



Legal Remedies for Downing Flight MH17

White Paper

By Public International Law & Policy Group
and VU University Amsterdam

LEGAL REMEDIES FOR DOWNING FLIGHT MH17

WHITE PAPER

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EXECUTIVE SUMMARY

On 17 July 2014, Malaysia Airlines Flight MH17 from Amsterdam to Kuala Lumpur was shot down over Eastern Ukraine. On board the Boeing 777 were 283 passengers and 15 crew members who all lost their lives. The victims' families and the states whose nationals were lost now seek remedies from those that are responsible for this tragedy.

This white paper addresses in detail possible legal redress mechanisms that may be available to victims and their states: 1) the International Court of Justice (ICJ); 2) the European Court of Human Rights (ECtHR); 3) the International Criminal Court (ICC); 4) prosecutions in domestic criminal courts; and 5) civil litigation proceedings. This paper does not identify those potentially responsible or recommend a course of action, but rather provides practical advice on pursuing legal remedies.

Under the doctrine of state responsibility, the Netherlands and/or Malaysia may be able to bring a case before the ICJ for violations of international law and internationally wrongful acts attributable to Russia and/or Ukraine. While it is in general very difficult to meet the criteria for jurisdiction before the ICJ, the civil aviation conventions may allow for such proceedings regarding the MH17 situation. There are strong arguments supporting the position that Russia and Ukraine may have violated their obligations under the civil aviation conventions to communicate information, to investigate the situation and allegations against potential perpetrators, and to prosecute or extradite those that may be responsible. However, attributing the actual firing of the missile on Flight MH17 onto a state will be much more difficult and depends on the availability of evidence to establish a link between the perpetrators (including those who ordered or contributed to firing the missile) and the relevant state. Nonetheless, a number of contentious cases and Advisory Opinions by the ICJ have shown that, even where the Court cannot find a state directly liable for violations of specific international obligations, it can elaborate on the factual background of the case. This declarative function of the ICJ's judgments may serve to publicly characterize the conduct of the respondent state or even provide a degree of satisfaction for the relatives of the victims.

There are several other relevant violations of international law, including violations of international humanitarian law and international human rights law, that could potentially be attributed to either Russia or Ukraine. However, for these violations it is more difficult to find a court with jurisdiction over such state violations, and thus to bring proceedings. A clear exception to this is the European Court of Human Rights, which has jurisdiction over the Netherlands, Ukraine and Russia, and can hold them accountable for violating their obligations under the European Convention on Human Rights. With regard to MH17, victims could potentially bring proceedings against Russia and/or Ukraine for violating the right to life. The standard of proof before the ECtHR is lower than that required by the ICC (which determines individual criminal liability). Where a violation is found, the ECtHR can issue binding judgments against member states and provide just satisfaction, which could be helpful in obtaining redress for victims.

Next to seeking the responsibility of states, it may also be possible to criminally prosecute the individuals responsible for firing the missile on Flight MH17. One option is that alleged perpetrators are prosecuted by the ICC. If the ICC Prosecutor positively reviews Ukraine's declaration that it accepts the jurisdiction of the ICC, the Prosecutor may open a criminal investigation into the situation. Even if these jurisdictional hurdles are overcome and the situation proceeds as an investigation before the ICC, there will be further difficulties in prosecuting any case(s), including that the ICC Prosecutor will need to prove to a high evidentiary standard that war crimes were committed by the accused. Furthermore, investigations and proceedings at the ICC can take many years. Of note, the ICC is also able, upon finding a conviction, to provide reparations to victims.

As an alternative (or in some cases in addition to) prosecutions at the ICC, domestic jurisdictions could also choose to prosecute alleged perpetrators in their own domestic criminal courts. There are, however, some limitations. The *ne bis in idem* principle of criminal law provides that no person is to be tried with respect to conduct that formed the basis of crimes for which the individual has already been convicted or acquitted by another court. Therefore, if a person is tried by the ICC or in a domestic court, another court may not be able to take this case on as well. In addition, according to the principle of complementarity, the ICC Prosecutor is mandated to grant primacy to domestic investigations and prosecutions. The current investigation by the Joint Investigation Team may mean that the ICC will not intervene, unless the domestic proceedings target different actors and/or crimes, or if states such as the Netherlands/Ukraine are unable or unwilling to investigate. The perpetrators of downing Flight MH17 may be prosecuted before domestic courts on the basis of Article 1 of the 1971 Montreal Convention, as an international crime, and on the basis of a domestic criminal code. Several states could assert jurisdiction in their domestic courts over the downing of MH17: Ukraine, Russia, the Netherlands, Malaysia, and other states whose nationals were killed. These states could obtain jurisdiction based on the territoriality principle, the passive personality principle, or the provisions for jurisdiction laid down in Article 5 of the 1971 Montreal Convention. As with prosecutions before the ICC, prosecuting alleged perpetrators in domestic courts will also face evidentiary problems because of the high evidentiary standards that criminal law prescribes. Moreover, obtaining custody of the accused is likely to pose another complication.

The final legal avenues that this paper discusses are those that seek accountability through civil proceedings for the downing of Flight MH17. This chapter identifies various legal options available to the relatives of the MH17 victims to seek financial compensation for losses suffered. Those that may have violated their responsibilities to ensure the safety of passengers on board Flight MH17 include i) Ukraine; ii) Malaysia Airlines/KLM; and iii) Malaysia. First, based on both national and international legislation, it can be argued that Ukraine has a duty to protect foreigners legally passing through its airspace, which could form the legal ground for a case in Ukraine against the state. Second, a civil suit against the airlines could be brought before a court in several states based on the Chicago and Montreal Conventions. Third, a case against Malaysia, as the state where the airline has its domicile, might be faced with some obstacles, as there is no clear legal obligation for such states to conduct risk assessments or ensure the safety of proposed flight routes. It differs per state how involved the relevant authorities are in the establishment of flight routes of its airlines. The Malaysian authorities claim that there is no

legal requirement for them to provide airlines with any information on the safety of foreign airspace, yet there are arguments to contest this.

This white paper aims to show victims and their supporting governments some of the potential pathways for legal accountability. It highlights legal, political and practical hurdles likely to arise, as well as provides some preliminary observations concerning legal strategies. The families of the victims know better than anyone that legal remedies of any kind will never fully compensate them for their losses. At a minimum, they deserve, as does the rest of the flying public, answers as to what happened and accountability for those responsible. By laying out the present applicable law and possible remedies, the authors hope that this paper will help the families and their governments decide which routes to pursue, and which goals to prioritize. As the families have already experienced, the road towards justice in any case involving the downing of civilian aircraft is likely to be long and arduous .

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The project was led by Marieke de Hoon, Julie Fraser and Brianne McGonigle Leyh. PILPG Senior Research Associates Sander Couch, Tjebbe Geldof, Ilina Georgieva, Rok Jamnik, Jolien Quispel and Margaux Reynaud provided invaluable contributions in both the drafting and editing of this report. Much praise is due to their excellent research, writing and editing. Moreover, this white paper has benefited greatly from the research and drafting assistance of PILPG Research Associates Ksenia Kutyreva, Andrew Merrylees, Adina Nistor, Maite van Rinsum, Robin de Ruiter, Thomas Verstege, and Mike Videler.

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LIST OF ABBREVIATIONS

DCC	Dutch Criminal Code
DSB	Dutch Safety Board (Onderzoeksraad voor Veiligheid, OVV)
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
HR	Human Rights Law
ICAO	International Civil Aviation Organization
ICC	International Criminal Court
ICJ	International Court of Justice
IHL	International Humanitarian Law
JIT	Joint Investigation Team
NOTAM	Notice to Airmen
SMS	Safety Management System
SDR	Special Drawing Rights

1. INTRODUCTION

Statement of Purpose

This white paper on legal remedies for the downing of Flight MH17 addresses potential mechanisms for accountability that may be available with regard to the crash of MH17 and death of 298 civilian victims, including 196 Dutch nationals. The paper details prior occurrences where civilian airliners were shot down and how they were dealt with, and what legal avenues for accountability are available to the Netherlands and the victims through international and domestic legal proceedings. This includes holding liable anyone with (direct/indirect) “involvement” in the crash including the individual(s) responsible and those individuals/states who may be held responsible for aiding, abetting or commanding the missile attack. These accountability options are discussed in the following order. The report first looks at the ways through which states, and in this situation in particular Russia, could be held accountable under the doctrine of state responsibility, particularly through its responsibilities under civil aviation treaties, should evidence indicate that Russia failed to meet its obligations or was responsible directly or indirectly. It then discusses the possibilities for proceedings against Russia for potentially violating Article 2 of the European Convention of Human Rights, the right to life. The analysis continues with individual responsibility through international prosecution at the International Criminal Court, and criminal proceedings in domestic jurisdictions, and closes with a discussion of civil complaints proceedings that may be open to victims.

In the absence of access to evidence, this report does not perform a legal assessment of those potentially responsible for the crash. Rather, it addresses potential judicial avenues for accountability on the basis of which the various options may be considered. This report does not recommend a particular course of action, but provides information on benefits and drawbacks of the various accountability mechanisms available.

The Downing of Flight MH17

On 17 July 2014, Malaysia Airlines Flight MH17 from Amsterdam to Kuala Lumpur was shot down over Eastern Ukraine. On board the Boeing 777 were 283 passengers and 15 crew members who all perished. Of the passengers, 196 were Dutch nationals. The flight was a Malaysia Airlines aircraft (registered 9M-MRD) that was code-sharing with KLM flight KL4103. The Dutch Safety Board (DSB) conducted an investigation into the specific circumstances of the crash. The investigation concluded that the plane was shot down by warhead installed on a Buk surface-to-air missile system, which was based on the rebel-held territory of the Donetsk region in Ukraine.¹

Since late 2013, Ukraine has faced ongoing civil and international conflict. Increasingly large protests occurred in Kiev after former President Yanukovich’s cabinet abandoned an

¹The Dutch Safety Board Report, *MH17 Crash*, The Hague, 22 October, 2015, available at <http://www.onderzoeksraad.nl/en/onderzoek/2049/investigation-crash-mh17-17-july-2014>.

agreement on closer trade ties with the European Union and instead sought to continue cooperation with Russia. The increasingly violent clashes between protesters and the police led to the removal of President Yanukovich. In response, pro-Russian groups and individuals in Crimea and Eastern Ukraine rejected the new interim government and increasingly fought to separate from Kiev. Russian Federation President Putin publicly offered Russia's support for their struggle against the new leadership in Kiev. In March 2014, Russia's Parliament approved President Putin's request to use force in Ukraine. Subsequently, Russia announced it annexed Crimea, and continued to support pro-Russian rebels in Eastern Ukraine who were seeking independence.

By July 2014, a full-fledged armed conflict was taking place between rebel forces fighting for the independence of Eastern Ukraine, allegedly being supported by Russia, and Ukrainian armed forces. Central to any legal or diplomatic accountability remedy will be establishing the facts regarding the extent to which Russian Federation military and/or civilian officials directed, trained, equipped or controlled rebel forces in Eastern Ukraine.

In the aftermath of the MH17 crash, no one has claimed responsibility, with all sides blaming each other. The Dutch government took the initiative at Ukraine's request to investigate the crash, to repatriate the victims and their belongings, as well as to seek to hold those responsible accountable. A number of Dutch government reports have since been published and others are expected to be completed and become public in the next months.

The October 2015 report by the Dutch Safety Board (DSB) is concerned solely with the technical reasons for the crash and seeks to contribute to the safety of civil aviation in the future. The criminal investigation is being conducted by the Joint Investigation Team (JIT) that consists of the Dutch National Police, the Netherlands Public Prosecutor's Office, and judicial authorities and police forces of Australia, Belgium, Malaysia and Ukraine, whose citizens died in the crash, as well as authorities from Germany, the USA, Italy, Canada, New Zealand, Indonesia and the Philippines. Russia is conducting its own investigation into the matter, which remains unfinished as of now. The Russian investigation has already parted ways with the DSB's findings regarding the type of missile used to fire at the plane and the direction from which it was fired. Various independent actors are conducting separate investigations. For example, Bellingcat, a team of investigative journalists, after having studied the situation on the ground for over a year, compiled a report containing the names of 20 Russian nationals they allege were involved in the downing. Both the Dutch Public Prosecution Service and the JIT received the report and are currently analyzing the information presented.

Investigating and obtaining the evidence required for judicial accountability mechanisms is greatly complicated by the ongoing conflict in the Donetsk region. The DSB had to discontinue operations when the situation on the ground was particularly unstable and life-threatening. At the moment, JIT experts are investigating the causes of the crash on the territory of Eastern Ukraine. However, if the security situation deteriorates, their access to the site could be compromised. As criminal trials require a high standard of proof, access to such potential evidence, as well as its proper protection and preservation, is crucial.

The investigatory materials regarding the MH17 investigation are unfortunately also vulnerable to cyber-attacks. The DSB has already suffered one such attack by the cyber-espionage organization Pawn Storm in which hackers tried to gain access to MH17 materials, the personal files of the DSB's employees and those of its partner organizations.²

Moreover, once those responsible are identified, the ongoing conflict and diplomatic tensions may make arresting any of the suspected perpetrators difficult, particularly the members of non-state, armed groups. One of the current understandings is that if responsible persons are identified and indicted, they will be transferred to the Netherlands to be tried at The Hague District Court. This would require cooperation on the part of their home countries or the countries to which they may have fled. Russia does not extradite its nationals implicated in crimes committed on foreign soil and has generally not been cooperative with regard to transferring persons who have been indicted by international tribunals. It does not seem plausible that it would do so this time, particularly since President Putin has explicitly deemed the tribunal premature, counterproductive, "inexpedient," and running "a risk of politicizing justice."³

Dutch and Ukrainian officials have proposed that an international criminal tribunal be established. In July 2015, Russia vetoed a draft of a UN Security Council resolution that supported the establishment of such a tribunal.

Furthermore, various political considerations may prove to be an obstacle to holding those involved accountable. For example, any legal proceedings have the potential to exacerbate existing tensions and interstate relations across Europe. Geopolitical interests are also relevant, as the USA has implicated Russia for its involvement in the MH17 crash, and sanctions have been imposed by both Russia and Western states. While Security Council Resolution 2166 (2014) condemned the downing of MH17 and called for accountability, just how that Resolution is implemented, could any alternative measures agreed upon by all the involved states, and what comes to light in the investigations are yet to be determined. Furthermore, whatever legal process is initiated, state cooperation cannot be guaranteed and may play a large role in the success or otherwise of the proceedings.

Accountability in International Context

There are a number of cases in the history of civil aviation that can provide fruitful lessons in the pursuit of legal accountability remedies for the MH17 crash. Unfortunately it is often the case that victims have not been able to find adequate legal remedies, and in some tragic situations, no redress at all. One such example is the downing of three Transair Georgia and ORBI Georgian Airways airplanes with civilians onboard by Abkhaz separatist forces on the territory of Sukhumi airport in September 2008. Two of the crashes involved casualties: 22

² Trend Micro, *Operation Pawn Storm: Fast Facts and the Latest Developments*. October 22, 2015, available at <http://www.trendmicro.com/vinfo/us/security/news/cyber-attacks/operation-pawn-storm-fast-facts>.

³ Reuters, *Russia's Putin Says Opposes MH17 Tribunal Ahead of U.N. Vote*. Moscow, July 29, 2015, available at <http://www.reuters.com/article/us-ukraine-crisis-mh17-russia-idUSKCN0Q31LQ20150729>.

passengers and five crew members died in the TU-134A downed on 21 September,⁴ and 108 passengers including Georgian police authorities and allegedly Georgian refugees together with eight crew members in the TU-134B on 22 September.⁵ Despite the high death toll, there have been no public investigations or remedies for those victims, perhaps because those crashes never attracted enough attention to trigger domestic or international mechanisms. This is certainly not the case with the MH17 crash. The victims' families have been very vocal in demanding justice, and every step of investigation takes place under substantial public scrutiny in a democracy with a free and active press.

When it comes to accountability mechanisms in international law, there are several possibilities, each with its own procedural and jurisdictional rules and substantive scope. To adjudicate inter-state matters, the International Court of Justice (ICJ) may find state responsibility if states have committed an internationally wrongful act. A state can be found responsible if: 1) an international obligation (for instance a treaty obligation or customary international law) is violated; 2) this conduct is attributable to the state with this obligation (through, for instance, state organs such as its armed forces or non-state actors over which it has effective control); and 3) there are no circumstances that preclude wrongfulness, such as a state of necessity, force majeure, distress or self-defense.⁶ Inter-state conflicts may also be addressed through arbitration rather than litigation. Inter-state judicial mechanisms are characterized by their consent-based nature, requiring consent of the states involved. Where the ICJ is limited to hearing cases between states only, arbitration is more flexible and could also be arranged between a state and a non-state party.

In the context of human rights law, human rights mechanisms seek to protect individuals from abuse of state authority. Although intended to protect the rights of individuals, human rights mechanisms address the responsibility of states for their conduct *vis-à-vis* individuals. For example, the European Court of Human Rights (ECtHR) adjudicates individuals' complaints against state parties to the European Convention on Human Rights (ECHR), and is the relevant institute for human rights claims regarding MH17. Human rights include the right to life, which obliges a state to refrain from taking a life arbitrarily and to take measures to prevent third parties from killing. Human rights law also obliges states to investigate and prosecute violations to the right to life.

In addition to (inter-)state and human rights accountability, international criminal law serves to hold individuals accountable for committing international crimes. The International Criminal Court (ICC) has jurisdiction over genocide, crimes against humanity, and war crimes. In accordance with the complementarity principle, the ICC investigates and prosecutes when domestic authorities are unable or unwilling to do so themselves.

⁴ Aviation Incidents, Accidents and Airplane Catastrophes in USSR and Russia, *The Destruction of the Three Planes of the Georgian Air Transport Department in the Midst of the Armed Conflict in Abkhazia. Tu-134A*. Available (in Russian language), available at <http://www.airdisaster.ru/database.php?id=231>.

⁵ Aviation Incidents, Accidents and Airplane Catastrophes in USSR and Russia, *The Destruction of the Three Planes of the Georgian Air Transport Department in the Midst of the Armed Conflict in Abkhazia. TU-134B*. Available (in Russian language), available at <http://www.airdisaster.ru/database.php?id=232>.

⁶ Articles of Responsibility of States for Internationally Wrongful Acts, annex to General Assembly Resolution 56/83 of 12 December 2001, corrected by document A/56/49(Vol.1)/Corr.4, available at http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf.

In addition to these international mechanisms, the Dutch domestic judicial system may exercise jurisdiction over individuals (irrespective of their nationality) who have committed crimes against Dutch nationals. So may the domestic judicial systems of Malaysia, Australia, Ukraine, Russia and other injured countries based on territorial, active or passive personality, and universal principles of jurisdiction as is provided by international law.

Lastly, victims may also seek legal remedies by submitting civil claims in domestic civil courts against civil parties that may be liable under the circumstances at hand, for instance the airliner, as well as against states for their unlawful acts relating to the downing of MH17.

This white paper addresses in detail possible legal redress mechanisms in the following order: state responsibility and interstate adjudication by the ICJ or arbitral tribunal; accountability for human rights violations at the ECtHR; prosecution of individuals under international criminal law at the ICC; domestic criminal law prosecution of foreign nationals in the Netherlands or in other domestic jurisdictions; and civil suits between individuals or against states in domestic courts. There is no hierarchy of mechanisms, and generally they may be pursued simultaneously. Although there may appear many routes towards legal remedies in theory, each presents substantial complications.

This paper aims to show victims and their supportive governments some of the potential pathways for legal accountability. It highlights legal and political hurdles that are likely to arise, as well as provides some preliminary observations concerning legal strategies. Given the confidentiality of the ongoing governmental and inter-governmental investigations, however, any discussion of potential legal remedies by outside parties must of necessity be broad.

As was the case concerning past bombings or crashes of international civilian airliners, the suitability or potential for success of a particular legal path will change, of course, as the diplomatic relationships among countries, status of the conflict and leadership of governments change. While international political dynamics and lack of international cooperation and respect for the most basic tenets of the rule of law are likely to continue to be a source of daily frustration, it is worth recalling that unexpected changes in governments and diplomatic relationships have led to accountability in similarly complex cases.

The victims' families know better than anyone that legal remedies of any kind will never fully compensate them for their losses. At a minimum, they deserve, as does the rest of the flying public, answers as to what happened and accountability for those responsible. By laying out the present applicable law and possible remedies, the authors hope that this paper will help the families and their governments decide which routes to pursue, and which goals to prioritize. As the families have already experienced, the road towards justice in any case involving the downing of civilian aircraft is likely to be long and arduous.

2. ACCOUNTABILITY FOR DOWNING CIVILIAN FLIGHTS: COMPARATIVE PRACTICE

In the past 60 years, nearly 20 civilian airplanes have been shot down.⁷ In some instances the aircrafts were deliberately targeted, and in others, the planes were shot down due to the violation of a closed airspace and/or deviation from the initial flight route.⁸ While the international community has strongly condemned such actions, the international and/or domestic responses to such attacks vary from inaction to investigations, from diplomatic sanctions to prosecutions. In most cases, investigations into the crash preceded any legal or political action. In a few instances, the downing of a civilian airplane triggered judicial proceedings either at the domestic or international level, or both. This section briefly describes the main instances of downing civilian aircrafts and the international and domestic accountability attempts. As can be seen from this section, securing accountability can be a long and difficult process for states and victims.

The practice here discussed includes judicial proceedings before international institutions, international agreements on responsibility and payment of (*ex gratia*) compensation, condemnatory statements by individual states and international organizations, prosecution of individuals, and the adjudication of civil claims brought before domestic courts.

Judicial Proceedings before International Institutions

Aerial Incident of 27 July 1955

On 27 July 1955, two Bulgarian jet fighters shot down the international civilian El Al Flight 402, resulting in the death of 51 passengers and crew. The civilian airliner, en route from Vienna to Tel Aviv, had violated Bulgarian airspace. The Bulgarian Government initially reported that the airliner was fired upon from the ground, because they were unable to identify it. The Israeli investigation team, however, found that the crash was caused by a fighter aircraft rather than a missile fired from the ground. It furthermore reported a lack of cooperation by the Bulgarian authorities and denounced attempts to destroy incriminatory evidence.⁹ While the Bulgarian Government issued a statement admitting that it was a fighter jet that shot down the plane and that it was willing to provide compensation, it later changed this position to deny all responsibility for the incident.¹⁰

⁷ The described instances were selected for their relevance in assessing the most appropriate accountability mechanisms with regards the MH17 downing. The core of the research thus excludes instances of airliners downing left unsanctioned, uninvestigated, unprosecuted, or uncompensated.

⁸ Security Council Report, *Monthly Forecast: August 2014*, 2 (Aug. 2014), available at http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/2014_08_forecast.pdf.

⁹ Major John T. Phelps II, *Aerial Intrusions by Civil and Military Aircraft in a Time of Peace*, 107 MILITARY LAW REVIEW 255, 279 (1985).

¹⁰ Major John T. Phelps II, *Aerial Intrusions by Civil and Military Aircraft in a Time of Peace*, 107 MILITARY LAW REVIEW 255, 279 (1985).

The respective governments of Israel, the United States of America and Great Britain brought the dispute before the ICJ on 16 October 1957.¹¹ The ICJ dismissed the cases, however, on the ground that it lacked jurisdiction.¹² It ruled that Bulgaria's declaration of acceptance of compulsory jurisdiction of the Permanent Court of International Justice (PCIJ), the ICJ's predecessor, was no longer applicable for the ICJ under Article 36(5). The reason for this ruling was that the declaration had ceased to be in force when the PCIJ was dissolved since Bulgaria did not immediately become a member of the United Nations and thus party to the Statute.¹³ Bulgaria eventually proposed to make *ex gratia* payments to the victims' families, which means that it agreed to the payment of monetary compensation while formally denying responsibility.¹⁴

Aerial Incident of 3 July 1988

On 24 July 1990 the Islamic Republic of Iran filed an application with the ICJ to seek accountability of the United States of America for firing at Iranian Civil Airliner 655.¹⁵ The United States navy fired a missile from cruiser USS Vincennes at the civilian airliner that penetrated Iranian airspace. All 290 passengers and crew died. The United States claimed to have confused the civilian airplane with a fighter jet of the Islamic Republic of Iran Air Force believed to be preparing for an attack. According to the Iranian Government, the crew of the USS Vincennes violated the Chicago and Montreal Conventions. Ultimately, the parties discontinued the proceedings after the signing of an agreement, whereby the US Government provided compensation to the victims' families without admitting legal liability.

Pan Am Flight 103 or the "Lockerbie Bombing" (1988)

On 21 December 1988, 243 passengers and 16 crewmembers died in the explosion of the Pan Am trans-Atlantic flight that departed London on course to New York and Detroit. The airplane crashed in Lockerbie, Scotland, resulting in 11 additional casualties on the ground. In 1990, the British Civil Aviation Authority's Air Accidents Investigation Branch reported that the crash was caused by an explosive device.¹⁶ Further investigations conducted jointly by the US

¹¹ *Case concerning the Aerial Incident of 27 July 1955 (Israel v. Bulgaria)*, Application Instituting Proceedings and Pleadings, 1957 I.C.J. Pleadings, 5 (16 Oct 1957), available at <http://www.icj-cij.org/docket/files/35/9135.pdf>; *Case concerning the Aerial Incident of 27 July 1955 (United States of America v. Bulgaria)* 1957 I.C.J. Pleadings, 22 (28 Oct 1957) available at <http://www.icj-cij.org/docket/files/36/10727.pdf>; *Case concerning the Aerial Incident of 27 July 1955 (United Kingdom of Great Britain v. Bulgaria)*, Application Instituting Proceedings, I.C.J. Pleadings, 34 (21 Nov 1957), available at <http://www.icj-cij.org/docket/files/37/10729.pdf>.

¹² *Case concerning the Aerial Incident of 27 July 1955 (Israel v. Bulgaria; United States of America v. Bulgaria; United Kingdom of Great Britain v. Bulgaria)*, Judgment, 1959 I.C.J. Reports, 127 (1959).

¹³ *Case concerning the Aerial Incident of 27 July 1955 (Israel v. Bulgaria; United States of America v. Bulgaria; United Kingdom of Great Britain v. Bulgaria)*, Judgment, 1959 I.C.J. Reports (1959).

¹⁴ *Settlement Agreement on the Case Concerning the Aerial Incident of 3 July 1988 Before the International Court of Justice*, art. 1 (United States of America and the Islamic Republic of Iran, 1996), available at <http://www.icj-cij.org/docket/files/79/11131.pdf>. See also, Brian E. Foont, *Shooting Down Civilian Airplanes: Is There an International Law?* 72 JOURNAL OF AIR LAW AND COMMERCE 695, 706 (2007).

¹⁵ *Case concerning the Aerial Incident of 3 July 1988 (Islamic Republic of Iran v. United States)*, Application Instituting Proceedings, 28 I.L.M. 842 (17 May 1989), available at <http://www.icj-cij.org/docket/files/79/6623.pdf>.

¹⁶ Air Accident Investigation Branch, Report No: 2/1990, Report on the accident to Boeing 747-121, N739PA at Lockerbie, Dumfriesshire, Scotland on 21 December 1988, 1, available at <https://www.gov.uk/aaib-reports/2-1990-boeing-747-121-n739pa-21-december-1988>.

and Scotland led to the indictment of two Libyan nationals.¹⁷ In 1991, the Lord Advocate for Scotland issued arrest warrants for the two suspects. The chain of events relating to domestic judicial proceedings for the Lockerbie bombing are discussed in the next sub-section.

Concerning the international judicial aspects of this bombing, on 3 March 1992, Libya filed applications with the ICJ against the United Kingdom, and the United States to address disputes arising out of the Lockerbie bombing. The Libyan Government requested the ICJ to rule on the contentious requests for extradition of two Libyan citizens to stand trial, and disputed jurisdiction over the incident.¹⁸ The Libyan authorities claimed that the US did not have the right to compel it to surrender the suspects since Libya was justified in exercising their domestic criminal jurisdiction as provided by the Montreal Convention.¹⁹ While the ICJ declared itself competent to hear the merits of the case, in September 2003 the parties jointly requested its discontinuation.²⁰ During the same period, a deal was closed with Libya admitting responsibility for the incident, providing compensation for the victims' families and renouncing acts of terrorism. Subsequently, the UN Security Council lifted existing sanctions against Libya.²¹

Aerial Incident of 10 August 1999 or the 'Atlantique incident'

The Islamic Republic of Pakistan instituted proceedings before the ICJ concerning the 1999 Indian Air Force's shooting down of a Pakistani aircraft.²² The Pakistani authorities claimed the unarmed aircraft was on a training mission when the Indian Air Forces attacked the plane, resulting in the death of six passengers. Furthermore, Pakistan claimed that the plane was within Pakistani territory. The Republic of India admitted the shooting but claimed that the plane acted in a hostile manner while heading towards the border with India. The shooting took place just a month after the Kargil War, adding to an already tense situation between India and Pakistan.

¹⁷ *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, Documentary exhibits submitted by the United States of America, 1995 I.C.J. Reports, available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&case=89&code=lus&p3=10>.

¹⁸ *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom; Libyan Arab Jamahiriya v. United States of America)* Judgment, 1998 I.C.J. Reports 9, 18 (Feb. 27 1998), available at <http://www.icj-cij.org/docket/files/89/7249.pdf>; Michael Plachta, *The Lockerbie Case: The Role of the Security Council in Enforcing the Principle Aut Dedere Aut Judicare*, 12 EUROPEAN JOURNAL OF INTERNATIONAL LAW 125, 126-131 (2001).

¹⁹ *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)* Application instituting proceedings, 1998 I.C.J. iii (c) (Feb. 27, 1998), available at <http://www.icj-cij.org/docket/files/89/7209.pdf>.

²⁰ Hague Justice Portal, *The Lockerbie Cases before the International Court of Justice*, 2 (2003), available at http://www.haguejusticeportal.net/Docs/Miscellaneous/Lockerbie_info_EN.pdf.

²¹ UN Meetings Coverage and Press Releases, *UN Security Council Lifts Sanctions Imposed on Libya After Terrorist Bombings of Pan Am 103, UTA 772* (Sept. 12, 2003), available at <http://www.un.org/press/en/2003/sc7868.doc.htm>.

²² *Case concerning the Aerial Incident of 10 August 1999 (Pakistan v. India)*, Application Instituting Proceedings, 3 (May 17 1989), available at <http://www.icj-cij.org/docket/files/79/6623.pdf>; *Case concerning the Aerial Incident of 10 August 1999 (Pakistan v. India)* Judgment, 2000 I.C.J. Reports 12, 34 (June 21 2000).

At the ICJ, the Pakistani authorities sought reparations from India for the loss of the aircraft, and as compensation for the victims' relatives.²³ The ICJ had to decide whether to uphold India's preliminary objection that it did not have jurisdiction, based on a reservation India made in 1974 under Article 36(2) of the Statute of the Court. This declaration excluded all disputes arising between India and other Commonwealth states from the Court's jurisdiction. The Court agreed with India's objection and decided that it indeed lacked jurisdiction to adjudicate the case because Pakistan is a Commonwealth state.²⁴

Judicial Proceedings before Domestic Courts

Aerolinee Itavia Flight 870 or the "Ustica Disaster" (1980)

On 27 June 1980, the domestic Itavia Airlines Flight crashed into the Tyrrhenian Sea, while flying from Bologna to Palermo, killing all 81 passengers and crew.²⁵ The several commissions charged with investigating the crash failed to agree on their conclusions, including the cause of the crash. While some investigators suspected the explosion of a bomb, others suggested that the plane was caught in a NATO training exercise or military action.²⁶ NATO denied the existence of military activities at the time of the crash.²⁷

In 1987, the Italian Magistracy opened an investigation to establish criminal responsibility for the crash, which lasted for over 10 years. Investigative magistrate Rosario Priore concluded in his report that Flight 870 had probably been caught in a "dog fight" between NATO Air Force fighters, and Libyan fighter jets.²⁸ However, he could not establish who was responsible, because, Judge Priore declared, his investigation had been deliberately obstructed by Italian military and secret service officials acting on a NATO request to cover up the cause of the crash.²⁹ In 1999, the prosecution indicted four Italian Air Force generals on charges of high treason for withholding information, abuse of office and falsifying documents. However, the

²³ *Case concerning the Aerial Incident of 10 August 1999 (Pakistan v. India)* Judgment, I.C.J. Reports 12, 17 (21 June 2000).

²⁴ *Case concerning the Aerial Incident of 10 August 1999 (Pakistan v. India)* Judgment, I.C.J. Reports 12, 34 (21 June 2000).

²⁵ International Law Office, *Supreme Court has last word on Ustica disaster* (July 2, 2013), available at <http://www.internationallawoffice.com/newsletters/detail.aspx?g=c8ef0caa-0ba5-42be-a1c8-e15e4e650925#>.

²⁶ Harro Ranter, *Italian court: Missile caused 1980 Ustica plane crash*, Aviation Safety Network (Jan. 28, 2013), available at <http://news.aviation-safety.net/2013/01/28/italian-court-missile-caused-1980-ustica-plane-crash/>.

²⁷ Harro Ranter, *Italian court: Missile caused 1980 Ustica plane crash*, Aviation Safety Network (Jan. 28, 2013), available at <http://news.aviation-safety.net/2013/01/28/italian-court-missile-caused-1980-ustica-plane-crash/>.

²⁸ Barbara McMahon, *The Mystery of Flight 870*, The Guardian (Jul. 21, 2006), available at <http://www.theguardian.com/world/2006/jul/21/worlddispatch.italy>.

²⁹ Barbara McMahon, *The Mystery of Flight 870*, The Guardian (Jul. 21, 2006), available at <http://www.theguardian.com/world/2006/jul/21/worlddispatch.italy>.

accused were acquitted due to a lack of evidence.³⁰ The Court of Cassation formally ended all criminal proceedings in accordance with the domestic statute of limitations.³¹

Nonetheless, many relatives of the deceased decided to continue proceedings through the filing of a civil action against the Italian Government. In a corresponding ruling, the Palermo Civil Tribunal ordered the Government to pay EUR100 million to the victims' relatives.³² On 29 January 2013, the Court of Cassation upheld this judgment and ordered the Government to compensate the victims' families for failing to guarantee the passengers' safety.³³

The Air India Bombings (1985)

On 23 June 1985, 329 passengers and crewmembers died in the bombing of Air India Flight 182, flying from Toronto to London, which occurred off the coast of Ireland.³⁴ Explosives were loaded onto the plane in a suitcase that destroyed the aircraft.³⁵ On the same night, an explosive suitcase in transit to Air India Flight 301 detonated at Japan's Narita Airport, resulting in the death of the two airport personnel. Various agencies undertook investigations into the bombings, and the Royal Canadian Mounted Police in June 2015 indicated its investigation is active and ongoing.³⁶ The Canadian authorities arrested three individuals for conspiracy to commit murder and tried them jointly three years later before the Vancouver Law Courts. The proceedings led to two acquittals due to inadequate evidence,³⁷ however, the third man was sentenced to five years imprisonment for manslaughter and to an additional nine years for perjury.³⁸ This decision was upheld on appeal.³⁹

³⁰ State Watch, Civil court orders transport and defense ministries to pay damages to Ustica victim's relatives, collateral victims of undeclared warfare in the Mediterranean (2011), *available at* <http://www.statewatch.org/news/2011/oct/02italy-ustica.htm>.. See also Sentenza, Corte Di Assise Di Appello Di Roma, 108-109 (Dec. 15, 2005) *available at* <http://www.stragi80.it/documenti/processo/appello/motiviappello.pdf>.

³¹ Sentenza, Corta Suprema Di Cassazione, 11 (Jan. 10, 2007), *available at* <http://www.stragi80.it/documenti/processo/cassazione/motivi.pdf>.

³² International Law Office, *Supreme Court has last word on Ustica disaster* (July 2, 2013), *available at* <http://www.internationallawoffice.com/newsletters/detail.aspx?g=c8ef0caa-0ba5-42be-a1c8-e15e4e650925#>

³³ International Law Office, *Supreme Court has last word on Ustica disaster* (July 2, 2013), *available at* <http://www.internationallawoffice.com/newsletters/detail.aspx?g=c8ef0caa-0ba5-42be-a1c8-e15e4e650925#>

³⁴ Encyclopedia Britannica, *Air India Flight 182 Disaster*, (last updated in May 2013), *available at* <http://www.britannica.com/EBchecked/topic/1462740/Air-India-Flight-182-disaster>.

³⁵ Air India Review Secretariat, *Lessons to be Learned: The Report of the Honourable Bob Rae, Independent Advisor to the Minister of Public Safety and Emergency Preparedness, On Outstanding Questions with Respect to the Bombing of Air India Flight 182*, 11 (2005), *available at* <http://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/lssns-lrnd/lssns-lrnd-eng.pdf>.

³⁶ Jim Bronskill, RCMP Says 1985 Air India Investigation 'Active and Ongoing', THE GLOBE AND MAIL, *available at* <http://www.theglobeandmail.com/news/national/rcmp-says-1985-air-india-bombing-investigation-active-and-ongoing/article25071447/>.

³⁷ The Queen v. Ripudaman Singh Malik & Ajaib Singh Bagri (2005), para. 1345, *available at* <http://www.courts.gov.bc.ca/Jdb-txt/SC/05/03/2005BCSC0350.htm>.

³⁸ BBC News, *Air India bomb plotter convicted of perjury*, BBC (Sept. 16, 2010), *available at* <http://www.bbc.com/news/world-us-canada-11360367>. See also CBS News, *Air India Bomber Gets 9 Years for Perjury*, CBS News (Jan. 7, 2011), *available at* <http://www.cbc.ca/news/canada/british-columbia/air-india-bomber-gets-9-years-for-perjury-1.1049335>.

³⁹ The Canadian Press, *Indejit Singh Reyat, Air India Bomb Maker, Loses Appeal of Prison Term*, Huffington Post (March 13, 2014), *available at* http://www.huffingtonpost.ca/2014/03/13/inderjit-singh-reyat-air-india-bomb-maker-appeal_n_4957797.html.

Further, a Canadian Commission of Inquiry into the Investigation of the Bombing of Air India Flight 182 was appointed in 2006. The report of the Commission concluded that the authorities, *inter alia*, committed a “cascading series of errors” and condemned the Canadian intelligence for failing to share potentially helpful information at the time of the trial.⁴⁰

Following the bombing, the Indian Government also established a court of inquiry.⁴¹ Although no remedies followed, the recommendations to the ICAO that this court issued in its report of February 1986 led to an improving of the security of baggage handling.⁴²

Pan Am Flight 103 or the “Lockerbie Bombing” (1988)

As was discussed above, Pan Am Flight 103 crash resulted in 11 additional casualties on the ground. An international team investigated the circumstances of the bombing, with conclusive evidence indicating the bombing was a deliberate and criminal act. After the conclusion of the three-year investigation into the Lockerbie bombing, in November 1991 the Lord Advocate for Scotland issued arrest warrants for two Libyan nationals. Libya initially refused to hand over the suspects. Following UN sanctions and tense negotiations, in 1999 Colonel Muammar Gaddafi eventually surrendered the accused persons to the Scottish authorities. The two suspects were tried in an *ad hoc* Scottish court established at Kamp Zeist, a military terrain in the Netherlands, which operated on the basis of and within Scottish law. In 2001, the Court ordered the imprisonment of Libyan officer Abdelbaset al-Megrahi but found the other suspect, Al Amin Khalifa Fhimah, not guilty.⁴³

Some of the victims’ relatives instigated a civil lawsuit against Pan Am World Airways before a US District Court in New York. After a three-month trial in 1992, the Court found the airline guilty of “willful misconduct” for allowing a bomb to be smuggled onto the airplane, making it liable to pay compensatory damages.⁴⁴ By 1996, over 250 cases against Pan Am were concluded with a total of over USD500 million in damages.⁴⁵

Civil cases were also brought against the Libyan State, for which the US Supreme Court at first upheld Libya’s claim to state immunity from jurisdiction by US courts. However, following an amendment of the Foreign Sovereign Immunities Act in 1996 allowing for civil suits against foreign governments in cases involving terrorism, the US Supreme Court concluded

⁴⁰ Encyclopedia Britannica, *Air India Flight 182 Disaster*, (last updated in May 2013), available at <http://www.britannica.com/EBchecked/topic/1462740/Air-India-Flight-182-disaster>. See also Ministry of Public Works and Government Services, *Air India Flight 182: A Canadian Tragedy. Volume Three: The Relationship Between Intelligence and Evidence and the Challenges of Terrorism Prosecutions (2010)*, available at http://publications.gc.ca/collections/collection_2010/bcp-pco/CP32-89-2-2010-3-eng.pdf.

⁴¹ Rodney Wallis, LOCKERBIE: THE STORY AND THE LESSONS, 9-10 (2001).

⁴² Rodney Wallis, LOCKERBIE: THE STORY AND THE LESSONS, 10 (2001).

⁴³ CNN Library, *Pan Am Flight 103 Fast Facts*, CNN, available at <http://edition.cnn.com/2013/09/26/world/pan-am-flight-103-fast-facts/> (22 Aug 2014).

⁴⁴ Arnold H. Lubasch, Pan Am is Held Liable by Jury in '88 Explosion, THE INTERNATIONAL NEW YORK TIMES (Jul. 11, 1992), available at <http://www.nytimes.com/1992/07/11/world/pan-am-is-held-liable-by-jury-in-88-explosion.html>.

⁴⁵ Steven R. Pounian & Blanca I. Rodriguez, *The Bombing of Pan Am Flight 103 Over Lockerbie – 16 Years Later*, New York Law Journal (Mar. 30, 2005), available at <http://www.kreindler.com/Publications/Aviation-Law-9.shtml>.

that newly brought suits were to be continued.⁴⁶ However, a “national security waiver” in the new legislation meant that the US executive branch could refuse to assist litigants with collecting damages when it claimed to be needed for national security reasons.⁴⁷

In August 2003, a deal was closed with Libya paying \$2,7 billion to compensate for the victims’ families’ losses. As part of the deal, Libya admitted responsibility for the bombing and renounced terrorism.⁴⁸

However, the bombing was seen as an act of terrorism in which al-Megrahi did not act alone. In October 2015, Scottish prosecutors identified two other Libyan nationals as suspects in the bombing.⁴⁹ Consequently, the Lord Advocate issued an International Letter of Request to Libya, and sought assistance from the Libyan judicial authorities to interview the two new suspects. The Libyan authorities reportedly appointed two prosecutors to facilitate the international investigations on its territory.⁵⁰

Rwandan Presidential Airplane (1994)

An airplane carrying Presidents Juvénal Habyarimana of Rwanda, and Cyprien Ntaryamira of Burundi, as well as several members of their respective cabinets, was shot down on 6 April 1994.⁵¹ The crash is commonly believed to have been the catalyst for the Rwandan Genocide of 1994. Several reports were published on who carries responsibility for the event. A declassified US State Department intelligence report indicated that rogue Hutu elements of the military were responsible for the downing of the airplane.⁵² A 1997 Belgian Senate report was inconclusive as to the identity of those responsible. A 1998 report by the French National Assembly presented two theories without choosing one over the other: the plane was taken down either by Hutu extremists, or by the (Tutsi) Rwandan Patriotic Front under Paul Kagame’s leadership, Rwanda’s current President.⁵³

⁴⁶ BBC News, Lockerbie: Long Road to Legal Claim (Feb. 5, 2001), *available at* <http://news.bbc.co.uk/2/hi/americas/1154140.stm>.

⁴⁷ Anthony J. Sebok, *Libya, Lockerbie, and the Long-Delayed Settlement Relating to Pan Am Flight 103*, FindLaw (Sep. 8, 2003), *available at* <http://writ.lp.findlaw.com/sebok/20030908.html>; William P. Hoye, *Fighting Fire With... Mire? Civil Remedies And The New War On State-Sponsored Terrorism* 12 Duke Journal of Comparative & International Law 105, 118 (2001), *available at* <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1190&context=djcil>

⁴⁸ BBC News, Libya Admits Lockerbie Blame (16 Aug. 2003), *available at* http://news.bbc.co.uk/2/hi/uk_news/scotland/3155523.stm.

⁴⁹ CNN News, Two Libyans Identified As Lockerbie Bombing Suspects, Scotland, U.S. say (17 Oct. 2015), *available at* <http://edition.cnn.com/2015/10/15/europe/lockerbie-pan-am-flight-103/>.

⁵⁰ Scotland’s Prosecution Service *Libyan prosecutors appointed to assist with Lockerbie bombing investigation*, Media Release (17 Dec. 2013), *available at* <http://www.copfs.gov.uk/media-site/media-releases/596-libyan-prosecutors-appointed-to-assist-with-lockerbie-bombing-investigation>.

⁵¹ Philip Gourevich, *The Mutsinzi Report on the Rwandan Genocide*, The New Yorker (Jan. 8, 2010), *available at* <http://www.newyorker.com/news/news-desk/the-mutsinzi-report-on-the-rwandan-genocide>.

⁵² United States Department of State, Bureau of Intelligence and Research, *Spot Intelligence Report Rwanda/Burundi: Turmoil in Rwanda (7 April 1994)*, *available at* <http://nsarchive.gwu.edu/NSAEBB/NSAEBB119/Rw4.pdf>.

⁵³ National Assembly of the French Republic, *Briefing Report on the Fact-Finding Mission to Rwanda 224-261 (15 Dec 1998)*, *available in French at* <http://www.assemblee-nationale.fr/11/dossiers/rwanda/telechar/r1271.pdf>.

Investigating the deaths of three French crewmembers, French investigative judge Bruguière of the High Court of Paris released a report in 2004, concluding that Paul Kagame had given the order for the assassination of the President of Rwanda by shooting down the airplane.⁵⁴ In 2006, Judge Bruguière came to the same conclusion in a new report, issuing arrest warrants for nine Kagame aids, after which Rwanda severed diplomatic ties with France.⁵⁵ Diplomatic relations were normalized after Rwanda published its own investigative report on the attack on the airplane in January 2010, pointing at proponents of Hutu Power as those responsible.⁵⁶ Interestingly, the expert investigation assigned by judges Poux and Trévidic, the successors of judge Bruguière, concluded in January 2012 that the missiles that took down the Presidential airplane were fired from Rwandan military camps, which points at the involvement of a rogue Hutu group.⁵⁷ Despite these judicial investigations, no one was ultimately convicted in a criminal trial.

Siberia Airlines Flight 1812 (2001)

On 4 October 2001, the Siberia Airlines Flight 1812, on its way from Tel Aviv to Russia crashed into the Black Sea. All 78 passengers and crew died when the airplane exploded at more than 35,000 feet.⁵⁸ The level of involvement of the Ukrainian military remains uncertain to this date, although a spokesperson for the Ukrainian military indicated that it may have mistakenly fired a missile at the airplane.⁵⁹ Nonetheless, on 20 November 2003, Ukraine, Russia and Israel agreed to sign *ex gratia* compensation agreements.⁶⁰ However, these agreements did not engage any of the government's legal responsibility, but arranged for the payment by Ukraine of compensation intended for the victims' relatives.

However, the victims' relatives who refused compensation brought a civil suit against Ukraine before the Pechersk local court, which rejected the applicants' claims due to inadequate evidence pointing towards a Ukrainian missile as the cause of the downing of Flight 1812.⁶¹ On 22 August 2007, the Kiev Appeals Court confirmed this judgment and refused to award

⁵⁴ BBC News, Rwanda Denies French Allegations (11 March 2004), *available at* <http://news.bbc.co.uk/2/hi/africa/3501032.stm>.

⁵⁵ New York Times, Rwanda Breaks Diplomatic Relations with France (24 Oct. 2006), *available at* <http://www.nytimes.com/2006/11/24/news/24iht-rwanda.3660589.html>.

⁵⁶ Philip Gourevich, The Mutsinzi Report on the Rwandan Genocide, *The New Yorker* (8 Jan. 2010), *available at* <http://www.newyorker.com/news/news-desk/the-mutsinzi-report-on-the-rwandan-genocide>.

⁵⁷ Le Point, Judge Bruguière's Report on Rwanda Nullified (10 Jan. 2012), *available in French at* http://www.lepoint.fr/societe/l-enquete-du-juge-bruguiere-sur-le-rwanda-annihilee-10-01-2012-1417411_23.php.

⁵⁸ Inigi Gilmore et al., Israel Accuses Ukraine of Hiding of Hiding Missile Strike that Destroyed Jet, *The Telegraph* (7 Oct 2001), *available at* <http://www.telegraph.co.uk/news/worldnews/europe/ukraine/1358757/Israel-accuses-Ukraine-of-hiding-missile-strike-that-destroyed-jet.html>.

⁵⁹ Ukraine Admits Missile May have Downed Airplane, *The Guardian* (12 Oct 2001), *available at* <http://www.theguardian.com/world/2001/oct/12/russia.israel>.

⁶⁰ Brian E. Foont, *Shooting Down Civilian Airplanes: Is There an International Law?* 72 *JOURNAL OF AIR LAW AND COMMERCE* 695, 716 (2007).

⁶¹ Maria Danilova, Ukraine Court Decides Missile not Being Behind Crash, *The Moscow Times* (22 Aug 2007), *available at* <http://www.themoscowtimes.com/news/article/ukrainian-court-decides-missile-not-behind-crash/194894.html>.

compensation.⁶² Earlier in 2004, Siberia Airlines filed a similar and equally unsuccessful lawsuit against the Ukrainian Ministries of Defense and Finance before the Kiev Economic Court. In December 2012, the Ukraine Supreme Commercial Court upheld the lower court's judgment, ruling that the Ukrainian military had no involvement in the downing of the flight.⁶³

Non-Judicial: Diplomatic Responses, International Civil Aviation Organization, and Monetary Compensation

States, acting alone or in a community of states have responded to the shooting down of civilian airliners with political statements, and in some cases, with diplomatic sanctions. In a few instances, states have acted through the International Civil Aviation Organization (ICAO) to note their disapproval. Furthermore, states have relied on the award of monetary compensation to restore peaceful diplomatic relations.

Diplomatic Responses and the ICAO

On 21 January 1973, Israeli fighter jets intercepted Libyan Arab Airlines Flight 114 when it was flying over the Sinai Desert.⁶⁴ The plane reportedly encountered severe meteorological problems forcing it to deviate from its flight route, as a result of which the plane violated Egypt's airspace. The Israeli military suspected that the plane was on a spy mission and fired on the airliner. The crash killed 108 out of the 113 passengers and crew. Israel initially denied involvement before admitting responsibility. However, the Israeli Government claimed that shooting the plane down was consistent with Israeli's right to self-defense in light of the tense security situation in the region.⁶⁵ While the UN decided to refrain from taking any action against Israel, the 30 member states of the ICAO passed a resolution strongly condemning the actions of the Israeli Government.⁶⁶

On 1 September 1983, Soviet Air Forces shot down Korean Air Line Flight 007 on its way from New York to Seoul, resulting in the death of all 269 passengers and crew. The Soviet Accident Investigation Commission published a report attempting to justify the attack. The report claimed a violation of Soviet Law, of the 1944 Chicago Aviation Convention, and of the standards of the ICAO.⁶⁷ The international community unequivocally condemned the attack.⁶⁸

⁶² Maria Danilova, Ukraine Court Decides Missile not Being Behind Crash, *The Moscow Times* (Aug. 22, 2007) available at <http://www.themoscowtimes.com/news/article/ukrainian-court-decides-missile-not-behind-crash/194894.html>.

⁶³ Sputnik International, *Ukraine Court Upholds Dismissal of Airline Shooting Down Claim*, (Dec. 11, 2012) available at <http://sputniknews.com/russia/20121211/178080469.html>; Interfax, *Top Ukrainian court rejects S7 airline's appeal against compensation ruling*, (Dec. 11, 2012), available at <http://en.interfax.com.ua/news/general/131349.html>.

⁶⁴ The Libyan Arab Airlines Flight 114 departed from Tripoli on a course to Cairo.

⁶⁵ Major John T. Phelps II, *Aerial Intrusions by Civil and Military Aircraft in a Time of Peace*, 107 *MILITARY LAW REVIEW* 255, 290 (1985).

⁶⁶ Major John T. Phelps II, *Aerial Intrusions by Civil and Military Aircraft in a Time of Peace*, 107 *MILITARY LAW REVIEW* 255, 290 (1985); ICAO Council Resolution, 1973 ICAO Bulletin, 13 (June 4, 1973).

⁶⁷ Major John T. Phelps II, *Aerial Intrusions by Civil and Military Aircraft in a Time of Peace*, 107 *MILITARY LAW REVIEW* 255, 260 (1985).

Canada, Japan, Switzerland and most NATO member states imposed a temporary ban on landings of Aeroflot planes, the Soviet airline.⁶⁹ In addition, nine members of the UN Security Council approved a draft resolution recognizing the right to compensation for the victims' relatives and declaring such use of force "incompatible with the norms concerning international behavior."⁷⁰ The Soviet Union, however, used its veto to ensure the resolution was not adopted. At the request of Canadian and South Korean officials, the ICAO met in an extraordinary session to discuss the attack. The debates resulted in a resolution condemning the attack and initiating an investigation. As a result of this investigation, the organization unequivocally condemned the Soviet Union for destroying the airliner and, *inter alia*, for failing to cooperate with the investigatory team.⁷¹

Following the bombing of Air India Flight 182 in 1985, an *ad hoc* Committee of Experts met at the ICAO headquarters. The Committee identified several security issues and recommended drastic changes in the handling of luggage.⁷² However, provisions are often watered-down as a result of the negotiation process that comes with the ICAO's consensual decision making process.⁷³

On 31 October 2015, a Russian charter plane on its way to St. Petersburg from Sharm-el-Sheikh was shot down over Sinai, Egypt, killing all 224 passengers and crew on board. A few hours after the crash, the Islamic State in Iraq and the Levant (ISIL) claimed responsibility for the crash.⁷⁴ On 20 November 2015, the UN Security Council unanimously adopted Resolution 2249, which "unequivocally condemns in the strongest terms" among other things the terrorist attack over Sinai.⁷⁵ The Council also called upon all UN Member States that have the capacity to take all necessary measures to prevent and suppress terrorist attacks committed specifically by ISIL.

Monetary Compensation

The award of compensation to the victims' relatives constitutes a common response to the downing of a civilian airplane. For instance, as mentioned previously, the Israeli Government awarded compensation to the victims of Libyan Arab Airlines Flight 114 over

⁶⁸ Major John T. Phelps II, *Aerial Intrusions by Civil and Military Aircraft in a Time of Peace*, 107 *MILITARY LAW REVIEW* 255, 260-261 (1985).

⁶⁹ Major John T. Phelps II, *Aerial Intrusions by Civil and Military Aircraft in a Time of Peace*, 107 *MILITARY LAW REVIEW* 255, 261 (1985).

⁷⁰ Major John T. Phelps II, *Aerial Intrusions by Civil and Military Aircraft in a Time of Peace*, 107 *MILITARY LAW REVIEW* 255, 262 (1985).

⁷¹ Major John T. Phelps II, *Aerial Intrusions by Civil and Military Aircraft in a Time of Peace*, 107 *MILITARY LAW REVIEW* 255, 266 (1985).

⁷² Rodney Wallis, Lockerbie: The Story and the Lessons, 11-12.

⁷³ Report of the Canadian Commission of Inquiry: *Air India Flight 182, A Canadian Tragedy*, Volume IV Aviation Security, 20 (June 17, 2010) available at <http://jnsfp.wordpress.com/2010/06/18/nationalsecuritylaw-commission-of-inquiry-report-air-india-flight-182-a-canadian-tragedy/>.

⁷⁴ Neil MacFarquhar and Merna Thomas, Russian Airlines Crashes in Egypt, Killing 224, *The International New York Times* (Oct. 31, 2015), available at <http://www.nytimes.com/2015/11/01/world/middleeast/russian-plane-crashes-in-egypt-sinai-peninsula.html>.

⁷⁵ United Nations Security Council, Resolution 2249 (Nov. 20, 2015), available at [http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2249\(2015\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/2249(2015)).

Egypt.⁷⁶ Similarly, the People's Republic of China agreed to pay monetary compensation for shooting down a Cathay Pacific Airliner over its territory in July 1954. The Chinese military targeted the aircraft en route from Bangkok to Hong Kong, killing 10 passengers. The Nationalist Chinese Forces immediately admitted responsibility and proceeded to compensation.⁷⁷ Another example is the Lockerbie Bombing, where, as discussed above, a deal was closed with Libya over the payment of USD 2,7 billion to compensate the victims' families. As part of the deal, Libya admitted responsibility for the bombing and renounced terrorism.⁷⁸

In other cases, states have awarded compensation on an *ex gratia* basis, meaning that they agreed to the payment of monetary compensation while formally denying responsibility. For instance, the Bulgarian Government agreed to *ex gratia* compensation of USD 195,000 to the relatives of the 22 Israeli victims of the El Al incident of 1955.⁷⁹ Colonel Gaddafi similarly accepted Libya's responsibility for the Lockerbie bombing and agreed to compensate the victims while continuing to deny he had personally ordered the attack.⁸⁰ The downing of the Iran civilian flight 655 in July 1988 constitutes another instance of *ex gratia* compensation. In this case, the United States navy fired a missile at the civilian airliner that penetrated the Iranian airspace. All 290 passengers and crew died. The United States claimed to have confused the civilian plane with a plane of the Islamic of Iran Air Force. The US Government agreed to pay USD 62 million in compensation to the victims on an *ex gratia* basis without formally admitting liability.

In July 2011, the Canadian Government announced it would make available *ex gratia* payments for the families of the victims of the Air India Flight 182 disaster of 1985, at USD 24,000 per victim.⁸¹ Moreover, on 20 November 2003, Ukraine, Russia and Israel agreed to sign *ex gratia* compensation agreements related to the Siberian Airlines Flight 1812 crash.⁸² Ukraine agreed to *ex gratia* payments of USD 200,000 for the families of all Russian and Israeli victims.

⁷⁶ Brian E. Foont, *Shooting Down Civilian Airplanes: Is There an International Law?* 72 JOURNAL OF AIR LAW AND COMMERCE 695, 707 (2007).

⁷⁷ Major John T. Phelps II, *Aerial Intrusions by Civil and Military Aircraft in a Time of Peace*, 107 MILITARY LAW REVIEW 255, 278 (1985).

⁷⁸ BBC News, *Libya Admits Lockerbie Blame* (Aug. 16, 2003), available at http://news.bbc.co.uk/2/hi/uk_news/scotland/3155523.stm.

⁷⁹ Jewish Telegraph Agency, *Bulgaria Agrees to Pay \$195,000 to Israel for Shot Down El Al Plane* (Jun. 4, 1963), available at <http://www.jta.org/1963/06/04/archive/bulgaria-agrees-to-pay-195000-to-israel-for-shot-down-el-al-plane>.

⁸⁰ BBC News, *Colonel Gaddafi 'Ordered Lockerbie Bombing'* (23 Feb. 2011), available at <http://www.bbc.com/news/uk-scotland-south-scotland-12552587>.

⁸¹ Public Safety Canada, *Application Guide: Air India Flight 182 Ex Gratia Payment*, available at http://publications.gc.ca/collections/collection_2012/sp-ps/PS4-119-2011-eng.pdf.

⁸² Brian E. Foont, *Shooting Down Civilian Airplanes: Is There an International Law?* 72 JOURNAL OF AIR LAW AND COMMERCE 695, 716 (2007).

3. STATE RESPONSIBILITY FOR THE DOWNING OF FLIGHT MH17

The doctrine of state responsibility provides that whenever one state commits an internationally wrongful act against another state, international responsibility is established between the two.⁸³ Accordingly, state responsibility cannot establish the responsibility of individuals or non-state groups but merely of states among each other. With regard to MH17, Russia and Ukraine are the two most obvious states that may have violated international obligations under the doctrine of state responsibility.

This chapter briefly introduces the requirements for the establishment of state responsibility and the general possibilities for the ICJ to exercise jurisdiction over a case. It then primarily assesses the possibility to hold Russia responsible for its violations of international law in relation to the downing of Flight MH17. In particular, this chapter focuses the international legal obligations of Russia and Ukraine under the civil aviation conventions. These conventions are particularly interesting because although it is usually very difficult to find grounds for jurisdiction to bring a case before the International Court of Justice (ICJ), these conventions may allow for such a case. The chapter also discusses other international legal obligations that may have been violated by Russia, such as obligations under international humanitarian law, international human rights law, or complicity in the commission of the act. However, establishing ICJ jurisdiction over these violations will be more difficult.

Doctrine of State Responsibility

The international law on state responsibility is contained in the *Draft Articles on the Responsibility of States for Internationally Wrongful Acts* (ARS). Although these articles have not been adopted in the form of a treaty by states, they have largely been accepted to be a reflection of customary international law.⁸⁴ According to these articles three requirements have to be met in order to establish state responsibility. It has to be proven that: (i) a state violated an international obligation, (ii) the conduct in question is attributable to the state, (iii) there are no circumstances precluding wrongfulness. The first two criteria are of particular relevance to the downing of MH17 and are discussed in detail below. At this stage, there do not appear convincing possibilities for Russia to rely on a “circumstance precluding wrongfulness,” the third criterion, to prevent the establishment of its responsibility.

When state responsibility is established, the responsible state is under an obligation to provide full reparation for the injury caused by the wrongful act.⁸⁵ This obligation primarily entails a duty to make restitution: to re-establish the situation which existed before the wrongful

⁸³ Malcolm N. Shaw, *INTERNATIONAL LAW*, 566 (2015).

⁸⁴ See, for example: *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion, 1999, I.C.J. 62, par. 62 (April 29), available at <http://www.icj-cij.org/docket/files/100/7619.pdf>.

⁸⁵ *Articles on Responsibility of States for Internationally Wrongful Acts*, art. 31, annex to General Assembly Resolution 56/83 of 12 December 2001, corrected by document A/56/49(Vol.1)/Corr.4, available at http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf.

act was committed.⁸⁶ If making restitution is materially impossible, as is the case for MH17, the responsible state may have to provide monetary compensation for the damage caused.⁸⁷ The ICJ is the international court that is concerned with disputes between states and is therefore the primary forum for bringing claims of state responsibility.

Jurisdiction at the ICJ over a Contentious Case

The ICJ is an inter-state court that cannot directly prosecute individuals or groups for violations of international obligations, but can, however, declare states responsible for violations of their obligations under customary international law and treaty law, and may order states to provide for reparation for losses suffered or damage incurred.

The ICJ has a high jurisdictional threshold based on consent of the states involved. As a consequence, the ICJ has limited practice in the field of violations relating to human rights, international humanitarian law or use of force.⁸⁸ Furthermore, there are only a few international human rights treaties that give the ICJ jurisdiction in relation to their interpretation and application. The ICJ may, however, be able to hear claims based on one of the international treaties regulating the safety of civil aviation.⁸⁹

The ICJ's jurisdiction is based on the consent of states. Only where states have expressed consent through one of the applicable methods does the Court have jurisdiction to consider a case. Where there is a dispute as to whether the Court has jurisdiction over a case, the matter is settled by the Court itself.⁹⁰ Article 36 of the Court's Statute provides four grounds on which the Court may exercise jurisdiction. Each of these approaches is based on either direct or indirect (inferred) consent of the states involved.

⁸⁶ Articles on Responsibility of States for Internationally Wrongful Acts, art. 35, annex to General Assembly Resolution 56/83 of 12 December 2001, corrected by document A/56/49(Vol.1)/Corr.4, available at http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf.

⁸⁷ Articles on Responsibility of States for Internationally Wrongful Acts, art. 36, annex to General Assembly Resolution 56/83 of 12 December 2001, corrected by document A/56/49(Vol.1)/Corr.4, available at http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf.

⁸⁸ Issues related to international human rights law and international humanitarian law had been directly discussed by the Court only within the last two decades. See, for example, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996, I.C.J. 226 (8 July), available at <http://www.icj-cij.org/docket/files/95/7495.pdf>; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004, I.C.J. 136 (9 July), available at <http://www.icj-cij.org/docket/files/131/1671.pdf>; Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, 2006, I.C.J. 6 (3 Feb), available at <http://www.icj-cij.org/docket/files/126/10435.pdf>; Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, 2012, I.C.J. 422 (July 20), available at <http://www.icj-cij.org/docket/files/144/17064.pdf>.

⁸⁹ Such claims have already been brought before the Court by Iran for the shooting down of Flight IR655 by the United States in 1988. However, the parties in that case eventually agreed on a non-judicial solution and the Court never pronounced a judgment in the case. See Aerial Incident of 3 July 1988 (Islamic Republic of Iran v. United States of America), Application Instituting Proceedings, 1989 (17 May), available at <http://www.icj-cij.org/docket/files/79/6623.pdf>.

⁹⁰ Statute of the International Court of Justice, art. 36(6), 26 June 1945, 59 Stat. 1031; T.S. 993 (1945), available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>.

Three of the four grounds seem unlikely for the MH17 situation. First, the the ICJ can exercise jurisdiction when states bring a case before the ICJ together.⁹¹ This is done by way of a special agreement, also known as *compromis*. Usually through a negotiated process, states formulate the special agreement and submit it to the ICJ. The agreement specifies the terms of the dispute, the initial claims of the parties, and the framework within which the ICJ shall operate.⁹² Although this approach gives much space to parties to frame the dispute and the legal questions according to their choosing, it also requires a high degree of consensus and willingness of the parties to resolve the dispute. The potentially grave political, legal, and financial consequences of an establishment of responsibility for the downing of MH17 make it unlikely that Russia (or Ukraine) will agree to submit a dispute to the ICJ.

Second, jurisdiction based on the so-called “optional clause” or “facultative clause” of the ICJ Statute, when jurisdiction arises because all parties to a dispute have recognized compulsory jurisdiction of the ICJ in accordance with Article 36(2) of the ICJ Statute, is unlikely because of the states involved only the Netherlands has submitted such a unilateral declaration under Article 36(2) of the Statute.⁹³

Third, again, due to the potentially grave political, legal, and financial consequences of a finding of state responsibility for the downing of Flight MH17, it is highly unlikely that Ukraine or Russia will accept a case on the basis of *forum prorogatum*. The doctrine of *forum prorogatum* refers to a situation where consent of the respondent state to the ICJ’s jurisdiction can be inferred from acts subsequent to the initiation of the proceedings from the applicant. Given the current political climate, this does not appear likely. However, with all these jurisdiction grounds it must be noted that a possible future government of Russia may be more open to such legal proceedings, which could then still be held.

There is however a fourth ground that in this situation does appear to provide a route towards jurisdiction, although it is a long and complicated one. Jurisdiction of the ICJ may also be granted in the form of a “compromissory clause” in international treaties and conventions. These are particular provisions in treaties or conventions that provide that disputes on the application or interpretation of the respective treaty will be referred to the ICJ. By becoming parties to a treaty with a compromissory clause (and not making a reservation to the treaty with respect to that compromissory clause), states agree to grant jurisdiction to the ICJ provided that certain preconditions are met.⁹⁴

The Civil Aviation Conventions that are discussed below contain provisions that may have been violated by Russia and possible also by Ukraine in the case of the downing of Flight MH17. Importantly, these Conventions contain compromissory clauses which provides for ICJ jurisdiction under specific circumstances. The compromissory clause may prove crucial in

⁹¹ Statute of the International Court of Justice, art. 36(1), June 26, 1945, 59 Stat. 1031; T.S. 993 (1945), available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>.

⁹² Malcolm N. Shaw, INTERNATIONAL LAW, 779 (2015).

⁹³ See International Court of Justice, Jurisdiction – Declarations Recognizing the Jurisdiction of the Court as Compulsory (Aug. 19, 2014), available at <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3>.

⁹⁴ Stanimir A. Alexandrov, The Compulsory Jurisdiction of the International Court of Justice: How Compulsory is it? 5 CHINESE JOURNAL OF INTERNATIONAL LAW 29, 30-1 (2006).

establishing ICJ jurisdiction over the downing of Flight MH17 since neither Russia, Ukraine or the Netherlands has made reservations as to the compromissory clause and have therefore agreed that disputes over the application and interpretation of the civil aviation treaties may, eventually, be settled by the ICJ.

Other Options for Adjudication

There are two other options for bringing this case before a legal body. Firstly, the ICJ may give an Advisory Opinion on any legal question “at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations.”⁹⁵ The UN General Assembly and Security Council are two of the bodies that are authorized to request an opinion on any legal question.⁹⁶ If Russia opposes a contentious case at the ICJ, it will most likely also use its veto power to block a request for an Advisory Opinion by the Security Council. The General Assembly, however, can request an Advisory Opinion by majority. But this decision would require significant diplomatic effort and political support. The ICJ’s Advisory Opinions are not binding upon states but can provide clarity on a legal position. So although not an optimal way with regard to remedies, a finding of responsibility through an Advisory Opinion could have significant symbolic value.

Secondly, the Netherlands could enter into negotiations with Russia to establish an arbitral tribunal to settle the dispute on the basis of state responsibility. Arbitration uses the same international legal norms as the ICJ, unless parties agree otherwise. Arbitration allows for an adjudication mechanism that parties may decide upon themselves, as long as it does not violate international law. It is therefore consent based, and as such may prove difficult to establish, yet since the setting of the rules is to large extent upon the states themselves, this avenue may provide more flexibility to address possible concerns which may make it more agreeable. The Permanent Court of Arbitration (PCA) functions as an administrative body that facilitates states with the setting up of arbitral tribunals and provides the secretariat’s support to the proceedings. Interestingly, arbitration is not restricted to states, and may thus include non-state actors to appear as counter-party, should they consent to such proceedings.

Russia’s Accountability under the Civil Aviation Conventions

A number of conventions have been adopted by states to deal with a wide range of issues related to civil aviation. The oldest and most general of these is the 1944 Convention on International Civil Aviation (Chicago Convention).⁹⁷ The Chicago Convention is supplemented and clarified by a number of Annexes that contain binding and non-binding provisions. It deals

⁹⁵ Statute of the International Court of Justice, art. 65, 26 June 1945, 59 Stat. 1031; T.S. 993 (1945), *available at* <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>.

⁹⁶ Charter of the United Nations, art. 96, 26 June 1945, 59 Stat. 1031; TS 993 (1945), *available at* <https://treaties.un.org/doc/publication/ctc/uncharter.pdf>

⁹⁷ Convention on International Civil Aviation, 7 Dec 1944, 15 U.N.T.S. 295 (1994), *available at* <http://www.icao.int/publications/pages/doc7300.aspx>.

with a large number of issues ranging from the coordination of flight paths to the provision of air traffic control services. In addition, the 1971 Convention for the Suppression of Acts Against the Safety of Civilian Aviation (Montreal Convention) was adopted in response to a number of hijackings that occurred in the years before.⁹⁸ Accordingly, the Montreal Convention deals mostly with individuals' acts against the safety of civilian aviation and with states' obligations to prevent and respond to these acts. Jointly, they establish the basic international regulations regarding civil aviation safety. Both Conventions impose on states an obligation to provide for the safety of civil flight and to refrain from using weapons against civil aircraft in flight.⁹⁹ Russia, Ukraine and the Netherlands are all parties to both Conventions. Importantly, both Conventions contain a compromissory clause that allows, under certain circumstances, for the exercise of ICJ jurisdiction over disputes.

Establishing ICJ Jurisdiction in the Case of Flight MH17

The Chicago and Montreal conventions have near universal ratification, and they have also been ratified by the Netherlands, Russia and the Ukraine.¹⁰⁰ None of the involved states made a reservation to either of the conventions, meaning they are also bound by the respective compromissory clauses and to the jurisdiction of the Court, provided the relevant preconditions are met.

With regard to establishing ICJ jurisdiction with regard to violations of the Chicago Convention, its Article 84 provides for the possibility to unilaterally submit a dispute to the Council of the ICAO. A decision of the Council can be appealed at the ICJ. Before submitting a case to the Council, there has to be an attempt from the states concerned to resolve the dispute through negotiations.¹⁰¹ These negotiations have to be genuine, on the subject matter of the dispute, and have to be pursued as far as possible for the case to be admissible.¹⁰² This means that mere protests or disputations would not be sufficient.¹⁰³ Where the dispute cannot be solved through negotiation, any of the states involved can submit the dispute to the Council of the ICAO. The Council of the ICAO is in essence a political and policy setting body, consisting of 36 representatives of the contracting states, which may, on occasion, act as arbiter between member states. The Council has the power to withdraw a Contracting State's voting powers in

⁹⁸ Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Sep. 23, 1971, 974 U.N.T.S. 178 (1971), available at <https://www1.umn.edu/humanrts/instree/civilaviation.html>.

⁹⁹ See Convention on International Civil Aviation, art. 3bis, 7 Dec 1944, 15 U.N.T.S. 295 (1994), available at <http://www.icao.int/publications/pages/doc7300.aspx>. See also Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, arts. 1(1), 10(1), Sep. 23, 1971, 974 U.N.T.S. 178 (1971), available at <https://www1.umn.edu/humanrts/instree/civilaviation.html>.

¹⁰⁰ See International Civil Aviation Organization, Status of the Convention on International Civil Aviation (Aug. 19, 2014), available at http://www.icao.int/secretariat/legal/List%20of%20Parties/Chicago_EN.pdf; International Civil Aviation Organization, Status of the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (19 Aug 2014), available at http://www.icao.int/secretariat/legal/List%20of%20Parties/Mt171_EN.pdf.

¹⁰¹ Convention on International Civil Aviation, art. 84, Dec. 7, 1944, 15 U.N.T.S. 295 (1994), available at <http://www.icao.int/publications/pages/doc7300.aspx>.

¹⁰² See: Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Georgia v. Russian Federation*), Preliminary Objections, 2011, I.C.J. 14, 132-4 (1 April), available at <http://www.icj-cij.org/docket/files/140/16398.pdf>.

¹⁰³ Application of the International Convention on the Elimination of All Forms of Racial Discrimination (*Georgia v. Russian Federation*), Preliminary Objections, 2011, I.C.J. 14, 132 (1 April), available at <http://www.icj-cij.org/docket/files/140/16398.pdf>.

the ICAO Assembly if that Contracting State is “in default.”¹⁰⁴ The Council has adopted “Rules for the Settlement of Differences” which lay down rules regarding, *inter alia*, jurisdiction, the filing of preliminary objections, and the submission of written memorials.¹⁰⁵ The Council usually limits itself to the technical issues while attempting to steer clear of political issues.¹⁰⁶ Some scholars have described the role of the Council “less as a court of law than as a facilitator for settlement.”¹⁰⁷ Only after the Council has made its decision and if one of the involved states does not agree with the said decision, may that state submit the dispute to an *ad hoc* arbitration or to the ICJ.¹⁰⁸

The ICAO Council has used its adjudicative powers only on a small number of occasions. Most notable is the 1971 dispute between India and Pakistan. Pakistan argued that India had violated certain provisions of the Chicago Convention and other aviation treaties.¹⁰⁹ India raised preliminary objections arguing that there was no dispute because the relevant aviation conventions were suspended between the two countries.¹¹⁰ The Council rejected India’s preliminary objections without providing reasons. India appealed this preliminary decision at the ICJ on the basis of Article 84 of the Chicago Convention, which provides that any state may appeal from the ICAO Council’s decision to the ICJ. The ICJ limited itself to the complaint on the jurisdiction of the Council and did not go into the merits of the dispute put before the ICAO Council.¹¹¹ The ICJ thus only assessed whether the ICAO Council had made the right decision in accepting jurisdiction and refused to resolve the entire dispute. Pakistan asserted that only Council decisions on the merits could be appealed to the ICJ. The ICJ ruled that the Council’s decision on jurisdiction was of such relevance to the position of the parties that it did have jurisdiction to hear the case.¹¹² The ICJ reiterated that the Council has jurisdiction to hear any dispute that requires the “interpretation or application” of the aviation conventions.¹¹³ Since the dispute between India and Pakistan concerned the interpretation and application of the aviation convention, the ICJ concluded that the Council did indeed have jurisdiction.¹¹⁴ The ICJ thus rejected India’s appeal of the ICAO Council decision but made no further rulings on how to proceed. The matter was eventually settled extra-judicially between India and Pakistan and therefore the ICAO Council never reached a final decision.¹¹⁵ From this case it appears that the ICJ is able to exercise jurisdiction over a broad range of aviation disputes on the basis of Article 84 of the Chicago Convention. However, the ICJ may well find itself limited to the particular

¹⁰⁴ Convention on International Civil Aviation, art. 88, 7 Dec 1944, 15 U.N.T.S. 295 (1994), *available at* <http://www.icao.int/publications/pages/doc7300.aspx>.

¹⁰⁵ José Alvarez, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 448 (2006).

¹⁰⁶ Ruwantissa Abeyratne, CONVENTION ON INTERNATIONAL CIVIL AVIATION: A COMMENTARY 665 (2014).

¹⁰⁷ José Alvarez, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 449 (2006).

¹⁰⁸ Convention on International Civil Aviation, art. 84, 7 Dec 1944, 15 U.N.T.S. 295 (1994), *available at* <http://www.icao.int/publications/pages/doc7300.aspx>.

¹⁰⁹ José Alvarez, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 448 (2006).

¹¹⁰ José Alvarez, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 448 (2006).

¹¹¹ Appeal Relating to the Jurisdiction of the ICAO Council (*India v. Pakistan*) 1972 I.C.J. 46, par. 11, *available at* <http://www.icj-cij.org/docket/files/54/5665.pdf>.

¹¹² Appeal Relating to the Jurisdiction of the ICAO Council (*India v. Pakistan*) 1972 I.C.J. 46, par. 18, *available at* <http://www.icj-cij.org/docket/files/54/5665.pdf>.

¹¹³ Appeal Relating to the Jurisdiction of the ICAO Council (*India v. Pakistan*) 1972 I.C.J. 46, par. 28, *available at* <http://www.icj-cij.org/docket/files/54/5665.pdf>.

¹¹⁴ Appeal Relating to the Jurisdiction of the ICAO Council (*India v. Pakistan*) 1972 I.C.J. 46, par. 43, *available at* <http://www.icj-cij.org/docket/files/54/5665.pdf>.

¹¹⁵ Kimberley N. Trapp, STATE RESPONSIBILITY FOR INTERNATIONAL TERRORISM 226 (2011).

question or dispute submitted to the ICAO Council and might be reluctant to settle other issues related to that question. Therefore, if a dispute on the downing of Flight MH17 is submitted to the ICAO Council it would be useful to submit a broad dispute that addresses as many aspects and avenues as possible under the Civil Aviation Conventions.

The above dispute is the only ICAO Council dispute that has been referred to the ICJ. On two other occasions, the ICAO Council served more as a fact-finding body than a judicial organ. After the Soviet Union's downing of Korean Airlines Flight 007 in 1983 and the United States shooting of Iran Air Flight 655 in 1988, the Council referred the matters to the ICAO Secretary-General to conduct fact-finding missions. The investigation into the downing of the Korean Airlines Flight concluded that the Soviet Union had not engaged in visual identification of the aircraft as it was supposed to. The ICAO consequently "condemned" Russia's actions as well as its failure to cooperate afterwards.¹¹⁶ With respect to the downing the Iran Air Flight the ICAO concluded that the US had not issued its warnings to the airliner in conformity with the ICAO standards. It therefore "deeply deplored" the "tragic incident."¹¹⁷ In neither case did the ICAO impose sanctions or award reparations. Iran later appealed the ICAO's decision to the ICJ but both parties decided to withdraw the case before the ICJ had made any decisions.¹¹⁸

With regard to violations of the Montreal Convention, there is also an opening towards bringing a dispute before the ICJ. Like the above discussed Chicago Convention, the Montreal Convention contains a compromissory clause which provides that the states involved have to engage in genuine negotiations to resolve any dispute.¹¹⁹ If the dispute cannot be settled through negotiation, either of the states may request for the dispute to be submitted to arbitration.¹²⁰ If within six months from that request the states are not able to agree on the organization of the arbitration, any of them may bring the case to the ICJ.¹²¹ Failure to meet the required steps would mean that the applicant state had not exhausted all the measures required and the ICJ would likely consider the case as inadmissible.

The ICJ confirmed this reading in the *Armed Activities* case.¹²² In that case the Democratic Republic of the Congo claimed that Rwanda had violated, *inter alia*, the Montreal Convention when an airplane belonging to Congo Airlines was shot down shortly after takeoff from Kindu Airport. The DRC did not specify, however, whether it claimed Rwanda's alleged support for the rebels as the violation or whether it asserted that Rwanda state agents were directly responsible for the act. In any case, the ICJ ruled that it did not have jurisdiction to consider these claims for a number of reasons. First, the DRC had not specified which provisions of the Montreal Convention it claimed to have been violated. Second, the DRC had

¹¹⁶ José Alvarez, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS* 253 (2006).

¹¹⁷ José Alvarez, *INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS* 253 (2006).

¹¹⁸ International Court of Justice, *Press Release 1996/6: Discontinuance*, Feb. 23, 1996, available at <http://www.icj-cij.org/docket/index.php?pr=624&code=irus&p1=3&p2=3&p3=6&case=79&k=9c>.

¹¹⁹ Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, art. 14(1), 23 Sept 1971, 974 U.N.T.S. 178 (1971), available at <https://www1.umn.edu/humanrts/instree/civilaviation.html>.

¹²⁰ Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, art. 14(1), 23 Sept 1971, 974 U.N.T.S. 178 (1971), available at <https://www1.umn.edu/humanrts/instree/civilaviation.html>.

¹²¹ Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, art. 14(1), 23 Sept 1971, 974 U.N.T.S. 178 (1971), available at <https://www1.umn.edu/humanrts/instree/civilaviation.html>.

¹²² Case Concerning *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, 2006 I.C.J. 6, (3 Feb), available at <http://www.icj-cij.org/docket/files/126/10435.pdf>.

made no proposal the Rwanda to settle the dispute through arbitration.¹²³ This case illustrates that attempts at negotiation and arbitration are crucial for the later establishment of ICJ jurisdiction. In addition, but not surprisingly, a claim to the ICJ would at least have to specify which exact obligations may have been violated under the Montreal Convention.

In relation to the Lockerbie bombing, Libya initiated proceedings at the ICJ against the United States and the United Kingdom on the basis of article 14 of the Montreal Convention. Libya asserted that the requests and pressure by the US and the UK for extradition of two Libyan nationals suspected of the bombing was in violation of the provisions of the Montreal Convention. Despite objections by the US and the UK, the ICJ ruled that it had jurisdiction to hear the case on the basis of Article 14 of the Montreal Convention.¹²⁴ At the request of all parties, however, both cases were removed from the ICJ's list before a decision was taken on the merits.

It follows that on the basis of the civil aviation obligations of the states involved, the Netherlands may consider submitting the dispute to the Council of the ICAO. If the outcome of that submission is not satisfactory to the Netherlands it could bring the case to the ICJ. Furthermore, it could submit an application to the ICJ on the basis of Article 14 of the Montreal Convention, if prior arbitration and negotiation fails. The ICJ has accepted jurisdiction on these bases on two occasions and this way of establishing ICJ jurisdiction looks therefore viable.

Russia's Legal Obligations Under the Civil Aviation Conventions

The Montreal Convention specifically criminalizes offenses against the safety of civilian aviation and obliges state parties to efficient international cooperation in prosecuting such offenses. Among the list of offenses against the safety of civil aviation, the Montreal Convention lists any unlawful and intentional act that “destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight.”¹²⁵ Being an accomplice to any such act is also criminalized.¹²⁶ States parties are required to make any such offenses punishable by severe penalties and have to “endeavour to take all practicable measures for the purpose of preventing the offences mentioned in Article 1.”¹²⁷

¹²³ Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002) (*Democratic Republic of the Congo v. Rwanda*), 2006 I.C.J. 6, par. 188 (Feb. 3), available at <http://www.icj-cij.org/docket/files/126/10435.pdf>.

¹²⁴ Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (*Libyan Arab Jamahiriya v. United States of America*), Preliminary Objections, 1998 I.C.J. 115, par. 53 (27 Feb), available at <http://www.icj-cij.org/docket/files/89/7249.pdf>; Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (*Libyan Arab Jamahiriya v. United Kingdom*), Preliminary Objections, 1998 I.C.J. 9, par. 53 (27 Feb), available at <http://www.icj-cij.org/docket/files/88/7129.pdf>.

¹²⁵ Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, art. 1(1)(b), 23 Sept 1971, 974 U.N.T.S. 178 (1971), available at <https://www1.umn.edu/humanrts/instreet/civilaviation.html>.

¹²⁶ Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, art. 1(2), 23 Sept 1971, 974 U.N.T.S. 178 (1971), available at <https://www1.umn.edu/humanrts/instreet/civilaviation.html>.

¹²⁷ Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, arts. 3, 10(1), 23 Sept 1971, 974 U.N.T.S. 178 (1971), available at <https://www1.umn.edu/humanrts/instreet/civilaviation.html>.

Where an accident involving an aircraft occurs, the state in which the accident occurs is obliged to institute an inquiry into the circumstances.¹²⁸ The state where the aircraft is registered may appoint observers, and the state undertaking the inquiry has to communicate the report and the findings regarding the accident to the state of registration.¹²⁹ All states are also obliged to report to the ICAO any information they possess on the circumstances of the offense or, if applicable, on the measures taken in relation to prosecution or extradition of an alleged offender.¹³⁰ The state in which the accident occurred is also obliged to arrest the alleged offender and either prosecute him or her, or extradite him or her to another state for prosecution.¹³¹

Russia may be held accountable for violating its obligations under the civil aviation conventions for not taking these measures to prevent offenses against aviation security for example if it is found to have any relationship to the firing of the missile, for instance by having known that the pro-Russian separatists were in possession of the said BUK missile, if it is clear that they have been responsible for shooting down MH17. Also, under the civil aviation conventions, Russia may have breached its obligations to investigate properly the allegations of involvement by Russian nationals and Ukrainian nationals that may have fled to Russian territory. Russia may therefore have violated its obligations to investigate, communicate its information to the ICAO, and prosecute or extradite those responsible.

Specifically, Russia may be held accountable for violating Article 6 of the Montreal Convention, for failing to take into custody any offender or alleged offender that is present in its territory if it is “satisfied that the circumstances so warrant.”¹³² In addition, Russia would immediately have to make an inquiry into the facts if charges are brought against an offender in their territory.¹³³ If Russia does not extradite the arrested offender, it has an obligation to prosecute him or her.¹³⁴ Also, Article 10 of the Montreal Convention holds that all “Contracting States shall, in accordance with international and national law, endeavour to take all practicable measures for the purpose of preventing” offences against civilian aircraft.¹³⁵

The case law on the Montreal Convention is virtually non-existent since no case on this basis has been addressed by the ICJ on the merits. However, an obligation to either prosecute or

¹²⁸ Convention on International Civil Aviation, art. 26, 7 Dec 1944, 15 U.N.T.S. 295 (1994), *available at* <http://www.icao.int/publications/pages/doc7300.aspx>.

¹²⁹ Convention on International Civil Aviation, art. 26, 7 Dec 1944, 15 U.N.T.S. 295 (1994), *available at* <http://www.icao.int/publications/pages/doc7300.aspx>. See also Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, art. 6(2), 23 Sept 1971, 974 U.N.T.S. 178 (1971), *available at* <https://www1.umn.edu/humanrts/instree/civilaviation.html>.

¹³⁰ Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, art. 13, 23 Sept 1971, 974 U.N.T.S. 178 (1971), *available at* <https://www1.umn.edu/humanrts/instree/civilaviation.html>.

¹³¹ Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, arts. 6, 7, 23 Sept 1971, 974 U.N.T.S. 178 (1971), *available at* <https://www1.umn.edu/humanrts/instree/civilaviation.html>.

¹³² Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, art. 6 (1), 23 Sept 1971, 974 U.N.T.S. 178 (1971), *available at* <https://www1.umn.edu/humanrts/instree/civilaviation.html>.

¹³³ Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, art. 6 (2), 23 Sept 1971, 974 U.N.T.S. 178 (1971), *available at* <https://www1.umn.edu/humanrts/instree/civilaviation.html>.

¹³⁴ Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, art. 7, 23 Sept 1971, 974 U.N.T.S. 178 (1971), *available at* <https://www1.umn.edu/humanrts/instree/civilaviation.html>.

¹³⁵ Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, art. 10, 23 Sept 1971, 974 U.N.T.S. 178 (1971), *available at* <https://www1.umn.edu/humanrts/instree/civilaviation.html>.

extradite, such as is provided by the Montreal Convention, is quite common in international conventions and is traditionally referred to as an *aut dedere aut judicare* obligation. In a recent case between Belgium and Senegal, the ICJ assessed this obligation under the Convention against Torture.¹³⁶ The ICJ first considered Senegal's obligation to conduct an inquiry into the facts. It came to the conclusion that although the choice of means for conducting the investigation remains in the hands of states, they do immediately have to instigate an investigation to corroborate the allegations.¹³⁷ The ICJ then came to the conclusion that the state concerned has an obligation to submit the dispute to its competent authorities. Those competent authorities may then decide whether or not to prosecute based on the evidence before them.¹³⁸ The case has to be submitted to those authorities within a reasonable time. The Court found Senegal to be in violation of both these obligations and ordered it to immediately submit the case to its competent authorities.¹³⁹

For the actual shooting down of MH17, the primary conduct at stake, and a much more severe violation of international law, Russia's obligations under the civil aviation conventions will differ according to who actually committed the act of shooting down Flight MH17. If evidence shows that Russian state agents shot down Flight MH17, Russia is accountable because acts of its state organs are attributable to the state under Article 4 of the Articles of State Responsibility. If evidence shows that rebels (or any other non-state groups) shot down Flight MH17, the extent of the relationship between these rebels and Russia (if such existed at all), will determine whether these acts are attributable to Russia. The most likely scenario for attributability of non-state actors' actions to Russia will be an investigation as to whether Russia would have had "effective control" over the person or group in question, in accordance with Article 8 of the Articles of State Responsibility.¹⁴⁰

The notion of "effective control" has been clarified somewhat in the case law of the ICJ. In the *Nicaragua* case,¹⁴¹ Nicaragua held the US responsible for the IHL and human rights violations committed in Nicaragua by a rebel group called the Contras. The ICJ considered it proven that the US had participated in the "financing, organizing, training, supplying, and equipping" of the Contras.¹⁴² However, the ICJ said that this was not enough to establish effective control. Although the ICJ found that this support given by the US to the Contras was a

¹³⁶ Questions Relating to the Obligation to Prosecute or Extradite (*Belgium v. Senegal*), 2012 I.C.J. 422, (20 July), available at <http://www.icj-cij.org/docket/files/144/17064.pdf>.

¹³⁷ Questions Relating to the Obligation to Prosecute or Extradite (*Belgium v. Senegal*), 2012 I.C.J. 422, par. 86 (20 July), available at <http://www.icj-cij.org/docket/files/144/17064.pdf>.

¹³⁸ Questions Relating to the Obligation to Prosecute or Extradite (*Belgium v. Senegal*), 2012 I.C.J. 422, par. 94 (20 July), available at <http://www.icj-cij.org/docket/files/144/17064.pdf>.

¹³⁹ Questions Relating to the Obligation to Prosecute or Extradite (*Belgium v. Senegal*), 2012 I.C.J. 422, par. 121 (20 July), available at <http://www.icj-cij.org/docket/files/144/17064.pdf>.

¹⁴⁰ Articles on Responsibility of States for Internationally Wrongful Acts, art. 8, annex to General Assembly Resolution 56/83 of 12 December 2001, corrected by document A/56/49(Vol.1)/Corr.4, available at http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf; as clarified in: Case Concerning Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v. United States of America*), 1986 I.C.J. 14, (27 June), available at <http://www.icj-cij.org/docket/files/70/6503.pdf>.

¹⁴¹ Case Concerning Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v. United States of America*), 1986 I.C.J. 14, (27 June), available at <http://www.icj-cij.org/docket/files/70/6503.pdf>.

¹⁴² Case Concerning Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v. United States of America*), 1986 I.C.J. 14, par. 115 (27 June), available at <http://www.icj-cij.org/docket/files/70/6503.pdf>.

clear breach of the principle of non-intervention and thus a violation of international law in and of itself,¹⁴³ it did not legally attribute the actions of the Contras to the US because it could not be proven that the US directed or enforced those violations.¹⁴⁴ The effective control standard requires states to have had either directed or enforced the perpetration of the act itself,¹⁴⁵ and that “instructions were given, in respect of each operation in which alleged violations occurred, not generally in respect of overall actions taken by the persons or groups of persons having committed the violations.”¹⁴⁶ So it must be shown that effective control was exercised with respect to the specific violation and not to the group’s actions in general.¹⁴⁷

Should evidence point to a possible way to argue attribution to Russia, it can be argued that Russia would have violated Article 3bis of the Chicago Convention. Article 3bis of the Chicago Convention provides that “the Contracting States recognize that every State must refrain from resorting to the use of weapons against civilian aircraft in flight,”¹⁴⁸ unless in accordance with a state’s right to self-defense, which is not a viable argument in the situation of MH17. The article was adopted in 1998 in response to the shooting down of Korean Air Flight 007 over Soviet airspace and is largely considered to be a reflection of customary international law.¹⁴⁹ As one commentator puts it, “Article 3 bis is intended to effectively preclude a State from using its unfettered discretion to use weapons against an intruding aircraft and to ensure that people onboard are not harmed.”¹⁵⁰ Should Russia have been involved in the shooting down of MH17, it may well have violated this provision, and in any case, this could be phrased as a dispute on the “application or interpretation” of the Chicago Convention and could thus be submitted to the ICAO Council and be appealed at the ICJ.

¹⁴³ Case Concerning Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v. United States of America*), 1986 I.C.J. 14, par. 249 (27 June), available at <http://www.icj-cij.org/docket/files/70/6503.pdf>.

¹⁴⁴ Case Concerning Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v. United States of America*), 1986 I.C.J. 14, par. 115 (27 June), available at <http://www.icj-cij.org/docket/files/70/6503.pdf>.

¹⁴⁵ Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*), Judgment, 1986, I.C.J. 14, 64 (27 June), available at <http://www.icj-cij.org/docket/files/70/6503.pdf>.

¹⁴⁶ Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment, 2007, I.C.J. 43, 207-8 (26 Feb), available at <http://www.icj-cij.org/docket/files/91/13685.pdf>.

¹⁴⁷ Case Concerning the Application of the Convention of the Prevention and Punishment of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), 2007 I.C.J. 43, par. 400 (Feb. 26), available at <http://www.icj-cij.org/docket/files/91/13685.pdf>. It is interesting to note that the Court’s preference for this test, as opposed to the “overall control” test used by the international criminal tribunals, has been criticized by the academia. See, for example, Antonio Cassese, The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia, 18 EUROPEAN JOURNAL OF INTERNATIONAL LAW 649 (2007).

¹⁴⁸ Convention on International Civil Aviation, art. 3bis, Dec. 7, 1944, 15 U.N.T.S. 295 (1994), available at <http://www.icao.int/publications/pages/doc7300.aspx>.

¹⁴⁹ Ruwantissa Abeyratne, CONVENTION ON INTERNATIONAL CIVIL AVIATION: A COMMENTARY 68 (2014).

¹⁵⁰ Ruwantissa Abeyratne, CONVENTION ON INTERNATIONAL CIVIL AVIATION: A COMMENTARY 70 (2014).

Ukraine's Accountability under the Civil Aviation Conventions

Investigations show that the missile was fired from Ukrainian territory.¹⁵¹ Although the precise area from which it was fired appears to have been the rebel controlled Eastern Ukraine, Ukraine still has obligations under the civil aviation conventions to ensure the safety of its airspace and may have violated the conventions by not closing its airspace.

Under the civil aviation conventions, states have a due diligence obligation to ensure the safety of civil aviation in the airspace over their territory. Although the Chicago Convention reiterates that “every state has complete and exclusive sovereignty over the airspace above its territory,”¹⁵² and a state may not have the obligation to ensure the total safety of their airspace or to close its airspace for reasons of military necessity or public safety,¹⁵³ states are at the very least under a due diligence obligation to ensure safety of their airspace. For example, Annex 11 to the Chicago Convention provides that activities potentially hazardous to civil aircraft shall be coordinated with the appropriate air traffic services, in order to avoid hazards to civilian aircraft.¹⁵⁴ Annex 17 stipulates that each Contracting State shall implement regulations, practices and procedures to ensure the safety of civilian aviation.¹⁵⁵ Contracting States shall keep the level of threat to civilian aviation within its territory under constant review.¹⁵⁶ Contracting States shall further establish procedures to share threat information with other Contracting States.¹⁵⁷ And Contracting States issue a Notice to Airmen (NOTAM) to inform pilots of, *inter alia*, the presence of hazards which affect air navigation and the establishment of danger areas.¹⁵⁸ Knowledge of the possession of missiles by those fighting in and holding control over Eastern Ukraine or other information that the fighting in Eastern Ukraine posed a serious threat to civil aviation and not informing other states and the ICAO of such facts may well constitute a breach of Ukraine's due diligence obligations under the civil aviation conventions. Moreover, it can be argued that Ukraine was under the legal obligation to close its airspace although this is contested among commentators.¹⁵⁹

¹⁵¹ Dutch Safety Board, *Crash Of Malaysia Airlines Flight MH17*, p. 147, (Oct. 2015), available at <http://www.onderzoeksraad.nl/uploads/phase-docs/1006/debcd724fe7breport-mh17-crash.pdf>.

¹⁵² Convention on International Civil Aviation, art. 1, 7 Dec 1944, 15 U.N.T.S. 295 (1994), available at <http://www.icao.int/publications/pages/doc7300.aspx>.

¹⁵³ Convention on International Civil Aviation, art. 9, 7 Dec 1944, 15 U.N.T.S. 295 (1994), available at <http://www.icao.int/publications/pages/doc7300.aspx>.

¹⁵⁴ International Civil Aviation Organization, *Annex 11 to the Convention on International Civil Aviation: Air Traffic Services*, art. 2.17., July 2001.

¹⁵⁵ International Civil Aviation Organization, *Annex 17 to the Convention on International Civil Aviation: Security*, art. 2.1.2., April 2005.

¹⁵⁶ International Civil Aviation Organization, *Annex 17 to the Convention on International Civil Aviation: Security*, art. 3.1.3., April 2005.

¹⁵⁷ International Civil Aviation Organization, *Annex 17 to the Convention on International Civil Aviation: Security*, art. 2.4.3., April 2005.

¹⁵⁸ International Civil Aviation Organization, *Annex 15 to the Convention on International Civil Aviation: Aeronautical Information Services*, art. 5.1.1.1. (l), (n), July 2013.

¹⁵⁹ Ruwantissa Abeyratne, *Flight MH17 and state responsibility for ensuring safety and security of air transport*, 7 JOURNAL OF TRANSPORTATION SECURITY 347, 353 (2014); Dutch Safety Board, *Crash Of Malaysia Airlines Flight MH17*, p. 253, (Oct. 2015), available at <http://www.onderzoeksraad.nl/uploads/phase-docs/1006/debcd724fe7breport-mh17-crash.pdf>.

In addition to Ukraine's potential responsibility to failing to ensure the safety of its airspace, like Russia, it was under the obligation to investigate: the state in which the accident occurs is obliged to institute an inquiry into the circumstances.¹⁶⁰ The state where the aircraft is registered may appoint observers, and the state undertaking the inquiry has to communicate the report and the findings regarding the accident to the state of registration.¹⁶¹ All states are also obliged to report to the ICAO, in accordance with national law, any information they possess on the circumstances of the offense or, if applicable, on the measures taken in relation to prosecution or extradition of an alleged offender.¹⁶² As already discussed above in the context of Russia's obligations, the state in which the accident occurred is similarly obliged to arrest the alleged offender and either prosecute or extradite the individual(s).¹⁶³

With regards to Ukraine's obligations, the *Corfu Channel* case is of particular relevance. In that case, Britain filed charges against Albania for the casualties and damages it had sustained as a result of its ships running into a minefield in the Corfu Channel. Britain asserted that Albania had laid the minefield and as such should be held responsible. The ICJ did not find evidence that Albania had in fact laid that minefield. However, the ICJ did find evidence that Albania was aware of the presence of the minefield in the Corfu Channel. This knowledge required Albania to notify all ships in the vicinity of the minefield of the danger that they were facing. The ICJ concluded that Albania's "grave omissions involve its international responsibility."¹⁶⁴ If it can be shown that Ukraine knew that the rebels had obtained weapons that could shoot down civil aviation at cruising altitude, it could be argued that Ukraine was under a similar obligation as Albania to warn states and airliners about this danger. Instead, Ukraine only closed its airspace up to 32,000 feet and did not provide a reason for this closure in its notifications to airlines.¹⁶⁵ This could be submitted to the ICAO Council and the ICJ for consideration.

Obtaining Foreign Satellite and Radar Images Through the Civil Aviation Treaties

A final point to raise under the civil aviation conventions is the obligations to share satellite and radar information. Families of the victims of Flight MH17 have recently urged the Netherlands to claim the satellite and radar images that Russia (and Ukraine and the US) allegedly possess on the basis of Article 13 of the Montreal Convention. Article 13 provides that

¹⁶⁰ Convention on International Civil Aviation, art. 26, 7 Dec 1944, 15 U.N.T.S. 295 (1994), available at <http://www.icao.int/publications/pages/doc7300.aspx>.

¹⁶¹ Convention on International Civil Aviation, art. 26, 7 Dec 1944, 15 U.N.T.S. 295 (1994), available at <http://www.icao.int/publications/pages/doc7300.aspx>. See also Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, art. 6(2), 23 Sept 1971, 974 U.N.T.S. 178 (1971), available at <https://www1.umn.edu/humanrts/instree/civilaviation.html>.

¹⁶² Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, art. 13, 23 Sept 1971, 974 U.N.T.S. 178 (1971), available at <https://www1.umn.edu/humanrts/instree/civilaviation.html>.

¹⁶³ Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, arts. 6, 7, 23 Sept 1971, 974 U.N.T.S. 178 (1971), available at <https://www1.umn.edu/humanrts/instree/civilaviation.html>.

¹⁶⁴ The *Corfu Channel Case (United Kingdom v. Albania)*, Preliminary Objection, 1948, I.C.J. 15, 22 (25 Mar), available at <http://www.icj-cij.org/docket/files/1/1569.pdf>.

¹⁶⁵ Dutch Safety Board, *Crash Of Malaysia Airlines Flight MH17*, p. 260, (Oct. 2015), available at <http://www.onderzoeksraad.nl/uploads/phase-docs/1006/debcd724fe7breport-mh17-crash.pdf>.

each contracting shall, in accordance with its national law, report to the ICAO any information concerning the circumstances of the event.¹⁶⁶ Unfortunately, this provision only obliges states to share information *in accordance with national law*. Although there is little literature on this subject, some scholars argue that this provision gives states a “high degree of latitude to determine the content of the report, but its national law should not be construed to the effect that no information should be provided to the ICAO.”¹⁶⁷ In addition, it would have to be proven that Russia (or Ukraine and the US) actually possesses further satellite and radar images that they have not disclosed. This provision might be used to put political pressure on Russia (or Ukraine and the US) but is unlikely to be an efficient legal tool to achieve the release of satellite or radar images. Obtaining this information may be more successful in judicial proceedings of criminal prosecutions or civil litigations.

Additional Violations of International Law

International Humanitarian Law and International Human Rights Law

In addition to violation of the civil aviation treaties, the downing of MH17 may also amount to violation of international humanitarian law (IHL, also known as the laws of armed conflict), and of international human rights law. While the specific context of the rights that are guaranteed by the European Convention of Human Rights are discussed in the next chapter and the qualification of downing MH17 as a violation of international humanitarian law (and a war crime) is further discussed in Chapter 5, this chapter discusses a number of violations that may also lead to a claim of state responsibility on the part of Russia or Ukraine. However, attributing this to the said states, proving this with evidence and finding a ground for jurisdiction at the ICJ or another institution seem more difficult than with the aforementioned civil aviation treaties.

International humanitarian law applies to any situation of armed conflict.¹⁶⁸ Obligations under IHL differ according to the classification of the conflict as an international armed conflict or a non-international armed conflict. In both types of conflict, however, one of the core rules of IHL is that a distinction must be made between civilian and military objects: the “principle of distinction.”¹⁶⁹ Only military objects may be the target of an attack. In addition, parties to any

¹⁶⁶ NOS, *Nabestaanden MH17 willen dat Rutte radarbeelden opeist*, Jan. 13, 2016, available at <http://nos.nl/artikel/2080253-nabestaanden-mh17-willen-dat-rutte-radarbeelden-opeist.html> ; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, art. 13, Sep. 23, 1971, 974 U.N.T.S. 178 (1971), available at <https://www1.umn.edu/humanrts/instree/civilaviation.html>.

¹⁶⁷ Jiefang Huang, AVIATION SAFETY AND ICAO, 130 (2009).

¹⁶⁸ See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949, art. 2, Aug. 12, 1949, 75 U.N.T.S. 287; 1958 ATS No 21, available at <https://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=4825657B0C7E6BF0C12563CD002D6B0B&action=openDocument>.

¹⁶⁹ Protocol Additional to the Geneva Conventions of 12 August 1949 and Relation to the Protection of Victims of International Armed Conflicts (Protocol I), art. 48, June 8, 1977, 1125 UNTS 3; 16 ILM 1391 (1977), available at <https://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=D9E6B6264D7723C3C12563CD002D6CE4&action=openDocument> ; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 13, June 8, 1977, 1125 UNTS 609; 16 ILM 1442 (1977), available at

armed conflict must take constant care to spare the civilian population, civilians, and civilian objects: the “precautionary principle.”¹⁷⁰ The situation in Ukraine can be argued to be a non-international armed conflict.¹⁷¹ Both parties must then respect the basic principles of IHL, including the principles of distinction and precaution. The shooting down of a civilian airliner is a clear violation of these core principles of IHL. A civilian airliner clearly does not “make an effective contribution to military action” nor does its destruction offer a “definite military advantage.”¹⁷² Therefore, the shooting down of Flight MH17 is a violation of international humanitarian law. See Chapter 5 for a more detailed qualification of MH17 as a war crime.

International human rights law imposes further obligations upon states. Even though states owe human rights obligations exclusively to individuals (and not to other states), the ICJ has heard cases on the violation of human rights obligations in the past.¹⁷³ In the present case, Russia and Ukraine may have violated the right to life as is provided by the International Convention on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR), to which Russia, Ukraine, and the Netherlands are parties to. While the right to life protection under the ECHR is discussed in the next chapter, a few considerations on a potential case on the right to life under the ICCPR are due here.

The ICCPR provides that no one shall be arbitrarily deprived of his life.¹⁷⁴ First, states have the (negative) obligation to refrain from taking anyone’s life, unless “necessary” and “proportional.”¹⁷⁵ The shooting down of a civilian airliner cannot be said to be either necessary or proportional. The ICJ has argued that in times of war (such as during the armed conflict in Eastern Ukraine), the test of which deprivation of life is “arbitrary” falls to be determined by the *lex specialis*: the laws of armed conflict, or international humanitarian law.¹⁷⁶ Above it was already submitted that this qualifies as a violation of IHL because it does not meet the requirements of making a distinction between military and civilian targets. Like with the civil

<https://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=AA0C5BCBAB5C4A85C12563CD002D6D09&action=openDocument>.

¹⁷⁰ ICRC, Customary IHL Database, Rule 15, available at https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter5_rule15.

¹⁷¹ ICRC, *Ukraine: ICRC calls on all sides to respect international humanitarian law*, July 23, 2014, available at <https://www.icrc.org/eng/resources/documents/news-release/2014/07-23-ukraine-kiev-call-respect-ihl-repatriate-bodies-malaysian-airlines.htm>.

¹⁷² Protocol Additional to the Geneva Conventions of 12 August 1949 and Relation to the Protection of Victims of International Armed Conflicts (Protocol I), art. 52(2), June 8, 1977, 1125 UNTS 3; 16 ILM 1391 (1977), available at

<https://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=D9E6B6264D7723C3C12563CD002D6CE4&action=openDocument>.

¹⁷³ See, for example: Case Concerning Ahmadou Sadio Diallo (*Republic of Guinea v. Democratic Republic of Congo*), 2010 I.C.J. 639, 30 Nov, available at <http://www.icj-cij.org/docket/files/103/16244.pdf>; Case Concerning Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v. United States of America*), 1986 I.C.J. 14, 27 June, available at <http://www.icj-cij.org/docket/files/70/6503.pdf>

¹⁷⁴ International Covenant on Civil and Political Rights, art. 6, 19 Dec 1966, 999 UNTS 171 and 1057 UNTS 407; 6 ILM 368 (1967), available at <https://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf>.

¹⁷⁵ Nigel Rodley, *Integrity of the Person*, in INTERNATIONAL HUMAN RIGHTS LAW 174, 186 (Daniel Moeckli, 2nd Edition, 2014).

¹⁷⁶ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996, I.C.J. 226, par. 25 (8 July), available at <http://www.icj-cij.org/docket/files/95/7495.pdf>.

aviation breaches, these violations of the right to life and of international humanitarian law can be attributed to the state if those directly responsible were state organs or under the effective control of a state.

Second, again as was also seen in the civil aviation conventions breaches, states have a positive obligation to conduct an effective investigation into cases of apparently unlawful killings.¹⁷⁷ And, thirdly, states have a due diligence obligation to protect people from death from third parties.¹⁷⁸ This due diligence obligation is an obligation of conduct and not of result, meaning that a state has to act within its means when informed of potential danger to people but does not have to prevent every death by a third party. These obligations to conduct an investigation and to protect people from death by third parties primarily rest on Ukraine because the incident happened in its territory. Ukraine might legally be able to claim that it was not able to fulfill this obligation entirely because it had lost control over the Eastern part of Ukraine. If it can be shown that Russia exercised effective control over Eastern Ukraine and/or over the principal perpetrators, those obligations would instead fall upon Russia.¹⁷⁹

Providing the Weapon

Alternatively, Russia may be held responsible for violating its international obligations if evidence shows that it would have provided the weapon that was used to shoot down Flight MH17.¹⁸⁰ Russia has not ratified the Arms Trade Treaty that imposes certain obligations upon states when supplying weapons to non-state actors. However, since the rebels have likely committed a war crime by violating international humanitarian law, should Russia have provided the weapon, they may have provided a significant contribution to the rebels' ability to commit such a crime. This argument would require evidence that those that delivered the weapon were not only linked to the Russian state, but also that they were aware that there was a serious risk that they would be used to commit a crime.¹⁸¹ In the ICJ *Bosnian Genocide* case, the ICJ held that it suffices that the Serbian authorities "could hardly have been unaware of the serious risk"

¹⁷⁷ *Abubakar Amirov and Aïzan Amirova v. Russian Federation*, Case No. 1447/2006, U.N. Doc. CCPR/C/95/D/1447/2006, 2 April 2009, available at

http://www.worldcourts.com/hrc/eng/decisions/2009.04.02_Amirov_v_Russian_Federation.htm.

¹⁷⁸ Nigel Rodley, *Integrity of the Person*, in INTERNATIONAL HUMAN RIGHTS LAW 174, 191 (Daniel Moeckli, 2nd Edition, 2014).; Human Rights Committee, General Comment 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, para. 8, CCPR/C/21/Rev.1/Add.13 (26 May 2004), available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.13&Lang=en.

¹⁷⁹ Human Rights Committee, General Comment 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add.13 (26 May 2004), available at http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2f21%2fRev.1%2fAdd.13&Lang=en.

¹⁸⁰ The Guardian, *MH17 Crash: Dutch Investigators to Assess New Study Implicating Russian Soldiers*, 4 Jan 2016, available at <http://www.theguardian.com/world/2016/jan/04/mh17-dutch-investigators-to-study-citizen-journalist-claims-over-russians-involved-in-crash>.

¹⁸¹ See Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), 2007 I.C.J. 43, par. 432 (26 Feb), available at <http://www.icj-cij.org/docket/files/91/13685.pdf>.

that genocide would be committed.¹⁸² This criterion thus requires a standard of proof below that of knowing that a crime would be committed.¹⁸³

Jurisdiction

Although it is possible to argue the responsibility of Russia (and Ukraine) of other violations of international law than provided by the civil aviation treaties, establishing jurisdiction for the ICJ (or any other body) to bring a case on such a violation is not easy. The same problems emerge for the jurisdictional grounds of making a special agreement for this particular case, the absence of unilateral declarations to accept the compulsory jurisdiction of the ICJ by both Russia and Ukraine, and the likelihood that either state will implicitly accept jurisdiction (*forum prorogatum*). However, as noted before, circumstances may change, and although states may not be open to allowing the ICJ to decide over matters of dispute today, does not mean that they won't in the future, when different people hold office.

While the civil aviation treaties pose the opportunity to bring a case to the ICJ on the basis of compromissory clauses, neither the ICCPR or the relevant IHL treaties contain such clauses. The Netherlands can search further whether in any other treaty between the Netherlands and Russia or Ukraine with a compromissory clause a substantive basis can be found on which to build a case of state responsibility. An example could be Declarations of Friendly Relations, which usually provide for the obligation to refrain in hostile behavior, which would include the shooting down, allowing or failing to prevent the shooting down, and failing to investigate or hold accountable for shooting down a civilian aircraft from the counterpart.

Conclusions

Under the doctrine of state responsibility, there appear to be ways to bring a case to the ICJ for the violation of international law by Russia and Ukraine. While it is in general very difficult to meet the criteria of jurisdiction at the ICJ, the civil aviation conventions may allow for such proceedings. Bringing a claim on the basis of the Chicago or Montreal Convention, or both, represents the most promising avenue, although other violations of international law may also be argued. For violations of international humanitarian law and human rights law, jurisdiction may, at least at the moment, not be possible.

With regard to the merits, there appear reasonably strong arguments to claim that Russia and Ukraine have violated their obligations to communicate information, investigate the situation and allegations against potential perpetrators, and prosecute or extradite. With regard to attributing the actual firing of the missile to Russia, this will depend on whether evidence indicates a relationship between those that fired the missile and Russia that meets the standards

¹⁸² Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), 2007 I.C.J. 43, par. 436 (26 Feb), available at <http://www.icj-cij.org/docket/files/91/13685.pdf>.

¹⁸³ See for the argument that this applies to delivering weapons to non-state actors, Andrew Clapham, *Weapons and Armed Non-State Actors*, in *WEAPONS UNDER INTERNATIONAL HUMAN RIGHTS LAW* 163, 164 (Stuart Casey-Maslen, 1st Edition, 2014).

of attributability. The same can be said for the delivering of the missile to the principal perpetrators.

Nonetheless, as the recent example of the *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* shows, even where the Court cannot find a state directly liable for violations of specific international obligations, it can elaborate and elucidate on the factual background of the case.¹⁸⁴ This declarative function of the Court's judgments may serve to publicly characterize the conduct of the respondent state or even provide a degree of satisfaction for the relatives of the victims.

¹⁸⁴ See *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 2007, I.C.J. 43 (February 26), available at <http://www.icj-cij.org/docket/files/91/13685.pdf>.

4. EUROPEAN COURT OF HUMAN RIGHTS FOR VIOLATING THE RIGHT TO LIFE

The European Court of Human Rights (ECtHR) is another option that could be pursued to seek accountability for those responsible for downing MH17. An application before the ECtHR is an avenue to secure the responsibility of a member state of the Council of Europe for the violations of the European Convention on Human Rights (ECHR).¹⁸⁵ The Netherlands, Ukraine and Russia are all member states of the ECHR. Although the ECtHR potentially has jurisdiction over the violations, jurisdiction may be difficult to secure, along with the requisite evidence, and the process is likely to take a number of years to complete.

The ECHR permits both inter-state and individual applications.¹⁸⁶ An application will be successful provided that (i) it is admissible; and (ii) a violation of the Convention is attributable to the state. The admissibility requirements differ depending on whether the application is an inter-state or an individual application. Both procedures may result in binding judgments and the awarding of just satisfaction. Of note, the ECtHR only addresses allegations of state conduct, and thus focuses on the responsibility of states to safeguard human rights, and does not address allegations of individual liability.¹⁸⁷

On 24 November 2014, an application entitled *Ioppa v Ukraine* was lodged with the ECtHR.¹⁸⁸ The applicant is the mother of one of the victims of the MH17 crash.¹⁸⁹ The contents of the application are not public knowledge. However, the ECtHR has confirmed that the case is now under examination and is being treated as a priority.¹⁹⁰ Moreover, as of 14 December 2015, Russia has enacted domestic legislation which allows it to overrule decisions of the ECtHR.¹⁹¹ This may have implications in terms of enforcement of the Court's rulings should a case be brought against Russia at the ECtHR for the downing of MH17.

This chapter sets out the process for bringing both inter-state and individual applications relating to the MH17 crash. It also explains the potential implications of the above-mentioned recent developments for future applications to the Court.

¹⁸⁵ Ukraine, Russia and the Netherlands are member states of the Council of Europe and ECHR.

¹⁸⁶ European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, art. 33 and 34, Nov. 4, 1950, ETS No. 5, *available at* <http://www.refworld.org/docid/3ae6b3b04.html>.

¹⁸⁷ See e.g. *Avsar v. Turkey*, Application no. 25657/94, Judgment of 10 July 2001, paras. 282-284.

¹⁸⁸ Conseil de L'Europe, Ukraine: Flight MH17 crash victim's mother lodges court complaint, HUMAN RIGHTS EUROPE, December 1, 2014, *available at* <http://www.humanrightseurope.org/2014/12/ukraine-flight-mh17-crash-victims-mother-lodges-court-complaint/>.

¹⁸⁹ Al Jazeera, Mother of German MH17 victim sues Ukraine, AL JAZEERA, November 30, 2014, *available at* <http://www.aljazeera.com/news/europe/2014/11/family-german-mh17-victim-sues-ukraine-20141129233051954730.html>.

¹⁹⁰ Conseil de L'Europe, Ukraine: Flight MH17 crash victim's mother lodges court complaint, HUMAN RIGHTS EUROPE, 1 Dec 2014, *available at* <http://www.humanrightseurope.org/2014/12/ukraine-flight-mh17-crash-victims-mother-lodges-court-complaint/>.

¹⁹¹ Vladimir Soldatkin, Putin signs law allowing Russia to overturn rulings of international rights courts, REUTERS, 15 Dec 2015, *available at* <http://www.reuters.com/article/us-russia-court-putin-idUSKBN0TY17H20151215>.

Article 2 ECHR and Attribution of Violations to a Member-State

Article 2 ECHR prohibits arbitrary killing or deprivation of life that is not prescribed by law or absolutely necessary for the purposes mentioned in the second paragraph of the article. The shooting down of a civilian airliner, whether deliberate or accidental, constitutes a violation of the right to life under Article 2 ECHR. Failure to investigate the killings constitutes a further breach of Article 2. The ECtHR's jurisprudence has established a strong legal framework for the assessment of lethal force by state agents, including in cases of internal and international armed conflict.¹⁹² The following sections explore responsibility regarding two scenarios: (a) state-agents fired the missile; and (b) separatists (or any non-state actor) fired the missile. In both situations, and depending on the results of the investigation and available evidence, the ECtHR may hold a state responsible for Convention violations.

Unlawful use of lethal force

Article 2(2) ECHR permits the use of lethal force when absolutely necessary and in accordance with one of the purposes mentioned in this Article. The requirement of "absolute necessity" means that any use of lethal force must be "strictly proportionate" to achieve a legitimate aim.¹⁹³ Where an individual has been killed by state agents, that state must show "the absolute necessity" of any killing, not only in respect of the actions of the agents who actually carried out the killing, but in respect of "all the surrounding circumstances," including the planning, control and organization of the operation.¹⁹⁴ The ECtHR has also found that the absence of "proper training and instructions" in the use of firearms for the police, can be a contributing factor leading to a violation of the duty under Article 2 to protect the right to life "by law."¹⁹⁵ The lack of proper training may constitute a "surrounding circumstance" to consider when assessing state responsibility.

In *McCann v. UK* the ECtHR found that "the failure to make provision for a margin of error must also be considered in combination with the training of the soldiers [...]. Against this background, the authorities were bound to their obligation to respect the right to life [...] to exercise the greatest of care in evaluating the information at their disposal before transmitting it to soldiers whose use of firearms automatically involved shooting to kill."¹⁹⁶ The Court held that it was unclear whether the soldiers had been properly trained or instructed in assessing whether the use of firearms were warranted in the specific circumstances. The ECtHR considered the authorities' lack of appropriate care regarding the control and organization of the operation, and

¹⁹² See *McCann and Others v. the United Kingdom*, Application no. 18984/91, Grand Chamber judgment of 27 September 1995; and Douwe Korff, *A Guide to the Implementation of Article 2 of the European Convention on Human Rights*, Council of Europe, 25 (Nov 2006), available at http://www.echr.coe.int/LibraryDocs/HR%20handbooks/handbook08_en.pdf.

¹⁹³ *McCann and Others v. UK*, Application no. 18984/91, Grand Chamber judgment of 27 September 1995, para. 149.

¹⁹⁴ *McCann and Others v. UK*, Application no. 18984/91, Grand Chamber judgment of 27 September 1995, para. 150.

¹⁹⁵ *Makaratzis v. Greece*, Application no. 50385/99, Grand Chamber judgment of 20 December 2004, para. 70.

¹⁹⁶ *McCann and Others v. UK*, Application no. 18984/91, Grand Chamber judgment of 27 September 1995, para. 211.

their failure to consider the possibility that their intelligence assessments may have been erroneous.¹⁹⁷ On this basis, the ECtHR found a violation of Article 2 by the state.

The ECtHR has also applied this approach in situations of internal armed conflicts. In *Ergi v. Turkey* the applicant claimed that the death of her sister was the result of indiscriminate fire by security forces. The ECtHR found that state responsibility was engaged in terms of the planning and conduct of the military operation. The failure of the authorities to adduce direct evidence on the planning and conduct of the military operation led the Court to conclude that “insufficient precautions had been taken to protect the lives of the civilian population.”¹⁹⁸ Furthermore, in *Isayeva v. Russia* the Court held “that when the military considered the deployment of aviation equipped with heavy combat weapons within the boundaries of populated area, they should have considered the dangers that such methods invariably entail.”¹⁹⁹ The Court held that “using this kind of weapon [heavy free-falling, high-explosion aviation bombs] in a populated area, outside wartime and without prior evacuation of the civilians, is impossible to reconcile with the degree of precaution expected from a law-enforcement body in a democratic society.”²⁰⁰

On this basis, the Court’s jurisprudence indicates that the use of heavy artillery in civilian areas is difficult to reconcile with the standard of care expected from a member state, even in an internal armed conflict. To defend their actions, the respondent state is required to produce sufficient evidence on the careful planning and organization of a military operation, training of soldiers and precautions for the civilian population. Provided that the present investigations into who is responsible for the crash²⁰¹ can establish that agents of a member state fired the missile on flight MH17 and that state cannot adduce sufficient evidence to disprove responsibility, that state could be held in violation of Article 2 ECHR.

Lastly, on 13 March 2014 Ukraine lodged an inter-state application to the ECtHR against Russia. This application concerns the events directly prior to and after the Russian assumption of control over the Crimea.²⁰² In the context of this *Ukraine v. Russia* inter-state application, on the same day the ECtHR, acting under Rule 39 of the Rules of Court, called upon both states to refrain “from taking any measures, in particular military actions, which might entail breaches of the Convention rights of the civilian population, including putting their life and health at risk, and to comply with their engagements under the Convention, notably in respect with Article 2.”²⁰³ Pursuant to the Court’s case law, measures under Rule 39 (interim measures) are binding

¹⁹⁷ *McCann and Others v. UK*, Application no. 18984/91, Grand Chamber judgment of 27 September 1995, paras. 211-214.

¹⁹⁸ *Ergi v. Turkey*, Application 23818/94, Judgment of 28 July 1998, paras. 79-81.

¹⁹⁹ *Isayeva v. Russia*, Application no. 57950/00, Judgment of 24 February 2005, para 189.

²⁰⁰ *Isayeva v. Russia*, Application no. 57950/00, Judgment of 24 February 2005, paras. 189-191.

²⁰¹ The Dutch Safety Board, in their report on the causes of the crash, did not establish who were responsible for the firing of the missile on flight MH17 – Dutch Safety Board, Crash of Malaysia Airlines flight MH17, 7 (Oct 2015), available at <http://www.onderzoeksraad.nl/uploads/phase-docs/1006/debcd724fe7breport-mh17-crash.pdf>.

²⁰² European Court of Human Rights Press Unit, Press Country Profile, 14 (Oct 2015), available at http://www.echr.coe.int/Documents/CP_Russia_ENG.pdf.

²⁰³ European Court of Human Rights, Press Release issued by the Registrar of the Court, Interim measure granted in inter-State case brought by Ukraine against Russia, ECHR 073 (2014), available at <http://hudoc.echr.coe.int/webservices/content/pdf/003-4699472-5703982>.

upon states.²⁰⁴ Thus, any state-led military action endangering the life of civilians would constitute a breach of the above-mentioned interim measure. Furthermore, such breach may constitute an additional ground to support another application before the ECtHR. As MH17 was downed after the ECtHR granted the interim measure, it is thus possible that Ukraine may bring a claim against Russia in relation to the downing of MH17 within its current application against Russia or in a new inter-state case.

Duty to Conduct Effective Investigations

In addition to the above obligations, state parties to the ECHR are under an obligation to conduct an effective investigation into killings allegedly committed by their agents.²⁰⁵ The ECtHR has repeatedly held that it is not necessary to establish beyond reasonable doubt the involvement of a state agent in a killing in order to give rise to the procedural duty to investigate under Article 2 ECHR.²⁰⁶ Mere knowledge of a killing suffices to trigger this duty notwithstanding the existence of a formal complaint.²⁰⁷ The obligation to investigate is an obligation of means, not of result.²⁰⁸ The failure to fulfill this obligation constitutes a direct breach of Article 2 ECHR.

The ECtHR defines “effective investigation” as an investigation capable of identifying those responsible and committing them to justice.²⁰⁹ The obligation to conduct an investigation into killings is breached if a lacuna or deficiency in the procedure may prevent the establishment of the facts surrounding the killing or the liability of the persons responsible.²¹⁰ The Court will consider an investigation effective provided that the following institutional and procedural requirements are fulfilled: i) strict institutional and practical independence of the investigators; ii) undertaking the necessary investigative steps to secure the evidence; iii) promptness; and iv) openness to public scrutiny and involvement of the next of kin.²¹¹

Importantly, the exigencies and/or difficulties of armed conflict do not dilute the standards of investigation.²¹² In particular, difficult security conditions do not preclude the authorities from conducting prompt investigations into the unlawful use of lethal force.²¹³

²⁰⁴ *Mamatkulov and Askarov v. Turkey*, Applications no. 46827/99 and 46951/99, Judgment of 4 Feb 2005, para. 125.

²⁰⁵ *McCann and Others v. UK*, Application no. 18984/91, Grand Chamber judgment of 27 Sept 1995, para. 161.

²⁰⁶ See generally: *Ergi v. Turkey*, Application 23818/94, Judgment of 28 July 1998.

²⁰⁷ *Ergi v. Turkey*, Application 23818/94, Judgment of 28 July 1998, para. 82 (1998).

²⁰⁸ *Shanaghmay v. the United Kingdom*, Application No. 37715/97, Judgment of 4 May 2001, para. 90; *Tanrikulu v. Turkey*, Application no. 23763/94, Judgment of 8 July 1999, para. 103.

²⁰⁹ *Kelly and Others v. the United Kingdom*, Application No. 30054/96, Judgment of 4 May 2001, para. 94.

²¹⁰ Joint partly dissenting opinion of Judges Costa, Bratza, Lorenzen and Thomassen in *Ramsahai and Others v. the Netherlands*, Application no. 52391/99, Judgment of 15 May 2007, para. 3.

²¹¹ Alastair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, 31-35 (2004).

²¹² Alastair Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, 40 (2004).

²¹³ *Kerimova and Others v. Russia*, Application no. 17170/04, Judgment of 3 May 2011, para. 265; *Khashiyev and Akayeva v. Russia*, Applications no. 57942/00 and 57945/00, para. 155; *Al-Skeini and Others v. UK* Application no. 55721/07, Grand Chamber judgment of 7 July 2011, paras. 176-177. Also see *Tanrikulu v. Turkey*, Application no. 23763/94, Judgment of 8 July 1999, para. 103.

In the present case, Ukraine delegated to the Dutch authorities its duty to investigate the MH17 crash under the Convention on International Civil Aviation. In addition, the states affected by the crash have agreed to coordinate and cooperate in conducting a criminal investigation aimed at identifying the perpetrators and securing evidence for prosecution and trial. Such investigation may suffice to meet the ECtHR's above stated requirements on Ukraine's behalf. However, the failure of Russian or Ukrainian authorities to conduct effective investigations into the possible responsibility of their state agents may result in a breach of Article 2 and support an application to the ECtHR. In addition, the ECtHR may consider as unlawful any attempt to undermine the effectiveness of the investigation.

Use of Lethal Force by Non-State Agents

Under the ECHR, states may also be held responsible for the actions of non-state actors in certain circumstances. The question of whether a member state (such as Russia or Ukraine) may be held responsible for the unlawful actions of the separatists or any other non-state/private actor is closely linked to the issue of jurisdiction and effective control over the relevant region – in this case the Donetsk region in Ukraine. In addition, the ECtHR may find that a state is responsible for the acts of a private party where the state lacked due diligence in preventing the violation.

Effective Control and “Decisive Influence”

Human rights law provides both negative and positive obligations engaging state responsibility for violations it did not directly commit, provided that such violation occurred within its jurisdiction. Article 1 ECHR sets limits on the Convention's jurisdiction, which the ECtHR has broadly interpreted. The ECtHR acknowledged that “jurisdiction is a broader concept than territory,” meaning that the states parties “are bound to secure the said rights and freedoms to all persons under their authority and responsibility, not only when the authority is exercised within their own territory but also when it is exercised abroad.”²¹⁴ This has implications for engaging the responsibility of Russia if they are found to have exercised authority in Eastern Ukraine over those responsible for the downing of MH17.

A state may be found responsible for human rights violations in another territory notwithstanding the annexation of the latter or establishment of a military or civil government by the said state. In *Cyprus v. Turkey* the (now former) European Commission on Human Rights found Turkey responsible for violations on the basis that Turkish armed forces exercised authority over persons and property in Cyprus.²¹⁵ The ECtHR further held in *Loizidou v. Turkey* that “the responsibility of a contracting party may also arise when, as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside of its national territory.”²¹⁶ The state may directly exercise effective control, or indirectly, through a

²¹⁴ G. v. UK and Ireland, Application no. 9837/82, Decision of 7 March 1985, para. 25.

²¹⁵ Cyprus v. Turkey (I) and (II), Applications nos. 9780/74 and 6950/75, Decision of the Commission of 26 May 1975, 136-137.

²¹⁶ Loizidou v. Turkey (preliminary objections), Application no. 15318/89, Judgment of 23 March 1995, para. 62.

subordinate local administration. In this case, the ECtHR found that Turkey exercised effective control through its military presence. In *Andreas Manitaras and Others v. Turkey*,²¹⁷ the ECtHR clarified the effective control requirement in finding that Turkey's responsibility could not be confined to the acts of its own soldiers or officials in northern Cyprus. Such responsibility can also be engaged via the acts of the local administration, which survived due to Turkish military and other support.²¹⁸

In *Ilascu and Others v. Republic of Moldova and Russia* the Grand Chamber of the ECtHR held that the USSR army had fought with and on behalf of the separatist forces.²¹⁹ In addition, the Russian authorities had continued to provide military, political and economic support to the separatist regime following the 1992 ceasefire agreement.²²⁰ The ECtHR found that the region remained under the effective authority, or at the very least under the *decisive influence*, of the Russian Government.²²¹ The Court considered that, in any event, the region survived due to the military, economic, financial and political support of the Russian Government. The ECtHR found a continuous and uninterrupted link of responsibility by the Russian authorities for the alleged violations, meaning that the latter fell under Russia's jurisdiction.²²²

The Court confirmed this finding in the case of *Ivantoc and Others v. the Republic of Moldova and Russia*. In this case, the Court found the Russian authorities responsible for violations on the basis of their "close relationship" with the separatist forces, to which they provided political, financial and economic support.²²³ The judgment further relied on the passivity of the Russian authorities in preventing Convention violations.²²⁴ The ECtHR appears to have abandoned, or at least to have a very broad understanding of, the requirement for effective control. While international law strictly defines effective control,²²⁵ the ECtHR considers political, financial and economic support as a sufficient ground for establishing the jurisdiction of a member state.

The concept of jurisdiction set out in the Court's above-mentioned cases broadens the options in triggering an application before the ECtHR regarding the MH17 crash. These cases indicate that a state may be held responsible for the unlawful actions of non-state agents provided that a "close link" or relationship is established between the actions of the non-state agent and the state in question (Russia). The ECtHR assesses such a link based on the state

²¹⁷ *Andreas Manitaras and Others v. Turkey*, Application no. 54591/00, Decision on admissibility of 3 June 2008.

²¹⁸ *Andreas Manitaras and Others v. Turkey*, Application. 54591/00, Decision on admissibility of 3 June 2008, paras. 27-30.

²¹⁹ *Ilascu and Others v. Republic of Moldova and Russia*, Application no. 48787/99, Judgment of 8 July 2004, para. 380.

²²⁰ *Ilascu and Others v. Republic of Moldova and Russia*, Application no. 48787/99, Judgment of 8 July 2004, paras. 380-382.

²²¹ *Ilascu and Others v. Republic of Moldova and Russia*, Application no. 48787/99, Judgment of 8 July 2004, para. 392.

²²² *Ilascu and Others v. Republic of Moldova and Russia*, Application no. 48787/99, Judgment of 8 July 2004, para. 393.

²²³ *Ivantoc and Others v. Moldova and Russia*, Application No. 2368/05, Judgment of 15 Nov 2011, paras. 118-119.

²²⁴ *Ivantoc and Others v. Moldova and Russia*, Application No. 2368/05, Judgment of 15 Nov 2011, paras. 118-119.

²²⁵ Regarding effective control and jurisdiction see also cases of *Al-Jedda v. UK*, Application No. 27021/08, Judgment of 7 July 2011; and *Al-Skeini and others v. UK*, Application no. 55721/07, Judgment of 7 July 2011.

support (military, economic and political) provided to the private party, or whether it had decisive influence. Depending upon the evidence available following the investigation into those responsible for the crash, state responsibility of Russia (or Ukraine) may be established by the ECtHR for the action of firing the missile on MH17 by non-state agents.

Due Diligence

In addition to responsibility stemming from the links between a non-state actor firing the missile and state support, the ECtHR may also find a state responsible where the state lacked due diligence in preventing the violation or failing to investigate and prosecute. The ECtHR has held that state authorities have a duty to prevent criminal offences provided that: (i) the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party; and (ii) the authorities failed to take all necessary measures within the scope of their powers, which, judged reasonably, might have been expected to avoid the risk.²²⁶

The question arises whether, pursuant to this doctrine, Ukraine may be responsible for failing to close the airspace over the Donetsk region and thus in violation of their substantive obligations under Article 2. As a sovereign state, Ukraine has sovereignty over its airspace and is thus responsible for its safety.²²⁷ As a result a state has to decide whether it is necessary in the interests of safety to close the airspace to civilian air traffic.²²⁸ The Dutch Safety Board in its report on the causes of the downing of MH17 explored this issue of whether the airspace over Eastern Ukraine, where MH17 came down, should have been closed to civil aviation. Especially given the fact that it was a known conflict area.²²⁹ However, if one applies the criteria laid out above by the ECtHR in *Osman v. UK* to the downing of MH17, it appears that there may be a potential obstacle for a successful claim.²³⁰ The ECtHR noted in *Osman v. UK* that there needs to be an immediate risk to the life of an “identified individual.”²³¹ In *Osman v. UK* it could not be shown that the police ought to have known that the lives of the Osman family were at real and immediate risk.²³² The Court took this somewhat narrow approach to the duty to protect life due to the difficulties in policing modern society and the unpredictability of human conduct.²³³ To take an alternative approach was regarded to place a disproportionate burden on the state.²³⁴ Applying this to the downing of MH17, it must be asked how Ukraine could have known specifically that those individuals onboard MH17 were at an immediate risk. This is a high threshold and could be difficult for the applicants to overcome, it would need to be demonstrated that Ukraine knew or ought to have known specifically that there was a real risk to the lives of

²²⁶ *Osman v. UK*, Application no. 23452/94, Judgment of 28 February 1998 para. 115.

²²⁷ Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation 1971, Article 10, 23 Sept 1971, available at <https://treaties.un.org/doc/Publication/UNTS/Volume%20974/volume-974-I-14118-English.pdf>.

²²⁸ Chicago Convention on International Civil Aviation 1944, Article 1 & 2, 7 Dec 1944, available at http://www.icao.int/publications/Documents/7300_orig.pdf.

²²⁹ Dutch Safety Board, Crash of Malaysia Airlines flight MH17, 191 (October 2015), available at <http://www.onderzoeksraad.nl/uploads/phase-docs/1006/debcd724fe7breport-mh17-crash.pdf>.

²³⁰ *Osman v. UK*, Application no. 23452/94, Judgment of 28 Feb 1998, para. 116.

²³¹ *Osman v. UK*, Application no. 23452/94, Judgment of 28 Feb 1998, para. 116.

²³² *Osman v. UK*, Application no. 23452/94, Judgment of 28 Feb 1998, para. 116.

²³³ Jacobs, White & Ovey, THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 154 (2014).

²³⁴ Jacobs, White & Ovey, THE EUROPEAN CONVENTION ON HUMAN RIGHTS, 154 (2014).

those onboard MH17 before the downing of the plane took place. It is uncertain if the applicants could provide evidence to show that this threshold has been reached.

The second criterion stemming from *Osman v. UK* is that the authorities have failed to take all necessary measures to avoid the risk. The Dutch Safety Board Report concluded in light of its investigation that the risk assessment undertaken by Ukraine into whether to close its airspace to civilian traffic was incomplete because they did “not account for the consequences to civil aviation of potential errors or slips” in relation to the known use of surface to air missiles against military aircraft in the area where MH17 came down.²³⁵ Ukraine also did not provide reasons for their airspace restrictions and thus airspace users were not informed to the greatest possible extent of the risks of flying in the area.²³⁶ In short, the Dutch Safety Board concluded that Ukrainian authorities had not taken sufficient notice of the possibility that civil aircraft could have been fired upon, given the information in their possession at the time.²³⁷ The DSB noted that the Ukrainian authorities were aware of the weapon systems being used in the area, however, no measures were taken to protect civilian aircraft against these weapon systems.²³⁸

In light of these findings a case could be brought against Ukraine in the ECtHR for violations of Article 2 ECHR for not closing their airspace provided that *both* criteria laid out above in *Osman v. UK* are satisfied, given their cumulative nature.²³⁹ Although the Dutch Safety Board have concluded that Ukraine should have closed their airspace, it would appear that the applicants will struggle to satisfy the criterion of having “identified individuals” being at risk. It is believed that the current case of *Ioppa v. Ukraine* has taken this due diligence argument, that Ukraine should have closed their airspace, in their application to the ECtHR.²⁴⁰

Of note, there is the issue that Malaysia Airlines, who operated the flight of MH17, were a potential concurrent cause of the downing of MH17 by allowing the plane to fly into a known conflict zone. However, it would appear that regardless of this, Ukraine would still be held accountable under the ECHR for failing to close its airspace. International law appears to take the position that there is no reduction of state liability in cases of concurrent causation, as seen in the ICJ’s Corfu Channel case.²⁴¹ Similarly, the Dutch Safety Board concluded in its report that the way in which Malaysia Airlines operated the flight complied with applicable regulations and that no other airlines had altered their flight routes.²⁴² Therefore, in light of this it would appear

²³⁵ Dutch Safety Board, Crash of Malaysia Airlines flight MH17, 207 (Oct 2015), available at <http://www.onderzoeksraad.nl/uploads/phase-docs/1006/debcd724fe7breport-mh17-crash.pdf>.

²³⁶ Dutch Safety Board, Crash of Malaysia Airlines flight MH17, 207 (Oct 2015), available at <http://www.onderzoeksraad.nl/uploads/phase-docs/1006/debcd724fe7breport-mh17-crash.pdf>.

²³⁷ Dutch Safety Board, Crash of Malaysia Airlines flight MH17, 209 (Oct 2015), available at <http://www.onderzoeksraad.nl/uploads/phase-docs/1006/debcd724fe7breport-mh17-crash.pdf>.

²³⁸ Dutch Safety Board, Crash of Malaysia Airlines flight MH17, 209 (Oct 2015), available at <http://www.onderzoeksraad.nl/uploads/phase-docs/1006/debcd724fe7breport-mh17-crash.pdf>.

²³⁹ *Osman v. UK*, Application no. 23452/94, Judgment of 28 Feb 1998, para. 115.

²⁴⁰ Burkhard Uhlenbroich, Familien der deutschen Opfer verklagen Ukraine, BILD, 9 Sept 2014, available at <http://www.bild.de/politik/ausland/flug-mh-17/familien-der-deutschen-opfer-verklagen-ukraine-37748032.bild.html>; Al Jazeera, Mother of German MH17 victim sues Ukraine, AL JAZEERA, 30 Nov 2014, available at <http://www.aljazeera.com/news/europe/2014/11/family-german-mh17-victim-sues-ukraine-20141129233051954730.html>.

²⁴¹ Corfu Channel Case (UK v Albania), Judgment of 9 April 1940, I.C.J. Reports 1949, p 17-18, 22-23.

²⁴² Dutch Safety Board, Crash of Malaysia Airlines flight MH17, 260 (October 2015), available at <http://www.onderzoeksraad.nl/uploads/phase-docs/1006/debcd724fe7breport-mh17-crash.pdf>. This position by the

that regardless of any concurrent causation on the part of Malaysia Airlines this would not affect Ukraine's obligations under Article 2 ECHR in relation to not closing their airspace.”

Moreover, Russia may have breached their due diligence obligation by not investigating whether their state support (military, economic, political) was a factor in the crash of MH17 and failing to take steps to ensure that it does not occur again. As the ECtHR has never applied the due diligence doctrine in cases of armed conflict, it is difficult to assess the presence of “a real and immediate risk to the life of identified individuals.”

Types of cases before the ECtHR

Given this discussion of the substantive merits of a potential case, a case could be brought in two ways before the ECtHR, namely through individual application or an inter-state case.

Individual Application

Article 34 of the ECHR enables individuals to claim a violation of a right under the Convention provided that such violation occurred within the jurisdiction of a member state (see Article 1 ECHR). Any individual or legal entity may exercise the right to individual application, regardless of nationality, place of residence, civil status or capacity.²⁴³ As such, the relatives of the MH17 victims may consider filing an application against either or both Ukraine and/or Russia.

To bring an application, an individual applicant must: (i) be a victim of a violation; (ii) have suffered a “significant disadvantage”; (iii) have exhausted all domestic remedies; and (iv) file his/her application in a timely manner.²⁴⁴ The Court will reject an application that is substantially the same as a matter that has already been examined by the Court or submitted to another procedure of international investigation; or is manifestly ill-founded or constitutes an abuse of a right.²⁴⁵ These requirements are discussed below.

Dutch Safety Board is however contested; several airlines did decide that they would not fly over the area concerned.

²⁴³ European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, art. 34, Nov. 4, 1950, ETS No. 5, *available at* <http://www.refworld.org/docid/3ae6b3b04.html>.

²⁴⁴ European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, arts. 35(1), 35(3)(b) and 34, Nov. 4, 1950, ETS No. 5, *available at* <http://www.refworld.org/docid/3ae6b3b04.html>.

²⁴⁵ European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, arts. 35(2)(b) and 35(3)(a), Nov. 4, 1950, ETS No. 5, *available at* <http://www.refworld.org/docid/3ae6b3b04.html>.

Victim status

The issue of victim status is linked to the merits of the case.²⁴⁶ Pursuant to Article 34, applicants must claim to be a victim of the alleged violation,²⁴⁷ and must have suffered a “significant disadvantage.”²⁴⁸ Victims can be either direct or indirect, with direct victims being those directly affected by the state’s act or omission,²⁴⁹ while indirect victims are those who have a personal and specific link with the direct victim. In cases of alleged violations of Article 2 (right to life), the ECtHR has consistently recognized the relatives (e.g. parents, children, uncles, nephews) of the deceased as “victims.”²⁵⁰ The relatives of the MH17 victims could qualify as “victims” and have *locus standi* before the ECtHR. Despite this, the application would likely have difficulties meeting the other requirements before the ECtHR discussed below.

Exhaustion of Domestic Remedies

Article 35 of the ECHR sets out the obligation to exhaust domestic remedies before filing an individual application with the Court. This means that individuals need to file a case in the state against which it raises its application. The rationale behind this rule is that the state should have the opportunity to address and put right the violations being alleged against them before being submitted to the ECtHR.²⁵¹ However, the ECtHR has consistently applied the rule with “some degree of flexibility and without excessive formalism.”²⁵² Applicants are only required to exhaust domestic remedies that are available “in theory and in practice,” i.e. remedies that are accessible in practice, capable of providing redress in respect of their applications and offering reasonable prospects of success.²⁵³ The ECtHR assesses the availability and effectiveness of the remedy with regards the particular circumstances of each case. The Court takes into account the general political and legal context in which the remedies operate, as well as the personal circumstances of the applicant.²⁵⁴ However, factual and/or legal borders do not constitute as such an obstacle to the exhaustion rule. Applicants living outside the jurisdiction of a member state (such as those in Australia or Malaysia) are also required to exhaust the domestic remedies within the state against which they wish to bring a case.²⁵⁵

²⁴⁶ Siliadin v. France, Application no. 73316/01, Judgment of 26 July 2005, para. 63.

²⁴⁷ European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, art. 34, 4 Nov 1950, ETS No. 5, *available at* <http://www.refworld.org/docid/3ae6b3b04.html>. Also see: Scordino v. Italy (no. 1), Application no. 36813/97, Grand Chamber judgment of 29 March 2006, para. 179.

²⁴⁸ European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, art. 35(3)(b), 4 Nov 1950, ETS No. 5, *available at* <http://www.refworld.org/docid/3ae6b3b04.html>.

²⁴⁹ Amuur v. France, Application no. 19776/92, para. 36.

²⁵⁰ In relation with indirect victims of Article 2 violations (right to life), see McCann and Others v. the United Kingdom, Application no. 18984/91, Grand Chamber judgment of 27 Sept 1995; Yasa v. Turkey, Application no. 22495/93, Judgment of 2 Sept 1998, para. 66.

²⁵¹ Schenk v Germany, Application no. 42541/02, Fifth Section Decision as to the Admissibility, 9 May 2007, *available at* [http://hudoc.echr.coe.int/eng?i=001-80805#{\"item\":\"001-80805\"}](http://hudoc.echr.coe.int/eng?i=001-80805#{\).

²⁵² See for instance Ringeisen v. Austria, Application no. 2614/65, Judgment of 16 July 1971, para. 89.

²⁵³ Sejdic v. Italy, Application no. 56581/00, Grand Chamber judgment of 1 March 2006, para. 46.

²⁵⁴ Akdivar and Others v. Turkey, Application no. 21893/93, Grand Chamber Judgment of 16 Sept 1996, paras. 68-69.

²⁵⁵ Demopoulos and Others v. Turkey, Application no. 46113/99, Grand Chamber decision on admissibility of 1 March 2010, paras. 98-101.

Given the flexibility of the Court’s approach to date, whether an individual application would fulfill this requirement is difficult to determine in the present case. It is, however, unlikely that the Court would accept at this stage an application from victims in the Netherlands who had not yet fully pursued domestic remedies in either Ukraine or Russia. It is unclear at the moment whether the application brought in *Ioppa v Ukraine* has fulfilled the requirement of exhausting local remedies in Ukraine. If the applicants have not exhausted domestic remedies, then the ECtHR may be unable to hear the claim. Furthermore, under Article 35 of the ECHR, the Court may only deal with an application if it is submitted within a period of six months after exhaustion of domestic remedies, i.e. from the date of the final decision at the domestic level.

Object of the Application

The ECtHR will declare an application inadmissible “if the application is incompatible with the provisions of the Convention or the Protocol” or “manifestly ill-founded.”²⁵⁶ An application will be “manifestly ill founded” where the applicant has made unsubstantiated allegations or, where the allegations are substantiated, they are not sufficient to establish a violation.²⁵⁷ An application should concern rights that are protected by the Convention and should not lack real purpose. In addition, the ECtHR may not hear applications that are substantially the same as a matter that has already been examined by the Court or that is submitted simultaneously to two international institutions. Applications are “substantially the same” when they concern the same persons, facts and complaints.²⁵⁸ International criminal proceedings cannot, by their nature, bar access to the ECtHR. Such proceedings aim at establishing the criminal liability of an individual as opposed to the responsibility of the state, and thus may not concern “substantially the same matter” as ECtHR proceedings. However, the filing of a petition before an international body such as the UN Human Rights Committee²⁵⁹ may prevent the ECtHR from hearing a substantially similar application.

Conclusions: Individual Application ECtHR

The relatives of the MH17 victims from various States may consider filing individual applications before the ECtHR to hold Council of Europe member states liable for Convention violations. The jurisprudence indicates that the relatives of the deceased can be considered victims and thus have *locus standi* before the Court. The relatives of the victims may decide to ground their claim on Article 2 of the ECHR that protects the right to life. However, they may not file parallel petitions before other human rights committees that would render their application inadmissible. In addition, the applicants must show that they exhausted all available and effective remedies, and file their application in a timely manner.

²⁵⁶ European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, art. 35(3), Nov. 4, 1950, ETS No. 5, *available at* <http://www.refworld.org/docid/3ae6b3b04.html>.

²⁵⁷ Jacobs, White & Ovey, *THE EUROPEAN CONVENTION ON HUMAN RIGHTS*, 40 (2014).

²⁵⁸ See generally, *Pauger v. Austria*, Application No. 24872/94, Judgment of 9 Jan 1995 (admissibility).

²⁵⁹ Such bodies have the ability to hear individual complaints but are only quasi-judicial and do not render binding judgments. As such, they have not been included in this memorandum.

Inter-State Application

Article 33 of the ECHR enables any member state to “refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by any other High Contracting Party.”²⁶⁰ One or more states may institute proceedings against another state notwithstanding any additional acceptance of competence on the respondent state’s part.²⁶¹ Thus, the sole condition for the Court’s competence *ratione personae* is that both the applicant and respondent states have ratified the ECHR. Russia, Ukraine and the Netherlands are all member states of the Council of Europe and contracting parties to the Convention, however Australia and Malaysia are not.

Inter-state applications are partly subject to the admissibility criteria set out in Article 35. A member state may file an application within a period of six months following the exhaustion of domestic remedies.²⁶² Yet, this exhaustion of domestic remedies rule is much less strictly applied in the inter-state application procedure. A state may file an application regardless of whether “substantially the same matter has already been examined,” and the ECtHR does not assess at the admissibility stage whether the application is “manifestly ill-founded” or “abusive.”²⁶³

Victim Status

Inter-state applications differ from individual applications in that they generally aim at “bringing before the [Court] an alleged violation of the public order of Europe.”²⁶⁴ It follows that the applicant state does not have to claim to be a “victim” of any breach nor to justify a special interest in the subject matter of the application.²⁶⁵ Further, a state may file an application irrespective of whether the matter has affected or prejudiced one of its nationals. Member States can use the inter-state application in favor of individuals regardless of their nationality, meaning that the range of potential beneficiaries is not limited to the nationals of the complaining State.²⁶⁶ It follows that inter-state applications open the possibility for the Netherlands (or any other member state of the Council of Europe) to file an application potentially benefiting not only to its own nationals but also the relatives of MH17 victims, regardless of their nationality.

²⁶⁰ European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, art. 33, 4 Nov 1950, ETS No. 5, available at <http://www.refworld.org/docid/3ae6b3b04.html>.

²⁶¹ Andrew Drzemczewski, *The European Human Rights Convention: Protocol No. 11 Entry into Force and First Year of Application*, 79/80 Documentacao e Direito Comparado 221, 226 (1999), available at <http://www.corteidh.or.cr/tablas/13600.pdf>.

²⁶² Steve Foster, *Human Rights and Civil Liberties*, 32 (2003). Also see, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, art. 35(1), 4 Nov 1950, ETS No. 5, available at <http://www.refworld.org/docid/3ae6b3b04.html>.

²⁶³ *Cyprus v. Turkey*, Application no. 8007/77, 13 DR 85 at 154-155 (1978), paras. 54-57.

²⁶⁴ *Cyprus v. Turkey*, Application no. 25781/94, Grand Chamber decision on just satisfaction of 12 May 2014, para. 37.

²⁶⁵ See: *Austria v. Italy*, Application no. 788/60, Decision of the Commission as to the admissibility of 11 Jan 1961, available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115598#{"itemid":\["001-115598"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115598#{).

²⁶⁶ *Austria v. Italy*, Application no. 788/60, Decision of the Commission as to the admissibility of 11 Jan 1961 (1961) available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115598#{"itemid":\["001-115598"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115598#{).

Exhaustion of “Domestic Remedies”

The exhaustion of domestic remedies rule applies more limitedly in inter-state applications where the applicant state alleges violations of the Convention against individuals than with individual applications.²⁶⁷ Like with individual applications, the ECtHR has consistently underlined the need to apply the rule with flexibility to ensure the increased protection of human rights.²⁶⁸ The ECtHR has previously waived the requirement where there exists an administrative practice that would render any remedies ineffective in the respondent state. Such practice involves a repetition of acts²⁶⁹ and official tolerance²⁷⁰ from the part of the respondent state.

Provided that the current investigations establish the *prima facie* existence of such a practice, the Netherlands (or Ukraine)²⁷¹ may consider filing an inter-state application notwithstanding the lack of exhausting of domestic remedies. Such application may be grounded on the recent *Ukraine v. Russia* inter-state application and the subsequent ordering of interim measures, which called upon the two parties “to refrain from taking any measure, in particular military actions, which might entail breaches of the Convention rights of the civil population.”²⁷² *Prima facie* evidence demonstrating that firing the missile is part of a pattern or was done in continuity of past military actions would enable an inter-state application regardless of the existence of domestic remedies. In light of the findings of the Dutch Safety Board which has adduced evidence that numerous aircraft had been shot down in Eastern Ukraine by missiles, there could be appropriate evidence for an inter-state application.²⁷³

Timing of the Inter-State Application

Article 35(1) ECHR stipulates that inter-state applications must be filed within six-months from the date of the final domestic decision. Administrative practices or situations that ended six months before the date of the application thus fall outside the Court’s jurisdiction. However, continuing practices constitute an exception to the six-month rule.²⁷⁴ Similarly, the

²⁶⁷ *Austria v. Italy*, Application no. 788/60, Decision of the Commission as to the admissibility of 11 Jan 1961, 148 (1961), available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115598#{"itemid":\["001-115598"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-115598#{). Also see, *Ireland v. United Kingdom*, Application no. 5310/71, Judgment of 18 Jan 1978, para. 159; *Georgia v. Russia (I)*, Application no. 13255/07, Decision as to the admissibility of 30 June 2009, paras. 40 & 48.

²⁶⁸ See for example, *Ringeisen v. Austria*, Application no. 2614/65, Judgment of 16 July 1971, para. 89.

²⁶⁹ The requirement of “repetition of acts” has been described by the ECtHR as “an accumulation of identical or analogous breaches which are sufficiently numerous and inter-connected to amount not merely to isolated incidents or exceptions but to a pattern or system.” - *Ireland v. United Kingdom*, Application no. 5310/71, Judgment of 18 Jan 1978, para. 129.

²⁷⁰ “Official tolerance” refers to superior’s refusal to take action to punish those responsible or to prevent the repetition of act, despite their cognizance of the unlawful acts. This may also refer to the refusal or indifference of a higher authority in conducting adequate investigations of a claim’s truth or falsity - *Greece v. UK*, Application no. 176/56, 12 YK II, 196 (1969) (report of the Commission).

²⁷¹ See for example, *France, Norway, Denmark, Sweden and Netherlands v. Turkey*, Application no. 9940-9944/82, Decision on admissibility of 6 December 1983, 35 DR 143, 162-8 (1983), available at [http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-74161#{"itemid":\["001-74161"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-74161#{).

²⁷² *Georgia v. Russia (I)*, Application no. 13255/07, Decision on admissibility of 30 June 2009, para. 34-35.

²⁷³ Dutch Safety Board, *Crash of Malaysia Airlines flight MH17*, 181-185, 209-210, (Oct 2015), available at <http://www.onderzoeksraad.nl/uploads/phase-docs/1006/debcd724fe7breport-mh17-crash.pdf>.

²⁷⁴ *Georgia v. Russia (I)*, Application no. 13255/07, Decision on admissibility of 30 June 2009, para. 47.

recent judgment in *Cyprus v. Turkey* indicates that the six-month rule does not strictly apply in just satisfaction cases. In such cases, the respondent state bears the burden to demonstrate that the applicant's claims are disproportionately prejudicial to their legitimate interests, in accordance with public international law.²⁷⁵

Therefore, the Netherlands may consider filing an application against another member state of the Council of Europe, such as Russia or Ukraine. Such application may claim violations of individual rights as well as the existence of an unlawful administrative practice.

Remedies: Awarding Just Satisfaction

Under the Convention the ECtHR can award just satisfaction where a violation is found. Article 41 of the ECHR foresees the possibility for just satisfaction to be awarded in both individual and inter-state applications, where a breach of the Convention is established and domestic law is insufficient to fully repair the consequences of this violation.²⁷⁶ In inter-state cases, the ECtHR may award just satisfaction when the victims are individualized. Such cases can lead to an award of monetary compensation.²⁷⁷ In the case of *Cyprus v. Turkey*, the relatives of 1,456 missing persons were awarded 90 million dollars in just satisfaction.²⁷⁸ The applicability of Article 41 thus depends on the nature of the claim(s) brought by the applicant state. If the state complains *in abstracto* of a general failure by another State party to comply with the Convention, just satisfaction "may not be appropriate."²⁷⁹ Pursuant to Article 46(1) ECHR, a decision of the Court is binding on the responsible state, which must comply with the judgment and its orders.

Changes to Russia's Constitutional Law

On 4 December 2015, Russia adopted new legislation allowing it to overrule judgments from the ECtHR,²⁸⁰ which was subsequently signed into law by President Putin on 14 December 2015.²⁸¹ This new law effectively allows Russia's Constitutional Court to decide whether or not

²⁷⁵ *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, 1992 I.C.J. 240, para. 3 (June 1992); *Cyprus v. Turkey*, Application no. 25781/94, Grand Chamber decision on just satisfaction of 12 May 2014, para. 26.

²⁷⁶ European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, art. 41, Nov. 4, 1950, ETS No. 5, available at <http://www.refworld.org/docid/3ae6b3b04.html>.

²⁷⁷ *Cyprus v. Turkey (just satisfaction)*, Application no. 25781/94, Grand Chamber judgment of 12 May 2014, para. 42.

²⁷⁸ *Cyprus v. Turkey (just satisfaction)*, Application no. 25781/94, Grand Chamber judgment of 12 May 2014, para. 47.

²⁷⁹ *Cyprus v. Turkey (just satisfaction)*, Application no. 25781/94, Grand Chamber judgment of 12 May 2014, para. 44.

²⁸⁰ BBC News, Russia passes law to overrule European human rights court, BBC NEWS, Dec 4, 2015, available at <http://www.bbc.co.uk/news/world-europe-35007059>.

²⁸¹ Vladimir Soldatkin, Putin signs law allowing Russia to overturn rulings of international rights courts, REUTERS, 15 Dec 2015, available at <http://www.reuters.com/article/us-russia-court-putin-idUSKBN0TY17H20151215>.

to implement rulings of the ECtHR if they deem them unconstitutional.²⁸² It is important to note that this new Russian law does not simply relate to the ECtHR but also applies to other international human rights bodies such as the UN Human Rights Committee.²⁸³ This new law could effectively undermine the effect of Article 46(1) ECHR which provides for the binding force of judgments from the court. This will have implications for any case against Russia in the ECtHR in relation to the downing of MH17, as the Russian Constitutional Court can effectively decide to ignore any judgment issued by the ECtHR. This in turn may lead to a denial of compensation to victims if the ECtHR would find that Russia has acted in violation of the Convention and issues such an order in its judgment.

However, it is worth pointing out the differing forms of satisfaction that the ECtHR can provide. Article 41 provides that the Court can award satisfaction to the applicant if it finds that a violation of the ECHR has taken place. This satisfaction can come in various forms, the Court can decide that merely finding that a violation of the ECHR has taken place is sufficient just satisfaction in itself or they may in addition award compensation to the applicant(s).²⁸⁴ The new amendment to Russia's constitution could be argued to have no effect on the ECtHR's ability to decide that Russia is in violation of the ECHR for the downing of MH17. This may be sufficient satisfaction for the victims and/or applicants. However, if the victims want monetary compensation then a case against Russia in the ECtHR may not be effective in this regard. Furthermore, the applicants may have difficulty in recovering expenses incurred in the case, should the Court order Russia to pay such expenses.²⁸⁵

In short, it depends on what is the intended outcome of proceedings in the ECtHR. If it is simply recognition that Russia are responsible, then the ECtHR may be an appropriate option. However, if the victims want more than just declaratory relief, namely compensation, then a case against Russia in the ECtHR may not be the best avenue for redress.

Conclusions

The ECtHR potentially has jurisdiction over the MH17 crash and, importantly, the Netherlands, Ukraine and Russia are member states. While the ECtHR can render binding judgments and award compensation for victims, bringing an application before the Court is not unproblematic. The Court's jurisdiction, in relation to both individual and inter-state applications, may be difficult to secure and the evidence would need to prove the requisite elements to establish a violation of the Convention. While still a high threshold, unlike the ICC which exercises

²⁸² Vladimir Soldatkin, Putin signs law allowing Russia to overturn rulings of international rights courts, REUTERS, 15 Dec 2015, *available at* <http://www.reuters.com/article/us-russia-court-putin-idUSKBN0TY17H20151215>.

²⁸³ Veniamin Geynbikhner, Dispatches: Russian Court Hopes to Thwart International Law Rulings, HUMAN RIGHTS WATCH, 10 Dec 2015, *available at* <https://www.hrw.org/news/2015/12/10/dispatches-russian-court-hopes-thwart-international-law-rulings>.

²⁸⁴ President of the European Court of Human Rights, Rules of Court, Practice Directions – Just Satisfaction claims, EUROPEAN COURT OF HUMAN RIGHTS, January 1, 2016, *available at* http://www.echr.coe.int/Documents/PD_satisfaction_claims_ENG.pdf.

²⁸⁵ Jacobs, White & Ovey, THE EUROPEAN CONVENTION ON HUMAN RIGHTS 49 (2014).

criminal jurisdiction, the standard of proof is lower before the ECtHR. Equally, the ECtHR can only determine the responsibility of states and not individual criminal liability. Moreover, the recent legislative changes to Russia's constitutional law will have ramifications for a successful case against Russia. Finally, like proceedings before the ICJ and ICC, the process before the ECtHR is likely to take a number of years to complete.

5. INTERNATIONAL CRIMINAL COURT

If the Netherlands wishes to seek individual high-level criminal accountability, the International Criminal Court (ICC) is a potential avenue to hold accountable those responsible for downing flight MH17. The ICC is an international criminal court that prosecutes individuals accused of committing genocide, war crimes and crimes against humanity of the gravest kind. The ICC renders binding judgments and can award reparations to victims. Moreover, it is the only non-domestic avenue that can determine individual criminal liability and potentially include a prison sentence. However, it is often difficult to trigger the ICC's jurisdiction. Also, it has a high standard of proof, requiring both physical acts and mental elements, and its processes are slow. This section sets how the MH17 situation could fall under the ICC's jurisdiction; how an investigation by the Prosecutor could commence; what potential crimes could be investigated (or brought against individuals); and other relevant procedural concerns (admissibility) that may affect a case related to MH17 before the ICC.

ICC Jurisdiction

The ICC Prosecutor can only commence investigations where the Court has jurisdiction. Under the Rome Statute, the Court's founding treaty, there are several ways for the Court to acquire jurisdiction. First, the ICC only has jurisdiction over alleged crimes committed on the territory of state parties, or by nationals of state parties (see Articles 12, 13(a) and 14). However, the ICC may also obtain jurisdiction over a situation by a referral from the UN Security Council (see Article 13(b)), or by a declaration to the Court by a non-state party (see Article 12(3)). Without such jurisdiction, the Prosecutor is unable to carry out preliminary examinations or investigations in a situation. Before the ICC, a "situation" relates to a conflict and generalized crimes allegedly committed in a specific area and/or timeframe. By contrast, a "case" before the ICC involves a specific person (or sometimes jointly accused persons) accused of committing specific crimes.

It is also necessary to consider the Court's territorial, temporal and personal jurisdiction. The Court's temporal jurisdiction applies from the date of entry into force of the Rome Statute – 1 July 2002.²⁸⁶ Temporal jurisdiction with respect to a particular situation depends on the date of entry into force of the Statute for the state party concerned, the date specified in a Security Council referral, or the date indicated in a declaration lodged pursuant to Article 12(3).²⁸⁷ Territorial or personal jurisdiction of the Court applies if the relevant crime is committed on the territory or by a national of a state party (Article 12(2)), or on the territory or by a national of a non-state party that has lodged an Article 12(3) declaration.²⁸⁸ In addition, the ICC may exercise

²⁸⁶ Office of the Prosecutor, International Criminal Court, Policy Paper on Preliminary Examinations, Nov., 2013, para. 37; see also, Rome Statute of the International Criminal Court, arts. 11 and 24, Jul. 17, 1998, UN Doc. A/CONF. 183/9; 2187 UNTS 90; 37 ILM 1002 (1998).

²⁸⁷ Office of the Prosecutor, International Criminal Court, Policy Paper on Preliminary Examinations, Nov., 2013, para. 37; see also, Rome Statute of the International Criminal Court, art. 11(2), Jul. 17, 1998, UN Doc. A/CONF. 183/9; 2187 UNTS 90; 37 ILM 1002 (1998).

²⁸⁸ See also, International Criminal Court, Rules of Procedure and Evidence, Rule 44.

its jurisdiction in relation to any territory or national if the Security Council has referred the situation. These mechanisms for gaining jurisdiction are addressed below in turn: state party referral; *proprio motu* investigations; UN Security Council referral; and Article 12(3) Declarations.

State Party referral

Currently the ICC has 122 states parties, including the Netherlands, but excluding Malaysia, Ukraine and Russia.²⁸⁹ A state party may refer a situation to the ICC and request the Prosecutor to investigate the situation. Such a referral must relate to a situation within the jurisdiction of the Court, must be made in writing,²⁹⁰ specify the relevant circumstances (to the extent possible), and be accompanied by supporting documentation (see Article 14(2) Rome Statute). As Ukraine, Malaysia and Russia are not states parties, they are unable to refer the situation of the MH17 to the ICC.

As a state party, the Netherlands would be able to refer situations to the ICC if the conduct in question: occurred on its territory; or if the person accused is a Dutch national (see Article 12(2) Rome Statute). Given that the events occurred over Ukraine and that there are no indications that those responsible are Dutch nationals, it appears unlikely that the Netherlands will be able to successfully refer the situation to the ICC. However, the Rome Statute further specifies that a state may also refer a situation if the crime was committed on board a vessel or aircraft registered to that state.²⁹¹ It could be explored further whether flight MH17 could be legally considered to also be registered to the Netherlands given that it was a code-sharing flight.

Proprio Motu investigations

To use her *proprio motu* powers, the ICC Prosecutor is bound by the jurisdiction requirement that the situation must have occurred on the territory of a state party to the Rome Statute or that the individual under investigation is a national of a state party. As this appears not to be the situation – given that Ukraine, Russia and Malaysia are not state parties - the Prosecutor is therefore not able to use her *proprio motu* powers to trigger the Court's jurisdiction.

UN Security Council referral

Under Article 13(b) of the Rome Statute, the UN Security Council, acting under Chapter VII of the UN Charter, can refer a situation to the ICC. In this way, the Court can exercise its

²⁸⁹ United Nations Treaty Collection, Rome Statute of the International Criminal Court, Status as at 18-08-2014, available at https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en.

²⁹⁰ Rome Statute of the International Criminal Court, art. 14(1), Jul. 17, 1998, UN Doc. A/CONF. 183/9; 2187 UNTS 90; 37 ILM 1002 (1998), available at http://www.icc-cpi.int/nr/rdonlyres/ea9aef77-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf; International Criminal Court, Rules of Procedure and Evidence, Rule 45, available at <http://www.icc-cpi.int/iccdocs/PIDS/legal-texts/RulesProcedureEvidenceEng.pdf>.

²⁹¹ See Article 12(2)(a) Rome Statute. For example, the Comoros, a state party to the Rome Statute referred the 31 May 2010 Israeli raid on the Humanitarian Aid Flotilla bound for Gaza Strip, as the flotilla was a vessel registered to the Comoros. See referral dated 14 May 2013, available at <http://www.icc-cpi.int/iccdocs/otp/Referral-from-Comoros.pdf>.

jurisdiction over situations present in the territory of non-states parties and regarding nationals of non-states parties. For example, the Security Council referred to the ICC the situations in Libya and Sudan – both of which are not parties to the Rome Statute.²⁹² The most likely hurdle in seeking a referral of the MH17 situation to the ICC by the Security Council is the possibility of a veto by the permanent five members, particularly Russia.

The possibility that Russia may be investigated by the ICC for its potential involvement in the downing of MH17 may cause it to veto any proposed Security Council referral. Russia has used its veto previously, for establishing a special UN Tribunal for MH17 as well as recently rejecting a referral of the Syrian situation to the ICC.²⁹³ However, Russia did support the adoption of Security Council Resolution 2166 (2014) condemning the downing of MH17 and calling for an investigation,²⁹⁴ and Russia has not openly obstructed the ICC's preliminary examination into Russia's 2008 war with Georgia. Furthermore, Russia did not obstruct the Security Council referral of the situation in Darfur in 2005, and voted in favor of referring Libya in 2011. Therefore, Russia has recognized a role for the ICC in certain circumstances, and may not necessarily exercise its veto in the MH17 situation. It may, therefore, be an option for the Netherlands to lobby for such a referral of the situation by the UN Security Council to the ICC.

Article 12(3) Declaration

A final, and most likely, option to secure the ICC's jurisdiction over the MH17 situation is Article 12(3) of the Rome Statute. States that are not party to the Rome Statute may accept the Court's jurisdiction on an *ad hoc* and temporary basis by lodging a declaration with the Registrar. The declaration must set out the timeframe and the territory that it covers. The timeframe can be limited to a few months, or to the whole period of the conflict, and can be on-going.²⁹⁵ Upon receipt, the Registrar transmits the declaration to the Prosecutor for consideration, including an assessment of jurisdiction. This assessment may take a number of months or even years, and may involve examination of both jurisdictional and criminal matters. It is noted that the Court's jurisdiction cannot be limited in the declaration to certain alleged perpetrators and that the Prosecution may investigate crimes committed by all parties to a conflict. In this way, a state making an Article 12(3) declaration cannot attempt to target certain alleged perpetrators or shield its own nationals.

²⁹² Security Council 1970, para. 4, U.N. Doc. S/RES/1970 (Feb. 26, 2011), available at <http://www.icc-cpi.int/NR/rdonlyres/081A9013-B03D-4859-9D61-5D0B0F2F5EFA/0/1970Eng.pdf>; Security Council 1593, para. 1, U.N. Doc. S/RES/1593 (Mar. 31, 2005), available at <http://www.icc-cpi.int/nr/rdonlyres/85febd1a-29f8-4ec4-9566-48edf55cc587/283244/n0529273.pdf>; U.N. Security Council, *Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court*, Press Release SC/8351, Mar. 31, 2005, available at <http://www.un.org/News/Press/docs/2005/sc8351.doc.htm>.

²⁹³ United Nations News Centre, *Russia, China block Security Council referral of Syria to International Criminal Court*, May 22, 2014, available at http://www.un.org/apps/news/story.asp?NewsID=47860#.U_kB3rySwcg.

²⁹⁴ Security Council Resolution 2166, U.N. Doc. S/RES/2166 (Jul. 21, 2014) available at http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_res_2166.pdf.

²⁹⁵ The ICC has jurisdiction only with respect to crimes committed after the entry into force of the Rome Statute on 1 July 2002: See Article 11(1). As the MH17 situation occurred in July 2014 that should not be problematic for present purposes.

To date, there have been (at least) four such Article 12(3) declarations. The first was made by Côte d'Ivoire in 2003, which successfully proceeded to investigation and prosecution.²⁹⁶ The second declaration was made by the Palestinian authority in 2009, but was finally after a long period not accepted by the ICC Prosecutor in 2012 due to statehood issues.²⁹⁷ For similar reasons, the attempted declaration made by the Egyptian opposition in 2013 also failed to engage the Court's jurisdiction.²⁹⁸ Most recently, on 17 April 2014, Ukraine made a declaration accepting the Court's jurisdiction and the situation is currently at the preliminary examination stage by the Prosecutor.²⁹⁹

This declaration by Ukraine accepted the jurisdiction of the ICC for alleged crimes committed on its territory during the limited time period of 21 November 2013 to 22 February 2014. The Prosecutor, as a matter of policy, opened a preliminary examination into the situation in Ukraine covering the specified period. While this period does not cover the MH17 crash on 17 July 2014, Ukraine submitted a second declaration under Article 12(3) of the Rome Statute that does cover this period. The new declaration, made on 8 September 2015, covers acts committed on the territory of Ukraine from 20 February 2014 onwards (for an indefinite period).³⁰⁰ As such, the Prosecutor determined to extend the temporal scope of their existing preliminary examination in order to establish whether the criteria set out in the Rome Statute for opening an investigation have been met.³⁰¹ The ICC may now exercise jurisdiction over alleged crimes that might have been committed in the Ukraine situation since 20 February 2014, which includes the downing of MH17.

In addition to Ukraine, Malaysia could also make an Article 12(3) declaration specifically recognizing the ICC's jurisdiction over the MH17 situation. Malaysia could do so as the relevant registered state of the MH17 aircraft (see Article 12). Such a declaration, if made in compliance with the Statute and accepted by the Registrar and Prosecutor, could lead to an examination of the MH17 situation by the Prosecutor. If either of these options are pursued and the Court accepts jurisdiction over the MH17 situation, other issues relating to initiating an investigation and prosecution would have to be addressed. These are discussed below.

²⁹⁶ See declaration dated 18 Apr 2003, *available at* <http://www.icc-cpi.int/NR/rdonlyres/CBE1F16B-5712-4452-87E7-4FDDE5DD70D9/279779/ICDE.pdf>.

²⁹⁷ See declaration dated 21 Jan 2009, *available at* <http://www.icc-cpi.int/NR/rdonlyres/74EEE201-0FED-4481-95D4-C8071087102C/279777/20090122PalestinianDeclaration2.pdf>. See the Office of the Prosecutor's response dated Apr. 3, 2012 *available at* <http://www.icc-cpi.int/NR/rdonlyres/C6162BBF-FEB9-4FAF-AFA9-836106D2694A/284387/SituationinPalestine030412ENG.pdf>.

²⁹⁸ ICC OTP, The determination of the Office of the Prosecutor on the communication received in relation to Egypt (ICC-OTP-20140508-PR1003), Press Release, 8 May 2014, *available at* http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1003.aspx.

²⁹⁹ See declaration dated Apr. 9, 2014, *available at* http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/997/declarationRecognitionJurisdiction09-04-2014.pdf.

³⁰⁰ See the declaration at: https://www.icc-cpi.int/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf

³⁰¹ Press Release 29/09/2015, ICC Prosecutor extends preliminary examination of the situation in Ukraine following second article 12(3) declaration (ICC-OTP-20150929-PR1156), *available at* https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1156.aspx.

Initiation of an Investigation by the Prosecutor

The formal start of a preliminary examination involves the Office of the Prosecutor (OTP) examining the factors in Article 53(1) Rome Statute, which control the Prosecutor's determination to initiate an investigation. These are set out here and addressed in turn below:

- whether there is “a reasonable basis to believe that a crime within the jurisdiction of the Court has been or is being committed” (Article 53(1)(a));
- whether “the case is or would be admissible under article 17” (Article 53(1)(b)); and
- whether “taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice” (Article 53(1)(c)).³⁰²

Jurisdictional requirements under Article 53(1)(a)

The Prosecutor must determine whether there is a reasonable basis to believe that a crime within the jurisdiction of the Court has been, or is being, committed. In accordance with Article 15(4), the Pre-Trial Chamber must also consider whether “the case appears to fall within the jurisdiction of the Court.” In the situation in the Republic of Kenya, the Chamber observed that this requirement would be understood as relating to ‘potential cases’ within the situation at stake.³⁰³ Accordingly, there must be a reasonable basis to believe that the information fulfills all jurisdictional requirements, namely: temporal; subject-matter; and either territorial or personal jurisdiction.³⁰⁴ Temporal, territorial and personal jurisdiction in relation the MH17 downing were addressed above, and subject matter jurisdiction - namely whether it can qualify as genocide, a war crime or crime against humanity - is discussed next.

Subject matter jurisdiction

To attract jurisdiction it is necessary for the alleged crime(s) in a situation to fall within the subject-matter jurisdiction of the ICC. This requirement is set out in Article 5 of the Rome Statute and extends to: (a) the crime of genocide (Article 6); (b) crimes against humanity (Article 7); and (c) war crimes (Article 8).³⁰⁵ To assess subject-matter jurisdiction, the Prosecutor considers, on the basis of available information, the following elements:

- the relevant underlying facts and factors relating to the crimes that appear to fall within the jurisdiction of the Court;
- contextual circumstances, such as the nexus to an armed conflict or to a widespread or systematic attack directed against a civilian population; and

³⁰² Office of the Prosecutor, ICC, Policy Paper on Preliminary Examinations, Nov., 2013, para. 72.

³⁰³ International Criminal Court, Situation in the Republic of Kenya, ICC-01/09-19-Cor, para. 64.

³⁰⁴ Rome Statute of the ICC, arts. 12 and 13(b), Jul. 17, 1998, UN Doc. A/CONF. 183/9; 2187 UNTS 90; 37 ILM 1002 (1998).

³⁰⁵ The ICC will be able to exercise jurisdiction over a fourth crime, the crime of aggression (Article 8*bis*), once the provision adopted by the Assembly of States Parties enters into force, Office of the Prosecutor, International Criminal Court, Policy Paper on Preliminary Examinations, Nov., 2013, para. 38.

- alleged perpetrators, including the *de jure* and *de facto* role of the individual, group or institution and their link with the alleged crimes, and the mental element, to the extent discernible at this stage.³⁰⁶

The crime of genocide is not addressed below in relation to the MH17 downing because the known facts of the downing do not rise to the level of genocide, which requires the intent to destroy, in whole or in part, a national, ethnical, racial or religious group. The other two crimes - war crimes and crimes against humanity - are analyzed below in greater detail.

War Crimes

Based on initial public information available, it would appear that the downing of MH17 may constitute a war crime.³⁰⁷ In order for conduct to potentially qualify as war crime, the situation in which the conduct occurs takes place within an armed conflict. While not binding on the ICC and subject to its own judicial determination, the International Committee of the Red Cross has made a legal assessment that the situation in Ukraine constitutes a non-international armed conflict.³⁰⁸ If a non-international armed conflict is found to have existed in Ukraine as at 17 July 2014, the alleged crimes that may have been committed in relation to MH17 include murder under Article 8(c)(i), and “intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities” under Article 8(e)(i). A fuller analysis of the *actus reus* and the *mens rea* elements of the conduct is necessary.

Under international humanitarian law, the body of law that governs what conduct is acceptable in times of armed conflict and what conduct, alternately, constitutes a war crime, the principle of distinction is key. This principle requires that a combatant distinguishes between military and civilian targets. While combatants are lawful targets, civilians who do not partake in hostilities are not. Moreover, the precautionary principle provides that parties to a conflict must take all feasible precautions to protect the civilian population and civilian objects under their control against the effects of attacks. It follows that international humanitarian law requires parties to the conflict to make an effort to avoid civilian casualties from their use of armed measures. To determine whether those firing on flight MH17 have committed a war crime, it is therefore necessary to investigate what measures they (may) have taken to identify the target as a legitimate military target before launching the missile.

To be convicted of the war crime of attacking civilians it must be proven that “[t]he perpetrator intended the civilian population as such or individual civilians not taking direct part

³⁰⁶ Office of the Prosecutor, International Criminal Court, Policy Paper on Preliminary Examinations, Nov., 2013, para. 39.

³⁰⁷ UN Office of the High Commissioner for Human Rights, Intense fighting in eastern Ukraine “extremely alarming”, says Pillay, as UN releases new report, Jul. 28 2014, *available at* <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14908&LangID=E>; United Nations News Centre, Eastern Ukraine: UN rights chief says downing of plane may be ‘war crime,’ urges probe, Jul. 28, 2014, *available at* http://www.un.org/apps/news/story.asp?NewsID=48360#.U_JverxdUcg.

³⁰⁸ International Committee of the Red Cross, Ukraine: ICRC calls on all sides to respect international humanitarian law, Jul. 23, 2014, *available at* <http://www.icrc.org/eng/resources/documents/news-release/2014/07-23-ukraine-kiev-call-respect-ihl-repatriate-bodies-malaysian-airlines.htm>; Reuters, Trial over Malaysian plane crash not likely at ICC: Dutch, Jul. 30, 2014, *available at* <http://www.reuters.com/assets/print?aid=USKBN0FZ1MD20140730>.

in hostilities to be the object of the attack.”³⁰⁹ If those responsible for downing MH17 intended to kill civilians then the attack likely constitutes a war crime. If not, for example if those responsible believed the plane was part of the Ukrainian air force, while the attack may qualify as murder under domestic law, it may not constitute a war crime under the Rome Statute,³¹⁰ unless they violated the principles of precaution, due diligence and distinction.

If those who launched the missile on MH17 were honestly mistaken after taking sufficient precaution and believed that the plane was a military target, they could rely on mistake of fact as a defence under Article 32(1). The Rome Statute provides mistake of fact as a ground for excluding criminal responsibility if it negates the *mens rea* required for the crime. The war crime of murder requires that the perpetrator be aware of the factual circumstances establishing the protected status of the person killed, namely that they were civilian(s). Therefore, if the person genuinely considered they were attacking a military force, the mental element would not be complete and no responsibility would attach. Moreover, the Rome Statute requires that the crime be committed with intent and knowledge. Thus, even if they were attacking a military object such as a Ukrainian military plane, but knew that in the ordinary course of events the civilian plane could be hit instead, there is the intent to kill those civilians.

The question whether or not a war crime has been committed is therefore a highly fact driven enquiry as to whether, in the circumstances, the accused person(s) did, or could have been, so mistaken. Moreover, given the difficulty in investigating the situation and the high evidentiary threshold required for international criminal law, proving who was responsible and how they are linked to the launching of the missile could prove difficult. It is therefore crucial at this stage of the investigation that evidence is carefully collected that can be used to establish the *actus reus* and *mens rea* elements of the crime.

Crimes against humanity

The downing of MH17 is unlikely to constitute a crime against humanity unless it is referred to the ICC as part of the broader conflict in Ukraine. The single act of downing MH17 would be unlikely to meet the threshold requirement in Article 7(1) of the Rome Statute of “a widespread or systematic attack directed against a civilian population.” The contextual elements of an “[a]ttack directed against a civilian population” are understood to mean a course of conduct involving the commission of multiple acts referred to in Article 7(1) against any civilian population, pursuant to or in furtherance of a state or organizational policy to commit such attack.³¹¹ Of the acts referred to in Article 7(1), the main one potentially relevant to the downing of MH17 is (a) murder. It is understood that the term “policy to commit such attack” requires that the state or organization responsible actively promotes or encourages such an attack against a civilian population.³¹² Further evidence is required to establish whether or not such a policy existed in the case of downing MH17.

³⁰⁹ ICC, Elements of Crimes, 2011, art. 8(2)(e)(i)(3).

³¹⁰ Kevin Jon Heller, MH17 Should Be Framed as Murder, Not as a War Crime, OPINIO JURIS, August 11, 2014, available at <http://opiniojuris.org/2014/08/11/mh-17-framed-murder-war-crime/>.

³¹¹ ICC, Elements of Crimes, 2011, art. 7(3).

³¹² ICC, Elements of Crimes, 2011, art. 7(3).

Admissibility Criteria

Another important consideration regarding jurisdiction before the ICC is admissibility (see Article 17(1)). Admissibility is comprised of three elements: complementarity, gravity, and the interests of justice.³¹³ The Prosecutor must be satisfied as to admissibility on all of these elements before proceeding with prosecution.³¹⁴ The principle of complementarity requires that state authorities must have shown themselves unable or unwilling to carry out genuine investigations/prosecutions into the relevant case (with the same accused and same alleged crimes). As can be seen from this principle, national jurisdictions hold primary responsibility to prosecute Rome Statute crimes.³¹⁵ The gravity component requires that a potential case be of sufficient gravity to warrant the ICC's attention.³¹⁶ The requirement to consider the "interests of justice" are found in article 53(1), and involve taking into account whether an ICC investigation would not serve the interests of justice. These elements are discussed in greater detail below.

Complementarity

Pursuant to the requirements of Articles 53(1)(b) and 17(1)(a)-(c) of the Rome Statute, the complementarity assessment is case-specific and relates to whether genuine investigations/prosecutions have been or are already being conducted. At the preliminary examination stage this is assessed with respect to potential cases that may arise from an investigation into the situation.³¹⁷ As a court of last resort, where a state is already (independently and impartially) investigating/prosecuting an individual for certain crimes, the cases against those individuals for those crimes will not be admissible before the ICC.³¹⁸

Currently there are investigations regarding MH17 ongoing by the Dutch Safety Board (jointly with Malaysia and Australia), potential domestic prosecutions in the Netherlands, and the indication that prosecutions might be initiated in Malaysia. Given these investigations, it may be difficult to establish that there are no investigations or prosecutions regarding MH17 for the

³¹³ Rome Statute of the ICC, Jul. 17, 1998, UN Doc. A/CONF. 183/9; 2187 UNTS 90; 37 ILM 1002 (1998).

³¹⁴ Office of the Prosecutor, ICC, Policy Paper on Preliminary Examinations, Nov., 2013, para. 42.

³¹⁵ Office of the Prosecutor, International Criminal Court, Policy Paper on Preliminary Examinations, Nov., 2013, para. 1.

³¹⁶ Given that at the pre-investigation stage there are as yet no cases (understood to mean the an "identified set of incidents, individuals, and charges"), the prosecutor has interpreted the reference to admissibility of "the case" in article 53(1)(b) as requiring examining the admissibility of "potential cases that would likely arise from an investigation into the situation." Office of the Prosecutor, International Criminal Court, Policy Paper on Preliminary Examinations, Nov., 2013, para. 43. This approach has been confirmed by an ICC pre-trial chamber in a majority decision authorizing the prosecutor to open an investigation in Kenya. See Situation in Kenya, ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, paras. 48-50, Mar. 31, 2010, available at <http://www.icc-cpi.int/iccdocs/doc/doc854287.pdf>.

³¹⁷ See for example the Situation in the Republic of Kenya, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09-19-Cor, Mar. 31, 2010, para. 50; Situation in the Republic of Côte d'Ivoire, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d'Ivoire, ICC-02/1-14 (Oct. 3, 2001), paras. 190-191 and 202-204.

³¹⁸ This was recently confirmed by the ICC Appeals Chamber on July 24, 2014, in the situation in Libya in the Judgment on the appeal of Mr Abdullah Al-Senussi against the decision of Pre-Trial Chamber I of 11 October 2013 entitled "Decision on the admissibility of the case against Abdullah Al-Senussi" (ICC-01/11-01/11-565), available at <http://www.icc-cpi.int/iccdocs/doc/doc1807073.pdf>.

purposes of complementarity before the ICC. However, Ukraine's second Article 12(3) declaration to the Court could be seen as demonstrating that it is unable/unwilling to investigate and prosecute, thus rendering the situation admissible before the ICC. Alternatively, the case(s) may still be admissible before the ICC if it is investigating different groups/individuals or crimes than the domestic investigations. For example, it would be possible for the ICC to investigate those most responsible via the chain of command for downing MH17 or those high-level individuals aiding and abetting the crime, while national investigations could address those individuals lower down the hierarchy who were physically in the Donetsk region firing the missile.

Gravity

The second admissibility aspect is the gravity of the alleged crime(s). Under the Rome Statute gravity includes an assessment of the scale, nature, and manner of commission of the crimes, and their impact.³¹⁹ With 298 people killed and a potentially much larger number of direct and indirect victims (such as family members) who suffered harm as a result of the alleged crime, the scale and nature of downing MH17 appears quite severe. Moreover, the particular vulnerability of the victims – who were civilians (including children) with no connection to the conflict in Ukraine – contributes to the severity of the crime. The impact of the crime, with victims from all over the world, also appears to have caused significant damage to communities and a large social impact, particularly in the Netherlands, Australia and Malaysia. These factors would be considered in assessing the gravity of the alleged crime and whether it reaches a sufficiently high threshold to engage the Court's jurisdiction. Based on the Court's case law regarding gravity,³²⁰ it is likely that the MH17 situation would pass the gravity threshold.

Interests of Justice

After the complementarity and gravity criteria have been met,³²¹ the final consideration under Article 53(1) is whether “taking into account the gravity of the crime and the interests of victims, there are nonetheless substantial reasons to believe that an investigation would not serve the interests of justice”. To date, there is no precedent for a case not proceeding on the basis that it is determined to not be in the interests of justice.³²² Given that there is a strong presumption that investigations and prosecutions will be in the interests of justice, and therefore that a decision not to proceed on the grounds of the interests of justice would be highly exceptional, this would not appear to pose an obstacle to the ICC's jurisdiction regarding the downing of MH17.

³¹⁹ Office of the Prosecutor, ICC, Policy Paper on Preliminary Examinations, Nov., 2013, para. 9.

³²⁰ See the OTP's report on 6 November 2014 rejecting the Comoros flotilla case due to insufficient gravity: [https://www.icc-cpi.int/iccdocs/otp/OTP-COM-Article_53\(1\)-Report-06Nov2014Eng.pdf](https://www.icc-cpi.int/iccdocs/otp/OTP-COM-Article_53(1)-Report-06Nov2014Eng.pdf). See also the ICC Pre-Trial Chamber I's decision of 16 July 2015 reviewing the decision by the Prosecutor not to open an investigation: <https://www.icc-cpi.int/iccdocs/doc/doc2015869.pdf>.

³²¹ Office of the Prosecutor, ICC, Policy Paper on Preliminary Examinations, Nov., 2013, paras. 67.

³²² See for example the ICC OTP Policy Paper on the Interests of Justice (September 2007), available at http://www.icc-cpi.int/iccdocs/asp_docs/library/organs/otp/ICC-OTP-InterestsOfJustice.pdf.

Conclusions

At present, there are several obstacles to a successful investigation and prosecution of the MH17 downing before the ICC. Currently, the Prosecutor is considering the Article 12(3) declaration by Ukraine. If positively reviewed, the Prosecutor may open an investigation into the situation. However, the Prosecutor may also decline to do so. According to the principle of complementarity, the Prosecutor is mandated to grant primacy to domestic investigations and prosecutions. The current investigation by the Joint Investigation Team may mean that the ICC will not intervene unless the proceedings target different actors/crimes, or if the conflict renders the Netherlands/Ukraine unable to investigate. The Prosecutor will also have to determine that the MH17 matter is of sufficient gravity to warrant the Court's attention, and also that an investigation into MH17 is not contrary to the interests of justice.

Even if these jurisdictional hurdles are overcome and the situation proceeds as an investigation before the ICC, there will be further difficulties in prosecuting the case(s). For example, the Prosecutor will need to prove in court that war crimes (and/or crimes against humanity) were committed by the accused(s). To secure conviction it is necessary to prove the *actus reus* and *mens rea* of the offences, namely for war crimes that those responsible knew that the object of the attack (MH17) were civilians and intended to kill them, or failed to take sufficient precaution. Here the defense regarding mistake of fact may also prove a difficult issue if the accused claim that they believed the target to be a military object. Establishing the link between those responsible and the commission of the alleged crime is also likely to raise difficult evidentiary and legal issues in the case of MH17.

Furthermore, there are no timelines in the Rome Statute for concluding a preliminary examination,³²³ which means it can take years. The time required for assessing the Article 53(1) factors (complementarity, gravity, and interests of justice) varies from situation to situation, depending, for example, on how difficult it is to obtain information about the alleged crimes or, for the purposes of a complementarity determination, whether there are proceedings that need to be evaluated for their relevancy and genuineness. Consequently, the Prosecutor decides how fast to move in a preliminary examination. In situations like Libya, the Court moved from accepting jurisdiction to issuing arrest warrants with unprecedented speed. In most cases however, it takes years. Moreover, once a situation is referred to the Prosecutor, they have control over the examination of the above factors and the referring state is not able to direct the speed or focus of the examination.

³²³ Office of the Prosecutor, ICC, Policy Paper on Preliminary Examinations, Nov., 2013, para. 14.

6. DOMESTIC PROSECUTIONS

In addition to the international avenues for accountability outlined above, there are also domestic avenues that could be pursued. The following chapter analyzes how MH17 can be prosecuted as an international crime and as a domestic crime before a domestic court and looks at relevant case law and issues that may arise which could impede a successful prosecution.

As discussed above, Article 1 of the 1971 Montreal Convention highlights that any person who “destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight” commits a criminal offence.³²⁴ Ukraine, Russia, Malaysia and the Netherlands have all signed and ratified the Convention.³²⁵ The Scottish prosecution of Al-Megrahi for the Lockerbie bombing used the 1971 Montreal Convention³²⁶ as basis for prosecution.³²⁷ In the situation of MH17, the Convention could represent a potential basis for a successful prosecution of the perpetrators for the downing of MH17. Moreover, those states that have recognized international crimes could prosecute on that basis. And all states that have jurisdiction over the MH17 disaster could prosecute on the basis of their domestic criminal codes.

The legal remedy of criminal prosecutions in domestic courts concerns individuals rather than states, and concerns those individuals that are responsible for downing the airplane, including those that may have ordered it, conspired to it or aided and abetted to the crime. There are several states that could assert jurisdiction in their domestic courts over the downing of MH17. Since the crash occurred in Ukraine, Ukraine could assert jurisdiction over the act according to the territorial principle of jurisdiction. In addition, states whose citizens were killed could assert jurisdiction through the passive personality principle. Domestic prosecutions could therefore, for instance, be brought in the Netherlands, Malaysia, or Australia.

Importantly, however, the fundamental principle of criminal law *ne bis in idem* provides that no person is to be tried with respect to conduct which formed the basis of crimes for which the individual has already been convicted or acquitted by another court. Therefore, if one jurisdiction (including the ICC) takes on the prosecution of an individual, it is likely to severely hamper the ability of another jurisdiction to prosecute the same individual. It is therefore important that before any prosecution takes place, the interested states agree among each other how to proceed and that they support one another with the gathering of evidence and fair proceedings.

At Ukraine’s request, the Netherlands was delegated responsibility for investigating the cause of the crash. The Dutch Safety Board has led the investigation and coordinated the

³²⁴ 1971 Montreal Convention, Article 1(b).

³²⁵ See List of State parties to the 1971 Montreal Convention, *available at* http://www.icao.int/secretariat/legal/List%20of%20Parties/Mtl71_EN.pdf .

³²⁶ Implemented into UK Law through the Aviation Security Act 1982, *available at* <http://www.legislation.gov.uk/ukpga/1982/36/contents> .

³²⁷ High Court of Justiciary at Camp Zeist, *Her Majesty’s Advocate v Abdelbaset Ali Mohamed Al Megrahi and Al Amin Khalifa Fhimah*, Case No:1475/99, Opinion of the Court, 31 January 2001, para 2, *available at* <https://www.scotcourts.gov.uk/docs/default-source/sc---lockerbie/lockerbiejudgement.pdf?sfvrsn=2>.

international team of investigators. Members of the investigation team travelled to Ukraine to commence work on the crash site, seeking to identify the bodies and personal belongings of the victims. The Dutch opened the investigation pursuant to their International Crimes Act 2003,³²⁸ which provides Dutch courts with jurisdiction over war crimes, crimes against humanity and genocide committed against Dutch citizens anywhere in the world. While the investigations so far have mostly focused on the cause of the crash, the Dutch prosecution (Openbaar Ministerie) have declared that in 2016, they hope to find answers, among others, as to who the perpetrators are.³²⁹

The core issues that emerge with regard to prosecuting individuals for their role in MH17 include that criminal prosecution requires a high standard of proof of both physical acts and mental elements, and the difficulty of obtaining custody over those that could be prosecuted.

Jurisdiction

Article 5 of the 1971 Montreal Convention provides that a Contracting State must take measures as may be necessary to establish criminal jurisdiction over offences laid down in the Convention. With regard to MH17, Ukraine is under the obligation to exercise jurisdiction or provide assistance to prosecutions elsewhere based on Article 5(1)(a), which provides that jurisdiction must be exercised when the offence is committed in the territory of that state. Moreover, since the aircraft was registered in Malaysia, Malaysia is able to exercise jurisdiction on the basis of Article 5(1)(b), which provides that the state where the aircraft is registered can exercise jurisdiction over the offences.

In addition, Article 5(2) and Article 7 impose an additional obligation on the states where alleged offenders are present in their territory to prosecute or extradite. Should alleged offenders be present in Russia, however, there appears a tension between Russia's internal law and its obligations under this treaty. While Russian domestic law prohibits the extradition of Russian nationals to face prosecution abroad,³³⁰ Article 27 of the Vienna Convention on the Law of Treaties provides that a state cannot invoke provisions of its internal law as justification for its failure to perform a treaty.³³¹ Nevertheless, it appears unlikely that Russia would extradite any Russian nationals for the downing of MH17.³³²

³²⁸ International Crimes Act, 2003, Wet van 19 juni 2003, houdende regels met betrekking tot ernstige schendingen van het internationaal humanitair recht, Staatsblad van het Koninkrijk der Nederlanden Jaargang 2003, available at <https://zoek.officielebekendmakingen.nl/stb-2003-270.pdf>.

³²⁹ Openbaar Ministerie, *Was It An Attack? Questions and Answers, MH17 Crash*, available at <https://www.om.nl/onderwerpen/mh17-crash/>.

³³⁰ Article 61 Russian Constitution reads "A citizen of the Russian Federation may not be deported from Russia or extradited to another State" available at <http://www.constitution.ru/en/10003000-03.htm>.

³³¹ Vienna Convention on the Law of Treaties. Concluded at Vienna on 23 May 1969, Article 7, available at <https://treaties.un.org/doc/Publication/UNTS/Volume%201155/volume-1155-I-18232-English.pdf>.

³³² Mark Schrad, *Will There Be Justice for MH17? (Op-Ed)*, THE MOSCOW TIMES, June 28, 2015 available at <http://www.themoscowtimes.com/opinion/article/will-there-be-justice-for-mh17-op-ed/524533.html>.

Jurisdiction may furthermore be obtained by all states whose nationals have been on board of MH17 under public international law's passive personality principle, and, although contentious, other states may also exercise jurisdiction on the basis of the universality principle.

Jurisdiction may also be exercised in less traditional set-ups than domestic courts. The prosecution for the Lockerbie bombing took place in the Netherlands in a special court which used Scottish law.³³³ The main reason for this was Libya refused to extradite those responsible due to concerns that should the prosecution take place in Scotland they would not be neutral.³³⁴ After extensive negotiations that lasted several years, Libya eventually allowed extradition after a treaty was signed between the Netherlands and the United Kingdom that established a special court at Camp Zeist in the Netherlands to prosecute those responsible for the bombing of Pan Am Flight 103 ("Lockerbie bombing").³³⁵

Downing MH17 as an International and as a National Crime before Domestic Courts

Various officials and commentators have referred to MH17 as a crime against humanity.³³⁶ However, according to international law and jurisprudence, a crime against humanity must be "widespread or systematic."³³⁷ This criterion is not met in relation to this act. Most likely, as was discussed in previous chapters, the downing of Flight MH17 may be classified as a war crime. War crimes are violations of the laws and customs of warfare, also known as serious violations of international humanitarian law.³³⁸

This chapter discusses the possible domestic prosecution options for MH17. Under the Geneva Conventions, all the states that are directly concerned with the MH17 downing are under the obligation to prosecute the violations of the laws of armed conflict (or international humanitarian law, see chapters above) at the domestic level. Through its complementarity principle, the Rome Statute of the ICC also encourages the prosecution of international crimes in domestic courts.

In addition to being prosecuted for the commission of an international crime, the perpetrators of the crash may be prosecuted for the perpetration of a domestic crime under domestic criminal law. There are several states that could exercise jurisdiction over the downing

³³³ Agreement between the government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of the Netherlands concerning a Scottish trial in the Netherlands (with annexes). The Hague, 18 September 1998, available at <https://treaties.un.org/doc/Publication/UNTS/Volume%202062/v2062.pdf>.

³³⁴ BBC News, *The long road to trial*, BBC NEWS, May 3, 2000, available at http://news.bbc.co.uk/2/hi/world/monitoring/media_reports/733755.stm.

³³⁵ Donna Arzt, *The Lockerbie "Extradition by Analogy" Agreement: "Exceptional Measure" or Template for Transitional Criminal Justice?*, 18 AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW, 163,166 (2002).

³³⁶ See Arseniy Yatsenyuk on MH17 attack: *This is the crime against humanity*, July 18, 2014, available at <http://yatsenyuk.org.ua/ua/news/open/1089>.

³³⁷ Malcolm N. Shaw, INTERNATIONAL LAW, 437 (2015).

³³⁸ Rule 156. Serious violations of international humanitarian law constitute war crimes, available at https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule156.

of MH17 in their domestic criminal courts. Specifically, Ukraine, the Netherlands, and Russia as well as Belgium, Malaysia and Australia respectively.

Ukraine

The shooting of MH17 took place within Ukrainian airspace. Therefore, according to the territorial principle of jurisdiction, Ukraine would be able to exert jurisdiction over the crime.³³⁹ Under Article 438 of the Ukrainian Criminal Code, which deals with the “violation of the rule of warfare” the downing of MH17 could be prosecuted as a war crime.³⁴⁰ All alleged offences committed within the territory of a state may be prosecuted before the municipal courts of the state, even when the perpetrators in question are not nationals thereof.

Notably, in September 2014, the government of Ukraine issued a declaration under Article 12(3) of the Rome Statute to accept the ICC jurisdiction over the MH17 bombing. This followed a previous declaration made in April 2014 through which Ukraine accepted the ICC jurisdiction over the crimes allegedly committed within its territory from 21 November 2013 to 22 February 2014. Ukraine has thereby acknowledged that it sees the downing of MH17 as a potential international crime for which those responsible should be prosecuted.

In the case of MH17, Ukraine has welcomed the Dutch Safety Board to conduct investigations into the bombing. And, as noted above, it has asked the ICC to look into the crime as well. Therefore it appears that Ukraine welcomes the opportunity that other states prosecute the offenders. For a successful prosecution elsewhere, though, it is important that Ukraine is willing to closely collaborate with the prosecuting state, which may prove a delicate process.

In addition to prosecuting those allegedly responsible as a war crime, Ukraine would also be able to prosecute the alleged offenders for domestic crimes. Although prosecutions for international crimes may be preferred to be conducted elsewhere, should in the future an individual be identified and arrested that played a role on the downing of MH17, Ukraine could decide to also prosecute such individual under its domestic criminal law. The primary provision that is relevant here is Article 115, “Intentional murder.”³⁴¹ Moreover, in January 2016, the District Court of Luhansk sentenced a Russian citizen who participated in the conflict in Eastern Ukraine to 13 years of imprisonment based on Article 258(3) (“Terrorism”) and Article 437 (“Planning, preparation and waging of an aggressive war”).³⁴²

However, if the alleged offenders are no longer present on Ukrainian territory, the ability to prosecute will be severely complicated. The extradition of the perpetrators of Russian nationality will be a significant obstacle, for Russia reserved the right not to extradite its citizens upon signing the 1957 European Convention on Extradition. Yet, if the perpetrators are of Ukrainian nationality and hiding on Russian territory, Ukraine would have legal grounds to demand extradition under Article 56 of the 1993 Minsk Convention on Legal Aid and Legal

³³⁹ Alex Whiting, *How to Prosecute the Perpetrators of the Malaysian Jet Downing*, JUST SECURITY, July 21, 2014, available at <https://www.justsecurity.org/13269/prosecute-perpetrators-malaysian-jet-downing/>.

³⁴⁰ Criminal Code of Ukraine, Article 438, available at: <http://yurist-online.com/uslugi/yuristam/kodeks/013.php>.

³⁴¹ Criminal Code of Ukraine, Art 115, available at: <http://yurist-online.com/uslugi/yuristam/kodeks/013.php>.

³⁴² Prosecutor General’s Office of Ukraine, *Russian Citizen, Member of the LNR Terrorist Organization Prosecuted*, available at: http://www.gp.gov.ua/ua/news.html?_m=publications&_c=view&_t=rec&id=167878.

Relations in Civil, Family and Criminal Cases signed under the auspices of the Commonwealth of Independent states.³⁴³

While Ukraine has jurisdiction over the downing of MH17, given that it took place within its airspace, the issues concerning the Donetsk region and the ongoing political turbulence render a criminal prosecution under Ukrainian domestic law challenging. Due to the fact that the shooting of MH17 has an international character, states such as the Netherlands, Malaysia or Australia may very well prosecute the perpetrators relying on, for instance, the 1971 Montreal Convention on the Suppression of Unlawful Acts against Civilian Aircraft.³⁴⁴ Nevertheless, for practical issues such as access to witnesses and evidence, Ukraine enjoys certain advantages in terms of carrying out domestic prosecution over other, foreign jurisdictions. Yet, as noted by observers, taking it all together, the political uncertainty in Ukraine and the strong Dutch involvement in the investigation and collection of evidence, indicate that prosecuting in the Netherlands may be the preferred route.³⁴⁵

The Netherlands

In the Netherlands, the prosecution of international crimes within in the domestic criminal court system can be done in accordance with the rules of the Wartime Offenses Act (for war crimes committed before 2003 or in any war in which the Netherlands was involved) and, relevant here, the International Crimes Act of 2003. Under the principle of passive personality, the Netherlands can prosecute the perpetrators of international crimes because many of the victims of MH17 were Dutch nationals.

The 2003 International Crimes Act reproduces the provisions on war crimes laid down in the Geneva Conventions. In addition, Article 7 says that “Anyone who, in the case of an international or non-international armed conflict, commits a violation of the laws and customs of war other than as referred to in sections 5 or 6 shall be liable to a term of imprisonment not exceeding ten years or a fifth category fine.” The Dutch law on international crimes therefore includes the relevant war crimes that are relevant for MH17, such as that it may suffice to show that those responsible were reckless by not taking all necessary precautions in making sure the plane they targeted was civilian.³⁴⁶

Moreover, in addition to prosecuting under the International Crimes Act, individuals may also be prosecuted under the Dutch Criminal Code (DCC).

Article 168 DCC reads that any person who intentionally and unlawfully causes an aircraft to crash shall be liable for life imprisonment or imprisonment not exceeding thirty years

³⁴³ The Convention On Legal Aid and Legal Relations in Civil, Family and Criminal Cases, Minks 1993, available at: http://www.consultant.ru/document/cons_doc_LAW_5942/.

³⁴⁴ Donald Rothwell, *MH17: the legal path to justice*, ABC NEWS, July 22, 2014, available at <http://www.abc.net.au/news/2014-07-22/rothwell-justice-will-be-achieved-for-mh17-victims/5613808>.

³⁴⁵ Aaron Matta and Anda Scarlat, *Guest Post: Malaysia Airlines Flight MH17-Possible Legal Avenues for Redress (Part 2)*, OPINIO JURIS, August 28, 2015, available at <http://opiniojuris.org/2015/08/28/guest-post-malaysia-airlines-flight-mh17-possible-legal-avenues-for-redress-part-2/>.

³⁴⁶ See also Alex Whiting, *How to Prosecute the Perpetrators of the Malaysian Jet Downing* (July 21, 2014), available at <https://www.justsecurity.org/13269/prosecute-perpetrators-malaysian-jet-downing/>.

if it causes someone's death.³⁴⁷ Intent under Dutch criminal law means that at the very least, it needs to be proven that the perpetrator knows that his acts may have a particular consequence and accepts this consequence.

When intent (*dolus*) cannot be established but guilt due to negligence (*culpa*) can, Article 169 DCC provides that for imprisonment not exceeding two years or a fine.³⁴⁸ Culpa can be established in the situation that the perpetrator recognized the risk that someone would lose their life but miscalculated that risk, or that the perpetrator did not recognize the risk that a life would be threatened where it should have recognized this risk. Under Dutch law, this can both be an act and an omission, which may be relevant for participants that neglected to intervene.

Like for Ukraine, securing the presence of an accused in a Dutch criminal court may be difficult due to issues of extradition. As noted above, Russia has reserved the right not to extradite its nationals under the 1957 European Convention on Extradition and has also included a comparable provision in its constitution.³⁴⁹ However, if a perpetrator is found on Russian territory but does not have Russian nationality, then Russia are under an obligation to extradite under the aforementioned European Convention on Extradition.³⁵⁰ Similarly, should the perpetrators be found on the territory of another state party to the 1957 European Convention on Extradition then that state would be obliged under Article 1 to extradite the perpetrators of MH17 to the Netherlands if it so requests.

Should the accused be identified and the prosecution want to start a trial but is unable to secure an extradition, the Netherlands could consider holding a trial in absentia, meaning a trial without the presence of the accused. However, it is difficult to conduct such a trial in accordance with the rights to a fair trial by the accused. Although the Dutch Criminal Procedure Code provides an opening for trials in absentia in Articles 278-280, it seems that to hold a trial with regard to an accused that is in a foreign state is likely to prove difficult to reconcile with the ECHR. In *Colozza v Italy*, the ECtHR stressed that a person charged with a criminal offence is entitled to take part in the hearings,³⁵¹ that this entitlement is based on the right to a fair trial and the right to a defence, and that a person convicted in absentia shall be entitled to a fresh trial once he becomes aware of the proceedings.³⁵² Under Dutch law, the trial can only be held once the

³⁴⁷ Wetboek van Strafrecht art. 168 (The Netherlands, 1881) available at wetten.overheid.nl/BWBR0001854/. See for an English version

http://www.ejtn.eu/PageFiles/6533/2014%20seminars/Omsenie/WetboekvanStrafrecht_ENG_PV.pdf.

³⁴⁸ Wetboek van Strafrecht art. 169 (The Netherlands, 1881) available at wetten.overheid.nl/BWBR0001854/. See for an English version

http://www.ejtn.eu/PageFiles/6533/2014%20seminars/Omsenie/WetboekvanStrafrecht_ENG_PV.pdf.

³⁴⁹ Declaration by Russia to 1957 European Convention on Extradition, available at

http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/024/declarations?p_auth=JdehRUkd <last accessed 13 January 2016>; See also Article 61 Russian Constitution, available at

<http://www.constitution.ru/en/10003000-03.htm>; Article 61 Russian Constitution reads "A citizen of the Russian Federation may not be deported from Russia or extradited to another State" available at

<http://www.constitution.ru/en/10003000-03.htm>.

³⁵⁰ 1957 European Convention on Extradition, Article 1, available at <http://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680064587>.

³⁵¹ *Colozza v Italy*, app no. 9024/80, Judgment, Feb 12 1985, para 27, available at [http://hudoc.echr.coe.int/eng?i=001-57462#{"itemid":\["001-57462"\]}](http://hudoc.echr.coe.int/eng?i=001-57462#{).

³⁵² *Colozza v Italy*, app no. 9024/80, Judgment, Feb 12 1985, para 49, available at [http://hudoc.echr.coe.int/eng?i=001-57462#{"itemid":\["001-57462"\]}](http://hudoc.echr.coe.int/eng?i=001-57462#{).

accused is aware of the circumstances and the term for appeal is only commences upon the awareness of the individual of the ruling. These considerations should be borne in mind by Dutch prosecutors should they decide to try the perpetrators in absentia.

Russia

In case the investigation concludes that the perpetrators are of Russian nationality, Russia has the right to prosecute them under its domestic criminal law based on the active personality principle. Russia has been conducting an own investigation of the MH17 crash, the conclusions of which oftentimes contradict those of the Dutch Safety Board and other states involved.

Russia denies involvement in any military conflicts in Eastern Ukraine, and claims restricting its presence to solely humanitarian purposes. Almaz Antey, a Russian company that produces Buk missiles, conducted an experimental destruction of a retired airliner using a Buk missile in October 2015.³⁵³ These experiments led to the conclusion that the Buk is not of Russian origin and that it was fired from Ukraine controlled territory,³⁵⁴ attempting to strip Russia of as many connections to the downing of MH17 as possible. Considering this, even in the case that the Joint Investigation Team or the Dutch criminal investigations prove that the perpetrators were Russian soldiers, it seems highly unlikely that Russia would accept these findings and prosecute its own nationals. For the purpose of this paper, it appears less relevant to investigate the possibilities of prosecutions in the Russian domestic legal order further.

Other States that Could Prosecute

There are a number of other states that may be able to prosecute individuals for their role in MH17, particularly those whose nationals were on Flight MH17, including Malaysia, Australia, Indonesia, Belgium as well as several other states. Importantly, however, as was noted above, in accordance with the *ne bis in idem* rule which provides that no person is to be tried with respect to conduct which formed the basis of crimes for which the individual has already been convicted or acquitted by another court, it is important that jurisdictions that consider to prosecute alleged perpetrators of MH17 communicate and cooperate. Authorities from Malaysia, Australia and Belgium are already involved in the work of the Joint Investigation Team that analyzes the evidence on the ground. However, since they also had their citizens on the MH17 plane, they too could initiate domestic prosecutions under the passive personality principle.

Malaysia may be able to bring prosecutions under its Geneva Conventions Act 1962.³⁵⁵ Moreover, Malaysia could invoke Article 302 of its Penal Code, "Punishment for murder,"

³⁵³ Russia Beyond The Headlines, *Manufacturer of BUK missiles disagrees with Dutch official report on MH17*. October 14, 2015, available at http://rbth.com/international/2015/10/14/manufacturer_of_buk_missiles_disagrees_with_dutch_official_rep_50061.html.

³⁵⁴ The Telegraph, *MH17: Russian missile company blow up plane to 'debunk' official report into air disaster*. October 13, 2015, available at <http://www.telegraph.co.uk/news/worldnews/europe/ukraine/11927963/MH17-Russian-missile-company-seeks-to-debunk-official-report-into-air-disaster.html>.

³⁵⁵ Gazette, vol. VI, No. 4, Feb. 24, 1962, available at <http://www.agc.gov.my/Akta/Vol.%2011/Act%20512.pdf>.

which applies to crimes that were committed both inside and outside the territory of Malaysia. Such act is punishable by death.³⁵⁶

In 2002, Australia introduced the International Criminal Court Act 2002, which gives Australia jurisdiction over international crimes.³⁵⁷ On 15 and 16 of December 2015, an inquest was made into the death of the Australian passengers on board of MH17, in Melbourne. However, the inquest has not produced any new information on the bombing, and it remains uncertain whether Australia would exercise jurisdiction over MH17.³⁵⁸ Australia could also prosecute for murder under Article 3 of its 1958 Crimes Act or invoke the 1945 War Crimes Act. The latter however has not been applied since 1951, and the country is overwhelmingly advocating for international courts and tribunals to prosecute international crimes.³⁵⁹

Conclusions

If evidence is found to base a case on against one or more perpetrators, there are several domestic jurisdictions that would have jurisdiction to take on such a case, should the ICC decide not to prosecute, should domestic prosecutions be preferred over ICC prosecutions, or should it concern other individuals than those prosecuted by the ICC.

Challenging for any criminal proceedings will be that under the circumstances it may be hard to obtain the required evidence to establish both the physical acts and the intent requirements that criminal law requires. Evidentiary standards in criminal law are higher than those in proceedings under human rights law and state responsibility. Another complication is that cooperation is necessary in order to gather the needed evidence. Moreover, the crash site is currently still a conflict zone. Furthermore, should evidence point to particular suspects, it may also become difficult to get them extradited from where they reside, although all states that have ratified the civil aviation conventions (including Russia and Ukraine) are under the obligation to do so. Refusal to extradite may be another ground for a complaint with the ICAO and eventually a case at the ICJ for violating the civil aviation conventions, as is discussed in Chapter 3.

However, it is important to note that what may seem impossible under the current political circumstances may not be impossible in the future. Governments change, power-constellations change, and so may the willingness to cooperate. It is therefore important to continue building the evidentiary base for cases, even if prosecution may not seem likely on the short term. Moreover, having identified an individual and issued a warrant of arrest at the very

³⁵⁶ *Penal Code of Malaysia (Act No. 574)*, Art.302 (Malaysia, 2002), available at

http://www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=61339&p_country=MYS&p_count=199.

³⁵⁷ Gillian Triggs, *Implementation of the Rome Statute for the International Criminal Court: A Quiet Revolution in Australian Law*, 1 SYDNEY LAW REVIEW (2003), available

at <https://www.tamilnet.com/img/publish/2010/12/ICCAustImplementation.pdf> <last accessed 14 January 2016>.

³⁵⁸ James O'Neill, *MH17 Coroner's Inquest: More Questions than Answers* (January 1st, 2016), available at <http://journal-neo.org/2016/01/06/mh17-coroner-s-inquest-more-questions-than-answers>.

³⁵⁹ Gillian Triggs, *Australia's War Crimes Trials*, in THE LAW OF WAR CRIMES: NATIONAL AND INTERNATIONAL APPROACHES 125 (Timothy L. H. MacCormack and Gerry J. Simpson, eds, 1997).

least limits the individual in question in his or her travel, to not being able to go to states where s/he runs the risk of arrest and extradition.

7. CIVIL SUIT PROCEEDINGS

The purpose of this chapter is to discuss various legal options available to the relatives of the victims of the downing of Flight MH17 to seek financial compensation for losses suffered. Civil proceedings are and have been an integral part of seeking accountability through judicial means following civil aviation accidents.

First, this chapter discusses previous civil lawsuits following civil aviation accidents relevant to the downing of Flight MH17. Previous cases are analyzed in light of the downing of Flight MH17 in order to identify on what grounds civil proceedings have featured in seeking accountability for aviation accidents in the past.

Secondly, this chapter identifies multiple avenues for seeking accountability through civil proceedings for the downing of Flight MH17. It is important to note from the outset that the identification and analyses of these avenues are based on the circumstances and facts as they are known at the time of writing. To date, no evidence has been found indicating that a mechanical failure or any other circumstance than detonation of a 9N314M warhead caused or contributed to the downing of Flight MH17. This limits the scope of inquiry considerably, since numerous civil claims have been brought by the relatives of victims of aviation accidents against manufacturers of airplane parts for failing mechanics. Discovery of new facts about the causes of the downing may open new avenues for civil proceedings, including but not limited to product liability.

Previous Civil Lawsuits in Civil Aviation Accidents

Aerolinee Itavia Flight 870, or the 'Ustica Massacre' (1980)

In 1980, Aerolinee Itavia Flight 870 en route from Bologna, Italy to Palermo, Italy crashed into the Tyrrhenian Sea, killing all on board. Although this crash involved an Italian airliner on a domestic flight, the crash and its context resemble the downing of Flight MH17. The cause of the crash remains contested today, even though the Italian Parliamentary Commission on Terrorism, several expert investigators, and courts have issued statements asserting that the airplane was taken down by a missile. The Italian airspace was unsafe at that time due to enhanced military activity, yet the Italian government did not close its airspace, nor did it send out (sufficient) warnings. Whereas criminal proceedings did not lead to convictions due to a lack of convincing evidence, and the applicability of a statute of limitations, a large number of relatives of the 81 victims killed in the crash successfully brought a civil lawsuit against the Italian state.

The Palermo Civil Tribunal awarded the claimants EUR 100 million in damages, asserting that the Ministries of Defense and Transport had failed to ensure flight safety through its airspace.³⁶⁰ Discarding alternative theories concerning the cause of the crash, the Third Civil

³⁶⁰ International Law Office, *Supreme Court Has Last Word on Ustica Disaster* (July 2, 2013), available at <http://www.internationallawoffice.com/newsletters/detail.aspx?g=c8ef0caa-0ba5-42be-a1c8-e15e4e650925#>.

Section of the Italian Court of Cassation on 28 January 2013 found that the theory of a missile having taken down Flight 870 was “abundantly and sufficiently motivated.”³⁶¹ According to the Court, the duty to ensure flight safety was “self-evident,”³⁶² to be understood in reference to Italy’s sovereignty over its airspace. Thus, the Court upheld the judgment, including the award of damages to the victims’ relatives.³⁶³ The decision by the Court of Cassation is particularly relevant for any future lawsuits related to the downing of Flight MH17 against the Ukrainian Government, since it ruled that a duty to ensure flight safety was self-evident. The reasoning of the Court can be used to strengthen civil claims seeking compensation from the Ukrainian Government on the basis that it did not provide flight safety while it had a duty to do so. Such cases will be further discussed in the second part of this chapter.

Pan Am Flight 103, or the ‘Lockerbie Bombing’ (1988)

In 1988, the detonation of a bomb on board of Pan Am Flight 103 en route from Frankfurt, Germany to Detroit, USA brought down the aircraft while flying over Lockerbie, Scotland, killing all on board and 11 on the ground. In November 1991, the Lord Advocate for Scotland issued arrest warrants for two Libyan nationals. Colonel Muammar Gaddafi eventually surrendered the accused persons to the Scottish authorities in 1999. The two suspects were tried in an *ad hoc* Scottish court established at Kamp Zeist, a military terrain in the Netherlands, which operated on the basis of and within Scottish law. In 2001, the Court ordered the imprisonment of Libyan officer Abdelbaset al-Megrahi but found the other suspect, Al Amin Khalifa Fhimah, not guilty.³⁶⁴

In addition to the several domestic and international criminal investigations and trials, some of the relatives of the victims of the Lockerbie Bombing initiated civil actions before United States courts. Civil actions were first filed against Pan Am World Airways and related companies (Pan Am), as the operator of Flight 103, and later against the Libyan state, whose officials had been said to have been responsible for planting the bomb, of which one has been found guilty.

Regarding the lawsuits against Pan Am, a Brooklyn federal judge in 1992 found that Pan Am had committed willful misconduct by failing to follow mandated security checks.³⁶⁵ That is, Pan Am failed to check the bag in which the bomb was placed that took down Flight 103 when that bag was transferred from Air Malta Flight 180 to Pan Am Flight 103.³⁶⁶ As a result of this

³⁶¹ Corriere della Sera, *State Must Compensate Ustica Victims’ Families* (Jan. 28, 2013), available at <http://www.corriere.it/International/english/articoli/2013/01/29/ustica.shtml>. See also *Italian Court of Cassation Judgment 1871/2013* (2013), available in Italian at <http://www.stragi80.it/documenti/civile/cassazione13.pdf>

³⁶² Corriere della Sera, *State Must Compensate Ustica Victims’ Families* (Jan. 28, 2013), available at <http://www.corriere.it/International/english/articoli/2013/01/29/ustica.shtml>.

³⁶³ Corriere della Sera, *State Must Compensate Ustica Victims’ Families* (Jan. 28, 2013), available at <http://www.corriere.it/International/english/articoli/2013/01/29/ustica.shtml>.

³⁶⁴ CNN Library, *Pan Am Flight 103 Fast Facts*, CNN, Aug. 22, 2014, available at <http://edition.cnn.com/2013/09/26/world/pan-am-flight-103-fast-facts/>.

³⁶⁵ Steven R. Pounian & Blanca I. Rodriguez, *The Bombing of Pan Am Flight 103 Over Lockerbie – 16 Years Later*, New York Law Journal (Mar. 30, 2005), available at <http://www.kreindler.com/Publications/Aviation-Law-9.shtml>.

³⁶⁶ *In re Air Disaster at Lockerbie Scotland on December 21, 1988*, 37 F.3d 804, §7-9 (2d Cir. 1994), available at <http://openjurist.org/37/f3d/804/air-disaster-at-lockerbie-scotland-on-december-pagnucco-v-pan-american-world-airways-inc>.

finding of willful misconduct, the liability cap for carriers contained in Art. 22 Warsaw Convention, the applicable convention for the establishment of carrier liability, did not apply.³⁶⁷ This cleared the way for awarding damages superseding this cap. In this specific case, the jury awarded USD 9,225,000, USD 9,000,000, and USD 1,735,000 to three families respectively, *inter alia* as damages for loss of society and damages for loss of parental care to adult children.³⁶⁸ The jury did not award survival damages, as it found that the passengers had not suffered conscious pain and suffering before their deaths.³⁶⁹ In total, more than 250 cases brought against Pan Am were successful, resulting in the cumulative award of USD 500 million in damages to the victims' relatives.³⁷⁰

In 1991, the US Court of Appeals for the Second Circuit held that the Warsaw Convention does not permit the punitive damages that are available under federal common law. The reason for this decision lied, *inter alia*, in the need for universal application of the Convention in different jurisdictions, which could not be guaranteed if punitive damages were allowed as no other state party to the Convention allowed them.³⁷¹ According to the court, the Warsaw Convention constitutes an entire liability scheme, and was intended to be universal, international law.³⁷² Thus, only compensatory damages could be awarded.

Civil lawsuits instigated against Libya by relatives of the victims before US courts were at first dismissed, since the Libyan state had a right to sovereign immunity from jurisdiction under the Foreign Sovereign Immunities Act (FSIA). As a general rule §1604 FSIA grants, subject to existing international agreements to which the US is a party, immunity from jurisdiction to foreign states.³⁷³ Plaintiffs argued that the United Nations Charter of 1945, and several UN Security Council Resolutions, fulfilled the conditions of the “existing agreement exception” contained in §1604. Judge Platt of the US District Court for the Eastern District of New York, dismissed the argument, as the Charter and the Resolutions relied on did not expressly conflict with the FSIA, which was necessary for the “existing agreement exception” to be applicable.³⁷⁴ Moreover, these Charter and the Resolutions did not create a private right of action.³⁷⁵

³⁶⁷ *In re Air Disaster at Lockerbie Scotland on December 21, 1988*, 37 F.3d 804, §6-7 (2d Circ. 1994), available at <http://openjurist.org/37/f3d/804/air-disaster-at-lockerbie-scotland-on-december-pagnucco-v-pan-american-world-airways-inc>.

³⁶⁸ *In re Air Disaster at Lockerbie Scotland on December 21, 1988*, 37 F.3d 804, §4 (2d Circ. 1994), available at <http://openjurist.org/37/f3d/804/air-disaster-at-lockerbie-scotland-on-december-pagnucco-v-pan-american-world-airways-inc>.

³⁶⁹ *In re Air Disaster at Lockerbie Scotland on December 21, 1988*, 37 F.3d 804, §4 (2d Circ. 1994), available at <http://openjurist.org/37/f3d/804/air-disaster-at-lockerbie-scotland-on-december-pagnucco-v-pan-american-world-airways-inc>.

³⁷⁰ Steven R. Pounian & Blanca I. Rodriguez, *The Bombing of Pan Am Flight 103 Over Lockerbie – 16 Years Later*, New York Law Journal (Mar. 30, 2005), available at <http://www.kreindler.com/Publications/Aviation-Law-9.shtml>.

³⁷¹ *In re Air Disaster at Lockerbie, Scotland on December 21, 1998*, 928 F.2d 1267, §109 (2d Circ. 1991), available at <http://openjurist.org/928/f2d/1267>.

³⁷² *In re Air Disaster at Lockerbie, Scotland on December 21, 1998*, 928 F.2d 1267, §57 (2d Circ. 1991), available at <http://openjurist.org/928/f2d/1267>.

³⁷³ 28 U.S.C., §1604, available at <http://codes.lp.findlaw.com/uscode/28/IV/97/1604>.

³⁷⁴ *Smith v. Socialist People's Libyan Arab Jamahiriya*, 886 F. Supp. 306, 311 (E.D.N.Y. 1995), available at <http://archives.syr.edu/panam/pdf/timeline/103PUB0044.pdf>.

³⁷⁵ *Smith v. Socialist People's Libyan Arab Jamahiriya*, 886 F. Supp. 306, 311 (E.D.N.Y. 1995), available at <http://archives.syr.edu/panam/pdf/timeline/103PUB0044.pdf>.

The plaintiffs furthermore based their case on the exceptions that §1605 FSIA provides with respect to the general rule of state immunity provided in §1604.³⁷⁶ First of these was the “commercial activity exception,” which was declined since the plaintiff’s claim related only to tortious injury.³⁷⁷ Second, the plaintiffs presented the “noncommercial tort exception,” which allowed for jurisdiction in case of personal injury occurring the United States that was caused by the tortious act or omission of a state. The Court did not accept this exception, because the act occurred on foreign territory.³⁷⁸ The last exception ruled on by the Court was that of an implied waiver of immunity by Libya. Judge Platt held that a letter to the Secretary-General of the United Nations by a Libyan official, indicating Libya guaranteed the payment of monetary compensation that might be awarded in civil suits resulting from the possible criminal conviction of two of its nationals, did not constitute such a waiver.³⁷⁹ Moreover, the circumstance that a *jus cogens* norm (a preemptory norm of international law) might have been violated, did likewise not constitute a waiver of immunity from jurisdiction.³⁸⁰

Having considered the exceptions presented by the plaintiffs, Judge Platt concluded that Libya enjoyed immunity from jurisdiction.³⁸¹ The US Court of Appeals of the Second Circuit in 1996 confirmed in its entirety the District Court’s ruling,³⁸² and the US Supreme Court upheld the ruling of the Court of Appeals in 1997.³⁸³

However, in 1996 the US Congress amended the FSIA to allow for jurisdiction for certain civil actions against foreign states that act as sponsors of terrorism.³⁸⁴ The amendment of the FSIA applied retroactively, and the US Court of Appeals for the Second Circuit confirmed that Libya did not enjoy immunity from jurisdiction in the case at hand.³⁸⁵ An important consideration in this decision was the fact that the State Department had declared Libya to be a state sponsor of terrorism before the amendment was adopted, as this meant that Congress did not (unconstitutionally) delegate legislative power to the US Department of State.³⁸⁶ Ultimately, after extensive negotiations taking place in London and Paris, the Plaintiff’s Committee

³⁷⁶ *Smith v. Socialist People’s Libyan Arab Jamahiriya*, 886 F. Supp. 306, 310 (E.D.N.Y. 1995), available at <http://archives.syr.edu/panam/pdf/timeline/103PUB0044.pdf>.

³⁷⁷ *Smith v. Socialist People’s Libyan Arab Jamahiriya*, 886 F. Supp. 306, 312 (E.D.N.Y. 1995), available at <http://archives.syr.edu/panam/pdf/timeline/103PUB0044.pdf>.

³⁷⁸ *Smith v. Socialist People’s Libyan Arab Jamahiriya*, 886 F. Supp. 306, 312-213 (E.D.N.Y. 1995), available at <http://archives.syr.edu/panam/pdf/timeline/103PUB0044.pdf>.

³⁷⁹ *Smith v. Socialist People’s Libyan Arab Jamahiriya*, 886 F. Supp. 306, 314 (E.D.N.Y. 1995), available at <http://archives.syr.edu/panam/pdf/timeline/103PUB0044.pdf>.

³⁸⁰ *Smith v. Socialist People’s Libyan Arab Jamahiriya*, 886 F. Supp. 306, 314-315 (E.D.N.Y. 1995), available at <http://archives.syr.edu/panam/pdf/timeline/103PUB0044.pdf>.

³⁸¹ *Smith v. Socialist People’s Libyan Arab Jamahiriya*, 886 F. Supp. 306, 315 (E.D.N.Y. 1995), available at <http://archives.syr.edu/panam/pdf/timeline/103PUB0044.pdf>.

³⁸² *Smith v. Socialist People’s Libyan Arab Jamahiriya*, 101 F.3d 239 (2d Cir. 1996), available at <http://openjurist.org/101/f3d/239/smith-v-socialist-peoples-libyan-arab-jamahiriya>.

³⁸³ *Smith v. Socialist People’s Libyan Arab Jamahiriya*, 520 U.S. 1204 (1997).

³⁸⁴ 28 U.S.C., §1605, available at <https://www.gpo.gov/fdsys/pkg/USCODE-2011-title28/html/USCODE-2011-title28-partIV-chap97-sec1605.htm>

³⁸⁵ *Rein v. Socialist People’s Libyan Arab Jamahiriya*, 162 F.3d 748, 764 (2d Cir. 1998), available at <https://casetext.com/case/rein-v-socialist-peoples-libyan>.

³⁸⁶ *Rein v. Socialist People’s Libyan Arab Jamahiriya*, 162 F.3d 748, 764 (2d Cir. 1998), available at <https://casetext.com/case/rein-v-socialist-peoples-libyan>.

representing the victims' relatives and Libya reached a settlement worth USD 2.7 billion.³⁸⁷ In 2008, however, the US Congress struck out §1605 (a)(7), which contained the state sponsor of terrorism exception to jurisdictional immunity, from the US Code.³⁸⁸

Flight MH17 was downed by a missile, rather than downed by a bomb taken on board of the airplane.³⁸⁹ However, the cases filed against Pan Am demonstrate that airlines can and have been held liable by civil courts for failing to implement security standards. The cases initiated against Libya before US civil courts demonstrate that state immunity from jurisdiction plays an important role in litigation against sovereign states.

Siberia Airlines Flight 1812 (2001)

On 4 October 2001, Siberia Airlines Flight 1812, on its way from Tel Aviv to Russia crashed into the Black Sea. All 78 passengers and crew died when the airplane exploded at more than 35,000 feet.³⁹⁰ The cause of the explosion remains uncertain. Russian investigators have said the Ukrainian military accidentally shot down the airplane, while conducting a training exercise on the Crimean Peninsula.³⁹¹ According to an anonymous statement to the New York Times by a Ukrainian official, the Ukrainian military fired 23 missiles at drones during the exercise, including two within a zone excluded from commercial airliners at the moment Flight 1812 passed.³⁹² A spokesperson for the Ukrainian military indicated that it may have mistakenly fired a missile at the airplane.³⁹³ In 2003, Ukraine concluded agreements with Russia and Israel on *ex gratia* payments for the families of the victims.

However, the families of four Israeli victims have instituted civil proceedings, with each family reportedly claiming USD 1,100,000 in compensatory damages.³⁹⁴ A Ukrainian Court of First Instance dismissed plaintiffs' claims in January 2007.³⁹⁵ Similarly, Kiev's Appeals Court

³⁸⁷ Steven R. Pounian & Blanca I. Rodriguez, *The Bombing of Pan Am Flight 103 Over Lockerbie – 16 Years Later*, New York Law Journal (Mar. 30, 2005), available at <http://www.kreindler.com/Publications/Aviation-Law-9.shtml>.

³⁸⁸ 28 U.S.C., §1605, available at <https://www.gpo.gov/fdsys/pkg/USCODE-2011-title28/html/USCODE-2011-title28-partIV-chap97-sec1605.htm>.

³⁸⁹ Dutch Safety Board, *Crash of Malaysia Airlines Flight MH17*, Dutch Safety Board, 253 (Oct. 2015), available at <http://www.onderzoeksraad.nl/en/onderzoek/2049/investigation-crash-mh17-17-july-2014>.

³⁹⁰ Inigi Gilmore et al., *Israel Accuses Ukraine of Hiding of Hiding Missile Strike that Destroyed Jet*, THE TELEGRAPH, Oct. 7, 2001, available at <http://www.telegraph.co.uk/news/worldnews/europe/ukraine/1358757/Israel-accuses-Ukraine-of-hiding-missile-strike-that-destroyed-jet.html>.

³⁹¹ Sabrina Tavernise, *Russians Say Evidence Indicates Ukrainians Shot Down Jet*, THE NEW YORK TIMES, Oct. 10, 2001, available at <http://www.nytimes.com/2001/10/10/world/russians-say-evidence-indicates-ukrainians-shot-down-jet.html>.

³⁹² Sabrina Tavernise, *Russians Say Evidence Indicates Ukrainians Shot Down Jet*, THE NEW YORK TIMES, Oct. 10, 2001, available at <http://www.nytimes.com/2001/10/10/world/russians-say-evidence-indicates-ukrainians-shot-down-jet.html>.

³⁹³ *Ukraine Admits Missile May have Downed Airplane*, THE GUARDIAN, Oct. 12, 2001, available at <http://www.theguardian.com/world/2001/oct/12/russia.israel>.

³⁹⁴ Maria Danilova, *Ukraine Court Decides Missile not Being Behind Crash*, THE MOSCOW TIMES, Aug. 22, 2007, available at <http://www.themoscowtimes.com/news/article/ukrainian-court-decides-missile-not-behind-crash/194894.html>.

³⁹⁵ Maria Danilova, *Ukraine Court Decides Missile not Being Behind Crash*, THE MOSCOW TIMES, Aug. 22, 2007, available at <http://www.themoscowtimes.com/news/article/ukrainian-court-decides-missile-not-behind-crash/194894.html>.

dismissed the plaintiffs' claims in August 2007, allegedly because the Moscow-based Interstate Aviation Committee investigation "did not support" the Court's determination.³⁹⁶

Although the Ukrainian courts ultimately dismissed the plaintiffs' claims, the case is of interest to those individuals and legal entities that want to bring a civil claim against the Ukrainian State. That is to say, the Ukrainian courts in this instance were open to hearing lawsuits initiated by foreign plaintiffs. The option of suing the Ukrainian state before its own courts with respect to the downing of Flight MH17 is discussed in a later section.

Ugaz v. American Airlines (2008)

In this incident, the plaintiff fell off an inoperable escalator shortly after disembarking her flight in Miami, Florida, having left of in Lima, Peru. Based on the Montreal Convention, she brought a case against American Airlines, the operator of her flight, before court. The Court had to judge whether American Airlines could be held liable based on negligence while the plaintiff voluntarily walked down the escalator. The Court first highlighted that the Montreal Convention "shows an increased concern for the rights of passengers."³⁹⁷ The Court held that there was no accident, since an escalator that is not working is not an "unusual or unexpected event," which is necessary to determine that an event amounts to an accident.³⁹⁸ However, the Court decided to discuss the requirements of negligence under the Montreal Convention. A three-tiered test has to be applied to establish whether or not the carrier acted negligently. First there is the question whether there was a duty to protect the victim, then whether that duty was violated and at last the Court argues that it needs to be assessed whether the injury was caused because the airline violated that duty to protect.³⁹⁹ For these three elements of the negligence test, the burden of proof rests on the plaintiff.⁴⁰⁰

Possible Avenues for Civil Proceedings

This section discusses the possible avenues for civil proceedings following the downing of Flight MH17 based on cases law and the facts surrounding the downing as known at the time of writing.

The primary purpose in a civil litigation proceeding is to hold another party liable for a wrongdoing and seek compensation for resulting losses suffered. Which parties can be held

³⁹⁶ Maria Danilova, *Ukraine Court Decides Missile not Being Behind Crash*, THE MOSCOW TIMES, Aug. 22, 2007, available at <http://www.themoscowtimes.com/news/article/ukrainian-court-decides-missile-not-behind-crash/194894.html>.

³⁹⁷ *Ugaz v. American Airlines, Inc.*, 576 F. Supp. 2d 1345 (S.D. Fla. 2008) available at <https://www.courtlistener.com/opinion/2406512/ugaz-v-american-airlines-inc/>.

³⁹⁸ *Ugaz v. American Airlines, Inc.*, 576 F. Supp. 2d 1345, (S.D. Fla. 2008) available at <https://www.courtlistener.com/opinion/2406512/ugaz-v-american-airlines-inc/>.

³⁹⁹ *Ugaz v. American Airlines, Inc.*, 576 F. Supp. 2d 1345 (S.D. Fla. 2008) available at <https://www.courtlistener.com/opinion/2406512/ugaz-v-american-airlines-inc/>.

⁴⁰⁰ *Ugaz v. American Airlines, Inc.*, 576 F. Supp. 2d 1345 (S.D. Fla. 2008) available at <https://www.courtlistener.com/opinion/2406512/ugaz-v-american-airlines-inc/>.

liable in civil proceedings depends on the circumstances of the case. In the case of the downing of Flight MH17, the primary factual circumstance is that one or multiple parties involved in the operation of the flight were unable to ensure the safety of the passengers, evidenced by the downing and loss of life of those on board. This factual circumstance is, however, insufficient to hold another party liable in a civil proceeding. It must be established that the inability to ensure the safety of the passengers on board was due to a wrongdoing of one or multiple of the parties involved.

Based on the analysis of relevant case law above, national as well as international aviation legislation and the facts of the downing as set out in the Dutch Safety Board report, the following three parties emerge as those under some obligation for ensuring the safety of the passengers on board Flight MH17, in order of responsibility:

1. The Government of Ukraine, as the sovereign whose airspace Flight MH17 was in when downed;
2. Malaysia Airlines, as the operator of the flight, and KLM, as code-sharer; and
3. The Government of Malaysia and/or The Netherlands, as the state of incorporation of the airline operate in question and state of departure, respectively.⁴⁰¹

The purpose of each of the following three subsequent subsections is to identify for each of these three parties: (i) what their obligation was to ensure the safety of the passengers on board of Flight MH17; (ii) to what extent the current facts indicate whether they fulfilled their obligations to ensure the safety of the passengers on board of Flight MH17; and (iii) what possible avenues for civil litigation are available to the relatives of the victims to challenge the fulfilment of their obligations to ensure the safety of the passengers on board Flight MH17.

The purpose of the subsections is explicitly not to imply any liability of any of the parties listed above, nor to pass any judgment on the likelihood of successfully pursuing any of these avenues for civil litigation. The purpose is solely limited to the identification of potential avenues.

Civil Proceedings against Ukraine

The Legal Framework

Article 26 of Ukraine's Constitution grants the same rights and freedoms enjoyed by Ukrainian citizens to foreigners that are legally present in Ukraine.⁴⁰² Article 27 of the Ukrainian Constitution continues by stating that every person has the right to life, which may not be deprived arbitrarily and the Ukraine has a duty to protect this life.⁴⁰³ Ukraine also has an obligation under the European Convention on Human Rights to protect the lives of all those

⁴⁰¹ Dutch Safety Board, *Crash of Malaysia Airlines Flight MH17*, 171 (Oct. 13, 2015), available at <http://www.onderzoeksraad.nl/en/onderzoek/2049/investigation-crash-mh17-17-july-2014>.

⁴⁰² *Constitution of Ukraine* art. 26 (Ukraine, 1996), available at www.ccu.gov.ua/doccatalog/document?id=12084.

⁴⁰³ *Constitution of Ukraine* art. 27 (Ukraine, 1996), available at www.ccu.gov.ua/doccatalog/document?id=12084.

persons that are within its jurisdiction. Based on these national and international sources of law, Ukraine has an unequivocal duty to protect human life in general, including human life of foreigners that are in Ukraine on legal grounds.

In the case of Flight MH17, the passengers on board were in Ukrainian territory, since they were passing through its airspace. The airline had been granted permission to enter the airspace of Ukraine and the airspace used by Flight MH17 on 17 July 2014 was not restricted at the altitude it was flying, meaning that there was a legal ground for the passengers to be in Ukrainian airspace. It follows that Ukraine had a duty to protect the lives of the passengers of MH17.

Articles 1 and 2 of the Chicago Convention place the control of airspace fully within the realms of state sovereignty. By virtue of Article 3(d), however, the sovereign power has agreed that when issuing mandatory regulations for use of its airspace, it must do so with “due regard for the safety of navigation of civil aircraft.”⁴⁰⁴ This may include restricting civil aviation in certain parts of its airspace or closing the airspace altogether. However, since the airspace belongs to the sovereign power of the state, it cannot be compelled to do so.⁴⁰⁵

Although the Chicago Convention does not explicitly establish that a state must guarantee safety of its airspace and take appropriate action as may be required to do so, the Dutch Safety Board finds that the Chicago Convention and related document 9554-AN/932 and Circular 330 AN/189 expects state parties to take reasonable measures to ensure a safe airspace.⁴⁰⁶ The Manual Concerning Safety Measures Relating to Military Activities Potentially Hazardous to Civil Aircraft Operations issued by the ICAO, although not binding, stipulates that in case of an armed conflict, the states whose military forces are involved bear the responsibility of taking any additional measures that are needed to ensure flight safety for civil aircrafts.⁴⁰⁷ Article 10(3) of this manual holds that the state that is responsible for air traffic services, which is Ukraine in this case, has to assess the risk of flying over the armed conflict area based on all the available information and ultimately determine whether or not the airspace is safe enough for passage, or should be closed or restricted.⁴⁰⁸

The question arises what measures Ukraine took to ensure the safety of its sovereign airspace as, albeit not explicitly mentioned, certainly expected under the Chicago Convention.

⁴⁰⁴ Convention on International Civil Aviation art. 3(d), Dec. 7, 1944, 15 U.N.T.S. 295 (1994) available at <http://www.icao.int/publications/pages/doc7300.aspx>.

⁴⁰⁵ Dutch Safety Board, *Crash of Malaysia Airlines Flight MH17*, Dutch Safety Board, 205 (Oct. 2015), available at <http://www.onderzoeksraad.nl/en/onderzoek/2049/investigation-crash-mh17-17-july-2014>.

⁴⁰⁶ Dutch Safety Board, *Crash of Malaysia Airlines Flight MH17*, Dutch Safety Board, 172 (Oct. 2015), available at <http://www.onderzoeksraad.nl/en/onderzoek/2049/investigation-crash-mh17-17-july-2014>.

⁴⁰⁷ International Civil Aviation Organization, Manual Concerning Safety Measures Relating to Military Activities Potentially Hazardous to Civil Aircraft Operations, para. 10.2, Doc. 9554-AN/932 (1990) available at http://www.icao.int/Meetings/anconf12/Document%20Archive/9554_cons_en.pdf.

⁴⁰⁸ International Civil Aviation Organization, Manual Concerning Safety Measures Relating to Military Activities Potentially Hazardous to Civil Aircraft Operations, para. 10.3, Doc. 9554-AN/932 (1990) available at http://www.icao.int/Meetings/anconf12/Document%20Archive/9554_cons_en.pdf.

The Factual Circumstances

Days prior to the crash of flight MH17, several military aircraft had been shot down, most of them by weapons operated from the ground.⁴⁰⁹ In June and July, several military aircrafts (including both airplanes and helicopters) had been shot down with the use of MANPADS, which are ground-to-air missiles.⁴¹⁰ For reasons unknown at the time but likely linked to the increase military activities in the region (as revealed by statements of Ukrainian officials after the downing of Flight MH17), Ukraine restricted civil aviation in its airspace on 14 July 2014. Civil aviation was prohibited to an altitude of 32,000 feet.

That same day, a Ukrainian Antonov An-26 was hit while flying at a level of 6,500 meters (approximately 21,325 feet) and downed.⁴¹¹ The Ukrainian government suggests that this aircraft must have been downed by a weapon that was more powerful than the MANPADS used to take down aircrafts prior to this crash, and considered that an air-to-air missile hit the Antonov An-26.⁴¹² Although the government never specified with what weapon the aircraft was actually downed (the official investigative report remains pending), reports in the media by Ukrainian officials included allusions to the fact that the weapons used to down aircrafts in the airspace above the area where the armed conflict was going on had in fact taken on more powerful forms than weapons used thus far.⁴¹³ The Ukrainian government did not, however, seem to connect these developments with any risks for civil aircrafts or at least took no action evidencing such connection being made.⁴¹⁴ Upon request of the Dutch Safety Board, Ukrainian officials have said that there was no grounds to expect threats to civil aviation following the increase of military activity in the region.⁴¹⁵

The report by the Dutch Safety Board indicates that the risk assessment performed by all parties involved throughout civil aviation, including Ukraine, relies too heavily on actual threat.⁴¹⁶ During armed conflict, unpredictability is high and unintentional threats are easily disregarded at an early stage of the risk assessment performed. “With the increase of military activities in the air, for example, there is a greater chance that civil airplanes are hit by a surface-to-air missile or air-to-air missile,”⁴¹⁷ the threat of which is not adequately taken into consideration if the emphasis is put on actual threat and intention. Control over certain parts of

⁴⁰⁹ Dutch Safety Board, *Crash of Malaysia Airlines Flight MH17*, Dutch Safety Board, 181 (Oct. 2015), available at <http://www.onderzoeksraad.nl/en/onderzoek/2049/investigation-crash-mh17-17-july-2014>.

⁴¹⁰ Dutch Safety Board, *Crash of Malaysia Airlines Flight MH17*, Dutch Safety Board, 183 (Oct. 2015), available at <http://www.onderzoeksraad.nl/en/onderzoek/2049/investigation-crash-mh17-17-july-2014>.

⁴¹¹ Dutch Safety Board, *Crash of Malaysia Airlines Flight MH17*, Dutch Safety Board, 183 (Oct. 2015), available at <http://www.onderzoeksraad.nl/en/onderzoek/2049/investigation-crash-mh17-17-july-2014>.

⁴¹² Dutch Safety Board, *Crash of Malaysia Airlines Flight MH17*, Dutch Safety Board, 184 (Oct. 2015), available at <http://www.onderzoeksraad.nl/en/onderzoek/2049/investigation-crash-mh17-17-july-2014>.

⁴¹³ Dutch Safety Board, *Crash of Malaysia Airlines Flight MH17*, Dutch Safety Board, 183-4 (Oct. 2015), available at <http://www.onderzoeksraad.nl/en/onderzoek/2049/investigation-crash-mh17-17-july-2014>.

⁴¹⁴ Dutch Safety Board, *Crash of Malaysia Airlines Flight MH17*, Dutch Safety Board, 184 (Oct. 2015), available at <http://www.onderzoeksraad.nl/en/onderzoek/2049/investigation-crash-mh17-17-july-2014>.

⁴¹⁵ Dutch Safety Board, *Crash of Malaysia Airlines Flight MH17*, Dutch Safety Board, 196 (Oct. 2015), available at <http://www.onderzoeksraad.nl/en/onderzoek/2049/investigation-crash-mh17-17-july-2014>.

⁴¹⁶ Dutch Safety Board, *Crash of Malaysia Airlines Flight MH17*, Dutch Safety Board, 247 (Oct. 2015), available at <http://www.onderzoeksraad.nl/en/onderzoek/2049/investigation-crash-mh17-17-july-2014>.

⁴¹⁷ Dutch Safety Board, *Crash of Malaysia Airlines Flight MH17*, Dutch Safety Board, 247 (Oct. 2015), available at <http://www.onderzoeksraad.nl/en/onderzoek/2049/investigation-crash-mh17-17-july-2014>.

the territory may be compromised and reliable information may be difficult to obtain, putting additional strain on a safety system designed to identify risks based on actual threat and intent (both of which require intelligence of high quality). Where the extent of risk identification and mitigation is supposed to be commensurate the risks involvement, a situation of armed conflict would appear reason for enhanced risk assessment and a risk-averse and precautionary approach. The Dutch Safety Board concludes that the circumstances set out above “provided sufficient reason for closing the airspace over the conflict zone as a precaution.”⁴¹⁸

Ukraine took limited additional action following the increase in military activity in its airspace days prior to the downing of Flight MH17 to protect the safety of its airspace. The restriction of civil aviation below 32,000 feet had been requested before the downing of Antonov An-26 and its implementation had at best been sped up by the crash.⁴¹⁹ It did not further restrict its airspace, nor did it issue any warning about the possible use of surface-to-air missiles, despite the fact that indications appeared that heavier weaponry was being used in the area. This has been understood in light of the existence of indications that civil aviation was at risk. Under such circumstances, the question arises whether Ukraine took reasonable measures to ensure the safety of its airspace as expected under the Chicago Convention. A negative answer to this question could trigger the liability of Ukraine, for failing to take reasonable measures to ensure the safety of its airspace.

Options for Civil Litigation Available

Article 26 of the Ukrainian Constitution grants foreign nationals and legal entities the same rights, freedoms, and duties as Ukrainian citizens.⁴²⁰ Legal equality between non-nationals and nationals is reflected in Article 55 of the Constitution, according to which everyone is allowed to challenge decisions, actions, and omissions of bodies of state power.⁴²¹ This is also upheld by Article 410 of the Ukrainian Code of Civil Procedure, which grants foreigners the right to apply to the courts of Ukraine for the “protection of their rights, freedoms, and legitimate interests.”⁴²² Ukraine’s obligations enshrined in the European Convention on Human Rights, and the Convention on International Civil Aviation and related documents are directly applicable in the Ukrainian legal system,⁴²³ and generally take precedence over conflicting national legislation.⁴²⁴ Moreover, Article 201 of the Ukrainian Civil Code explicitly mentions that the “personal non-property benefits” of life and health are protected by civil litigation.”⁴²⁵

⁴¹⁸ Dutch Safety Board, *Crash of Malaysia Airlines Flight MH17*, Dutch Safety Board, 10 (Oct. 2015), available at <http://www.onderzoeksraad.nl/en/onderzoek/2049/investigation-crash-mh17-17-july-2014>.

⁴¹⁹ Dutch Safety Board, *Crash of Malaysia Airlines Flight MH17*, Dutch Safety Board, 196 (Oct. 2015), available at <http://www.onderzoeksraad.nl/en/onderzoek/2049/investigation-crash-mh17-17->

⁴²⁰ *Constitution of Ukraine* art. 26 (Ukraine, 1996), available at www.ccu.gov.ua/doccatalog/document?id=12084.

⁴²¹ *Constitution of Ukraine* art. 55 (Ukraine, 1996), available at www.ccu.gov.ua/doccatalog/document?id=12084.

⁴²² *Civil Procedure Code of Ukraine* art. 410 (Ukraine, 2005), available at http://www.wipo.int/wipolex/en/text.jsp?file_id=187648.

⁴²³ Gennady M. Danilenko, *Implementation of International Law in Russia and Other CIS States* 36 (1998), available at www.nato.int/acad/fellow/96-98/danilenk.pdf.

⁴²⁴ Gennady M. Danilenko, *Implementation of International Law in Russia and Other CIS States*, 36 (1998), available at www.nato.int/acad/fellow/96-98/danilenk.pdf.

⁴²⁵ *Civil Code of Ukraine* art. 201 (Ukraine, 2003), available at <https://www.google.nl/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=0ahUKEwiGx7Gk0>

One incident of a civil lawsuit initiated by foreigners against the Ukrainian government is the civil action brought by Israeli plaintiffs before a Ukrainian Court of First Instance in their quest for justice concerning Siberian Airlines Flight 1812. Although in this case the Ukrainian court did not ultimately grant the claim, it shows that it is possible for foreign relatives of victims of a plane crash to bring a suit against the Ukrainian state before a Ukrainian court. The civil litigation resulting from the Ustica Disaster in Italy is an incident where a successful civil action concerning civil aviation was brought against a state before its own courts. A case against the Ukrainian government can be argued along the same lines. The legal arguments of this case have been discussed in part I of this chapter.

Civil Proceedings against the Airline Operator

The Legal Framework

The Chicago Convention establishes that flight operators, as users of the airspace, bear responsibility for safe flight operations. Ukraine, Malaysia and the Netherlands are all contracting parties to the Chicago Convention and as such are bound by its provisions and annexes (which form an integral part thereof). As each state enjoys sovereignty over its airspace,⁴²⁶ the state authorities decide to grant access to foreign operators to use their airspace, may decide for safety reasons to close its airspace and must ensure airline operators abide by all the relevant safety standards. Ultimately, however, where there are no restrictions on the use of airspace, it is to the flight operator to decide whether a particular flight path is safe for civil aviation.

Annexes 6, 17 and 19 in particular set out security and safety management recommendations applicable to civil aviation. Article 4(1)(1) of Annex 6 to the Chicago Convention requires that “an operator shall ensure that a flight will not be commenced unless it has been ascertained by **every reasonable means available** that the ground and/or water facilities available and directly required on such flight, **for the safe operations of the aeroplane and the protection of the passengers, are adequate for the type of operation under which the flight is to be conducted and are adequately operated for this purpose** [emphasis added].”⁴²⁷ A note is added on the meaning of “reasonable means,” clarifying that it is intended to denote the use of information available to the operator either through official information or readily obtainable from other sources. Further requirements for the management of safety and identification of potential hazards are set in Annexes 17 and 19.

National aviation authorities of Contracting Parties to the Chicago Convention are responsible for the required certification and monitoring of compliance with said

KfKAhVCFg8KHa_UDM0QFgggMAA&url=http%3A%2F%2Fteplydim.com.ua%2Fstatic%2Fstorage%2Ffilesfiles%2FCivil%2520Code_Eng.pdf&usg=AFQjCNHcCEn3eZj5SXmGvtvLm6uCKTwo0A.

⁴²⁶Convention on International Civil Aviation, art. 1, Dec. 9, 1944, DOC 7300/9 (2006), available at http://www.icao.int/publications/Documents/7300_cons.pdf.

⁴²⁷Annex 6 to the Convention on International Civil Aviation, Operation of Aircraft, art. 4.1.1 (2010), available at http://code7700.com/pdfs/icao_annex_6_part_i.pdf.

recommendations. As per Article 3(1)(3) of Annex 19 to the Chicago Convention, each Contracting shall require that certain service providers, including civil airlines, implement a safety management system or SMS.

Appendix 2 of Annex 19 to the Chicago Convention sets the framework for a SMS which service providers, including flight operators, must maintain according to Article 4(1)(1) of the Chicago Convention. Article 2 of Appendix 2 provides certain standards for safety risk management. An important part of safety risk management is hazard identification. Article 2(1)(1) reads that “[t]he service provider shall develop and maintain a process that ensures that hazards associated with its aviation products or services are identified.”⁴²⁸ Article 2(1)(2) further states that “[h]azard identification shall be based on a **combination of reactive, proactive and predictive methods of safety data collection** [emphasis added].”⁴²⁹ Upon identification of hazards, Article 2(2) holds that “[t]he service provider shall develop and maintain a process that ensures analysis, assessment and control of the safety risks associated with identified hazards.”

The Relevant Factual Circumstances

The final report published by the Dutch Safety Board of its investigations into the downing of Flight MH17 provides a reconstruction of the flight preparations and flight operations of Flight MH17 on 17 July 2014. The final report identifies what information regarding the safety of the scheduled flight path of Flight MH17 was collected and available to the operators of Malaysia Airlines. This information is needed to assess to what extent Malaysia Airlines can be said to have operated an SMS in accordance with the requirements set out in Appendix 2 of Annex 19 to the Chicago Convention.

In identifying and assessing the safety hazards to the requested flight plan for Flight MH17, the Flight Operations Department of Malaysia Airlines (or Flight Ops), according to the Dutch Safety Board, relied primarily on Notices of Airmen or NOTAMs.⁴³⁰ NOTAMs are safety warnings entered into a global database (Sabre) by the national aviation authorities. Flight plans are run through the database. A report is generated during the preparations for the flight showing any relevant NOTAMs on the suggested flight plan. Flight Ops also occasionally relies on other sources of information, such as media reports, but only ever as secondary sources due to the superficial and often speculative nature of the reports.⁴³¹

During the preparation for Flight MH17 on 17 July 2014, Flight Ops followed standard procedures and attached all relevant NOTAMs to the briefing package. Attached to this particular briefing package were a number of NOTAMs, including those on restricted airspace above Ukraine up to 32,000 feet. The scheduled flight path stayed clear of this piece of

⁴²⁸ Annex 19 to the Convention on International Civil Aviation, Safety Management, art. 2.1.1, (2013), available at http://web.shgm.gov.tr/documents/sivilhavacilik/files/pdf/saglik_birimi/aneks_19eng.pdf

⁴²⁹ Annex 19 to the Convention on International Civil Aviation, Safety Management, art. 2.1.2, (2013), available at http://web.shgm.gov.tr/documents/sivilhavacilik/files/pdf/saglik_birimi/aneks_19eng.pdf

⁴³⁰ Dutch Safety Board, *Crash of Malaysia Airlines Flight MH17*, 215 (Oct. 13, 2015), available at <http://www.onderzoekraad.nl/en/onderzoek/2049/investigation-crash-mh17-17-july-2014>.

⁴³¹ Dutch Safety Board, *Crash of Malaysia Airlines Flight MH17*, 215 (Oct. 13, 2015), available at <http://www.onderzoekraad.nl/en/onderzoek/2049/investigation-crash-mh17-17-july-2014>.

restricted airspace in accordance with the relevant NOTAM and hence no further action was taken.⁴³²

Interviews with employees of the Flight Operations Department of Malaysia Airlines reveal that Malaysia Airlines was aware of the situation in Ukraine was unstable and that a conflict was unfolding on the ground. They did not, however consider this reason for monitoring the flight path more closely as none of the restrictions conflicted with the projected flight path.⁴³³ Only a conflict at the location of take-off or landing would have led to a closer monitoring of potential hazards, in accordance with Annex 17 of the Chicago Convention. Non-restricted airspace was considered safe without any further enquiry done.

Malaysia Airlines also says not to have been aware of the downing of a military aircraft flying above the same eastern part of the Ukraine on 14 July 2014, nor of any statements by Ukrainian officials appearing in media reports who alleged that weapons were used in the downing of the military aircraft that could reach far into the non-restricted airspace above Ukraine.⁴³⁴

The Dutch Safety Board found in its final report that, as far it could determine, “Malaysia has a security programme, with which the operators fulfil the requirements set out in Annex 17 of the ICAO. Malaysia Airlines filtered, processed and used aeronautical information for preparing and executing the flight. The way in which Malaysia Airlines prepared the flight therefore complies with the requirements for Security and Flight Operations as defined in ICAO’s international regulations.”⁴³⁵ It continues by observing, however, that “Malaysia Airlines complied with its legal requirements but did not make any additional efforts to obtain an overview of the safety of the airspace above the eastern part of Ukraine. Malaysia Airlines’ information position related to the potential threats in the airspace was limited.”

The image arises of an operator set on complying only with the minimum legal requirements rather than acting in the spirit of the Chicago Convention and taking a reactive, proactive and predictive approach towards risk assessment. The Dutch Safety Board concludes that not just Malaysia Airlines, but in fact most major airlines assume that all non-restricted airspace must be safe without conducting further risk assessments.⁴³⁶ Airline operators therefore rely heavily on the issuances of NOTAMs by national aviation authorities and restrictions of airspace by sovereign states. The question arises whether in making no additional efforts, Malaysia Airlines can be said to have fulfilled the safety requirements as set in the Chicago Convention, particularly in light of knowledge at the time of an on-going conflict on the ground.

⁴³² Dutch Safety Board, *Crash of Malaysia Airlines Flight MH17*, 217-8 (Oct. 13, 2015), available at <http://www.onderzoeksraad.nl/en/onderzoek/2049/investigation-crash-mh17-17-july-2014>.

⁴³³ Dutch Safety Board, *Crash of Malaysia Airlines Flight MH17*, 218 (Oct. 13, 2015), available at <http://www.onderzoeksraad.nl/en/onderzoek/2049/investigation-crash-mh17-17-july-2014>.

⁴³⁴ Dutch Safety Board, *Crash of Malaysia Airlines Flight MH17*, 218 (Oct. 13, 2015), available at <http://www.onderzoeksraad.nl/en/onderzoek/2049/investigation-crash-mh17-17-july-2014>.

⁴³⁵ Dutch Safety Board, *Crash of Malaysia Airlines Flight MH17*, 227 (Oct. 13, 2015), available at <http://www.onderzoeksraad.nl/en/onderzoek/2049/investigation-crash-mh17-17-july-2014>.

⁴³⁶ Dutch Safety Board, *Crash of Malaysia Airlines Flight MH17*, 244 (Oct. 13, 2015), available at <http://www.onderzoeksraad.nl/en/onderzoek/2049/investigation-crash-mh17-17-july-2014>.

The Dutch Safety Board links the adequacy of Malaysia Airlines' safety management system explicitly to Annex 17, on security on board as well as at take-off and landing location, rather than Annex 19, on the applicable framework. It is the same link airlines make when it comes to establishing a compliant safety management system.⁴³⁷ If Annex 19 is used as the frame of reference instead and in light of the facts as included in the final report of the Dutch Safety Board, the question arises whether the safety management system used by Malaysia Airlines included "combination of reactive, proactive and predictive methods of safety data collection" as required under Article 2(1)(2) of Appendix 2. A negative answer to this question, finding that, in accordance with Annex 19, Malaysia Airlines should have done more to assess the safety en route in light of the on-going conflict in Ukraine, could trigger the liability of Malaysia Airlines under the Montreal Convention.

Options for Civil Litigation Available Against Malaysia Airlines and KLM

The Montreal Convention is meant to unify the patchwork of the Warsaw Convention and its additional protocols.⁴³⁸ It applies to international flights of which the place of departure and arrival are situated on the territory of state parties.⁴³⁹ The MH17 flight operated by Malaysia Airlines departed in Amsterdam, the Netherlands, and was scheduled to arrive in Kuala Lumpur, Malaysia. Both the Netherlands and Malaysia are party to the Montreal Convention. The flight constituted and code-shared, international carriage of persons who paid for a ticket at either KLM or Malaysia Airlines, fulfilling the requirement of Article 1 of the Montreal Convention.⁴⁴⁰ Therefore, the Montreal Convention applies to any legal question arising from the downing of Flight MH17.

Articles 17 and 21 of the Montreal Convention govern the liability of airlines/carriers in the case of the death or injury of a passenger.⁴⁴¹ According to Article 17, the carrier is liable "in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking."⁴⁴² The term "accident" as used in the Montreal Convention is generally defined as an "unusual and unexpected occurrence," which corresponds to the definition of accident as used in the Warsaw Convention.⁴⁴³ It has been questioned whether the accident must have happened *on board* of the aircraft or whether the accident must have happened while *the passenger* was on board of the aircraft. In the *Husserl v. Swiss Air Transport Company*, it was argued that "on board" referred to every moment in time between embarking at

⁴³⁷ Dutch Safety Board, *Crash of Malaysia Airlines Flight MH17*, 245 (Oct. 13, 2015), available at <http://www.onderzoeksraad.nl/en/onderzoek/2049/investigation-crash-mh17-17-july-2014>.

⁴³⁸ Ronald I.C. Bartsch, *INTERNATIONAL AVIATION LAW* 24-5 (2012).

⁴³⁹ Convention for the Unification of Certain Rules for International Carriage by Air, art. 1 and 2, May 28, 1999, 2242 U.N.T.S. 309 (1999), available at <http://www.jus.uio.no/lm/air.carriage.unification.convention.montreal.1999/>.

⁴⁴⁰ Convention for the Unification of Certain Rules for International Carriage by Air, art. 1, May 28, 1999, 2242 U.N.T.S. 309 (1999), available at <http://www.jus.uio.no/lm/air.carriage.unification.convention.montreal.1999/>.

⁴⁴¹ Convention for the Unification of Certain Rules for International Carriage by Air, art. 17 and 21, May 28, 1999, 2242 U.N.T.S. 309 (1999), available at <http://www.jus.uio.no/lm/air.carriage.unification.convention.montreal.1999/>.

⁴⁴² Convention for the Unification of Certain Rules for International Carriage by Air, art. 17, May 28, 1999, 2242 U.N.T.S. 309 (1999), available at <http://www.jus.uio.no/lm/air.carriage.unification.convention.montreal.1999/>.

⁴⁴³ Tory A. Weignand, *Recent Developments Under The Montreal Convention*, 77 *DEFENSE COUNSEL JOURNAL* 443, 455 (2010).

the origin and the disembarking at the destination.⁴⁴⁴ This is also supported by the aim of the Montreal Convention to benefit the passenger rather than the carrier.⁴⁴⁵ It can therefore be assumed that, while in the case of MH17 the explosion of the Buk missile happened outside the aircraft, the crash constitutes an “accident” under Article 17 of the Montreal Convention.

The MH17 flight was a code-shared flight between KLM and Malaysia Airlines, operated by the latter. The flight was also offered under the KLM airline code KL4103. Eleven passengers had a ticket with KLM, so for those victims the contracting carrier was KLM rather than Malaysia Airlines.⁴⁴⁶ Article 41 of the Montreal Convention stipulates that in the event of code-sharing, both the actual and the contracting carrier bear mutual liability for the acts and omissions of the actual carrier.⁴⁴⁷

Under the KLM and Malaysia Airlines code-sharing agreement applicable to this particular flight, Malaysia Airlines was the actual carrier and KLM acted merely as the contracting carrier. The actual carrier is responsible for the entire flight preparation, including any security and safety management. KLM therefore had no part in the preparation for Flight MH17 on 17 July 2014. The Dutch Safety Board confirmed that KLM as the contracting carrier had no role in preparations for Flight MH17 and that Malaysia Airlines was fully responsible for ensuring the safety of all passengers on board the flight.⁴⁴⁸ However, the factual circumstance that KLM had no part in the preparation for Flight MH17 on 17 July 2014 does in no way relieve it of or in any way affect its legal duties towards passengers with which it has contracted, including safety and security. Due to Article 41 of the Montreal Convention, KLM is liable towards its passengers as if it had been the actual carrier.

Relatives of KLM passengers on Flight MH17 have the same avenues at their disposal to hold KLM liable as relatives of Malaysia Airlines passengers have to hold Malaysia Airlines liable. As such, where the continuation of this analysis discusses civil proceedings against Malaysia Airlines, the same analysis applies to KLM and Malaysian Airlines for possible liability for the loss of life of its respective passengers on Flight MH17.

For damages not exceeding 100.000 Special Drawing Rights (SDR) for each passenger, Article 21 of the Montreal Convention does not allow Malaysia Airlines or KLM to exclude or limit its liability under any circumstance.⁴⁴⁹ The value of SDRs and conversion rates to local currencies are established by the International Monetary Fund.⁴⁵⁰ This is also known as the “strict liability” which airline carriers are not allowed to exclude or limit, unless the damage is

⁴⁴⁴ *Husserl v. Swiss Air Transport Company, LTD.*, 388 F. Supp. 1238, 1247 (S.D.N.Y. 1975) available at <http://law.justia.com/cases/federal/district-courts/FSupp/388/1238/2313442/>.

⁴⁴⁵ Pablo Mendes de Leon and Werker Eyskens, *The Montreal Convention: An Analysis of Some Aspects of the Attempted Modernization and Consolidation of the Warsaw System*, 66 JOURNAL OF AIR LAW AND COMMERCE, 1155, 1156 (2001).

⁴⁴⁶ Dutch Safety Board, *Crash of Malaysia Airlines flight MH17*, 213-4 (Oct. 22, 2015), available at <http://www.onderzoeksraad.nl/uploads/phase-docs/1006/debcd724fe7breport-mh17-crash.pdf>.

⁴⁴⁷ Brian F. Havel and Gabriel S. Sanchez, *THE PRINCIPLES AND PRACTICE OF INTERNATIONAL AVIATION LAW* 279 (2014).

⁴⁴⁸ <http://www.onderzoeksraad.nl/uploads/phase-docs/1006/debcd724fe7breport-mh17-crash.pdf>, p. 214.

⁴⁴⁹ Convention for the Unification of Certain Rules for International Carriage by Air, art. 21, May 28, 1999, 2242 U.N.T.S. 309 (1999), available at <http://www.jus.uio.no/lm/air.carriage.unification.convention.montreal.1999/>

⁴⁵⁰ Ronald I.C. Bartsch, *INTERNATIONAL AVIATION LAW* 25 (2012).

(partly) a result of negligence by the passenger.⁴⁵¹ Based on Article 25 of the Montreal Convention, a carrier may increase the amount of its strict liability under Article 17 of the Montreal Convention. Both KLM and Malaysia Airlines have set the amount of compensation under the strict liability to 113.100 SDR in their General Terms of Carriage.⁴⁵²

For claims exceeding its strict liability, Malaysia Airlines and KLM may limit or exclude its liability if it proves that (a) such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; or (b) such damage was solely due to the negligence or other wrongful act or omission of a third party.⁴⁵³ A further discussion of negligence is therefore warranted, given that Malaysia Airlines and KLM will likely argue that there was no negligence on their part when faced with a claim.

Negligence

Negligence has been argued to encompass three elements that need to be met, namely an existing duty of care, a breach of that duty and material damage arising from that breach.⁴⁵⁴ Scholars have also argued that, based on both the common law system and the civil law system, the law of negligence in general requires that to establish whether there was a duty of care in a specific situation, the alleged negligent act must be reasonably or adequately linked to the damage.⁴⁵⁵ Either a reasonable person must have foreseen the damage arising from the neglectful act (common law) or there must be a reasonable causal connection between the negligent act and the damage (civil law).⁴⁵⁶ There is no clear definition of negligence in Article 21 of the Montreal Convention yet, but there are some cases that have clarified this provision.

In the *Wright v. American Airlines, Inc.* case, a passenger brought a claim against the airline for injury caused by baggage falling onto his head from the overhead compartments, opened by a fellow passenger while the passengers should have been seated with fastened seat belts.⁴⁵⁷ According to the plaintiff, the airline acted negligent or wrongful, since it did not prevent the other passenger from opening the overhead compartment while the passenger should have been seated. The Court held that the airline or cabin personnel did all it could do to prevent the injury (by following the standard safety procedure on a plane). Therefore, the injury caused to the plaintiff was not caused by negligence, wrongful act or omission of the airline.⁴⁵⁸ The Court paid attention to whether the airline followed standard safety procedures and whether certain actions could have prevented the accident.

⁴⁵¹ Convention for the Unification of Certain Rules for International Carriage by Air, art. 21, May 28, 1999, 2242 U.N.T.S. 309 (1999), available at <http://www.jus.uio.no/lm/air.carriage.unification.convention.montreal.1999/> and Ronald I.C. Bartsch, INTERNATIONAL AVIATION LAW 25 (2012).

⁴⁵² Article 19.2.1 KLM General Terms of Carriage and article 16.2.2 Malaysia Airlines General Terms of Carriage.

⁴⁵³ Convention for the Unification of Certain Rules for International Carriage by Air, art. 21, May 28, 1999, 2242 U.N.T.S. 309 (1999), available at <http://www.jus.uio.no/lm/air.carriage.unification.convention.montreal.1999/>

⁴⁵⁴ Ronald I.C. Bartsch, INTERNATIONAL AVIATION LAW 112 – 115 (2012).

⁴⁵⁵ Ronald I.C. Bartsch, INTERNATIONAL AVIATION LAW 116 – 117 (2012).

⁴⁵⁶ Ronald I.C. Bartsch, INTERNATIONAL AVIATION LAW 116 – 117 (2012).

⁴⁵⁷ *Wright v. American Airlines, Inc.*, (N.D. Tex. Feb. 8, 2010) available at <https://casetext.com/case/wright-v-american-airlines>.

⁴⁵⁸ *Wright v. American Airlines, Inc.*, (N.D. Tex. Feb. 8, 2010) available at <https://casetext.com/case/wright-v-american-airlines>.

A Dutch case also involved baggage of one passenger that hit another passenger on the head, in an attempt to store it in the overhead compartments of the plane. The crew of El Al Airlines had the injured passenger checked by medical services, after which the flight departed. During the flight, the passenger felt unwell, and was treated by a doctor travelling on the aircraft. The plaintiff argued that El Al Airlines was responsible for the caused damage. The Court assessed whether El Al Airlines had done everything reasonably in its power to prevent the injury from occurring. The court couldn't preclude, based on the facts of the case, that El Al should have taken more precautionary measures to prevent the injury, and ruled that El Al could not be exempt from liability based on Article 21 of the Montreal Convention.⁴⁵⁹

The third incident has already been discussed in the first part of this chapter. In the *Ugaz v. American Airlines* case, the plaintiff fell of an escalator shortly after disembarking her flight. Based on the Montreal Convention, she brought a case against American Airlines, the operator of her flight, before court. The Court had to judge whether American Airlines could be held liable based on negligence while the plaintiff voluntarily walked down the escalator. Although the Court held that there was no accident, it discussed the requirements to establish negligence. A three-tiered test has to be applied to establish whether or not the carrier has acted negligent. First, there is the question whether there was a duty to protect the victim, second, whether that duty was violated, and third, whether the injury was caused because the airline violated that duty to protect.⁴⁶⁰

Relatives of a victim of flight MH370 filed a civil law suit against Malaysia Airlines and the Malaysian government, arguing that this is a case of negligence, since the parties failed to contact the plane after its disappearance.⁴⁶¹ Besides the negligence argument, the airline was also sued for a breach of contract, as it failed to bring the passenger to its final destination.⁴⁶² This case has been settled outside of court.⁴⁶³

Jurisdiction

A case based on the Montreal Convention can be brought before a court in several states, provided that the state in question is a party to the Convention. A case against Malaysia Airlines can be brought:

- Before the court of the state where the carrier has its domicile or principle business;
- Before the court of the state where the carrier has a place of business that contracted with the plaintiff;

⁴⁵⁹ Hof van Amsterdam, (03 December 2013) ECLI:NL:GHAMS:2013:4457 at 3.9 available at <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:GHAMS:2013:4457>.

⁴⁶⁰ *Ugaz v. American Airlines, Inc.*, 576 F. Supp. 2d 1345, 1356 (S.D. Fla. 2008) available at <https://www.courtlistener.com/opinion/2406512/ugaz-v-american-airlines-inc/>.

⁴⁶¹ BBC, *Lawsuit filed in Malaysia over missing MH370*, BBC, Oct. 31, 2014, available at <http://www.bbc.com/news/world-asia-29844691>.

⁴⁶² Abby Philip, *Two Malaysian boys sue airline, government in first case after MH370's mysterious disappearance*, THE WASHINGTON POST, Oct. 31, 2014, available at <https://www.washingtonpost.com/news/morning-mix/wp/2014/10/31/two-malaysian-boys-sue-airline-government-in-first-case-after-mh-370s-mysterious-disappearance/>.

⁴⁶³ BBC, *MH370 disappearance: Negligence suit settled out of court*, BBC, June 2, 2015, available at <http://www.bbc.com/news/world-asia-32971909>.

- Before the court of the state that was the scheduled destination of the flight; or
- In the case of death or injury of a passenger, before a court in the territory where the passenger had or has its permanent residence and to and which the carrier operates services.⁴⁶⁴

The last ground is additional to the other forums of jurisdiction when the incident in question involves the death or injury of a passenger.⁴⁶⁵ This means that a case against Malaysia Airlines for compensation of damages arising out of the death of victims that booked a ticket with Malaysia Airlines, can be brought before a court in Malaysia (domicile of the carrier and scheduled destination) and in any of the state parties to the Montreal Convention where a victim had its permanent residence, including the Netherlands. Thus, if a Dutch victim contracted with Malaysia Airlines because it bought a ticket from Malaysia Airlines (instead of code-sharer KLM), a claim can be brought against Malaysia Airlines in the Netherlands and/or the state Malaysia. A case under the Montreal Convention must be initiated within two years of the date on which the flight was scheduled to arrive.⁴⁶⁶

According to the Montreal Convention, the law of the court with jurisdiction will govern the procedure of a case.⁴⁶⁷ The Montreal Convention further refrains from regulating who can bring a suit and what their rights are.⁴⁶⁸ As most victims carry the Dutch nationality, the most likely choice of jurisdiction would be a competent court in the Netherlands.

The right to claim is regulated in Article 6:108 Dutch Civil Code, which regulates the right to claim by a third party (relatives of the deceased) in case the victim died. International private law regarding contractual obligations is found in the European Regulation on the law applicable to contractual obligations (Rome I). In the case of the MH17 flight, there was a contract of carriage. If a case against Malaysia Airlines is brought before a Dutch court, the applicable law would have to be established by a Dutch judge based on Rome I.⁴⁶⁹ Article 5(2) of Rome I contains a specific rule regulating the applicable law in the case of the carriage of passengers.⁴⁷⁰ This article stipulates that first it must be determined whether there is a choice of law between the parties (passenger and airline). This might be found in the General Terms of Carriage of Malaysia Airlines. If there is no such choice, the applicable law is the law of the state where the passenger had its “habitual residence,” provided that that state was also the place of departure or arrival of the flight.⁴⁷¹

⁴⁶⁴ Convention for the Unification of Certain Rules for International Carriage by Air, art. 33, May 28, 1999, 2242 U.N.T.S. 309 (1999), available at <http://www.jus.uio.no/lm/air.carriage.unification.convention.montreal.1999/>.

⁴⁶⁵ Ronald I.C. Bartsch, INTERNATIONAL AVIATION LAW 24 - 25 (2012).

⁴⁶⁶ Convention for the Unification of Certain Rules for International Carriage by Air, art. 35, May 28, 1999, 2242 U.N.T.S. 309 (1999), available at <http://www.jus.uio.no/lm/air.carriage.unification.convention.montreal.1999/>.

⁴⁶⁷ Convention for the Unification of Certain Rules for International Carriage by Air, art. 33(4), May 28, 1999, 2242 U.N.T.S. 309 (1999), available at <http://www.jus.uio.no/lm/air.carriage.unification.convention.montreal.1999/>.

⁴⁶⁸ Convention for the Unification of Certain Rules for International Carriage by Air, art. 29, May 28, 1999, 2242 U.N.T.S. 309 (1999), available at <http://www.jus.uio.no/lm/air.carriage.unification.convention.montreal.1999/>.

⁴⁶⁹ *Regulation on the law applicable to contractual obligations (Rome I)* (European Union, 2008), available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008R0593&from=EN>.

⁴⁷⁰ *Regulation on the law applicable to contractual obligations (Rome I)* art 5 (European Union, 2008), available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008R0593&from=EN>.

⁴⁷¹ *Regulation on the law applicable to contractual obligations (Rome I)* art 5 (European Union, 2008), available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008R0593&from=EN>.

According to this, Dutch law would be the applicable law in a case between the relatives of Dutch victims who lived in the Netherlands on the one hand and Malaysia Airlines on the other, even though Malaysia Airlines has its headquarter in and is subject to the laws of Malaysia. This can be understood in light of the well-being of the relatives of the victims, offering access to domestic courts in order to give full effect to the right to seek compensation.

Based on article 6:108 Dutch Civil Code, damages that can be compensated in case of death are loss of (prospective) income, cost related to disposal of the dead and funeral costs.⁴⁷² Moral damages are in general not compensated under Dutch law.

A case against Malaysia Airlines can also be brought before a Malaysian court, either by passengers with the Malaysian identity or by passengers with the Dutch identity (they may wish to seek remedies before a Malaysian court in case Dutch courts adhere to a stricter definition of damages). In Malaysia, the Sixth Schedule to the Carriage by Air Act 1974 gives effect to the Montreal Convention and its amendments.⁴⁷³ Further research and local knowledge of the Malaysian legal system is needed in order to set out the civil litigation procedure that will apply in such circumstance.

Civil Proceedings Against Malaysia or the Netherlands

The Legal Framework

The Chicago Convention and its annexes leave considerable room for states to take on a less or more active role when it comes to determining flight routes and flight route safety. As previously discussed, the Chicago Convention requires that states ensure that airline operators domiciled in and operating from its territory abide by the relevant standards and are properly certified. This requires states to ensure airlines maintain a safety management system to identify hazards to the safety of the plane and its passengers. The Chicago Convention does not, however, require any specific level of involvement of the state in the information gathering or risk assessment performed by the airlines. As such, states may but are not required under any provision of the Chicago Convention to restrict airlines operating from their territory from using certain flight routes.⁴⁷⁴

The Dutch Safety Board report concluded, based on information from Malaysia Airlines, that the competent authorities in Malaysia do not consider that it has the duty to assess the risks involved of flying in foreign airspace.⁴⁷⁵ A consequence of this is that the responsibility of

⁴⁷² *Burgerlijk Wetboek Boek 6 art. 108* (The Netherlands, 1992) available in English at <http://www.dutchcivillaw.com/civilcodebook066.htm>.

⁴⁷³ Chong Kok Seng and Chew Phye Keat, *Malaysia*, in *THE AVIATION LAW REVIEW*, 228, 229 (Sean Gates, 2nd ed., 2014).

⁴⁷⁴ Dutch Safety Board, *Crash of Malaysia Airlines flight MH17*, 221 (Oct. 22, 2015), available at <http://www.onderzoeksraad.nl/uploads/phase-docs/1006/debcd724fe7breport-mh17-crash.pdf>

⁴⁷⁵ Dutch Safety Board, *Crash of Malaysia Airlines flight MH17*, 221 (Oct. 22, 2015), available at <http://www.onderzoeksraad.nl/uploads/phase-docs/1006/debcd724fe7breport-mh17-crash.pdf>.

Malaysia Airlines in establishing a safe flight route becomes bigger, as it will have to conduct a greater risk assessment itself.⁴⁷⁶

The lack of an international requirement for states to monitor the safety of operators flying in foreign airspace or to impose restrictions on certain flight paths has resulted in various state practices. There are authorities such as those in Malaysia that restrict their responsibility to the safety of civil aviation in its territory. This puts a larger burden on flight operators to ensure the safety of the aircraft and passengers on board. Other states have taken on a more proactive role in ensuring the safety of its carriers while passing through foreign airspace. The US Federal Aviation Administration has the authority to issue warnings or even prohibit carriers to fly over certain areas, and has issued such warnings in the past.⁴⁷⁷ Other states share information with airlines that is gathered while investigating other information, and some states produce risk analyses specific for civil aviation activities.⁴⁷⁸ Although the extent to which information is provided by governments to airlines regarding risks of flying over certain areas varies greatly, the Malaysian authorities suppose that there is no legal requirement for them to provide airlines with any information regarding foreign airspace whatsoever. Although Malaysia could have taken on a more proactive role in supplying information about foreign airspaces to Malaysia Airlines, it may not have been under any (international) obligation to do so.

The Dutch Safety Board is even more unequivocal about the role of the Dutch government in ensuring the safety and security of the passengers on board Flight MH17. Whereas it identifies some form of responsibility for Ukraine, Malaysia and for Malaysia Airlines (in line with what is discussed in this chapter) in ensuring the safety of Flight MH17, it finds that “the Dutch State does not bear such responsibilities. A state does not bear any responsibility with regard to flights operated by a foreign operator in foreign airspace, even if the operator departs from the state’s territory.”⁴⁷⁹ As such, they do not see grounds for holding the Dutch state accountable for any losses suffered as a result of the downing of Flight MH17.

Case law supports the analysis of the legal framework applicable to Malaysia and the Netherlands. On 1 September 1983, a Soviet military aircraft shot down a flight that departed from New York and was scheduled to arrive in Seoul.⁴⁸⁰ Families of the victims filed a case against several parties, including the US Government. It was argued that the US Government had violated its duty of care over the passengers of the airplane because it had failed to warn the operator sufficiently of possible threats.⁴⁸¹ The Court held that there was no duty for the

⁴⁷⁶ Dutch Safety Board, *Crash of Malaysia Airlines flight MH17*, 221 (Oct. 22, 2015), available at <http://www.onderzoeksraad.nl/uploads/phase-docs/1006/debcd724fe7breport-mh17-crash.pdf>.

⁴⁷⁷ *U.S. Code*, Title 49, art. 44701, (United States of America, 1994) available at <https://www.law.cornell.edu/uscode/text/49/44701> and Dutch Safety Board, *Crash of Malaysia Airlines flight MH17*, 221 (Oct. 22, 2015), available at <http://www.onderzoeksraad.nl/uploads/phase-docs/1006/debcd724fe7breport-mh17-crash.pdf>.

⁴⁷⁸ Dutch Safety Board, *Crash of Malaysia Airlines flight MH17*, 221 (Oct. 22, 2015), available at <http://www.onderzoeksraad.nl/uploads/phase-docs/1006/debcd724fe7breport-mh17-crash.pdf>.

⁴⁷⁹ Dutch Safety Board, *Crash of Malaysia Airlines flight MH17*, 232 (Oct. 22, 2015), available at <http://www.onderzoeksraad.nl/uploads/phase-docs/1006/debcd724fe7breport-mh17-crash.pdf>.

⁴⁸⁰ *Korean Air Lines Disaster of Sept. 1, 1983*, 646 F. Supp. 30, 31 (D.D.C. 1986) available at <http://law.justia.com/cases/federal/district-courts/FSupp/646/30/1750024/>.

⁴⁸¹ *Korean Air Lines Disaster of Sept. 1, 1983*, 646 F. Supp. 30, 31 (D.D.C. 1986) available at <http://law.justia.com/cases/federal/district-courts/FSupp/646/30/1750024/>.

government to warn the flight in question about its position. However, even if such a duty would have existed, the Soviet attack also had to be foreseeable for the US Government for it to be held accountable.⁴⁸² The Court concluded that “any duty the United States may have had toward Plaintiffs’ decedents would not extend to the unforeseeable, tragic consequences of this disaster. Finally, the Soviets’ unnecessary act of aggression against KAL 007 was a superceding cause of harm insulating the United States from any liability.”⁴⁸³

The lack of a clear legal framework on the responsibility of a state to actively ensure the safety of flights operated by airlines domiciled in its territory in foreign airspace puts all the more focus on the airlines to ensure the safety of its passengers. Further information is needed in order to determine to what extent the Malaysian authorities fulfilled its monitoring duties towards airlines located within its jurisdiction. In absence of a duty to actively ensure the safety of flights operated by Malaysian airlines abroad, the only other avenue to hold the Malaysian state accountable would be for a breach of its duty to adequately monitor the safety procedures of Malaysian airlines. It may be useful to look into this further.

⁴⁸² *Korean Air Lines Disaster of Sept. 1, 1983*, 646 F. Supp. 30, 35 (D.D.C. 1986) available at <http://law.justia.com/cases/federal/district-courts/FSupp/646/30/1750024/>.

⁴⁸³ *Korean Air Lines Disaster of Sept. 1, 1983*, 646 F. Supp. 30, 36 (D.D.C. 1986) available at <http://law.justia.com/cases/federal/district-courts/FSupp/646/30/1750024/>.

8. CONCLUSIONS

This white paper discussed the potential ways to seek legal remedies for the downing of Flight MH17 in July 2014. States could be held accountable under the doctrine of state responsibility for violations of civil aviation treaties as well as other international legal obligations, and a case could potentially be pursued before the International Court of Justice. The paper further discussed how victims could bring a case before the European Court of Human Rights for state violations of the right to life. In addition, it addressed the possibilities for prosecuting individual perpetrators for their role in shooting down Flight MH17, both before the International Criminal Court and domestic jurisdictions. Lastly, the paper discussed avenues for holding the airlines and possibly responsible states accountable through civil litigation proceedings. All avenues were discussed in light of existing precedents and comparative practice from prior similar airline incidents.

Under the doctrine of state responsibility, the Netherlands and/or Malaysia may be able to bring a case before the ICJ for violations of international law and internationally wrongful acts attributable to Russia and/or Ukraine. While it is in general very difficult to meet the criteria for jurisdiction before the ICJ, the civil aviation conventions may allow for such proceedings regarding the MH17 situation. Bringing a claim on the basis of the Chicago and/or Montreal Convention represents a promising avenue, although it will involve a lengthy process. This is because such proceedings can only be commenced after negotiations and, if they fail, submitting the dispute to the ICAO Council, in the case of the Chicago Convention. Only after the Council has made its decision and if one of the involved states does not agree with the said decision, may that state submit the dispute to the ICJ, or an *ad hoc* arbitration.⁴⁸⁴ In the Montreal Convention, the case can be submitted to the ICJ if negotiations and agreement over establishing an arbitration court fail.

Regarding the merits of such a claim before the ICJ, there are strong arguments supporting the position that Russia and Ukraine may have violated their obligations under the civil aviation conventions to communicate information, to investigate the situation and allegations against potential perpetrators, and to prosecute or extradite those that may be responsible. As such, while there appear real possibilities to establish the accountability of Russia and Ukraine for these types of violations, attributing the actual firing of the missile on Flight MH17 will be much more difficult. Whether this is possible under the doctrine of state responsibility depends on, for example, whether evidence indicates that those responsible for firing the missile are connected to the Russian state or were under Russia's *effective control*. If it can be proven that those responsible (including indirect perpetrators who ordered or contributed to firing the missile) were state agents, attribution is easier to establish. In contrast, establishing a relationship of "effective control" requires a rather close relationship between the relevant state and the direct perpetrators regarding the specific violation, and not the group's actions in general. Whether this can be established by a court or other judicial body will depend on the evidence gathered. Nonetheless, a number of contentious cases and Advisory Opinions by the ICJ have

⁴⁸⁴ Convention on International Civil Aviation, art. 84, 7 Dec 1944, 15 U.N.T.S. 295 (1994), available at <http://www.icao.int/publications/pages/doc7300.aspx>.

shown that, even where the Court cannot find a state directly liable for violations of specific international obligations, it can elaborate on the factual background of the case.⁴⁸⁵ This declarative function of the ICJ's judgments may serve to publicly characterize the conduct of the respondent state or even provide a degree of satisfaction for the relatives of the victims.

There are several other relevant violations of international law, including violations of international humanitarian law and international human rights law, that could potentially be attributed to either Russia or Ukraine. However, for these violations it is more difficult to find a court with jurisdiction over such state violations, and thus to bring proceedings. A clear exception to this is the European Court of Human Rights, which has jurisdiction over the Netherlands, Ukraine and Russia, and can hold them accountable for violating their obligations under the European Convention on Human Rights. The Court has authority over both individual and inter-state applications, however jurisdiction can be difficult to secure given the strict criteria. Regarding MH17, victims could potentially bring proceedings against Russia and/or Ukraine for violating the right to life. A challenge in such proceedings before this Court may be obtaining the requisite evidence to establish a violation of the Convention. However, the standard of proof before the ECtHR is lower than that required by the ICC (which determines individual criminal liability). Where a violation is found, the ECtHR can issue binding judgments against member states and provide just satisfaction, which could be helpful in obtaining redress for victims. Despite this, given Russia's new constitutional rule allowing them to overrule ECtHR judgments, it is likely to be difficult to receive just satisfaction from Russia, should a successful case be brought against them. Finally, as with the ICJ, proceedings before the ECtHR are likely to take a number of years to complete.

Next to seeking the state responsibility of Russia and Ukraine for violating their international obligations, it may also be possible to criminally prosecute the individuals responsible for firing the missile on Flight MH17. One option is that alleged perpetrators are prosecuted by the ICC. Ukraine has made an Article 12(3) declaration accepting the ICC's jurisdiction, which is currently being considered by the ICC Prosecutor. If positively reviewed, the Prosecutor may open a criminal investigation into the situation in Ukraine – potentially including the downing of Flight MH17. However, the Prosecutor may also decline to do so. The Prosecutor will have to determine, among other things, that the MH17 situation is of sufficient gravity to warrant the Court's attention, and also that such an investigation is not contrary to the interests of justice.

Even if these jurisdictional hurdles are overcome and the situation proceeds as an investigation before the ICC, there will be further difficulties in prosecuting any case(s). For example, the ICC Prosecutor will need to prove to a high evidentiary standard that war crimes (and/or crimes against humanity) were committed by the accused(s). To secure conviction it is necessary for the Prosecutor to prove the *actus reus* and *mens rea* of the offences, namely for war crimes that those responsible knew that the object of the attack (Flight MH17) were civilians and intended to kill them, or failed to take sufficient precaution. Here the defense regarding mistake of fact may prove a difficult issue if the accused(s) claim that they believed the target to

⁴⁸⁵ See Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, 2007, I.C.J. 43 (February 26), available at <http://www.icj-cij.org/docket/files/91/13685.pdf>.

be a military object. Establishing the link between those responsible and the commission of the alleged crime is also likely to raise difficult evidentiary and legal issues in the case of MH17. Furthermore, there are no timelines in the Rome Statute for concluding a preliminary examination,⁴⁸⁶ which means it can take years. Moreover, once a situation is referred to the ICC Prosecutor, they have control over the examination of all relevant factors and the referring state is not able to direct the speed or focus of the examination. Of note, the ICC is also able, upon finding a conviction, to provide reparations to victims.

As an alternative (or in some cases in addition to) prosecutions at the ICC, domestic jurisdictions could also choose to prosecute alleged perpetrators in their own domestic criminal courts. There are, however, some limitations. The *ne bis in idem* principle of criminal law provides that no person is to be tried with respect to conduct that formed the basis of crimes for which the individual has already been convicted or acquitted by another court. Therefore, if a person is tried by the ICC or in a domestic court, another court may not be able to take this case on as well. In addition, according to the principle of complementarity, the ICC Prosecutor is mandated to grant primacy to domestic investigations and prosecutions. The current investigation by the Joint Investigation Team may mean that the ICC will not intervene, unless the domestic proceedings target different actors and/or crimes, or if states such as the Netherlands/Ukraine are unable or unwilling to investigate.

The perpetrators of downing Flight MH17 may be prosecuted before domestic courts on the basis of: Article 1 of the 1971 Montreal Convention; an international crime; and on the basis of a domestic criminal code. Several states could assert jurisdiction in their domestic courts over the downing of MH17: Ukraine, Russia, the Netherlands, Malaysia, and other states whose nationals were killed. These states could obtain jurisdiction based on the territoriality principle, the passive personality principle, or the provisions for jurisdiction laid down in Article 5 of the 1971 Montreal Convention. As with prosecutions before the ICC, prosecuting alleged perpetrators in domestic courts will also face evidentiary problems because of the high evidentiary standards that criminal law prescribes. Moreover, obtaining custody of the accused is likely to pose another complication.

The final legal avenues that this paper discusses are those that seek accountability through civil proceedings for the downing of Flight MH17. This chapter identifies various legal options available to the relatives of the MH17 victims to seek financial compensation for losses suffered. Based on an analysis of relevant aviation cases, national and international aviation legislation and the facts as provided by the Dutch Safety Board report, the following three parties were identified as those obliged to ensure the safety of passengers on board Flight MH17: i) Ukraine; ii) Malaysia Airlines/KLM; and iii) Malaysia. First, based on both national and international legislation, it can be argued that Ukraine has a duty to protect foreigners legally passing through its airspace, which could form the legal ground for a case in Ukraine against the state. Second, a civil suit against the airlines could be brought before a court in several states based on the Chicago and Montreal Conventions. Third, a case against Malaysia, as the state where the airline has its domicile, might be faced with some obstacles, as there is no clear legal obligation for such states to conduct risk assessments or ensure the safety of proposed flight routes. It differs per state how involved the relevant authorities are in the establishment of flight

⁴⁸⁶ Office of the Prosecutor, ICC, Policy Paper on Preliminary Examinations, Nov., 2013, para. 14.

routes of its airlines. The Malaysian authorities claim that there is no legal requirement for them to provide airlines with any information on the safety of foreign airspace, yet there are arguments to contest this.

Of the options discussed, only the ICC and domestic proceedings may yield criminal convictions that punish those individuals found liable for downing MH17. Proceedings before the ICJ and ECtHR are not criminal in nature but focus on state responsibility for internationally wrongful acts and the responsibility of states for human rights violations. There are different advantages and disadvantages to each mechanism and outcome. All of the international and regional options discussed in this paper are long and detailed processes that will not be concluded quickly. Domestic accountability options may be able to provide more expedient proceedings than those on the international level. Moreover, while criminal proceedings may be able to identify and punish individuals responsible, proceedings dealing with the responsibility of states are better able to address political or institutional shortcomings on a broader level. Importantly, both civil and criminal approaches may yield compensation for victims.

However, the type and amount of compensation to victims severely differs between mechanisms and states, particularly due to whether non-economic damages can be afforded. As such, the amount of compensation victims can claim or expect varies greatly depending on the jurisdiction. While this has partly been remedied by the fixed amount of 100.000 SDR for strict liability of the airline carrier provided the international civil aviation rules, this does not resolve the fact that victims can claim additional non-economic damages in some jurisdictions and not in others. On top of the fact that proceedings are often experienced by victims as traumatic, especially when they fail, victims may experience the disparity between compensation schemes between states when they are subjected to a less generous jurisdiction as further victimization, in addition to the crash itself. Therefore, it may be advisable to further develop more parity between states regarding the available compensation for victims of airline crashes, at least within the European context. Moreover, it is important that governments provide support to victims in their search for accountability, remedies and closure.

Regardless of the avenue(s) pursued, it is important to ensure that the current investigation into the MH17 crash secures *all* of the relevant evidence to support subsequent claims made in court. The investigation is currently being obstructed by, among other things, the ongoing conflict in Ukraine, but should remain the highest priority. While the different jurisdictions have different standards of proof, with criminal actions requiring a higher standard than civil proceedings, strong evidence will be needed to prove any claim. If a claim is successful in a court – be it international, regional or domestic – it will be another issue to ensure that the judgment is enforced and complied with by either the relevant state and/or individual(s).

While the focus of this paper is on the legal avenues for accountability, it is important to consider the political dimensions of any such legal action. Legal avenues are confrontational and do not leave (much) scope for political settlements. Nevertheless, there is the option at the ECtHR and ICJ for friendly settlements to be made by states and parties out of court. Criminal proceedings are less open to such possibilities. In the present case, this could have ramifications for the ongoing conflict in Ukraine and also for the escalating tensions between parts of Europe and Russia. Yet, even though the political context may be as it is today, the political landscape

within and between states may change rapidly, which may make cooperation and settlement easier – or more difficult - in the future. It is important not to dismiss any legal avenue on the basis of the current political situation so that if or when such circumstances change, the necessary evidentiary basis for any such proceedings is available to be used in newly available avenues.

This white paper aims to show victims and their supporting governments some of the potential pathways for legal accountability. It highlights legal, political and practical hurdles likely to arise, as well as provides some preliminary observations concerning legal strategies. The families of the victims know better than anyone that legal remedies of any kind will never fully compensate them for their losses. At a minimum, they deserve, as does the rest of the flying public, answers as to what happened and accountability for those responsible. By laying out the present applicable law and possible remedies, the authors hope that this paper will help the families and their governments decide which routes to pursue, and which goals to prioritize. As the families have already experienced, the road towards justice in any case involving the downing of civilian aircraft is likely to be long and arduous.

PILPG remains available to provide further information as requested.

ABOUT PILPG & VU AMSTERDAM

About the Public International Law & Policy Group

The Public International Law & Policy Group, a 2005 Nobel Peace Prize nominee, operates as a non-profit, global *pro bono* law firm providing free legal assistance to its clients, which include governments, sub-state entities, and civil society groups worldwide. PILPG specializes in the following practice areas:

- **Peace Negotiations**
- **Post-Conflict Constitution Drafting**
- **Transitional Justice and War Crimes Prosecution**
- **Policy Planning**
- **Democracy and Governance**

Through its work, PILPG promotes the use of international law as an alternative to violent conflict for resolving international disputes. PILPG provides legal counsel to *pro bono* clients during peace negotiations, advises on the creation and operation of transitional justice mechanisms, provides expertise during the drafting of post-conflict constitutions, and advises on ways to strengthen the rule of law and effective institutions. To facilitate the utilization of this legal assistance, PILPG also provides policy formulation advice and training on matters related to conflict resolution.

In January 2005, a number of PILPG's *pro bono* clients nominated PILPG for the Nobel Peace Prize for "significantly contributing to the promotion of peace throughout the globe by providing crucial *pro bono* legal assistance to states and non-state entities involved in peace negotiations and in bringing war criminals to justice."

In addition to a staff of full-time attorneys that implement PILPG's programs, PILPG leverages volunteer assistance from international lawyers, diplomats, and foreign relations experts, as well as *pro bono* assistance from major international law firms. Annually, PILPG is able to provide over \$20 million worth of *pro bono* international legal services.

PILPG is based in Washington, D.C., New York, and The Hague. To date, PILPG has maintained project offices in: Bosnia and Herzegovina, Côte d'Ivoire, Egypt, Georgia, Iraq, Kenya, Kosovo, Libya, Nepal, Somaliland, South Sudan, Sri Lanka, Tanzania, Tunisia, Turkey, and Uganda.

Over the course of the past two decades, PILPG has provided assistance to *pro bono* clients in Afghanistan, Armenia, Bosnia and Herzegovina, Botswana, Burma, Cambodia, Côte d'Ivoire, Darfur, Dutch Antilles, East Timor, Egypt, Estonia, Ethiopia, Georgia, Iraq, Kenya, Kosovo, Lebanon, Liberia, Libya, Macedonia, Mauritius, Montenegro, Nepal, Philippines, Rwanda, Seychelles, Somalia, Southern Cameroons, Somaliland, South Sudan, Sri Lanka, Sudan, Syria, Tanzania, Tunisia, Uganda, Yemen, and Zimbabwe. PILPG has also provided *pro bono* legal assistance to all of the international and hybrid war crimes tribunals.

About VU Amsterdam and its International Law Clinic

The VU University Amsterdam is committed to contributing to societal needs and aims to combine its research and education programs in an effort to provide assistance to the solution of societal problems. Its Faculty of Law focuses its research and education profile on the functioning and relevance of law in society.

To reinforce its goal to contribute to society through its research and education, the Faculty of Law has collaborated with PILPG's Netherlands Office since 2010 in operating the International Law Clinic. The VU International Law Clinic focuses on the law and politics of issues concerning global justice. This includes the prosecution of international crimes at international courts and tribunals as well as in domestic jurisdictions, other modes of transitional justice, and human rights redress. In general, the International Law Clinic is committed to assisting specific clients and society in general when it concerns complex and severely disruptive situations of violations of the highest norms.

In the past 5 years, the VU International Law Clinic has assisted clients in over a dozen countries throughout the world in their peace negotiations, post-rule of law development, activities to find justice and reconciliation, and strengthening of their system for human rights protection, including Syria, South Sudan, Nepal, Montenegro, and Indonesia. In addition, the International Law Clinic has provided a third party submission to the Grand Chamber of the European Court of Human Rights in the case *Janowiec and Others v. Russia* (2012), also known as the Katyn Massacre case. Moreover, the International Law Clinic produces a number of open access handbooks, aimed at supporting civil society actors throughout the world to document important information on human rights violations and bring such situations to the attention of human rights courts and supervisory mechanisms.

In addition to the International Law Clinic, the VU Law Faculty has also established clinical programs on migration issues and on reviewing the status of individuals that seem to have been unfairly listed as terrorists. The clinical programs are embedded in the VU Law Faculty's Master's programs. With its clinical programs, the VU believes that it can provide an important contribution to the integration of research and teaching for the purpose of addressing societal needs of those in the world that need it most.

On 17 July 2014, Malaysia Airlines Flight MH17 from Amsterdam to Kuala Lumpur was shot down over Eastern Ukraine. On board the Boeing 777 were 283 passengers and 15 crew members who all lost their lives. The victims' families and the states whose nationals were lost now seek legal remedies and accountability for those responsible for this tragedy.

This white paper entitled "[Legal Remedies for Downing Flight MH17](#)" addresses in detail possible legal redress mechanisms. First, it discusses potential ways to hold those states that may have violated their international responsibilities, such as the Russian Federation and/or Ukraine, accountable under the doctrine of state responsibility at the International Court of Justice. Second, it discusses how victims may pursue a case before the European Court of Human Rights for state violations of the right to life. Third, the paper discusses the possibilities for prosecuting individual perpetrators for their responsibility in shooting down Flight MH17, both by the International Criminal Court and through domestic jurisdictions. Last, the paper discusses avenues for holding the airlines and possibly responsible states accountable through civil litigation proceedings. All avenues are discussed in light of existing precedents and comparative practice from previous airline incidents.

The white paper aims to show victims and their supporting governments some of the potential pathways for legal accountability. It highlights legal, political and practical hurdles likely to arise, as well as provides some preliminary observations concerning legal strategies. The victims' families know better than anyone that legal remedies of any kind will never fully compensate them for their losses. At a minimum, they deserve, as does the rest of the flying public, answers as to what happened and accountability for those responsible. By laying out the present applicable law and possible remedies, the authors hope that this paper will help the families and their governments decide which routes to pursue, and which goals to prioritize. As the families have already experienced, the road towards justice in any case involving the downing of civilian aircraft is likely to be long and arduous.