed because no concrete support was forthcoming. In a telephone conversation on 18 July 2014, two members of the DPR discussed the encirclement of a Ukrainian brigade. One of the two interlocutors stated that he had been in contact with Moscow and that Moscow had indicated that the lives of the soldiers should be spared. In a similar vein, a series of telephone calls between Borodai and a Russian number made on 21 July 2014 is noteworthy. Borodai wanted to speak to the boss, but the boss was not available. Increasingly insistently, Borodai asked if the boss could call him back because he needed advice and instructions on how to handle certain aspects of the MH17 disaster, such as the refrigerated trucks and the black box. Borodai would also like to receive

talking points for a press conference. Borodai noted at that point that he assumed that “our neighbours” would want to say something about this matter. It is the court’s opinion that the fact that Borodai talked about “our neighbours” and asked about “the boss”, even though he himself was the highest-ranking person within the DPR, confirms that the boss he was referring to was a representative of the authorities of the Russian Federation.

Direct participation of the Russian Federation

[37] Reports and communications from various organisations mention shelling and artillery fire on Ukrainian territory, which is said to have been carried out from the Russian Federation. From the first half of July 2014 onwards, Russian soldiers would regularly move across the border and cross-border attacks would take place. One investigation by the International Partnership for Human Rights indicates that there was artillery fire on a Ukrainian encampment close to the border with the Russian Federation in early July 2014, and in an official notice issued on 16 November 2016 the Netherlands Military Intelligence and Security Service also states that, between 11 July 2014 and 17 July 2014, rocket artillery units located in Ukrainian territory close to the Russian border fired on unknown targets in Ukraine. According to the report, the vehicle tracks and traces of firing found showed that artillery installations entered Ukraine from Russian territory. Witnesses have also provided statements regarding Russian equipment manned by Russian military personnel, which crossed the border, fired shells and then returned. Intercepted conversations also confirm that such strikes took place. For example, in a conversation between two members of the DPR intercepted on 12 July 2014, the interlocutors mention that Russia had finally begun to open fire on the Ukrainian armed forces. In another conversation intercepted on 16 July 2014, two members of the DPR - namely the accused Dubinskiy and Pulatov - discuss the problems they were having because they were under fire. Pulatov indicated that Russia could let loose, to which Dubinskiy replied that he has indicated positions on the map that will be sent to Moscow. In a conversation on 17 July 2014, accused Dubinskiy said that Russia intended to fire on their positions from its side. These conversations are just a few examples of a number of similar intercepted conversations in the case file. All of this indicates not only some form of parallel direct involvement but also, and more importantly, coordinated military activities by the DPR and the Russian Federation.

[38] To date, the Russian authorities have denied any involvement in the conflict in eastern Ukraine during the period in question. However, with respect to the foregoing, the court finds that the case file certainly shows that funding, men, training, weapons and goods were all provided to the DPR by the Russian Federation. In addition, as of mid-May 2014 at the latest, the Russian Federation had a decisive influence on appointments to several senior positions within the DPR, including those of Prime Minister and Minister of Defence. This gave the Russian authorities considerable influence over the leadership of the DPR. The fact that the Russian Federation did indeed exercise influence is apparent from the fact that the Russian authorities were involved, at times directly, in coordinating and carrying out military activities even prior to the crash of flight MH17.

[39] In view of the above, the court concludes that the Russian Federation exercised overall control over the DPR from mid-May 2014, at least until the crash of flight MH17. This means that the armed conflict, which was non-international in geographic terms, was internationalised and was therefore an international armed conflict.

[40] The court therefore finds that on 17 July 2014, an international armed conflict between Ukraine and the DPR was taking place on Ukrainian territory, and that the DPR was under the overall control of the Russian Federation.

4.4.3.1.4 Combatant status

[41] Now that the conflict between Ukraine and the DPR must be viewed as an international armed conflict, the provisions of international humanitarian law governing combatant status apply. The court therefore turns to the question of whether members of the DPR can claim such status.

Member of the armed forces of the DPR - Definition of combatant under Article 43, AP I

[42] Pursuant to the provisions of Article 43 of the first Additional Protocol to the Geneva Conventions, members of the DPR can only be considered combatants – and therefore only have had the ‘right’ to take part in hostilities – if they were members of the armed forces of one of the combatant states, in this case the Russian Federation. In this respect, the armed forces of the Russian Federation can be viewed as being all the organised armed forces, groups and units under a command that is responsible to the Russian Federation for the conduct of subordinates. Furthermore, these armed forces must be subject to an internal system of military discipline which enforces, among other things, compliance with the rules of international law. Combatant privilege can only be claimed successfully if these criteria are met.

[43] Firstly, the court notes that the DPR was not part of the official armed forces of the Russian Federation but rather – as outlined above – was subject to overall control by the Russian Federation. However, the characterisation of overall control is not, in itself, sufficient to conclude that it was under a command that was responsible to the Russian Federation for the conduct of its subordinates. For that, the Russian Federation would also have to accept that the DPR was part of the Russian Federation and take responsibility for the conduct and actions of the fighters under the DPR’s command.

[44] The court concludes that this is not the case, because the Russian Federation has denied, and continues to deny to this day, having any control over or involvement in the DPR during that period, and the accused have also publicly denied being part of the armed forces of the Russian Federation at that time. Therefore, DPR fighters cannot be seen as part of the armed forces of the Russian Federation.

[45] Since the DPR cannot be viewed as part of the armed forces of the Russian Federation, the members of

the DPR also cannot be considered part of those armed forces. For that reason alone, then, they were not entitled to participate in hostilities and are therefore not entitled to immunity from prosecution. The court is therefore not concerned with any of the other requirements for the possible invocation of immunity, such as whether the accused complied properly with the provisions of international humanitarian law.

[46] For the sake of completeness, the court notes that the literature argues that the criteria of Article 4(A) of the Third Geneva Convention (GC III) should also be considered when assessing whether accused are entitled to combatant privilege. The court finds that this is incorrect. That article is not concerned with combatants and their privileges and immunities, but rather with the status of prisoners of war.

4.4.3.2 Conclusion

[47] The court concludes that there is nothing that points to the existence of any international law limitation on the jurisdictional provisions. The prosecutor, therefore, has the right to prosecute.

[48] Since the condition set by the prosecution in its conditional application with respect to combatant immunity has not been met, that application requires no further discussion.

[…]

Discussion

I. Classification of the Situation and Applicable Law

1. (*Paras [8]-[24]*) What is the conclusion of the Court about the classification of the situation at the time of the crash?

1. Was the determination of the intensity and organization necessary to classify the situation as non-international armed conflict required, considering that the Court concluded that IHL of international armed conflicts applied because of overall control by the Russian Federation over the armed group?
2. Is it satisfactory to refer first to the ICTY Tadić case to assess whether there was an armed conflict on the territory of Ukraine? Would it not be more relevant to refer to the related treaty law provisions in the first hand? (GC I-IV, Art. 2; see *The Prosecutor v. Tadić*, Appeals Chamber, Merits, 15 July 1999 para. 87)
3. Does the Court first assess if there was an international armed conflict (IAC) at the time of the crash? Would it have been more coherent to examine the existence of an IAC first?
4. What are the criteria for determining whether a situation is a non-international armed conflict (NIAC)? How does the Court interpret the phrase "*protracted armed violence*"? Are the duration and the intensity of the armed violence equivalent conditions to determine whether the threshold of violence has been met? (see *The Prosecutor v. Haradinaj et al.*, Trial Chamber Judgement, 3 April 2008, para. 49)
5. Are the elements exposed in paras [16] and [17] related to the duration of the conflict? To what do they refer? Why are they relevant to assessing the intensity of the situation? (see *ICTY, The Prosecutor v.*

Boškoski, Trial Chamber Judgement, 10 July 2008, paras. 177-193)

6. What are the elements mobilized by the Court in order to assess the organization criterion? In your opinion are these elements relevant? Why? The Court seems to put a lot of weight on the fact that the Donetsk People's Republic (DPR) cooperated in establishing cease-fire agreements on several occasions to consider the group as sufficiently organized to be a party to the armed conflict? What do you think? (see *ICTY, The Prosecutor v. Boškoski*, Trial Chamber Judgement, 10 July 2008, paras. 194-206)

2. May the fact that the local authorities in the Donetsk and Luhansk oblasts declared independence affect the classification of the situation?

3. Why is it important for the Court to outline that it refers to the groups "*as 'separatists', as this reflects their aims while avoiding any judgement regarding their origins or regarding the conflict itself*"?

4. What is the effect of a unilateral ceasefire? Was the conflict over between 20 June and 1 July 2014? Would that mean that IHL ceases to apply during that period?

5. (*Paras [25]-[39]*) What do you think about the title of point 4.4.3.1.3? Did the Court not establish the "*nature*" of the conflict in the preceding section?

1. What did the Court have to determine in order to consider the conflict internationalised? Where does the "*overall control*" test come from? What does it consist of? (See *The Prosecutor v. Tadić*, Appeals Chamber, Merits, 15 July 1999)
2. What are the elements to be assessed in order to determine whether a State exercises its overall control over an armed group?
3. Which factors and circumstances did the Court consider in examining whether the DPR was under the overall control of the Russian Federation, at least on the day of the MH17 crash? What do you think about the elements mentioned by the Court regarding the background of the DPR's members? Regarding weapon and financial support? Regarding the training programmes for DPR fighters which took place in the Russian Federation? Are these elements decisive in assessing whether overall control existed? Why is the examination of whether the Russian Federation assumed a coordinating role and issued instructions to the DPR "*[o]f particular relevance to the question of whether there was overall control*"?
4. Was it necessary for the Court to consider the *direct* military involvement of the Russian Federation to apply the overall control test? Are direct involvement and overall control cumulative or alternative requirements for IHL of international armed conflicts to apply? If the Russian Federation was directly militarily involved in the hostilities, what are the consequences regarding the classification of the situation?
5. Is a "*considerable influence over the leadership*" of an armed group similar to exercising overall control over it?

II. Combatant status

6. (*Paras [40]-[45]*) What is the conclusion of the Court regarding the status of those who were fighting under

the DPR banner?

1. According to Art. 43 of AP I, which criteria have to be met for someone to claim combatant status? Which one was not fulfilled in the present case? How did the Court interpret the phrase "*command responsible to that Party*" of Art. 43? (P I, Art. 43; CIHL Rules 3, 4)
2. Are members of an armed group found to be under the overall control of a State necessarily combatants in an international armed conflict? Does such an armed group necessarily "*belong*" to the State in the sense of Art. 4(A)(2) GC III? Under Art. 43 AP I?
3. Do you agree with the Court that Art. 4(A) of GC III is irrelevant for the present case? Does Art. 4 GC III only define POW status while Art. 43 and customary law define combatant status (GC III, Art. 4(A)(2); P I, Art. 43 and Art. 44(6))
4. Would you agree with the Court that "*the Russian Federation would also have to accept that the DPR was part of the Russian Federation and take responsibility for the conduct and actions of the fighters under the DPR's command*" for the DPR to be POWs? Why? What is the purpose of the overall control test if "*the characterisation of overall control is not, in itself, sufficient to conclude that [the DPR] was under a command that was responsible to the Russian Federation for the conduct of its subordinates*"? Is the fact that a State denies having any control over or involvement in the activities of an armed group relevant for the assessment of the status of its members? What about the fact that those members publicly deny being part of the armed forces of that State? Could the Court have relied on the facts on the ground instead?
5. Could the Court have followed a different reasoning and still have reached the same conclusion, not granting the accused combatant immunity?
6. (*Para. 5*) Do only persons who carry out acts in accordance with IHL benefit from combatant status?