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MISTAKES OF FACT IN USE OF FORCE AGAINST CIVILIAN AIRCRAFT

The case of Ukraine International Airlines Flight 752

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ABSTRACT:

Cases of mistaken use of force against civilian aircraft have attracted wide attention by the international community. However, few attempts have been made to understand the complex legal questions that arise from such actions. This work assesses the concept of mistake of fact and the fragmented treatment it receives in four different sub-fields of international law (international criminal law, international humanitarian law, human rights law, and law of the use of force), with the aim of extracting some general conclusions as to whether or not mistakes of fact in self-defense should preclude or at least limit responsibility of States. We will latter test our conclusions to our case study: the shooting down of Ukraine International Airlines Flight 752. Although the incident of Flight 752 stands as a good example of negligent mistake where there is no room for a possible excuse, it proves useful to differentiate mistakes arising from a lack of proper diligence form those that stem from reasonable conduct. My final argument is that reasonable mistakes should act as an alleviating factor when determining the reparations arising from international responsibility.

KEYWORDS: Chicago Convention, right to self-defence, mistake of fact, Ukraine International Airlines Flight 752, international State responsibility

RESUMEN:

Los casos de uso erróneo de la fuerza contra aeronaves civiles han despertado una gran preocupación en la comunidad internacional. Sin embargo, se han hecho pocos intentos por comprender las complejas cuestiones jurídicas que se derivan de tales acciones. Este trabajo evalúa el concepto de error de hecho y el tratamiento fragmentado que recibe en cuatro subcampos diferentes del derecho internacional (derecho penal internacional, derecho internacional humanitario, derecho de los derechos humanos y derecho del uso de la fuerza), con el objetivo de extraer algunas conclusiones generales sobre si los errores de hecho en legítima defensa deben excluir o al menos limitar la responsabilidad de los Estados. A continuación, pondremos a prueba nuestras conclusiones utilizando como caso de estudio el derribo del vuelo 752 de Ukraine International Airlines. Aunque el incidente del vuelo 752 es un buen ejemplo de error por negligencia en el que no cabe una posible excusa, resulta útil diferenciar los errores derivados de la falta de diligencia adecuada de los que se derivan de una conducta razonable. Mi planteamiento final es que los errores

razonables deberían actuar como circunstancia atenuante a la hora de determinar las reparaciones derivadas de la responsabilidad internacional.

PALABRAS CLAVE: Convencion de Chicago, la legítima defensa, error de hecho, vuelo 752 de Ukraine International Airlines, responsabilidad internacional del Estado

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ABBREVIATIONS

ASR	Articles on State Responsibility
UNCLOS	United Nations Convention on the Law of the Sea
ECtHR	European Court of Human Rights
ICAO	Interantional Civil Aviation Authority
ICCPR	International Convenant on Civil and Political Rights
ICL	International Law Commission
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the former Yugoslavia
ECHR	European Convention on Human Rights
SAM	Surface-to-air missile
ICRC	International Committee of the Red Cross
I.R. IRAN AAIB	Islamic Republic of Iran Aircraft Accident Investigation Board

I. INTRODUCTION

In the cold morning of January 8, 2020, the Iranian Revolutionary Guard Corps air-defense battery fired two surface-to-air missiles directed against a flying object identified as a U.S. cruise missile approaching sensitive installations neat the capital city of Teheran. Unfortunately, the target had been wholly misidentified. The flying object turned out to be a Boeing 737-800 which had taken off from Teheran´s main airport a few minutes earlier. All 176 lives on board were lost.

The mistaken shootdown down of Flight 752 constitutes the latest of a series of incidents of similar nature that have haunted civil aviation since its genesis more than a century ago. The list of civilian aircraft shot down by error includes notable cases such as the shooting downing of El Al Airliner by Bulgaria in 1955, the of Lybian Arab Airlines Flight 114 downed by Israeli fighter jets over the Sinai in 1973, and Iran Air Flight 655, shot down over the Persian Gulf by the USS *Vicennes* in 1988, among others.

Beyond the human tragedy each one of these events entails, an attentive scholar of international law may have noted that all of them raise a problematic point of law frequently neglected: what happens when State mistakenly uses force, particularly deadly force, against overflying civilian aircraft?[1] Is this action still an international wrongful act or does it receive a separate treatment? These questions are all embedded in a larger and broader discussion of whether mistakes of fact serve as valid defense to preclude or diminish liability for a State´s wrongful action (as ca be, for example, shooting down a civilian plane). International law does not offer a definitive answer. In fact, depending on the angle in which we approach the problem, we can obtain confusing or even contradictory solutions.

This paper will thus be structured into three separate parts. The first one will illustrate a clear picture of existing legal framework relating to civilian aircraft and the rules pertaining to the use of force against civilian aircraft. The second part will introduce the

[1] The idea for this investigation originated from the discussions of the Philip C. Jessup Moot Court competition (2021 edition) and a three-post series in *EJIL: Talk*! by Dr Marko Milanovic, Professor of Public International Law at the University of Nottingham School of Law. For this work I have relied not only on international conventions and case law, but also on abundant number of academic works, many of which are to be found in on-line sources. Because mistake of fact is such a dispersed subject in the field of international law, it proved necessary to collect all this fragmented information in order to bring about an accurate picture of the matter.

concept of mistake of fact, its main components and its use in domestic legal systems, in order to subsequently explore the role this doctrine plays in the sub-fields of international law that are engaged in scenarios of a shootdown of a civilian aircraft: international criminal law, international humanitarian law, international human rights law and the law of the use of force (*ius ad bello*). We will close with a general conclusion on the possibility of invoking mistake of fact to preclude responsibility for an act of such nature. On the third part we will use the case study of UIA Flight 752 to test our conclusions obtained in the previous part and attempt to draw some legal solutions. In addition, we will examine some of the legal remedies available for the victims.

Although the incident of Flight 752 stands as a good example of negligent mistake where there is no room for a possible excuse, it does help to differentiate mistakes arising from a lack of due diligence form those that stem from reasonable conduct. **My final argument is that reasonable mistakes should act as an alleviating factor when determining the reparations that arise from international responsibility**. With this solution we would not be negating the intrinsic responsibility that emanates from such acts, yet it would allow to moderate reparations under reasonable mistake scenarios.

II. THE INTERNATIONAL CIVIL AVIATION REGIME

The birth and development of civil aviation over the last century has been followed by a blooming body of international rules and guidelines aiming to properly regulate this phenomenon. Today we can argue with confidence that all States (with minor exceptions) abide by the general principles and provisions governing international civil aviation, making this area of law a laudable example of our rules-based international order.

A. The Chicago Convention

The Chicago Convention on International Civil Aviation of 1944[2] (hereinafter "The Chicago Convention") lays out the international legal framework concerning civil air navigation between States and at the same time establishes the International Civil Aviation Authority, a UN specialized agency tasked with fostering the cooperation and coordination between member States in matters concerning civil aviation and adopting practices and regulations to ensure aviation safety and development.

Aside from the prohibition of the use of weapons against civil aircraft (which will be developed further below), some of the key aspects of the Chicago Convention are:

a) Sovereignty over airspace

Following the traditional roman legal principle *Cuius est solum eius est usque ad coelum*, Article 1 of the Paris Convention of 1919 first recognized the exclusive sovereignty of States over their own airspace, effectively acknowledging the spacial (upward) dimension that emanated from the territorial sovereignty[3], and today a well-established principle of international law.[4] The Chicago Convention, as a predecessor to the Paris Convention, subsequently reaffirmed this idea by "(…) *recogniz[ing] that every State has complete and exclusive sovereignty over the airspace above its territory*".[5] "Territory" is defined for the purposes of the Chicago Convention as "*The land areas and*

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[2] *Convention on International Civil Aviation* (7 December 1944) (1994) 15 U.N.T.S. 295. The Chicago Convention entered into force in 1947, and as of today (2021) has 193 State parties. See list of state parties at: https://www.icao.int/secretariat/legal/List%20of%20Parties/Chicago_EN.pdf [accessed 21 January 2022]

[3] Abramovitch, Y., "The Maxim `Cujus Est Solum Ejus Usque Ad Coelum´ As Applied in Aviation", *Mc Grill Law Journal*, vol. 8, 1962, pp. 247-270, p.247

[4] Anne de Luca, "Using the Air Force against Civil Aircraft. From Air Terrorism to Self-Defense", A*SPJ Africa & Francophonie*, vol. 3 n. 3, 2012, p. 48

[5] *Chicago Convention*. Article 1.

territorial waters adjacent thereto under the sovereignty suzerainty, or mandate of such State".[6] Therefore, it is exact to say that a State has exclusive sovereignty over the dimensional space above its surface territory and territorial sea, with the exclusion of maritime contiguous and exclusive economic zones.[7] This reading is in line with the delineation of the sovereignty of coastal States in Article 2 of the UNCLOS.[8] The airspace that falls outside this area is considered international airspace and open to aircraft of all nationalities, although under some circumstances States might exert some control over zones of the international airspace (ex. air identification zones).[9] Beyond "airspace"—even if the limits have not been precisely drawn—, lays the region of "outer space", subject to a different legal regime (Space Law).

b) Aircraft´s nationality

The Chicago Convention in Article 17 provides that "*Aircraft have the nationality of the State in which they are registered*". Under Article 18, dual registration is not allowed, but registration may be changed.

c) Definition of "civil aircraft"

Article 3 of the Convention establishes a distinction between "state aircraft" and "civil aircraft" in strictly functional terms. The former are aircraft "*used in military, customs and police services*" while the latter are all those falling outside that definition.[10]

B. Article 3 Bis and the prohibition of the use of force against civil aircraft

1. Origins

The prohibition of the use of force against civil aircraft follows the more general prohibition of the use of force between States enshrined in Article 2 (4) of the UN Charter.[11] The original text of the Chicago Convention made no explicit reference to the matter of the use of force against civil aviation with the exception of the procedures of

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[6] *Chicago Convention*. Article 2.
[7] Abeyratne, R., *Convention on International Civil Aviation: A Commentary,* Springer, 2014, p. 45
[8] *United Nations Convention on the Law of the Sea* (10 December 1982) 1833 U.N.T.S. 397
[9] Aust, A., *Handbook of International law*, (2nd Edition), Cambridge University Press, 2010, p.321
[10] Geiß, R., "Civil Aircraft as Weapons of Large-Scale Destruction: Countermeasures, Article 3bis of the Chicago Convention, and the Newly Adopted German "Luftsicherheitsgesetz*", Michigan Journal of International Law*, vol. 27, 2005, p.239
[11] Anne de Luca, *op. cit*., p. 46

intervention laid out in the Annexes to the Convention, which did include a provision advising against the use of weapons in cases of interception of civil aircraft.[12] However, a series of tragic incidents involving excessive use of force by States against civilian aircraft (Libyan Arab Airlines Flight 114 in 1973, Korean Airlines Flight 902 in 1978, and, most notably, Korean Airlines Flight 007 in 1983) prompted the ICAO Council and State parties to reinforce the mechanisms that afforded protection to civilian aircraft in flight.[13] To this end, in 1984 the ICAO Assembly voted to adopt "The 1984 Protocol to the Convention" effectively incorporating Article 3bis to the Convention. This provision entered into force in 1998.[14]

> ***Article 3 Bis***
>
> *The contracting States recognize that every State must refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of aircraft must not be endangered.*
>
> *This provision shall not be interpreted as modifying in any way the rights and obligations of States set forth in the Charter of the United Nations.*

2. Analysis of Article 3 Bis

a) "The contracting States recognize"

The discussion has been whether this provision is declaratory of pre-existing customary law or rather constitutes the birth of a new rule of international civil aviation. The *travaux preparatoires* of the 1984 Protocol reveal that the drafters intended to recognize a pre-existing rule of customary law.[15] The wording of the preamble to the Protocol, –which reads "*Having noted the general desire of contracting States reaffirm the principle of non-use of weapons against civil aircraft in flight"*[16]—, supports the view that this prohibition constituted a well-established customary norm. In addition, both the ICAO Council and the the UN Security Council has condemned the use of weapons

[12] Geiß, R., o*p. cit*., p.243 (citing Annex 2 to the Chicago Convention, Attachment A, paragraph 7 "(..) *intercepting aircraft should refrain from the use of weapons in all cases of interception of civil aircraft*".)
[13] *Ibid*, p.233
[14] As of 2021 it has received 157 ratifications. See https://www.icao.int/secretariat/legal/list%20of%20parties/3bis_en.pdf [accessed 15 January 2022]
[15] Geiß, R., o*p. cit*., p.229
[16] *Protocol relating to an amendment to the Convention on International Civil Aviation* (10 May 1984) UNTS 2122, p.337

against civil aircraft as being incompatible with "elementary considerations of humanity" and "the rules of customary international law".[17]

b) "that every State"

As a logical consequence of the rule being declaratory of customary law, the drafters of the 1984 Protocol understood that this obligation equally concerned third States not parties to the Convention.[18] This means that all States, irrespective of whether parties or not to the Convention, are bound to follow this rule. Moreover, because the wording of the article does not make distinction between the origins or registration of the aircraft and simply refers to "civil aircraft", this obligation has been construed as extending to a State´s own aircraft [19]. Such interpretation has important consequences in scenarios when a State uses force against aircraft of its own registration, as it blurs the distinction between domestic law enforcement and international law on the use of force.

c) "Must refrain from resorting to the use of weapons against civil aircraft

One of the main achievements of UN Charter was to codify the principle of the prohibition of the use of force between States. Thus, Article 2(4) of the Charter reads "*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".* This principle is a rule of customary international law as well as a peremptory norm (*jus cogens*) and is consistently draw upon by the International Court of Justice in its judgements.*[20]* The main tenets of this prohibition were outlined by the UN General Assembly in the 1970 Declaration on the Principles of International Law: States are not to pursue wars of aggression, must not threaten to use force to resolve disputes and must not directly or indirectly participate or instigate attacks against other members.[21]

In this sense, the wording in Article 3 bis is not fortuitus. By referring to the words "use of weapons" instead of "use of force", the prohibition was intended to be more

[17] Security Council Resolution 1067 (26 July 1996) S/RES/1067; A17-1, Assembly Resolution, *ICAO Assembly Resolutions*, Doc. 9848, VII-2.
[18] Geiß, R., o*p. cit.*, p.237
[19] *Ibid*, p. 238
[20] Gray, C., *International Law and the Use of force*, (3rd Edition), Oxford University Press, 2008, p.30
[21] Shaw, M., *International law*, (8th Edition), Cambridge University Press, 2017, p.855

circumscribed.[22] This is because some measures of aircraft interception involve the use of some force, such as scrambling fighter jets to compel an aircraft to land on a designated airfield or firing warning shots to make an airplane change its course.[23] This limited use of force is understood as acceptable in certain scenarios, and, if properly carried out, they do not endanger the safety of the passengers or the aircraft. In contrast, the use of weapons, even when the purpose is not to directly hit the aircraft, poses an unquestionable danger to the lives of those on board, and thus is prohibited.

In addition, the protection formulated by Article 3 bis not only covers civil aircraft flying legally (i.e. aircraft that comply with aviation rules and procedures), but extends also to "rogue" aircraft which violate aviation rules (such as not following the corresponding flight paths or who fail to identify themselves).[24] The fact that the aircraft is overflying national or international airspace is also irrelevant.[25]

d) "in flight"

This article applies to civil aircraft in flight and excludes aircraft on the ground.[26]

e) "this provision shall not be interpreted as modifying in any way the rights and obligations of States set forth in the Charter of the United Nations."

The extensive protection afforded to civil aircraft cannot be understood as absolute. In some extreme cases States would (and should) resort to forceful measures (including the use of weapons) against civilian aircraft. The dilemma was striking a balance between the State´s right to defend their sovereignty and the protection of civilian aircraft, noting that furnishing States with multiple exceptions as to when to use force would render the prohibition altogether ineffective. For this reason, the right to self-defence was envisioned by the drafters of the Convention as the sole exception authorizing Sates to use of weapons against civil aircraft. No explicit reference was made to Article 51 of the UN

[22] Geiß, R., o*p. cit.*, p.243
[23] Anne de Luca, *op. cit.*, p.49
[24] *Ibid*, p.47
[25] *Ibid*, p. 48, (citing ICAO Investigation Report forwarded to the Security Council/S/1996/509).
[26] Geiß, R., o*p. cit.*, p.238

Charter or the right of self-defense. The use of force was to be governed exclusively by the "general rights and obligations of States" under the Charter.[27]

The allusion of the right of self-defence under the UN Charter brings an additional problematic to the equation. There exists an ongoing academic debate regarding the precise content and scope of this right. One side argues for a wide, pre-existing "inherent" customary right, while the other sees the existing codification in Article 51 as a new, more constrained right, which not only requires the test of necessity and proportionality, but also than an "armed attack" takes place.[28]

The notion of "armed attack" is not itself clearly defined in international law and stands at the centre of the academic and political controversy (e.g. the debate of pre-emptive self-defense and the Bush Doctrine).[29] The line is difficult to draw between an attack which gives right to self-defense from other actions which do not necessarily trigger this right. Among academic circles, scholars have suggested a more flexible approach to the notion of armed attack, so to include not only attacks that have already taken place but also attacks which are reasonably perceived to be imminent. For example, Shaw advocates for such interpretation to avoid having recourse to the more controversial concept of "anticipatory self-defense".[30] In these situations, the "immediacy" of the attack is a matter of strict evidence and accurate assessment, provided the requirements of proportionality and necessity are met as well.[31]

Going back again to the domain of civil aviation, Article 3 bis read under the light of the doctrine of self-defense leads us to the following conclusion: A State, in order to invoke the right to self-defense against a civilian aircraft needs first to have suffered an "armed attack". This rigid *dictum* can be somewhat tempered if we accept the broader interpretation of the notion of "armed attack" discussed above.

The notion of imminency of the attack, however, is not in itself sufficient to justify the use of lethal force against a civilian airplane. As described above, the right to self-defense is also subject to the requirements of *necessity* and *proportionality*, well

[27] *Ibid*, p. 245
[28] Gray, C., *op. cit*., p.118
[29] *Ibid*, p.209
[30] Shaw, Malcolm N., *op. cit*., p.867
[31] *Ibid*, p. 876

established under customary international law.[32] *Necessity* is understood as the lack of other viable, less-forceful alternatives to respond to the attack, while *proportionality* refers to the equivalency between the threat posed and the measures employed to repel such attack.[33]

States have at their disposal a wide array of measures for aircraft interception, reging from non-forceful methods to the use of deadly force. In this sense, the annexes of the Chicago Convention and ICAO Council Recommendations have produced multiple in-flight interception principles and rules to guide States in situations of interception and ensure that such actions do not endanger the lives of those on board.[34] Only in circumstances when an armed attack occurs and the conditions of necessity and proportionality are fulfilled can States repel the attack by resorting to lethal weapons of interception (e.g. fighter jets, SAMs, etc.). It must be noted that defense of sovereignty or protection of national independence alone do not suffice to legitimate an armed response in cases of unauthorized flight intrusions.[35]

In conclusion, the entry into force of Article 3 Bis has significantly constrained State´s ability to recourse to deadly force methods against civil aircraft.[36] While the basic axiom of this prohibition has not changed over time, the exception to this rule –being intrinsically connected to the evolution of the right to self-defense and the ever-changing idea of what constitutes an "armed attack"— remains equivocal and hence continues to produce uncertainty as to its applicability and limits.

[32] Gray, C., *op. cit*., p.148
[33] *Ibid*, p.150
[34] See ICAO, *Manual concerning Interception of Civil Aircraft* (2nd Edition), Doc 9433-AN/926, 1990, pp. 41-47.
[35] Geiß, R., o*p. cit*., p.246
[36] *Ibid*, p. 255.

III. MISTAKE OF FACT IN INTERNATIONAL LAW

A. Introduction

Before examining the notion of mistake of fact in international law, it is pertinent to explore the notion of mistake of fact and its role in national legal systems.

1. Concept of mistake of fact

"Mistake of fact" and "mistake in the law" refer to the mental condition of the perpetrator; the former refers to a situation when an individual commits a prohibited act because he ignores the law, while the latter consissts of the individual commiting a prohibited act because he misunderstood the facts that constituted the elements of the offence (i.e. made an erroenous assessment of the factual circunstances). Both mistake in the law and mistake of fact can be raised as a defence to preclude responsibility for a certain offense in civil and/or domestic legal procedures, with the exception of strict liability offences.[37]

The consequences of a mistake of fact vary depending on the standard of "reasonableness" that is requited to preclude responsibility in the fields of criminal or tort law. While the doctrine of mistake of fact is subject to different rules and doctrines in domestic legal systems, the body of public international law literature remains obscure about what consequences are to be derived from these situations.[38]

2. Mistake fact in domestic law

In domestic legal systems mistake of fact is a common defence in situations of *putative self-defense*, that is, "*when defensive force employed to repel an imaginary aggression that is objectively inexistent*"[39]. A prototypical example: person A attacks person B on the belief he is acting on self-defence against an imminent attack from person B, attack which turns out to be immaginary.

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[37] In strict liability offences the intent of the perpetrator (*mens rea*) is irrelevant.
[38] Milanovic, M., "Mistakes of Fact When Using Lethal Force in International Law: Part I", *EJIL.Talk!* (January 14, 2020). Available at: https://www.ejiltalk.org/mistakes-of-fact-when-using-lethal-force-in-international-law-part-i/ [accessed 21 January 2022]
[39] Muñoz Conde, F., "Putative Self-defense. A borderline case between justification and excuse", *New Criminal Law Review*, vol. 11, n.4, p. 598

Analyzing how domestic legal systems untangle mistakes of fact could offer us indicia as to how public international law (and its different sub-fields) can offer answers to these situations.

a) Criminal and Civil law

Criminal and civil cases award distinct value to the mental state of the individual (remember that mistake of fact is a purely subjective element). In criminal law, the mental element or *mens rea* constitutes *the* fundamental essence of a crime, as the idea of *culpability* resides in the notion of intentionality—an individual voluntarily performed an act with malicious intent and thus the action is considered blameworthy.[40] In tort (civil) law, hoewever, intentionality or the mental state of the individual is secondary, while the importance is placed in compensating the victim of the damages.

Therefore, in both criminal and tort law mistake of fact can play out differently. First, we must assess whether mistake of fact can indeed constitute a valid defense, or whether the matter is to be assessed under a strict objective liability, meaning that no belief, no matter how reasonable, can excuse a mistake. Secondly, if mistake is accepted as a possible defense, the standard required for the mistake can be either a purely subjective belief of the perpetrator or a "reasonable" belief, as determined by the "reasonable person standard".

In his discussion into mistakes of fact in internaitnal law, Milanovic identifies these three options and draws upon English Law as to illustrate them. For example, English criminal law allows mistake of fact as excuse and does not require any reasonableness standard; the individual subjective perception (*honest* belief) suffices to excuse the error. English tort law, however, seems to require a standard of reasonableness in addition to the author´s subjective belief, and the discussion remains open whether mistake should be admitted at all in tort.[41]

In other legal systems this solution is far from being identical. For example, mistake is a valid defence in U.S. criminal law (not in tort law) but requires a standard of

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[40] Brinig, M., "The Mistake of Fact Defense and the Reasonableness Requirement", *International NDLS Scholarship Review*, vol. 2, 1978, p. 213

[41] Milanovic, M., "Mistakes of Fact When Using Lethal Force in International Law: Part II", *EJIL.Talk*! (January 15, 2020). Available at: https://www.ejiltalk.org/mistakes-of-fact-when-using-lethal-force-in-international-law-part-ii/ [accessed 21 January 2022]

reasonableness in addition to the author´s subjective belief.[42] Similarly, in Spanish criminal law, a mistake of fact precludes criminal liability when mistake is reasonable or, in other words, based on a "well-grounded belief".[43]

b) The "reasonableness" requirement

In order to measure the "reasonableness" of the author´s internal belief, legal systems commonly rely on the "reasonable man standard" or the "objective bystander theory": what a proper reasonable individual would have done under the same circumstances. This lays out an objective standard against which the actions of the individual are measured. In other words, as Conde puts it, "*This position does not mean that the only requirement for justification is the good-faith subjective beliefs of the defendant, but rather that the subjective beliefs and reactions of the defendant must be tested against the objective community standard of reasonableness".*[44] The reasonable person standard should not be constructed as ideal hypothetical individual, detached from all cultural contexts, as what is deemed to be "reasonable" in one cultural context might not apply for other.[45]

B. International law.

Although no general theory of mistake of fact exists in public international law, many sub-fields directly or indirectly address the matter. Because International public law is such a vast domain, we will focus exclusively on the role that mistake of fact plays in the sub-fields of international law that are directly engaged in situations of cases of mistaken shootdown of civilian aircraft. To do this, will draw upon the distinctions made by Milanovic[46], to latter on add a more in-depth analysis to each one.

1. International Criminal Law

International Criminal Law expressly recognizes mistake of fact. In order to be held responsible for an international crime, both the material and mental element of the offense are needed. For example, in war crimes, the material element consists in the commission

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[42] Brinig, M., *op. cit*., p. 209

[43] Muñoz Conde, F., *op. cit*., pp. 602-603. Whether a mistake is excusable "vincible" or inexcusable "invincible" depends on the reasonability of the error.

[44] *Ibid,* p.592

[45] Forrel, C., "What's reasonable? Self-defense and mistake in criminal and tort law", *Lewis & Clark Law Review,* vol.14, n. 4, pp. 1402, 1408

[46] Milanovic, M., "Mistakes of Fact…Part I, *op. cit.*

of a "*serious violation of customary or treaty rules belonging to international humanitarian law*", while the mental element is the intention (*dolus*) or indirect intention (*dolus eventualis*) of the perpetrator to commit the act.[47]

As such, international criminal law (and domestic criminal systems) requires both elements to attribute criminal responsibility. Failure to prove the mental element entails that the perpetrator cannot be held criminally liable (yet he could still be liable for tort), because, as we discussed *supra*, criminal law provides that the criteria is strictly subjective: what counts is the *intentionality* of the author. In this sense, Article 32 (1) of the Rome Statute excludes criminal responsibility if the mental element is missing: "*A mistake of fact shall be a ground for excluding criminal responsibility only if it negates the mental element".*[48]

Difficulty arises when proving the mental element. In most cases international criminal tribunals have no choice but to infer the perpetrator's state of mind from the circumstantial evidence to demonstrate either a direct intentionality (*dolus),* to prove that the perpetrator accepted the outcome of the actions (*dolus eventualis*) or that he did not accept the outcome but acted with knowledge of the risk (recklessness).[49] Albeit, a certain degree of reasonableness of the mistake might be necessary to convince the tribunal that the individual honestly held the belief he was acting lawfully.

2. International Humanitarian Law

International humanitarian law is the body of international law that outlines the rules of engagement during military operations in times of war (*ius in bello*).[50] Therefore, this body of law would only come into play if the shootdown of a civilian airliner occurs in the context of an armed conflict. Regardless of wheter humanitarian law applies to our case or not, examining how mistake of fact interplays in this field of law will prove useful in our subsequet analysis. Besides, the interception of aircraft normally involves the

[47] Cassese, A., "War Crimes," in *International Criminal Law,* (3rd Edition), Oxford University Press, 2013, p. 65
[48] *Rome Statute of the International Criminal Court* (17 July 1998) 2187 UNTS 3
[49] See, for example, *Prosecutor vs. Jean-Paul Akayesu*, (Trail Judgment), ICTR, Chambre I, Case no. ICTR-96-4-T, 2 September 1998, para. 523.
[50] Shaw, M., *op.cit*., p.891

employment of military-grade equipment (radar, SAMs, fighter jets, etc), and the use of such equipment is governed by the rules of military engagement.

In opposition to international criminal law, no substantive provision of humanitarian law directly addresses situations of mistake of fact with the exception of the law of Cyber Warfare.[51] Nonetheless, as suggested by Milanovic[52], the rules and principles governing the use of military force during armed conflicts (principles of precaution, distinction, and proportionality) will serve us to infer the consequences of hypothetical mistakes in the use of lethal force. These provisions are found in the Additional Protocol I to the Geneva Conventions and the ICRC´s Customary International Humanitarian Law study (hereinafter "ICRC Rules").[53]

Firstly, the "Principle of Distinction" found in Article 49 of Additional Protocol I provides that belligerents must distinguish between civilians and combatants, and between military and civilian objectives.[54] Similarly, Rules 7, 11 and 13 of the ICRC establish that only properly distinguished military objectives can be the object of an attack. Military objectives are defined as "*those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage".*[55]

Connected to the principle of distinction is the principle of "Precaution in the attack", "*In the conduct of military operations, constant care must be taken to spare the civilian population, civilians and civilian objects. All feasible precautions must be taken to avoid,*

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[51] International humanitarian law applicable to **cyber warfare** does contemplate mistake of fact in one circumstance. As part of the definition of "cyber-attack" contained in Rule 92 of the *Tallinn Manual 2.0*, paragraph 19 establishes that "*If a cyber-attack is conducted against civilians or civilian objects in the* ***mistaken but reasonable belief*** *that they constitute lawful targets, an attack has nonetheless occurred. However, if the attacker has fully complied with the requirement to verify the target, the attack will be lawful*." A reading of the first line gives affords the impression that a mistaken cyber-attack, even if carried out reasonably, does not negate the concept of attack and all the legal consequences that ensue. However, if read in conjunction with the second line, the mistaken attack is lawful if the rules of target verification are followed (Rule 115 of the Manual). The conclusion we arrive at is the same in our analysis (See Schmitt, M., (ed). *Tallin Manual 2.0 On The International Law Applicable To Cyber Operations*, (2nd Edition), Cambridge University Press, 2017)

[52] Milanovic, M., "Mistakes of Fact…Part I, *op. cit.*

[53] P*rotocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts* ("Additional Protocol I"*)*, (8 June 1977); Jean-Marie Henckaerts & Louise Doswald-Beck (eds), ICRC. *Customary International Humanitarian Law. Volume I: Rules*, Cambridge University Press, 2009.

[54] Shaw, M., *op. cit*., p.906

[55] Additional Protocol I. Article 52 (2)

and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects (..)".[56]

Thirdly, there is the "Rule of proportionality**"**, which aims to balance the concrete military advantage sought with the incidental loss of civilian life or destruction. An attack which causes a very high number of civilian casualties would be disproportionate, and therefore illegal under humanitarian law.[57] In connection to this, the "Rule target verification" requires that "*Each party to the conflict must do everything feasible to verify that targets are military objectives".*[58]

Considering the substantive rules governing military attacks, the conclusion we could extract is that the conduct of military operations is subject to a very high level of responsibility. Because the rules of distinction, precaution, target verification and proportionality are so strict and establish a very high threshold of diligence, the margin awarded to possible exculpatory mistakes is very thin. To discharge his liability, a military commander would have to prove that, even after following all the rules and principles with utmost care, the resulting death of civilians was nonetheless unavoidable. In this case, the doctrine of the "reasonable military commander*"* provides a useful evaluation standard.*[59]* Only in this scenario we could aruge for a mistake of fact as a valid defence against an unlawful action.

Adversely, cases of mistaken use of military force as a result of neglecting the above-mentioned rules are, sadly, not uncommon. A first example could be the attack on the Palestine Hotel in Bagdad during the war in Iraq (April 2003), in which American forces fired to a hotel killing two journalists (one of them a Spanish national). A subsequent investigation by the Committee to Protect Journalists concluded that the attack could have been avoided had command been more diligent.[60] A more recent example has been the U.S. drone strike in Kabul in August 2021, which mistaken killed 10 civilians.[61] Although

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[56] ICRC Rules, Rule 15; Protocol Additional I, Article 57
[57] ICRC Rules, Rule 14
[58] ICRC Rules, Rule 16
[59] See, for example, Ian Henderson & Kate Reece, "Proportionality under International Humanitarian Law: The "Reasonable Military Commander" Standard and Reverberating Effects, *Vanderbilt journal of Transnational Law*, vol.51, pp.839-846
[60] Committee to Protect Journalists (CPJ), "Permission to Fire?", 27 May 2005. Available at: https://cpj.org/reports/2003/05/palestine-hotel/ [accessed 8 January 2022]
[61] BBC, "Afghanistan: US investigates civilian deaths in Kabul strike", *BBC*, 30 August 2021. Available at: https://www.bbc.com/news/world-asia-58380791 [accessed 19 January 2022]

the US argued was an "honest mistake" and there is still an ongoing investigation[62], this case might well serve to exemplify the lack of proper target verification and the possible breach of the principle of precaution in armed attacks. Finally, the shootdown of Malaysian Flight MH17 by Ukrainian separatists constitutes an example of a mistaken use lethal force against civilian aircraft during armed conflict.[63]

3. International Human Rights Law

The use of lethal force against a civilian aircraft has human rights implications, most notably, the right to life of the passengers on board. The right to life is regarded as the most important human right, a precondition for the existence and enjoyment of all other human rights.[64] This right is enshrined in the most important regional and universal human rights conventions: Article 3 of the Universal Declaration of Human Rights as well as in Article 6 of the International Covenant on Civil and Political Rights, Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Articles 4 of both the African Charter on Human and Peoples' Rights and the American Convention on Human Rights, among others.

The right to life is construed as imposing both positive and negative obligations on individual States. The Human Rights Committee, in its General Comment no.36, considers this double dimension of the right to life: first, the "*prohibition against arbitrary deprivation of life"* and, secondly, the "*duty to protect life"*. The negative dimension of the right spells that States must refrain from depriving individuals of their right except under limited exceptions.[65] The positive dimension imposes on States the obligation to take sufficient measures to protect the exercise of this right and render it effective.[66]

Notwithstanding the extensive body of legal literature dealing with the deprivation of the right to life and the use of force by State authorities, the possibility of invoking

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[62] Julian Borger, "'Honest mistake': US strike that killed Afghan civilians was legal – Pentagon", *The Guardian*, 4 November 2021. Available at: https://www.theguardian.com/world/2021/nov/04/us-afghanistan-strike-killed-civilians-legal-pentagon [accessed 20 January 2022]

[63] Kevin Jon Heller, "MH17 Should Be Framed as Murder, Not as a War Crime", *Opinio Juris*, 14 August 2014. Available at: http://opiniojuris.org/2014/08/11/mh-17-framed-murder-war-crime/ [accessed 11 January 2022]

[64] Human Rights Committee, "*General Comment no. 36, Article 6"*, ("GC36") 3 September 2019, CCPR/C/GC/35 GC36, para. 2

[65] *Ibid*, para. 10

[66] *Ibid*, para. 18

mistake of fact as defence for the violation of the right to life is a matter that has been sparsely investigated. None of provisions in any of the abovementioned human rights conventions address situations of error in the law or the facts.

As in domestic legal systems, the theme appears to be split between an objective standard and a subjective standard.

- **Under a purely objective standard**, a State would need to demonstrate that the use of force was objectively necessary and proportional to a given situation, allowing no room for an erroneous assessment of the situation, no matter how honest and reasonable. Because the test relies on the factual existence of a situation of the circumstances allowing for the exceptional use of force, any erroneous appreciation of such circumstances is not possible. Some authors argue that state liability for an arbitrary deprivation of life should be measured in purely objective terms, where erroneous subjective belief has no place, as the standard for State responsibility for human rights breaches should be stricter than the standard used in individual criminal law. [67]

- **Alternatively, the subjective standard** allows for the appreciation of the mental state of the author. Thus, mistake in the use of lethal force, if honest, could be sufficient to preclude the liability of the State even if the objective circumstances which allowed the use of force did not exist. This is the view of the European Court of Human Rights (ECtHR).

a) The International Covenant on Civil and Political Rights

Article 6 of the ICCPR[68] recognizes the right to life and prohibits any arbitrary deprivation of life. The use of force in self-defense must be intended "*to protect life or prevent serious injury form an imminent threat*" and follow the requisites of necessity (the lest harmful measure to achieve the objective) and proportionality (the correlation between the force used and the harm seek to avoid).*[69]* In addition, the position of the Human Rights Committee is that "*States parties are expected to take all necessary*

[67] Mavronicola N., "*Submission to the Human Rights Committee on its Draft General Comment on Article 6 of the International Covenant on Civil and Political Rights – Right to life"*, 5 October 2017, p.2.]
[68] *International Covenant on Civil and Political Rights*, (16 December 1966) 1976 UNTS 171
[69] GC36. para. 12

measures to prevent arbitrary deprivation of life by their law enforcement officials, including soldiers charged with law enforcement missions".[70] This includes establishing appropriate procedures, supervision of law enforcement, provide adequate training, and thoroughly planning operations so as to minimize all risk.[71]

b) The European Convention on Human Rights

Relevant case law of the ECtHR in the matter of the right to life (Article 2) is closer to the of subjective standard approach. Under the ECHR[72], deprivation of the life to be legitimate, the use of force has to be "absolutely necessary" for the purposes defined in Article 2 (2), which includes in letter a) "*defence of any person from unlawful violence*".

When faced with the scenario of mistake in the use of deadly force, the ECtHR has relied on the subjective standard assessment to determine State liability for the breach of the right to life. In other words, what the Court takes into account, in addition to the traditional necessity and proportionality analysis, is the perpetrator´s "honest belief" that he was in a situation that required the use of force in self-defence, even if this situation objectively did not exist.[73] In *Bubbins v. the United Kingdom*, the Court emphasized that any hindsight examination cannot replace the individual´s assessment of the situation who had to act in the "heat of the moment".[74]

This was the case in the *McCann Case,* which involved the killing of IRA terrorists in Gibraltar by UK SAS forces who acted under the belief that the terrorists were about to detonate a bomb.[75] The Court found that the soldier´s mistaken use of force in deprivation of the right to life was justified because they "honestly believed" that eliminating the terrorist suspects would prevent an imminent tragedy. In the words of the Strasbourg Court, "*It considers that the use of force by agents of the State in pursuit of one of the aims delineated in paragraph 2 of Article 2 (art. 2-2) of the Convention may be justified under this provision (art. 2-2) where it is based on an honest belief which is*

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[70] *Ibid*, para. 12
[71] *Ibid*, para. 13.
[72] *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*", (4 November 1950)
[73] Claire de Than., "European Court of Human Rights: Mistaken Belief in Self-Defense May Justify Use of Lethal Force", *The Journal of Criminal Law*. vol. 65, 2001, p.419
[74] Cite Mavronicola, N., "*Submission …", op. cit.,* p. 8. (citing *Bubbins v UK,* ECtHR, Application no. 50196/99, 17 March 2005, para 139)
[75] *McCann and others v. The United Kingdom,* European Court of Human Rights (Grand Chamber), Application No.18984/91, 27 September 1995.

perceived, for good reasons, to be valid at the time but which subsequently turns out to be mistaken.[76] And added: "As *to hold otherwise would be to impose an unrealistic burden on the State and its law-enforcement personnel in the execution of their duty, perhaps to the detriment of their lives and those of others".*

However, the subjective perception of police or state agents, even when acting under a "honest belief", does not in itself exonerate the responsibility of the State for the overall planning and organization of the operation. In other words, States are required to take all appropriate measures to minimize the risk of operations which might eventually involve the use of lethal force. This approach was emphasized in *Guiliani and Gaggio v Italy*, where the Court reminded that it considered "(…) *not only the actions of the agents of the State who actually administer the force but also all the surrounding circumstances, including such matters as the planning and control of the actions under examination".*[77]

Thus, even if the Court were to find that the individual´s mistake was honest, the State could still be held liable for a breach of the right to life if the deficiencies in the planning of the operation amounted to a failure to protect or minimize the risk to life. [78] This additional requirement by the ECtHR tempers the purely subjective approach mentioned earlier.

In the *MCcann* decision, the Court examined both the soldiers' actions and the general context, and concluded that the overall organization and control of the operation by UK authorities exhibited significant deficiencies: wrong information had been given to the SAS command and the IRA terrorists had been allowed to enter a populated area.[79] Although ultimately the Court did rule the UK responsible for the breach of its obligations under Article 2 of the Convention, the judges 'decision was very narrow (10:9).[80]

The debate resides in where the threshold should be placed when determining the responsibility for a State for a mistaken use force by its agents. The more one relies on the subjective approach and considers the subjective belief of the authors, the wider the margin to accept situations of mistaken (yet honest) use of force. In contrast, choosing to

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[76] *Ibid*, para. 200
[77] *Giuliani and Gaggio v Italy*, European Court of Human Rights (Grand Chamber), Application no. 23458/02, 24 March 2011
[78] Mavronicola N., *op. cit*., p.10
[79] Milanovic, M., "Mistakes…Part I", *op. cit.*
[80] Claire de Than, *op. cit*., p.418

apply a strict objective assessment effectively excludes the possibility of considering a mistake of fact an exculpatory defence in human rights violations.

As we see above, human rights instruments and organs apply different standards regarding situations of mistake of fact. What appears to be clear is that, in any circumstance, for a mistake to serve as defence it needs to be honestly held by the State. Yet to determine if such belief was indeed "honest*"*, one ultimately must rely on the analysis of the objective facts. Because the mental element ultimately can only be demonstrated with external *indicia*, reasonableness is intrinsically tied to the burden of proof of the honesty of the mistake. In other words, to believe in the honesty of a mistake, one must consider what an average individual, acting in the same circumstances, would have done. This brings us back to the "reasonable person test".

4. Jus ad bello. Law of use of force.

The right of self-defense as enshrined in Article 51 of the UN Charter does not address situations of "putative self-defense".[81] The question is, then: Can a State who mistakenly resorts to force in self-defense to repel an imaginary attack raise the mistake of fact doctrine as a valid defense, or be held responsible for a breach of the prohibition of the use of force?

As Milanovic points out, the solution for these scenarios has not been definitively settled in relevant case law nor in legal literature. Notwithstanding the fact that there appears to be a wide consensus on the impossibility of conjuring the "mistake of fact doctrine" as an excuse to erroneous use of force, –admitting mistake as an excuse could open a potential loophole for States to invoke putative self-defence for their own reckless actions—, the controversy is still far from being solved.[82]

The author gives three arguments to support the view that no mistake can serve as an excuse to the breach of the prohibition of the use of force:

- The wording of Article 51 explicitly refers to the existence of an "armed attack" as a necessary requirement to trigger the right to self-defence. A perceived or imagined attack, no matter how reasonable, does not constitute an "real" attack.

[81] Milanovic, M., "Mistakes …. Part II" *op. cit.*
[82] *Ibid,*

- Mistake of fact is not listed as one of the six circumstances precluding wrongfulness in the Draft Articles of Responsibility of States (which are, consent, self-defence, countermeasures, force majeure, distress, and necessity).[83]

- The taking of countermeasures (one of the circumstances precluding wrongfulness) only admits a purely objective standard. As the essence of a decentralized international system, countermeasures are unilateral remedies (self-help) available to injured states against State which commit an international wrongful act.[84] The *ICL Commentary* establishes that "*A State which resorts to countermeasures based on its unilateral assessment of the situation does so at its own risk and may incur responsibility for its own wrongful conduct in the event of an incorrect assessment."* [85] This purely objective standard to evaluate the legality of countermeasures further supports the view that mistakes—which are subjective representations of reality— cannot serve to excuse liability.

The International Court of Justice has not directly addressed the matter of mistake as an excuse. However, in the case of *Oil Platforms*, the Court ruled that *"(...) the requirement of international law that measures taken avowedly in self - defence must have been necessary for that purpose is strict and* ***objective****, leaving no room for any 'measure of discretion"*[86]. The ICJ did not accept considerations of good-faith as sufficient to establish the legality of mistaken self-defence This seems to corroborate the prevailing view: what the actor thought or believed is irrelevant, what matters is the objective existence of the circumstances allowing the legitimate right to self-defence.

Yet, what happens if State A carries out a mistaken attack against State B, but the imaginary threat was deliberately deceitful action of State B? This is a scenario of **contributory fault.** Following Article 39 of the ICL´s *Draft Articles on State Responsibility*, when the injured State *"has contributed to the damage by some wilful or negligent action or omission*", the determination of reparation needs to consider the

[83] International Law Commission, "Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries" (hereinafter "ASR"), *Yearbook of the International Law Commission*, 2001, vol. II, Part Two, (A/56/10), p.71
[84] *Ibid*, at p. 128
[85] *Ibid*, at. p. 130
[86] Milanovic, M., "Mistakes … Part II", *op. cit*, (citing *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America*, International Court of Justice (ICJ), 6 November 2003, para.73.)

injured state´s contributory fault.[87] So contributory fault does not preclude the original liability of State A, it only limits the reparation to the injured State.

To conclude, my view is that if we were to accept the prevailing view that negates the possibility of justifying self-defence in situations of mistake, we would be placing a very high burden on sovereign States. While it is true that in modern times sophisticated military equipment and technology have made errors less frequent, as long as humans remain the ultimate decision-makers, mistakes are bound to happen. Some will be the result of blatant negligent action and should be given no excuse, while others will occur even when extreme precautions taken to avoid them. Allowing States absolutely no margin in situations of honest and reasonable mistakes is probably not the best solution.

[87] ASR, p. 109-110

IV. CASE STUDY: UKRAINE INTERNATIONAL AIRLINES FLIGHT 752

A. The facts

Flight 752 was a Boeing 737-800 commercial airliner operated by Ukraine International Airlines flying the route from Teheran to Kyiv. On January 8, 2020, the plane was shot down a few minutes after taking off from Tehran´s main airport, killing all 176 occupants.[88] While at first Iran denied any involvement in the crash and pointed to a possible mechanical issue, a few days later it recognized that its armed forces had shot down the plane after having mistaken it for an U.S. cruise missile.

B. Investigation of the events.

On March 15, 2021, the Civil Aviation Organization of Iran (CAOI) issued a final report of the incident. The report, which concluded that the incident was caused by the firing of two surface-to-air missiles (SAM) after the misidentification of flight PS752 by a missile operator[89], has been criticized for its inaccuracies and omission of relevant information. The general view is that Iran has not given a complete and precise account of the events surrounding the shootdown of Flight 752. [90]

In an attempt to fill the missing information and draw a more accurate picture of the events, the Canadian Government ordered a forensic team investigate the events and produce a final report. Canada´s investigative team relied on public sources and classified intelligence to dilucidated the events. This report, released in June 2021, found no evidence of a deliberate targeting of the airplane. However, it concluded that Iran, by a series of actions and omissions, was responsible for failing to take necessary measures and reduce the risk to aircraft.[91]

The canadian report identifies three main contributing factors and causes that led to the shooting:[92]

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[88] Government of Canada, "*The downing of Ukraine International Airlines Flight 752. Factual Analysis*", 24 June 2021, p. 12. Available at: https://www.international.gc.ca/gac-amc/publications/flight-vol-ps752/factual_analysis-analyse_faits.aspx?lang=eng [accessed 27 January 2022]
[89] I.R. IRAN AAIB, "*Flight PS752Accident Investigation. Final Report",* (English version). Available at: https://reports.aviation-safety.net/2020/20200108-0_B738_UR-PSR.pdf [accessed 21 January 2022]
[90] BBC, "Ukraine rejects Iran's final report on downing of flight PS752", *BBC*, 17 March 2021. Available at: https://www.bbc.com/news/world-middle-east-56428698 [accessed 15 January 2022]
[91] Government of Canada, *op. cit.* p. 3
[92] *Ibid*, p.4-8.

1) **Lack of risk assessment and proper warnings**. Following the recent attack on US forces in Iraq, Iran was expecting an imminent U.S. counterstrike. In this context, Iranian authorities relocated SAM units close to the international airport and placed air defence systems on high level of alert. However, in this climate of risk, no decision was made to close the close Teheran´s airspace nor to warn airlines of this recent context of danger and the deployment of surface-to-air missile units near the airport. Iran claimed that it had carried a thorough risk assessment. Notwithstanding the hazardous situation, Iranian authorities adopted only one measure to prevent misidentification: military pre-authorization for flight take-off and failed to take other preventive measures

2) "**Misalignment" of the SAM unit**. The forensic team concluded that the missile operator did not correct the misalignment of the SAM indication system. As a result, the system failed to give an accurate representation of the hostile threats and their incoming direction. It is unknown whether the missile operator fired without authorization or if he received clearance form a higher command. Iran´s final report does not clarify this. Not does it provide with what training did these units receive, the engagement protocol and unit supervision.

3) **Chain of command communication**. The Iranian report does not properly explain what reasons underly the deficiencies in command-and-control communication with the missile unit and argue that the operator fired without authorization. The forensic team, however, assumes that SAM units operated simultaneously and reasonably had to engage in prior exchange of information with command to obtain approval to fire. The fact that there were nine departures for the airport before Flight 752 following similar flight paths indicates that the unit, after relocating, had faced similar air targets coming from the same direction and that there had been prior multiple interactions with command and control to identify these aircraft, so there should have been multiple interactions between the SAM unit and its immediate command and control, both which probably likely resulted in the misidentification of the tenth aircraft (Flight 752). A disruption in communication (Iran´s argument) has never been sufficiently established, though in any case this evidences the significant deficiencies in the capacity of Iran's military communications systems and the potential risk faced by airplanes overflying the zone.

The conclusion of Canada´s forensic team was that the acts and omissions by Iranian civil and military authorities generated a very dangerous situation. Had Iran been more diligent in risk identification and the placement of proper procedures to protect civil aircraft the tragedy could have been reasonably avoided. [93] In my view, the lack of transparency in the following investigation and final report of the events further support the conclusion that Iran's actions deviated from its duties under international law.

C. The legal regimes applicable

(1)International Criminal Law

The body of international criminal law is not applicable to this case. All evidence points to the fact that the SAM crew believed it was engaging a hostile target, irrelevant if the belief was reasonable under those circumstances. As we discussed earlier, Article 32 (1) of the Rome Statute relies on a purely subjective standard and thus excludes criminal responsibility in the absence of the mental element (*mens rea*)—intentionality.

(2)International Humanitarian Law

For international humanitarian law to apply to the downing of Flight 752, the actions need to take place in the context of armed conflict. To determine whether this is the case, we will rely on the definition of "armed conflict" given by the ITCY in the *Tadic* Judgment, which has become a reference in the field of humanitarian law: *"(…) armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."*[94] This definition can be subsequently completed by the ICRC Commentary to the First Geneva Convention (2016) which states that an armed conflict exists regardless of the reasons or intensity of the conflict, whether here has been a formal declaration of war or acknowledgement of the parties of the nature of the ongoing conflict.[95]

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[93] *Ibid*, p.8-9
[94] *Prosecutor v. Tadic* (Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction), ICTY Appeals Chamber, Case No. IT-94-l-A, 2 October 1995, para. 70
[95] ICRC Commentary to the First Geneva Convention, 2016, para. 209, 220, 236. Available at: Treaties, States parties, and Commentaries - Geneva Convention (I) on Wounded and Sick in Armed Forces in the Field,1949 - 2 - Article 2 : Application of the Convention - Commentary of 2016 (icrc.org) [accessed 21 January 2022]

Building upon this definition of armed conflict, it would be unreasonable to argue that an ongoing armed conflict was taking place in the territory of Iran at the time the of the incident (January 2020). The context of high tensions in the overall region and the fact that Iran expected an imminent retaliatory strike from U.S. forces following their retaliatory missile strike in Iraqi soil are, by all, not sufficient to meet the accepted definition of armed conflict. To support a contrary view, that is, that the situation of high alert and recent strikes in Iran equate to an ongoing armed conflict, would completely distort the definition.

With this idea in mind, we can conclude that the relevant provisions of humanitarian law (the Geneva Conventions, Additional Protocols, and other customary provisions) cannot apply in this case. In the hypothetical case that an actual armed conflict had been taking place, I would hold the shootdown of Flight 752 to be a clear example of a violation of the Principle of Distinction, Precaution and Target Verification. Iran´s failure to establish safety procedures, flawed communications systems and disorganized chain of command all support the idea that the actions, even if committed erroneously, amount to an evident lack of due diligence. The standard of responsible military commander would certainly not have been reached.

(3)Human Rights Law

The shootdown of Flight 752 and the death of all 176 passengers and crew members has significant human rights implications. Iran has been a party to the ICCPR ever since it ratified the Convention in 1975.[96] As such, it is bound by its provisions, notably the right to life and the prohibition of arbitrary deprivation of life under Article 6. The question which arises here is whether Iran´s actions amount to a violation of the right to life or whether they can be justified under the mistake of fact doctrine.

As we discussed earlier, neither the provisions of the ICCPR nor the observations the Human Rights Committee have addressed a scenario of erroneous deprivation of the right to life. Here it is pertinent to bring other human rights instruments to our analysis.

[96]Iran ratified the ICCPR in 1975. See: https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=81&Lang=EN [accessed 21 January 2022]

We concluded that, under the European Convention on Human Rights and ECtHR case law, a mistake in the use of force does not amount to a violation of the right to life if it is honestly believed by the author. In this case, available information supports the view that the missile crew honestly believed they were targeting a hostile target (U.S. cruise missile).[97] However, as we described above, the deficiencies in the manning of the SAM station, the flawed risk analysis, the failure to coordinate air defenses with air traffic control and the lack of proper communications between the crew and command and control were all factors which could have reasonably been avoided by Iranian authorities.

If future evidence confirms their mistake was honest, the missile crew could arguably be exonerated of their mistake. But the actions of Iranian military in directing and planning the whole operation are negligent as best and reckless at worst.[98] Therefore, even the flexible interpretation of mistake of fact in the ECtHR jurisprudence offers no room for Iran to plead mistaken self-defence to preclude its responsibility for violating the right to life of 176 human beings. We thus conclude that by firing the missiles at the civilian aircraft Iran arbitrarily deprived the individuals of their right to life as established in Article 6.

Iran´s responsibility may not only derive from the firing of the missile and the destruction of the aircraft. The right to life, in its positive dimension, establishes that State parties (Iran) have the duty to investigate and prosecute the perpetrators of the incident. This obligation extends to "(….) *incidents involving allegations of excessive use of force with lethal consequences."*[99] The Human Rights Committee notes that investigations into alleged violations of the right to life "(…) *must be aimed at ensuring that those responsible are brought to justice, at promoting accountability and preventing impunity, at avoiding denial of justice and at drawing necessary lessons for revising practices and policies with a view to avoiding repeated violations"*. Investigations must "(…) *explore, inter alia, the legal responsibility of superior officials with regard to violations of the right to life committed by their subordinates"* and investigations should "(…) *always be independent, impartial, prompt, thorough, effective, credible and transparent*."[100]

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[97] Government of Canada, *op. cit.* p. 46, 47
[98] Milanovic, M., "Mistakes of Fact When Using Lethal Force in International Law: Part III," *EJIL.Talk!* January 15, 2020. Available at: https://www.ejiltalk.org/mistakes-of-fact-when-using-lethal-force-in-international-law-part-iii/ [accessed 21 January 2022]
[99] GC36, para. 27
[100] *Ibid*, para. 28

Additionally, States cannot waive their obligation by conduction merely "*administrative or disciplinary investigations*" when there is sufficient incriminating evidence to carry out a criminal prosecution.[101]

We cannot conclude whether Iran has properly complied with the obligation to effectively investigate the violation. The first reaction of Iranian authorities was to deny any responsibility for the events, blaming the crash on mechanical issues. Only days later, as international pressure mounted, the Iranian revolutionary Guard Corps (IRCG) admitted to shooting down the plane. In addition, the final report issued by the Iranian Aircraft Accident Investigation Board has been highlighted as inaccurate and has failed to give a proper explanation of the events, specially concerning the final decision that motivated the firing of the missiles.

Regarding the State´s obligation to prosecute the perpetrators, Iran has announced that the perpetrators would be punished.[102] A year later, news emerged that 10 officials had been indicted by a military court in Teheran, yet no more information was given.[103] We will have to wait more to see if Iran finally takes measures to properly prosecute and punish those responsible, nevertheless it seems unlikely that in the long run those responsible will be brought to justice.

Finally, Iran has the obligation to provide full reparation to the to the families of the victims under Article 2 (3) of the ICCPR.[104] Concerning the compensation, in December 2020 Iran announced that it would compensate each victim's family with $150,000. This sum was decided unilaterally and not give any terms to make it effective.[105] Whether all these actions amount to a breach of Iran´s positive obligations under the right to life is an inconclusive matter.

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[101] *Ibid*, para. 27

[102] The Times of Israel, "Iran announces arrests over downing of plane; Rouhani: Must punish all involved", *The Times of Israel*, 14 January 2020. Available at: https://www.timesofisrael.com/iran-announces-arrests-over-downing-of-plane-rouhani-well-punish-all-involved/ [accessed 29 January 2022]

[103] Reuters., "Iran indicts 10 over Ukraine plane crash, prosecutor says; Canada demands justice", *Reuters*, April 6, 2021. Available at: https://www.timesofisrael.com/iran-announces-arrests-over-downing-of-plane-rouhani-well-punish-all-involved/ [accessed 23 January 2022]

[104] ICCPR. Article 2 (3). *"Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity"*

[105] Reuters, "Iran allocates $150,000 for each family of victims of Ukraine plane crash", *Reuters*, 30 December 2020. Available at: https://www.reuters.com/article/iran-ukraine-plane-compensation-int-idUSKBN29410I [accessed 18 January 2022]

(4)The Chicago Convention and jus ad bellum

The firing of missiles against an unarmed civilian aircraft based on the erroneous assessment of the imminency of a threat is a scenario that perfectly illustrates a mistaken use of force in self-defense.

Iran, as a full party to the Chicago Convention and the Protocol of 1984 (Article 3 Bis), is bound by both provisions.[106] The firing of the missiles is considered a breach of the prohibition of the use of weapons against civil aircraft and, concurrently, because Flight 737 was an aircraft registered to Ukraine, the missile attack by all standards constitutes a use of armed force against another State under Article 2 (4) of the UN Charter.

In addition, under the Annexes of the Chicago Convention, States are bound to issue risk warnings concerning their airspace. In the follow up the MH17 crash and the Dutch Safety Board final report into the incident, the ICAO issued a series of recommendations concerning risks associated with flying over o near conflict zones. These recommendations were compiled in the *Risk assessment manual for Civil Aircraft Operations over o Near conflicts zones*.[107] The document defines "conflict zones" broadly: "*airspace over areas where armed conflict is occurring or is likely to occur between militarized parties and is also taken to include airspace over areas where such parties are in a heightened state of military alert or tension, which might endanger civil aircraft*".[108] We see that the this definition of conflict zones perfectly describes the high-tension scenario that was occurring at the time of the shootdown of Flight 752.

The ICAO Manual focuses on the on risk posed intentional or unintentional attack by long range surface-to-air missiles, as they constitute the greatest threat to civil aircraft in conflict zones.[109] Under Annex 17 to the Chicago Convention, the burden of conducting risk assessment and security practices encumbers individual States. In this

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[106] See Iran´s ratification: https://www.icao.int/secretariat/legal/list%20of%20parties/3bis_en.pdf [accessed 15 January 2022]

[107] ICAO, *Risk assessment manual for Civil Aircraft Operations over o Near conflicts zones*", (2nd Edition), "Doc. 10084, 2018. Available at: https://zoek.officielebekendmakingen.nl/blg-846381.pdf [accessed 5 January 2022]

[108] *Ibid*, p.19

[109] The document is mainly concerned with surface-to-air missiles capable of attacking airborne targets at altitudes of at least 25,000 ft (7,600 m). Attacks of this nature are rare; there have been only three recorded cases: Iran Air flight 655 in 1988, Siberia Airlines flight 1812 in 2001 and Malaysian Airlines Flight 17 in 2014.

sense, ICAO has noted that "*States are required under Annex 17 to keep under constant review the level and nature of threats to civil aviation in their territory and the airspace above it,and adjust their security programs accordingly based upon a security risk assessment."*[110] The obligation comprises "*identif[ing] the geographical area of the conflict zones, assess the hazards/threats or potential hazards/threats to international civil aircraft operations, and determine whether such operations in or through the area of conflict should be avoided or may be continued under specified conditions*".[111]

There have been substantial efforts in developing conflict zone information sources. Two important Conflict Zone Information Repository (CZIR) are:

- The European Union Aviation Safely Agency´s (EASA) Conflict Zone Information Bulletin (CZIB), accessible to the public via its website.[112]
- The U.S. Federal Aviation Authority´s website of Prohibitions, Restrictions. NOTAMs (Notice to Airmen): provide information intended for both U.S. and foreign-registered aircraft.[113]

Had Iran properly complied with its obligations under Annex 17 to notify airlines overflying the region of the threat posed by the escalated tensions with the US, and simultaneously adopted the necessary measures to minimize the risk, the probability of an accidental shooting would have greatly reduced.

D. A final assessment of the mistake

Iran blames its mistake on the high state of alert of its military and anti-air systems, expecting an imminent attack by US forces. However, my view is that the wrongfulness of such an act cannot be precluded on the basis of mistaken self-defense. The foreseeability of an imminent US attack does justify Iran´s extreme reaction against the "unidentified" aircraft, yet not enough to make the reaction reasonable. The failure to take appropriate precautions so as to minimize the risk of an accidental shootdown excludes any sensible justification.

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[110] ICAO, "*Doc. 10084…*" *op. cit.,* p. 25
[111] *Ibid*, p.25
[112] Access: https://www.easa.europa.eu/domains/air-operations/czibs
[113] Access: https://www.faa.gov/air_traffic/publications/us_restrictions/

Supposing that Iran, given the state of high alert, had taken all necessary precautions to minimize the risk posed to civilian aircraft (closing the capital´s airspace, establishing channel communications between civil and military air control, providing proper training to missile crew operators, ensuring the communications between SAM units and central command) and still the incident had taken place, then one could judiciously argue in favour of a reasonable mistake of fact.

To further support this view we could draw upon an analogy between the use of force and the seizure of ships in high seas. Article 106 of the UNCLOS attributes liability to a State that proceeds to seizure a ship or aircraft on suspicion of piracy without having *adequate grounds* to do so (i.e intelligence/information that that plane or ship is engaged in piracy). If construed in the opposite sense, a State which, based on a reasonable assessment of available information, seizes a ship suspicious of piracy, could not be held liable for its actions even if it eventually it turns out that the ship was not engaged in any wrongdoing.

The analogy to Article 106 again demonstrates that international law does not offer a unanimous response to situations of mistake of fact, and that some fields of law are more permissive in the matter than it may seem at first glance. The argument that one cannot place an unreasonable burden on the State not to commit any errors of assessment or intelligence in high stress situations when decisions are needed fast (for example, whether to intercept suspicious aircraft or not) does make a fair point and should not be immediately dismissed by the view that no mistake, no matter how diligent the actions were, can preclude liability for the mistaken use of force. If the State acting under a mistaken belief were to hold internationally responsible for the wrongfulness of the act, at the very least the reasonableness of the mistake should be weighted in when determining the appropriate reparations awarded.

It seems a matter of justice that mistakes resulting from a lack of due diligence are not to be equated with those mistakes arising from reasonably diligent (yet mistaken) actions.

E. Legal remedies

Although the purpose of this work is no to explore the legal paths by which remedy might be sought by the families of the victims and their State of nationality, it is nevertheless useful to consider (some) of the possible legal channels.

1. International legal remedies

a) Human Rights Committee

It is not possible for the families of the victims to submit individual complaint to the Human Rights Committee for the violation of the right to life, as this country is not a party First Optional Protocol to ICCPR, which allows for individual communications.[114]

b) Jurisdiction of the International Court of Justice

The International Court of Justice could exercise jurisdiction in the matter of Iran´s breach of its obligations under the Chicago Convention (Article 3 bis, Annex 17), the ICCPR (right to life) and, more generally the prohibition of the use of force (UN Charter). We must remember that only States have standing before the ICJ, not the victims' families.

Article 84 of the Chicago Convention (Settlement of disputes) establishes that controversies arising under the Convention first need to be submitted to the ICAO Council before they can be referred to the International Court of Justice –which acts as an appellate body to the ICAO Council´s decision. Were the case finally submitted to the ICJ, the question remains as to which States could have legal standing to bring forth a claim against Iran. Ukraine, as the State of registration of the airplane, would be entitled to bring a claim. States´ of the passengers´ nationalities can also have standing by way of diplomatic protection.

2. Domestic proceedings

The traditional view in international law held that all acts of the State are immune from the jurisdiction of domestic courts. This *absolute immunity doctrine* has been successively modified in favor of a *restrictive immunity approach*, which is now dominant in most legal domestic systems.[115] This doctrine aims to differentiate between

[114] See list of State Parties: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4 [accessed 29 January 2022]
[115] Shaw, M., *op. cit*., p.531

sovereign acts (*jure imperii*) which are not subject to jurisdiction and non-sovereign acts (*jure gestionis*) which can be review by domestic courts. What acts of the State fall on the *iuri imperii* or *iuri gestionis* category is a matter ultimately defined by domestic law (UN Convention on Jurisdictional Immunities of States and Their Property).

In the case of Flight 752, an interesting procedure has developed in Canadian courts. The families of six of the victims of Canadian nationality have filed two class actions in the Ontario Supreme Court of Justice against the Iranian government, the Corps of Islamic Revolutionary Guards, and other senior Iranian officials. One for negligence[116] and other under the Canadian Justice for Victims of Terrorism Act.[117]

Under Canada´s State Immunity Act of 1985, foreign states enjoy immunity for jurisdiction from Canadian courts. However, the Act provides that such immunity is excluded the State is found to support terrorism or is in a Canada's list of states supporting terrorism.[118] In the case of Flight 752 the Court Ontario Supreme Court of Justice ruled (in a somewhat artificial manner) that the actions of Iran (firing the missile deliberately) constituted an "act of terrorism" under Canadian criminal law and thus Iran did not benefit from immunity.[119] The decision is not without controversies[120]. Iran did not participate in the proceedings, so a default judgment was issued in January 2022, where the Court awarded CAD $ 107 million as compensation to the families to be paid by the State of Iran. The problem that now arises is how to make effective such compensation. There have been talks about the possibility of enforcing the decision by seizing the assets of Iran in Canada and abroad, or even bringing the case to the ICJ.[121]

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[116] *Doe v Islamic Republic of Iran et al*, Ontario Superior Court of Justice, (Statement of the Claim), No. CV-20-635078. Available at: https://cbaapps.org/ClassAction/PDF.aspx?id=11471 [accessed 29 January 2022]

[117] *Mehrzad Zarei et al vs. Islamic Republic of Iran et al*., Ontario Superior Court of Justice, (Statement of the Claim), No. CV-20-00635078-0000. Available at: https://static1.squarespace.com/static/5e2c96399357e236fda551a5/t/6050c2cc31351f59423f2d1a/1615905484825/Fresh+as+Amended+SOC.pdf [accessed 21 January 2022])

[118] *State Immunity Act*, RSC 1985, c S-18. Section 6.1 (1) & (11). Available at: https://laws-lois.justice.gc.ca/eng/acts/S-18/ [accessed 15 February 2022]

[119] *Zarei v Iran*, 2021 (Judgment), Ontario Superior Court of Justice, ONSC 3377. Available at: https://humanrightsintl.com/wp-content/uploads/2021/05/Zarei-v-Iran-Judgement1.pdf [accessed 6 January 2022]

[120] Leah West & Michael Nesbitt, "Noble Cause, Terrible Reasoning: Zarei v Iran, 2021 ONSC 3377", *Intrepid*, 5 May 2021. Available at: https://www.intrepidpodcast.com/blog/2021/5/25/noble-cause-terrible-reasoning-zarei-v-iran-2021-onsc-3377 [accessed 21 January 2022]

[121] Bruke, A., "Ontario court awards $107M to families of Flight PS752 victims", *CBC News*, 3 January 2022. Available at: https://www.cbc.ca/news/politics/flight-ps751-court-decision-1.6302809 [accessed 21 January 2022]

V. CONCLUSIONS

The current legal framework of international civil aviation contains very strict rules regarding the use of force against civilian aircraft. In a world with ever-increasing air traffic, the safety of civilian aircraft is a matter of international concern and States have the obligation not to endanger their safety under any circumstance unless an imminent threat calls for the exercise of the right to self-defence.

In this context, mistakes of fact continue to be a grey area in international law despite having received extensive treatment in domestic la systems. As such, the consequences of a mistake in the use of force will vary depending on the sub-field of international law in question. We have seen that international criminal law does recognize mistakes of fact only if it negates intentionality (*mens rea*), as the mental element stands as one of two constitutive elements of any crime. International Humanitarian Law does not contemplate mistakes of fact directly. However, the basic provisions governing the use of military force (precaution, distinction, and proportionality) led us to infer the consequences of mistakes: liability could be precluded only if a high threshold of responsibility and diligence has been achieved. For its part, International human rights conventions remain ambiguous regarding the question of mistake of fact. Human rights instruments diverge between a subjective standard and an objective one, the second posture being reflected in the practice of the ECtHR, which allows for a mistake to preclude liability for a violation of the right to life if the mistake was honest --and if the overall operation was planned to minimize risk. Finally, the law on the use of force does not deal with mistakes of fact either. The international Court of Justice has remained silent on the matter, yet majority of academic views appear to be against the admissibility of mistake as defense.

The case study of Flight 752 serves to test our findings concerning the legal consequences of mistake of fact. The investigation into the facts has allowed us to determine that the Iranian military accidentally misidentified Flight 752 and fired two surface-to-air missiles. The lack of due diligence and preventive measures by Iranian authorities seem to have been the main causes that led to the accident. Under these circumstances, we can bring up several legal conclusions. International criminal would not apply in this case due to the apparent absence of intentionality. International humanitarian law falls outside of our legal reach as an armed conflict was not taking place in Iranian territory at the time of the actions. Yet there appears to be a violation of the

right to life under the ICCPR as Iran negligent actions exclude the possibility of invoking mistake as defence. The same reasoning should apply to the law of the use of force. Given the lack of due diligence and the fact that the mistake was avoidable, mistake of fact cannot preclude liability in this sense. Thus, the use of deadly force stands in breach of Article 3 bis of the Chicago Convention, the obligations in Annex 17 pertaining to risk assessments, and the general prohibition of the use of force against other States contained in the UN Charter.

Situations of mistake of fact call for an extensive contextual and factual analysis so as to determine the "reasonability" of the mistake. Flight 752 may well serve as an example of "unreasonable" mistake were a State failed to implement appropriate measures to guarantee the safety of aviation. In this sense, one might wonder why should mistake be accepted as a valid defense if all mistakes involve, intrinsically, some degree of negligence or lack of due diligence by the State. It is in the spectrum between reasonable and unreasonable mistakes that I believe the difference should be made. Because States cannot be expected to commit any errors of assessment or intelligence in high stress situations involving aircraft interception, it would be absurd to equate mistakes resulting from a lack of due diligence with those arising from reasonably diligent (yet mistaken) actions.

Here a point should be made. Human Rights Law appears to offer some margin for mistakes of fact but its admissibility in the law of the use of force is more contested, for obvious reasons. If admitting mistakes of fact as one of the circumstances precluding wrongfulness is seen as excessive, then I will argue for a general rule that considers mistakes of fact as a circumstance limiting reparations owed to the injured State. This can be done by including a new provision in the Articles of State Responsibility of a similar nature as Article 39 on contributory fault, which takes into account the contribution to the injury by the injured State when determining due reparations. In the same way, an honest and reasonable mistake by a State should moderate any reparations to the injured parties which might arise from such act.

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