

RESEARCH ARTICLE

Navigating the Legal Horizon: Lawyering the MH17 Disaster

Marieke de Hoon*

On 17 July 2014, Malaysia Airlines Flight MH17 was shot down over Eastern Ukraine, leaving no survivors. Since, victims' relatives, States, and the wider public are trying to understand what happened, how it could happen, who is responsible, and how to address these responsibilities. The efforts to find justice have faced many complications and legal complexities. This article aims to provide insight into these legal and political complexities. In particular, it discusses the core legal questions of the criminal accountability of the perpetrators and the State responsibility of those States involved—Ukraine and Russia—through the legal doctrines of public international law and the European Convention on Human Rights. It further offers some core considerations relating to civil liability of States and airline carriers. In addition to providing insight into why the road to justice is long and arduous, the legal options available, and the specific challenges of each, the article also emphasises that having a legal option does not necessarily mean that it is also the best choice to use it. That choice is up to victims' relatives and the States concerned. The article takes no position in this regard. Instead, it seeks to provide an analysis that may contribute to making such decisions in an informed manner.

Keywords: MH17; State responsibility; Politics of law; Civil aviation law; Criminal law; International criminal law; International humanitarian law; European Court of Human Rights; European Convention on Human Rights

I. Introduction

This Special Issue poses the question of what it means to practice international law. Or, put differently, what it means to practice law in an international sphere. This usually quickly leads to considerations of the possible legal issues involved with, for example, international transactions, mergers and acquisitions across borders, trade agreements, tax regulations for multinationals, a State providing legal aid to nationals arrested abroad, people buying property in foreign States, or prosecuting war criminals at international tribunals. This article addresses the complexities of lawyering justice when multiple legal fields (such as criminal law, international law, civil law, constitutional law, and human rights law) and legal orders (of different States as well as national-regional-international) intersect. In particular, this article discusses the tragedy of the MH17 crash, and the questions this provokes relating to what legal responsibilities may have been violated and how to hold those that violated these obligations to account.

Of the 298 victims, 196 were Dutch nationals. As the State that lost most nationals, the government of the Netherlands took a lead role in calling for and organising investigations. The Dutch parliament, in their role to ensure checks and balances concerning the government, sought advice to strengthen their effectiveness in ensuring that the right decisions were taken. The Public International Law & Policy Group's Netherlands Office was among those organisations that were asked to advise on the matter.¹ To be exact, we were asked to provide analysis on the legal options that are available to the Dutch State and victims' relatives. While the space of an article is too limited to present all of our findings, this paper presents some of the most relevant

* Assistant Professor, Vrije Universiteit Amsterdam, NL; Director of the Netherlands Office and Senior Counsel, Public International Law & Policy Group (headquartered in US).

¹ For more information on the Public International Law & Policy Group (PILPG) and its workings, see <www.pilpg.org>.

ones and thereby not only tries to provide legal analysis concerning MH17 but also place this in the broader context of the challenges for investigators and lawyers to address cross-boundary situations like MH17.

The text proceeds as follows. First, it provides some contextual setting by briefly introducing the key findings of the investigations so far and stipulates some observations on the often-heard question of why it takes so long to bring those responsible to account. The sections that follow discuss the legal avenues that are most relevant to MH17, explaining the different types of legal responsibilities and actors that each addresses and analyses some of the key legal difficulties with these different legal frameworks for the MH17 situation. Section III focuses on criminal law and international criminal law, which allows prosecution of individuals that were responsible for taking MH17 down in a criminal court of law. The sections that follow discuss legal responsibilities of different actors, which may have acted or failed to do so in ways that contributed to the situation in which MH17 could occur or concerning the investigative efforts afterwards. Section IV considers the responsibility of States under general public international law. Section V zooms in on the special system of the European Convention of Human Rights (ECHR) that places additional obligations on the States involved. And Section VI briefly touches upon some of the main civil law obligations that may well have been breached. While civil litigation as legal avenue is by no means less relevant than other legal frameworks, due to the limited space of this article and since most civil litigation for MH17 has by now been completed, this section only provides the analysis needed to understand the general framework and types of obligations for sake of comprehensiveness. The final part (Section VII) provides some observations on the political and ethical considerations on when and how to strategically use law, legal action and legal language. Having a legal option does not necessarily mean that it is also the best solution to use that legal option. Realising the limitations of what law can bring is an important and necessary realisation when considering your options, particularly in a difficult and sensitive situation like the tragedy of MH17.

II. The Complex Road to Answers: Investigating and Lawyering MH17

On 17 July 2014, Malaysia Airlines Flight MH17 that set off to fly from Amsterdam to Kuala Lumpur was shot down over Eastern Ukraine. The flight was a Malaysia Airlines aircraft (registered 9M-MRD) that was code-sharing with KLM flight KL4103. On board of the Boeing 777 were 283 passengers and 15 crewmembers who all lost their lives. The victims' families and the States whose nationals were lost were confronted with the difficult task to find out what happened, who were responsible for this tragedy, and to seek remedies from those responsible.

In the aftermath of the MH17 crash, no one claimed responsibility, with each side blaming the other. With Ukrainian consent, the Dutch government took the initiative to investigate the crash and repatriate the victims and their belongings. A number of Dutch government reports have since been published. The Dutch Safety Board (DSB) conducted an investigation into the specific circumstances of the crash itself. This investigation concluded that the plane was shot down by warhead installed on a Buk surface-to-air missile system, from the rebel-held territory of the Donetsk region in Ukraine.²

Since late 2013, Ukraine has faced ongoing civil and international conflict. By July 2014, a full-fledged armed conflict took place between Ukrainian armed forces and separatist forces fighting for the independence of Eastern Ukraine, allegedly supported by Russia with more than merely political backing. 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 separatist forces in Eastern Ukraine.

The October 2015 report by the 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 into who was responsible for downing the plane is conducted by the Joint Investigation Team (JIT). This team consists of the Dutch National Police and 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. Their objective is 'to establish the facts, identify those responsible for the crash and to collect evidence that can be used in court'.³ Russia is conducting its own investigation into the matter, which led to different conclusions than those of DSB with regard to the type of missile used and the direction from which it was fired. Various other actors have also conducted

² Dutch Safety Board, 'Crash of Malaysian Airlines Flight MH17' (The Hague, 22 October 2015) <<https://www.onderzoeksraad.nl/uploads/phase-docs/1006/debcd724fe7breport-mh17-crash.pdf>> accessed 17 March 2017 (MH17 Report).

³ As described on the website of the Dutch prosecutorial authorities, see Openbaar Ministerie, 'MH17' <<https://www.om.nl/onderwerpen/mh17-crash/>> accessed 17 March 2017.

separate investigations. For example, Bellingcat, a team of investigative journalists, studied the situation on the ground for over a year and compiled a report containing the names of 20 Russian nationals they allege were involved in the downing.

On 28 September 2016, the JIT announced that they had acquired sufficient evidence to uphold in court that the weapon system was a BUK missile of Russian origin, which was transported over Russian territory and into Ukraine days before MH17 was brought down, that this weapon was transported back into Russian territory days after, that the location from where this missile was launched was under control of pro-Russian separatists at the time of the crash, and that they had identified a hundred individuals that were involved in one way or another in what happened to MH17. They were however not ready to declare anyone as formal suspect yet. Their mandate is extended until early 2018 to distinguish perpetrators from mere witnesses among these individuals, and to prepare cases for those against whom they can acquire sufficient evidence to establish beyond reasonable doubt their specific role in downing MH17 as well as their knowledge and intent in doing so.

From the start, both the investigation into the cause of the crash and the criminal investigation into the downing of Flight MH17 investigations were severely challenged due to the ongoing armed conflict in Eastern Ukraine between pro-Russian separatists, supported by the Russian Federation, and the Ukrainian government. Access to the crime scene was severely hampered by security issues. At first due to pro-Russian separatists that controlled the area and later also because of the increased Russian military presence on their side of the border. There are moreover strong indications that military actions by Ukraine also prevented access to the crime scene by investigators. After the recovery of the bodies, investigators were ready to conduct their fact-finding mission only to find that Ukraine commenced a military offensive in the crime scene area, making the area too dangerous for the investigators. The ongoing conflict and military actions on either side therefore prevented access and proper research for many months, which may have allowed tampering with forensic evidence by one or more sides.⁴ Moreover, the investigations also became immediately part of the information war between warring sides. There are strong indications that hackers operating from the territory of the Russian Federation tried to hack into the investigators' database and tamper with the information gathered, and that Ukraine strategically leaked information from the JIT.⁵ It is therefore important to realise that information by intelligence agencies and other authorities from any State requires scrutiny with the utmost scepticism as each party has much to gain by reinforcing one or another narrative of the actual occurrences. What is more, any legal proceeding has the potential to exacerbate existing tensions and interstate relations across Europe and beyond. The US has implicated Russia for its involvement in the MH17 crash, and sanctions have been imposed by both Russia and Western States.

It is in this highly conflictual setting and context that victims of MH17 hope that those responsible will be held accountable. Yet, while gathering sound and reliable evidence for criminal and other legal proceedings would have been challenging in and of itself, the ongoing conflict and the efforts and high interest from those involved to influence which version of what happened becomes dominant, vastly complicate matters further. While Security Council Resolution 2166 (2014) condemned the downing of MH17 and called for accountability, it remains unclear to date just how that resolution is to be implemented. Whatever legal process is initiated, State cooperation plays a large role in their success. Yet, State cooperation cannot be guaranteed and there are ample signs that this has been lacking so far by several States involved. For victims' families, the idea that truth-seeking and justice efforts are hampered by geopolitical power play is additionally traumatising.

On top of these investigatory and geopolitical challenges, the MH17 situation also provides a number of challenges on the legal front. The MH17 situation is legally complex due to a number of reasons, including the different types of actors, legal fields and legal orders involved: it concerned a civilian aircraft that flew from one State (Netherlands) to another (Malaysia), crossing over the territory of a third State (Ukraine) that did not close down its airspace, where it was brought down over a territory that the concerned State lacked control over (Eastern Ukraine). Instead, it appears to have been under control of non-State actors (pro-Russian separatists), supported or even controlled by a fourth State (Russia), that seems to have provided support to

⁴ For an overview of the security situation of the crash site in the months after the crash, see 'The Situation at the MH17 Crashsite Since July 17' (20 October 2014) <<http://www.whathappenedtoflightmh17.com/the-safety-of-the-crashsite/>> accessed 17 March 2017.

⁵ For example, DSB was subjected to an attack by the cyber-espionage organisation 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 organisations. See 'Operation Pawn Storm: Fast Facts and the Latest Developments' (*Trend Micro*, 22 October 2015) <<http://www.trendmicro.com/vinfo/us/security/news/cyber-attacks/operation-pawn-storm-fast-facts>> accessed 17 March 2017.

the insurgents that seem to have been responsible for launching a heavy lethal weapon (BUK). This type of weapon is unlikely to have been obtained by non-State actors without knowledge of and support by a State. It moreover is a situation with victims of several different States, the aircraft was code-sharing between two private companies from different nationalities (Malaysia Airlines and KLM), that each was subject to their own national safety oversight mechanisms (Malaysia and the Netherlands respectively). And criminal, civil, international, human rights and due diligence responsibilities are all at play in various ways and relating to different actors. Thus, responsibilities of several types of actors (multiple States, companies, perpetrators and aiders and abettors) to several other types of actors (victims' families, States, companies) play out over a range of different legal fields: criminal law conduct of shooting down a plane or aiding and abetting, and the criminal responsibility up the chain of command through the doctrine of superior/command responsibility; human rights responsibilities to take precautionary measures and effective investigations; civil law obligations of companies and States vis-à-vis victims and other private actors; public international law's State responsibility regime of prevention and cooperation; and so forth.

While lawyers are usually trained and become experts in one or another legal field, situations like MH17 require more holistic analyses to prevent that viable paths or supporting legal analysis from other legal fields do not remain unidentified and unexplored. For example, if evidence shows (which appears so) that Ukraine was or should have been aware that its airspace was not safe for civil aviation, they were under the public international law obligation to send out a Notification to Airmen (NOTAM). Ukraine's failure to do so may not only be a violation of *international law* that the Netherlands and Malaysia may try to hold Ukraine accountable for, but also a *civil law* violation towards victims, who could claim this in a Ukrainian court of law. If then the Ukrainian judicial power (and thus the State) does not provide sufficient legal remedy, this then may become an admissible claim of a violation of international *human rights law*, and specifically one of the ECHR under its right to life provision of Article 2. Similar interactions between legal fields exist with *criminal law* and *international humanitarian law* (IHL) when it comes to the qualification of the downing of Flight MH17 as a war crime for failing to respect the principle of distinction between military and civilian target. And between *criminal procedure law*, Ukrainian *constitutional law*, *international civil aviation law*, and the *law of treaties* to understand that Russia and Ukraine cannot justify violating their international obligations to prosecute or extradite suspects that are on their territory by relying on their constitutional rules that prohibits extradition.

The reason why the road to answers is long and unsatisfying thus lies in a multiplicity of complicating factors, including the difficulty of conducting investigations in an ongoing armed conflict, political interest to influence the investigation and withhold cooperation, and the many difficult legal questions the situation poses: not only with regard to substantive law but also concerning how to find or establish jurisdiction and competency to hold legal proceedings and how to identify and obtain custody over those that brought MH17 down. The remainder of this article delves deeper into these legal aspects in the most relevant legal frameworks.

III. Prosecuting Perpetrators in a Criminal Court of Law

The most relevant and therefore most discussed legal avenue is criminal law, because this is the legal framework that provides for holding individuals accountable for the crimes they have committed. Criminal law may address individuals that were directly responsible for shooting down the airplane as well as those that may have ordered it, conspired to it, aided and abetted or were in other ways involved in downing the plane. Importantly, this may also include those that were involved in transporting the BUK missile through Russian territory and in and out of the location in Eastern Ukraine from where the missile was launched, depending on their level of knowledge and intent with regard to what the purpose of this transport was.

Because criminal prosecution entails the largest measure of State coercion (imprisonment of individuals), it also requires the highest standards of evidence. This means that the prosecution not only has to prove for each individual in the dock that s/he committed acts that are criminal, but also that they did so with the required knowledge and intent. This is why it is difficult to hold individuals accountable under criminal law in a situation where investigations are severely challenged and where there is little access to witnesses and forensic evidence. There are a number of aspects that are relevant to discuss in this section, in particular the questions of where to prosecute and for what crime.

A. Prosecuting Domestically or Internationally?

At the Dutch parliamentary debate on MH17 on 26 October 2016, the Government of the Netherlands reiterated that the question of where prosecutions will take place still remains to be decided, and that depending on further investigations, they will have to decide between either an international tribunal or the option

of prosecuting in the domestic judicial system of one of the JIT Member States. It is important to note that there is no reason why all criminal cases should be done at one and the same institution: for each individual, the most appropriate way of prosecution can be sought of extradition issues or other circumstances so require. For practical reasons, joining cases as much as possible may well be desirable.

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.

There is also the possibility of prosecuting at the international level. The International Criminal Court (ICC) in The Hague is a potential avenue for holding the perpetrators of MH17 to account. It is a permanent 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, may sentence individuals to imprisonment and can award reparations to victims. Ukraine, although not a Member State, has accepted the ICC's jurisdiction through a declaration in accordance with Article 12(3) of the Rome Statute.⁶ As a matter of policy, the Prosecutor has opened a preliminary examination in order to establish whether the criteria set out in the Rome Statute for opening an investigation have been met.⁷ In its November 2016 report, the Office of the Prosecutor has said that it 'is currently undertaking a detailed factual and legal analysis of the information available' with regard to assessing whether 'Russian authorities have provided support to the armed groups in the form of equipment, financing and personnel, and also whether they have generally directed or helped in planning actions of the armed groups in a manner that indicates they exercised genuine control over them'.⁸

As an alternative to the ICC, there have also been discussions on other international legal proceedings. In July 2015, Malaysia, backed by the Netherlands, Ukraine, Belgium and Australia, proposed in the UN Security Council to establish a UN Tribunal. This was vetoed by Russia, which said that the establishment of a tribunal would be 'premature' and 'counter-productive'.⁹ Other modalities could also include the establishment of a special chamber or other less traditional set-ups than regular domestic courts or the ICC. The prosecution for the bombing of Pan Am Flight 103 over Lockerbie (in Scotland) for example took place in the Netherlands in a special court which used Scottish law.¹⁰ The main reason for this was that Libya refused to extradite those responsible because they argued that prosecutions in Scotland would not be neutral.¹¹ After extensive negotiations over many 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 downing Pan Am Flight 103 ('the Lockerbie bombing').¹²

In principle, proceedings at international tribunals, including those at the ICC, are usually more difficult, costly and lengthy than prosecutions in existing and functioning domestic criminal law systems. Establishing

⁶ For the Art 12(3) declaration of 9 April 2014, see <<https://www.icc-cpi.int/itemsDocuments/997/declarationRecognitionJurisdiction09-04-2014.pdf>> accessed 22 March 2017. For the subsequent declaration, dated 8 September 2015, through which the Ukraine accepts jurisdiction of the ICC for an indefinite period, see <https://www.icc-cpi.int/iccdocs/other/Ukraine_Art_12-3_declaration_08092015.pdf> accessed 22 March 2017. The ICC has territorial or personal jurisdiction if the relevant crime is committed on the territory or by a national of a non-State Party that has lodged an Article 12(3) declaration, see ICC, *Rules of Procedure and Evidence* (2nd edn, ICC 2013) Rule 44. Although in its declaration, Ukraine tried to limit the jurisdictional reach of the ICC to crimes that are committed by senior Russian officials and leaders of the Donbass Republics of Luhansk and Donetsk, it would not only be striking but also against its principles and policy if the ICC would take this attempt to limit jurisdiction to only one side of the conflict into consideration. 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.

⁷ ICC, 'ICC Prosecutor Extends Preliminary Examination of the Situation in Ukraine Following Second Article 12(3) Declaration' (Press Release, 29 September 2015) <https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1156.aspx> accessed 17 March 2017.

⁸ ICC-OTP, 'Report on Preliminary Examination Activities' (14 November 2016) <https://www.icc-cpi.int/iccdocs/otp/161114-otp-rep-pe_eng.pdf> accessed 17 March 2017 (ICC-OTP Preliminary Examination Report) para 170.

⁹ See 'MH17 Crash: Russia Vetoes UN Resolution for International Tribunal' *BBC News* (London, 29 July 2015) <<http://www.bbc.com/news/world-europe-33710088>> accessed 17 March 2017.

¹⁰ 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 (adopted 18 September 1998, entered into force 8 January 1999) 2062 UNTS 81.

¹¹ See 'The Long Road to Trial' *BBC News* (London, 3 May 2000) <http://news.bbc.co.uk/2/hi/world/monitoring/media_reports/733755.stm> accessed 17 March 2017.

¹² Donna E Arzt, 'The Lockerbie 'Extradition by Analogy' Agreement: 'Exceptional Measure' or Template for Transitional Criminal Justice?' (2002) 18 *American University International Law Review* 163, 163–166.

a special institute is particularly challenging, since its entire staff, rules and procedures, and management needs to be built before it can even start prosecuting. Moreover, the ICC is intended as a court of last resort, and, in accordance with its complementarity principle, may only prosecute if domestic judicial systems are unable or unwilling to genuinely investigate/prosecute themselves (with the same accused and same alleged crimes).

When it comes to choosing an institution to prosecute, national courts are therefore preferable for a number of reasons. In this light, it is also important to note that the *ne bis in idem* principle, a fundamental principle of criminal law, provides that no person should be prosecuted for conduct which formed the basis of crimes for which the individual has already been convicted or acquitted by another court. Therefore, if one court (including the ICC) takes on the prosecution of an individual, it is likely to severely hamper the ability of another court to prosecute the same individual. It is therefore important that before any prosecution takes place, the interested States and ICC agree among each other how to proceed and that they support one another with the gathering of evidence and ensuring fair proceedings. The ICC's Office of the Prosecutor can also share information with local authorities so that relevant findings can be used in domestic proceedings where possible.

Given that currently the JIT is investigating with an eye to prosecuting individuals, cases at the ICC would not be admissible under the principle of complementarity.¹³ However, the complementarity assessment is case-specific.¹⁴ If for certain suspects domestic criminal trials are not possible or it is deemed more appropriate for the ICC to prosecute than through domestic systems, for example against certain high-level individuals aiding and abetting or ordering the crime, this would still be possible in good coordination between jurisdictions. Accordingly, the appropriate starting point for deciding where to prosecute is a domestic legal order. Given the lead role of the Netherlands in the investigations, this may well turn out to be the most viable option for most of the cases.

B. The Obligation to Prosecute or Extradite MH17 Suspects under International Law

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.¹⁵ Ukraine, Russia, Malaysia and the Netherlands have all signed and ratified the Convention.¹⁶ The Scottish prosecution of Al-Megrahi for the Lockerbie bombing used the 1971 Montreal Convention¹⁷ as basis for prosecution.¹⁸

Article 5 of the 1971 Montreal Convention provides that a Contracting State must take the necessary measures to establish criminal jurisdiction over offences laid down in the Convention. In addition, Article 6 imposes the obligation on each Member State to take any alleged offender into custody with the purpose of conducting criminal investigations or extradite them, and pursuant to Article 7 they should prosecute as if it would with any other serious crime under the law of that State. Finally, and importantly, Article 8 provides that if they do not prosecute, all States that are party to the Montreal Convention are obliged to extradite the individuals that are present on their territory and to include the offenses included in the Montreal Convention in their extradition treaties. It moreover allows States Parties to consider the Montreal Convention as the legal basis for any extradition in respect of these offenses. To sum up: the States that are party to the Montreal Convention are under the obligation to either prosecute or extradite.

Ukraine and Russia each have domestic laws (in their Constitution) that prevent the extradition of their nationals.¹⁹ However, this is overruled by their international obligations. 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

¹³ This was recently confirmed by the ICC Appeals Chamber in *The Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi* (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 (24 July 2014).

¹⁴ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (Rome Statute) arts 53(1)(b), 17(1)(a)–(c).

¹⁵ Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (adopted 23 September 1971, entered into force 26 January 1971) 974 UNTS 178 (Montreal Convention) art 1(b).

¹⁶ *ibid* List of State Parties, see <http://www.icao.int/secretariat/legal/List%20of%20Parties/Mtl71_EN.pdf> accessed 17 March 2017.

¹⁷ Implemented into UK Law through the Aviation Security Act 1982.

¹⁸ *HM Advocate v Abdelbaset Ali Mohamed Al Megrahi and Al Amin Khalifa Fhimah* [2001] Case No 1475/99 (Opinion of the Court) para 2.

¹⁹ Constitution of the Russian Federation [1993] art 61 reads: 'A citizen of the Russian Federation may not be deported from Russia or extradited to another State'.

failure to perform a treaty.²⁰ Moreover, Article 46 of the Vienna Convention establishes that a State may also not invoke the fact that its consent to be bound by a treaty has been expressed in violation of its internal law to invalidate its consent, unless this violation was manifest and the rule of its internal law is of fundamental importance. Consequently, if they do not prosecute themselves, neither Ukraine nor Russia can uphold that they cannot extradite pursuant to their constitutional rules. They are under an international obligation to do so: to either prosecute or extradite, one or the other, and they are also under an international obligation to make sure that their domestic law so allows.

Should a situation occur that either State says it is unable to extradite, they could agree with other States (such as the Netherlands) that their prosecutorial bodies assist in prosecuting in these States. If there are reasons to do so, they could also work out a construction like the Lockerbie trial, where these individuals are tried on their territory, but under Dutch jurisdiction and/or by Dutch or other authorities, for instance. In addition, there is the argument –that for instance the International Red Cross adheres to– that while Article 25(2) of the Ukrainian Constitution prohibits extradition of Ukrainian nationals to other States, this does not apply when it concerns international institutions. According to this argument, handing over individuals to an international mechanism is not ‘extradition’ but the surrendering of suspects, since an international institution is not a State.²¹ However, Article 25(2) of the Ukrainian Constitution also provides that a Ukrainian citizen cannot be outcast outside of Ukraine, similar to Article 61(1) of the Russian Constitution that provides that a citizen of Russia cannot be deported out of Russia. It thus remains to be decided by the executive or judicial systems of Ukraine and Russia how to apply this rule towards an international mechanism such as the ICC, but particularly for Russia it seems highly unlikely that it will under the present circumstances.

Importantly though, failing to extradite when also not prosecuting genuinely in the domestic legal order is and remains a violation of their international obligations. It will however prove difficult to find a competent court to claim these violations, since Russia and Ukraine have both made reservations to the possibility to bring a violation of the Montreal Convention before arbitration or the International Court of Justice (ICJ). As ‘competent authorities’, the UN General Assembly or the International Civil Aviation Organisation (ICAO) could request an Advisory Opinion by the ICJ to rule over a potential violation of the obligation to prosecute or extradite.²² Although Advisory Opinions have no binding effect, they carry great legal weight and moral authority.

Moreover, since conducting effective investigations resulting in prosecuting individuals is part of the obligations that both Russia and Ukraine have under Article 2 of the ECHR (right to life), should there be a failure to extradite, this may possibly count as a separate violation in addition to those further discussed in Section V of this paper, for which a case could be pursued at the European Court of Human Rights (ECtHR).

C. The Legal Qualification of Downing Flight MH17 under Criminal Law

1. Qualification as ‘War Crime’

The downing of MH17 may constitute a war crime.²³ This is a crime under the jurisdiction of the ICC as well as most domestic legal systems, including Ukraine and the Netherlands. In order for conduct to potentially qualify as war crime, the situation in which the conduct occurs has to qualify as an armed conflict. While not binding on the ICC or other judges, and subject to their own judicial determination, the International Committee of the Red Cross has made a legal assessment that the situation in Ukraine constitutes at the very least a non-international armed conflict.²⁴ Moreover, if it is proven that Russian military were actively

²⁰ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 7.

²¹ International Red Cross, Customary IHL, Ukraine, Practice Relating to Rule 161: International Cooperation in Criminal Proceedings, Section C, Extradition of Own Nationals. See <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cou_ua_rule161_sectionc> accessed 17 March 2017.

²² On the Advisory Opinion procedure, see ICJ, ‘Advisory Jurisdiction’ <<http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=2>> accessed 17 March 2017. The organisations that qualify as competent authorities to request such an Opinion can be found here; ICJ, ‘Organs and Agencies of the United Nations Authorised to Request Advisory Opinions’ <<http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=2&p3=1>> accessed 17 March 2017.

²³ UN Office of the High Commissioner for Human Rights, ‘Intense Fighting in Eastern Ukraine “Extremely Alarming”, Says Pillay, as UN Releases New Report’ (Press Release, 28 July 2014) <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14908&LangID=E>> accessed 17 March 2017; United Nations News Centre, ‘Eastern Ukraine: UN Rights Chief Says Downing of Plane May Be ‘War Crime’, Urges Probe’ (UN News Centre, 28 July 2014) <http://www.un.org/apps/news/story.asp?NewsID=48360#U_jverxdUcg> accessed 17 March 2017.

²⁴ International Committee of the Red Cross, ‘Ukraine: ICRC Calls on All Sides to Respect International Humanitarian Law’ (23 July 2014) News Release 14/125 <<http://www.icrc.org/eng/resources/documents/news-release/2014/07-23-ukraine-kiev-call-respect-ihl-repatriate-bodies-malaysian-airlines.htm>> accessed 17 March 2017; Anthony Deutsch, ‘Trial Over Malaysian Plane Crash Not Likely at ICC: Dutch’ (Reuters, 30 July 2014) <<http://www.reuters.com/assets/print?aid=USKBN0FZ1MD20140730>> accessed 17 March 2017.

engaged in the conflict in Eastern Ukraine, it may well qualify as an international armed conflict. The ICC is currently examining the involvement of Russian State agents into the situation, for the purposes of assessing whether it qualifies as international armed conflict.²⁵ Whether the conflict qualifies as internal or an international armed conflict affects the specific qualification of the crime. Depending on the nature of the conflict and conduct, the alleged crimes that may have been committed in relation to downing MH17 include wilful killing under Article 8(a)(i), intentionally directing attacks against civilians under 8(b)(i), 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).

The key principle of IHL, the body of law that governs what conduct constitutes as a war crime, is the principle of distinction. This principle requires that a combatant distinguishes between military and civilian targets. While other 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 IHL requires parties to the conflict to make an effort to avoid civilian casualties from their otherwise lawful use of armed measures. Therefore, if those that were involved in firing the BUK missile have not taken such precautionary measures to identify the target as a legitimate military objective before launching the missile, they may be guilty of committing a war crime.

The question whether or not a war crime has been committed is therefore a highly fact driven enquiry into whether sufficient precautionary measures have been taken, whether the criminal conduct has taken place, and whether it was done with the required knowledge and intent. And it is up to the prosecution to prove that the individual at trial has committed the crime, knowingly and willingly, and not up to the defendant to prove that s/he hasn't.

The ICC's Rome Statute as well as domestic criminal systems require proof of knowledge and intent. The clearest example of knowledge and intent is if the attackers intended to kill civilians. If, for example, those responsible believed the plane was part of the Ukrainian air force, the conduct may not constitute a war crime (although it can still qualify as murder under domestic law), provided they acted in accordance with the principles of precaution and distinction. Only if those who launched the missile on MH17 were honestly mistaken after taking sufficient precaution and still believed that the plane was a military target, they could rely on mistake of fact as a defence, as for instance defined under Article 32(1) of the ICC's Rome Statute. The war crime of murder requires that the perpetrator was 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 and took the necessary precautionary measures to distinguish military from civilian target, it is not a war crime. However, even if they were attacking a military object such as a Ukrainian military plane, but knew that 'in the ordinary course of events' a civilian plane could be hit instead, this would indeed meet the standard of the intent to kill those civilians and thus qualify as war crime. For a prosecution to succeed, the prosecution thus must be able to establish beyond reasonable doubt these kinds of detailed facts, which, in light of the challenges of investigating this crash, may explain why it is far from easy to get those responsible convicted.

2. Prosecuting in Ukraine

Usually, but not necessarily, the State where the crime has taken place—Ukraine—prosecutes those that are responsible. If there are reasons why it is more viable to prosecute in Ukraine than elsewhere, there appear sufficient means to do so within their domestic criminal code. 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.²⁶ 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.

In addition to prosecuting those allegedly responsible as a war crime, Ukraine would also be able to prosecute the alleged offenders for domestic crimes. The primary provision that is relevant here is Article 115, 'Intentional murder'.²⁷ Moreover, on 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').²⁸

²⁵ ICC-OTP Preliminary Examination Report (n 8) para 170.

²⁶ Criminal Code of Ukraine [2001, as amended] art 438.

²⁷ *ibid* art 115.

²⁸ Prosecutor General's Office of Ukraine, 'Russian Citizen, Member of the LNR Terrorist Organization Prosecuted' (Press Release, 15 January 2016) <http://www.gp.gov.ua/ua/news.html?_m=publications&_c=view&_t=rec&id=167878> accessed 17 March 2017.

For practical issues such as access to witnesses and evidence, Ukraine enjoys certain advantages in terms of carrying out domestic prosecution over other 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.²⁹ So far, Ukraine has welcomed the DSB to conduct investigations into the bombing, has delegated its primary investigative authority and is part of the JIT. For a successful prosecution in another State than Ukraine, it is important that Ukraine is willing to closely collaborate with the prosecuting State, which may prove a delicate process.

3. Prosecuting in the Netherlands

In the Netherlands, the prosecution of international crimes within the domestic criminal court system can be done in accordance with the 2003 International Crimes Act. Under the principle of passive personality, the Netherlands can prosecute all of the perpetrators involved in downing Flight MH17 because at least one of the victims of MH17 were Dutch nationals (in fact, of course, most were). The International Crimes Act reproduces the provisions on war crimes laid down in the Geneva Conventions. The Dutch domestic criminal code thereby 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.³⁰ Through this incorporation of war crimes by the International Crimes Act, the discussion above on war crimes thus applies to the manner in which perpetrators can be prosecuted in the Netherlands.

Moreover, in addition to prosecuting under the International Crimes Act, individuals may also be prosecuted under the (regular) 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 if it causes someone's death.³¹ 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.

Should the accused be identified and the prosecution is unable to secure an extradition, the Netherlands could consider holding a trial *in absentia*, which is a trial without the presence of the accused. While in general, States are reluctant regarding trials in absentia and the ECtHR is critical, the Dutch Criminal Procedure Code provides an opening for trials *in absentia* in Articles 278–280. However, this is only allowed if the accused is made aware of what he stands accused of and under what circumstances the criminal acts would have been committed. Moreover, the term for appeal only commences upon the awareness of the individual of the ruling. Trials *in absentia* are in principle not prohibited by the ECHR. Nevertheless, the ECtHR stressed in *Colozza v Italy* that a person charged with a criminal offence is entitled to take part in the hearings,³² 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.³³ These considerations should be borne in mind by Dutch prosecutors should they decide to try the perpetrators *in absentia*.

D. Concluding Observations

Summarising, criminal prosecutions for downing MH17 are severely hampered by two main issues. The first and foremost is that criminal law requires that it must not only be proven that crimes have taken place, but that the particular individual that stands trial has, knowingly and willingly, conducted the acts that he is accused, which causally led to the plane crash. There are good and important reasons why the standard of evidence is high when it comes to criminal law, as imprisoning an innocent while the guilty escape accountability is not only an injustice, but also creates its own offset of conflict. However, criminal law's evidentiary standards and the reality that investigations are difficult under the circumstances of the MH17 situation explain why criminal prosecutions take a long time. They also call for realistic expectations as to the likelihood that (m)any will be convicted in a criminal court of law, if, indeed, the facts show that crimes have been committed. The second severe challenge for criminal proceedings concerns the difficulty of obtaining

²⁹ Aaron Matta and Anda Scarlat, 'Malaysia Airlines Flight MH17 – Possible Legal Avenues for Redress (Part 2)' (*Opinio Juris*, 28 August 2015) <<http://opiniojuris.org/2015/08/28/guest-post-malaysia-airlines-flight-mh17-possible-legal-avenues-for-redress-part-2/>> accessed 17 March 2017.

³⁰ See also Alex Whiting, 'How to Prosecute the Perpetrators of the Malaysian Jet Downing' (*Just Security*, 25 July 2014) <<https://www.justsecurity.org/13269/prosecute-perpetrators-malaysian-jet-downing/>> accessed 17 March 2017.

³¹ Criminal Code of the Netherlands, art 168.

³² *Colozza v Italy* (1985) 7 EHRR 516, para 27.

³³ *ibid* para 49.

custody over potential suspects. As discussed above, there are difficulties and some possible ways out when it concerns the issues of extradition and trying *in absentia*, but none of it is without difficulties.

IV. The Responsibilities of States under International Law

While those that were involved in shooting down Flight MH17 are and should be the principal objects of investigation and legal action, these individuals are not the only entities that may have violated legal obligations. This section analyses the responsibility of States under public international law.

A. Adjudicating State Responsibility for Internationally Wrongful Acts

The doctrine of State responsibility provides that international responsibility arises when one State commits an internationally wrongful act against another State.³⁴ 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. Such obligations, for instance, concern the taking of precautionary measures and conduct effective investigations. Thus far, the JIT has not claimed that it has reliable evidence indicating that the States concerned would be directly responsible for taking down MH17. That does not, however, mean that States did not hold additional obligations that could have helped prevent the disaster or address it better. This section elucidates upon these kinds of obligations.

1. State Responsibility

When it comes to accountability mechanisms in international law, there are several possibilities, each with its own procedural and jurisdictional rules and substantive scope. 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. To adjudicate interstate matters, the ICJ may find a State 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-defence.³⁵ When State responsibility is established, the responsible State is under an obligation to provide full reparation for the injury caused by the wrongful act:³⁶ to re-establish the situation which existed before the wrongful act was committed.³⁷ 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.³⁸

The largest problem with regard to State responsibility is to obtain jurisdiction with a competent adjudicatory body. The ICJ has a high jurisdictional threshold based on consent of the States involved. Consequently, the ICJ also has limited practice in the field of violations relating to human rights, IHL or use of force, so the exact meaning of many of these legal obligations is often unclear as there is little judicial guidance through relevant case law.³⁹

Given Russia's statements on the matter, it seems unlikely that jurisdiction over the MH17 responsibilities will be established through agreement between States. It is therefore important to look carefully at international treaties and conventions that may have been violated. Some of these treaties contain a particular provision, a 'compromissory clause', that provides that disputes on the application or interpretation of the respective treaty will be referred to the ICJ. However, there are few international human rights treaties that give the ICJ jurisdiction and particularly Russia has made reservations to such clauses usually, which excludes the application of this clause.

³⁴ Malcolm N Shaw, *International Law* (CUP 2015) 566.

³⁵ ILC, 'Draft Articles of Responsibility of States for Internationally Wrongful Acts' UN GAOR 53rd Session Supp No 10 UN Doc A/56/83 (2001), corrected by UN Doc A/56/49(Vol.1)/Corr.4.

³⁶ *ibid* art 31.

³⁷ *ibid* art 35.

³⁸ *ibid* art 36.

³⁹ 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 eg *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136; *Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Rwanda)* (Jurisdiction and Admissibility) [2006] ICJ Rep 6; *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Merits) [2012] ICJ Rep 422.

2. Civil Aviation and Adjudication

A number of treaties 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).⁴⁰ The Chicago Convention is supplemented and clarified by a number of Annexes that contain binding and non-binding provisions. It deals with a large number of issues ranging from the coordination of flight paths to the provision of air traffic control services. In addition, the above-discussed 1971 Montreal Convention was adopted in response to a number of hijackings that occurred in the years before.⁴¹ Accordingly, the latter 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.⁴² Russia, Ukraine and the Netherlands are all parties to both Conventions.

Article 84 of the Chicago Convention 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.⁴³ 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.⁴⁴ 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 the ICAO Assembly if that Contracting State is 'in default'.⁴⁵ 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.⁴⁶ The Council usually limits itself to the technical issues while attempting to steer clear of political issues.⁴⁷ Some scholars have described the role of the Council 'less as a court of law than as a facilitator for settlement'.⁴⁸ Only after the Council has made its decision and if one of the involved States does not agree with the decision, may that State submit the dispute to an *ad hoc* arbitration or to the ICJ.⁴⁹

The 1971 India-Pakistan dispute is the only ICAO Council dispute that has been referred to the ICJ, which reiterated that the ICAO Council has jurisdiction to hear any dispute that requires the 'interpretation or application' of the aviation conventions.⁵⁰ The matter was eventually settled extra-judicially between India and Pakistan and therefore the ICAO Council never reached a final decision.⁵¹ 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.⁵² With respect to the downing of 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'.⁵³ In neither case did the ICAO impose sanctions or award reparations.

⁴⁰ Convention on International Civil Aviation (adopted 7 December 1944, entered into force 4 April 1947) 15 UNTS 295 (Chicago Convention).

⁴¹ See note 15.

⁴² See Chicago Convention, art 3bis. See also Montreal Convention, arts 1(1), 10(1).

⁴³ Chicago Convention, art 84.

⁴⁴ See *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)* (Preliminary Objections) [2011] ICJ Rep 14, 132–134.

⁴⁵ Chicago Convention, art 88.

⁴⁶ José E Alvarez, *International Organizations as Law-Makers* (OUP 2006) 448.

⁴⁷ Ruwantissa Abeyratne, *Convention on International Civil Aviation: A Commentary* (Springer 2014) 665.

⁴⁸ Alvarez (n 46) 449.

⁴⁹ Chicago Convention, art 84.

⁵⁰ *Appeal Relating to the Jurisdiction of the ICAO Council (India v Pakistan)* (Judgment) [1972] ICJ Rep 46, para 28.

⁵¹ Kimberley N Trapp, *State Responsibility for International Terrorism* (OUP 2011) 226.

⁵² Alvarez (n 46) 253.

⁵³ *id.*

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.⁵⁴

While the Montreal Convention also has a compromissory clause, Russia and Ukraine have made reservations to this clause, which means that these States have not given their consent to bring a case under the Montreal Convention to the ICJ.

3. Other Options

There are two other options for bringing MH17 before a legal body. First, the ICJ may give an Advisory Opinion on any legal question 'at the request of whatever body may be authorised by or in accordance with the Charter of the United Nations'.⁵⁵ As noted above, bodies that are authorised include the ICAO and the UN General Assembly.⁵⁶ To get such an organisation to submit a request for an Advisory Opinion requires significant diplomatic effort and political support. The ICJ's Advisory Opinions are not binding upon States but can provide clarity on a legal position and hold high authoritative status. So although not an optimal way with regard to remedies, a finding of responsibility through an Advisory Opinion could have significant symbolic value.

Second, the Netherlands could enter into negotiations with Russia and Ukraine to establish an alternative mechanism to settle the dispute on the basis of State responsibility. This may take form of an arbitral tribunal or a form of fact-finding through for instance a commission of inquiry. Arbitration uses the same international legal norms as the ICJ, unless parties agree otherwise, and allows to large extent the setting of the rules to be decided among the concerned States themselves, as long as it does not violate international law. Although it is also consent-based and may thus prove difficult to establish, it may provide more flexibility to negotiate and address possible concerns. The Permanent Court of Arbitration in The Hague functions as an administrative body that facilitates States with the setting up of arbitral tribunals and provides the secretariat's support to the proceedings. Noteworthy is also that arbitration is not restricted to States, and may thus include non-State actors to appear as counter-party, should they consent to such proceedings.

Another form of mechanism is to agree on a commission of inquiry, or other types of fact-finding missions. Like arbitral tribunals, they allow more flexibility in terms of scope and procedural arrangements.⁵⁷ While any contribution of reliable fact-finding is in principle beneficial to establishing a record of the occurrences and responsibilities, it is also important to note that the more watered-down these mechanisms become in terms of their bindingness and adversarial nature, the less likely it is that the verdict is perceived as credible and legitimate by those it tries to address. Importantly, without legitimacy and credibility, the whole endeavour is rather futile.

B. MH17 and Possible Violations of the International Law

1. Ukraine's Obligation to Close its Airspace

Investigations show that the missile was fired from Ukrainian territory.⁵⁸ Although State authorities seem not to have been in control of the area from which it was fired, Ukraine still has obligations under the civil aviation conventions to ensure the safety of its airspace and may have violated these obligations by not closing its airspace.

Although the Chicago Convention reiterates that 'every state has complete and exclusive sovereignty over the airspace above its territory',⁵⁹ 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,⁶⁰ States are at the very least under a due diligence obligation to ensure safety of the airspace over their territory. To explain, while States are under an obligation to ensure result that, for example, there are institutions in effect that examine the safety of their airspace and send out warnings when necessary, they are in addition under obligations of care or precaution –*due diligence*– to ensure that those institutions also function diligently. The Chicago

⁵⁴ *Case Concerning Aerial Incident of 3 July 1988 (Islamic Republic of Iran v United States of America)* (Discontinuance) ICJ Press Release 1996/6 <<http://www.icj-cij.org/docket/index.php?pr=624&code=irus&p1=3&p2=3&p3=6&case=79&k=9>> accessed 17 March 2017.

⁵⁵ Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 15 UNCTAD 355, art 65.

⁵⁶ Charter of the United Nations (adopted 24 October 1945) 1 UNTS XVI, art 96. See note 22 for a list of authorised bodies.

⁵⁷ See eg Jan M Lemnitzer, 'International Commissions of Inquiry and the North Sea Incident: A Model for a MH17 Tribunal?' (2016) 27 *European Journal of International Law* 923.

⁵⁸ MH17 Report (n 2) 147.

⁵⁹ Chicago Convention, art 1.

⁶⁰ *ibid* art 9.

Convention provides in its Annex 11 that activities potentially hazardous to civil aircraft shall be coordinated with the appropriate air traffic services, in order to avoid hazards to civilian aircraft.⁶¹ Annex 17 stipulates that each Contracting State shall implement regulations, practices and procedures to ensure the safety of civilian aviation.⁶² Contracting States shall keep the level of threat to civilian aviation within its territory under constant review.⁶³ Contracting States shall further establish procedures to share threat information with other Contracting States.⁶⁴ And Contracting States issue a NOTAM to inform pilots of, *inter alia*, the presence of hazards affecting air navigation, as well as the establishment of any danger areas.⁶⁵

Moreover, although the Chicago Convention does not explicitly establish that a State must guarantee safety of its airspace, the DSB held 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.⁶⁶ 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.⁶⁷ 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.⁶⁸ The question that arises is whether Ukraine took the required measures to ensure the safety of its sovereign airspace.

Days prior to the crash of flight MH17, several military aircrafts had been shot down, most of them by weapons operated from the ground.⁶⁹ In June and July, several military aircrafts (including both airplanes and helicopters) had been shot down with the use of man-portable air-defence systems (MANPADS), which are ground-to-air missiles.⁷⁰ For reasons unknown at the time but likely linked to the increased 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.⁷¹ The Ukrainian government considered that this aircraft must have been downed by a weapon that was more powerful than the MANPADS, and believed it could be an air-to-air missile.⁷² 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 concerned had in fact taken on more powerful forms than weapons used thus far.⁷³ 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.⁷⁴ Upon request of the DSB, Ukrainian officials have said that there were no grounds to expect threats to civil aviation following the increase of military activity in the region.⁷⁵

The DSB report indicates that the risk assessment performed by all parties involved throughout civil aviation, including Ukraine, relies too heavily on actual threat.⁷⁶ 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

⁶¹ ICAO 'Annex 11 to the Convention on International Civil Aviation: Air Traffic Services' [2001] art 2.17.

⁶² ICAO 'Annex 17 to the Convention on International Civil Aviation: Security' [2005] art 2.1.2.

⁶³ *ibid* art 3.1.3.

⁶⁴ *ibid* art 2.4.3.

⁶⁵ ICAO 'Annex 15 to the Convention on International Civil Aviation: Aeronautical Information Services' [2013] art 5.1.1.1 (l), (n).

⁶⁶ MH17 Report (n 2) 172.

⁶⁷ ICAO 'Manual Concerning Safety Measures Relating to Military Activities Potentially Hazardous to Civil Aircraft Operations' [1990] Doc 9554-AN/932, para 10.2.

⁶⁸ *ibid* para 10.3.

⁶⁹ MH17 Report (n 2) 181.

⁷⁰ *ibid* 183.

⁷¹ *id.*

⁷² *ibid* 184.

⁷³ *ibid* 183–184.

⁷⁴ *ibid* 184.

⁷⁵ *ibid* 196.

⁷⁶ *ibid* 247.

airplanes are hit by a surface-to-air missile or air-to-air missile',⁷⁷ 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 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). The DSB concluded that the circumstances set out above 'provided sufficient reason for closing the airspace over the conflict zone as a precaution'.⁷⁸

Following this increase in military activity in its airspace days prior to the downing of Flight MH17, Ukraine took limited additional action 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.⁷⁹ 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. The question therefore 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 State responsibility as well as civil liability of Ukraine for failing to take reasonable measures to ensure the safety of its airspace.

Civil liability can be claimed by victims in Ukrainian courts (see also Section VI). For State responsibility, the ICJ's *Corfu Channel* case is of relevance. 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, but ruled that Albania must have known 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.⁸⁰ If it can be shown that Ukraine knew or must have known that the rebels had obtained weapons that could shoot down civil aviation at cruising altitude, thus higher than 32,000 feet, it could be argued that Ukraine was under the obligation to warn States and airliners about this danger in accordance with the Chicago Convention. It can also be argued that it should have closed its entire airspace because the apparent knowledge that the airspace below 32,000 feet was dangerous entails that planes are unable to fly at a lower altitude or make an emergency landing if so required.

Accordingly, the failure to inform other States and the ICAO of 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 may well constitute a breach of Ukraine's due diligence obligations under the civil aviation conventions. These legal claims could be submitted to the ICAO Council for consideration, and possibly arbitration or the ICJ in appeal.

In addition to Ukraine's potential responsibility for failing to appropriately warn about or close its airspace, it was under the obligation to investigate: the State in which the accident occurs is obliged to institute an inquiry into the circumstances.⁸¹ This includes investigating whether sufficient precautionary measures have been taken with regard to notifying other States and airlines about the potential dangers in its airspace. All States are 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.⁸² In the section on the ECHR, these responsibilities are discussed further with regard to that particular legal context.

2. Russia's Obligations under the Civil Aviation Conventions

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 were somehow involved in shooting 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 had

⁷⁷ *id.*

⁷⁸ *ibid.* 10.

⁷⁹ *ibid.* 196.

⁸⁰ *Corfu Channel Case (United Kingdom v Albania)* (Preliminary Objections) [1948] ICJ Rep 15.

⁸¹ Chicago Convention, art 26.

⁸² Montreal Convention, art 13.

'effective control' over the persons or group in question, in accordance with Article 8 of the Articles of State Responsibility.⁸³

The notion of 'effective control' has been clarified somewhat in the case law of the ICJ. In the *Nicaragua* case,⁸⁴ Nicaragua held the US responsible for acts committed in Nicaragua by a rebel group called the Contras. The ICJ considered it proven that the US had participated in the 'financing, organising, training, supplying, and equipping' of the Contras.⁸⁵ However, the ICJ said that this was not enough to establish effective control. Although the ICJ found that this US support to the Contras was a clear breach of the principle of non-intervention and thus a violation of international law in and of itself,⁸⁶ 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.⁸⁷ The effective control standard requires States to have either directed or enforced the perpetration of the act itself,⁸⁸ 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'.⁸⁹ It is therefore a high standard and requires that it must be shown that effective control was exercised with respect to the specific violation and not to the group's actions in general.⁹⁰

Should evidence show that the perpetrators' acts are attributable to Russia (because State agents were involved or effective control was exercised over non-State actors), 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 recognise that every State must refrain from resorting to the use of weapons against civilian aircraft in flight',⁹¹ unless in accordance with a State's right to self-defence, which is not a viable argument in the situation of MH17. Article 3bis was adopted in 1984 and came into force in 1998 in response to the shooting down of Korean Air Flight 007 over Soviet airspace. It is largely considered to be a reflection of customary international law.⁹² Should Russia have been involved in the shooting down of MH17, the Netherlands or other States could claim that Russia may have violated this provision and submit this to the ICAO Council.

Moreover, as was discussed above, the Montreal Convention specifically criminalises offenses against the safety of civilian aviation and obliges State Parties to 'endeavour to take all practicable measures for the purpose of preventing the[se] offences'.⁹³ Russia may have violated its obligations under the civil aviation conventions for not taking these measures to prevent offenses against aviation security if, for example, it is found to have any relationship to the firing of the missile. This could for instance be by having known that the pro-Russian separatists were in possession of the BUK missile and/or for facilitating that possession, and not taking the required precautionary measures, such as by training them on how to ensure no civilians are (mistakenly) targeted. The case law on the Montreal Convention is virtually non-existent since the ICJ has, on this basis, not yet addressed a case on the merits.

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. As was discussed above in the criminal law section, Article 6 of the Montreal Convention provides that States need to take into custody any offender or alleged

⁸³ ILC Draft Articles (n 35) art 8. This was clarified in *Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States of America)* (Merits) [1986] ICJ Rep 14.

⁸⁴ *id.*

⁸⁵ *ibid* para 115.

⁸⁶ *ibid* para 249.

⁸⁷ *ibid* para 115.

⁸⁸ *ibid* para 64.

⁸⁹ *Case Concerning the Application of the Convention of the Prevention and Punishment of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [2007] ICJ Rep 43, paras 207–208.

⁹⁰ *ibid* para 400. 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 criticised by academia. See eg Antonio Cassese, 'The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia' (2007) 18 *European Journal of International Law* 649.

⁹¹ Chicago Convention, art 3bis.

⁹² For example, the UN Security Council recognised that it reflects customary international law in its UNSC Res 1067 (26 July 1996) UN Doc S/RES/1067. See also UNSC 'Security Council Condemns Use of Weapons Against Civil Aircraft; Calls on Cuba to Comply with International Law' (27 July 1996) Press Release SC/6247; Abeyratne (n 47) 68.

⁹³ Montreal Convention, arts 3, 10(1).

offender that is present in its territory⁹⁴ and prosecute or extradite.⁹⁵ This obligation to either prosecute or extradite, such as is provided by the Montreal Convention, is common for serious international crimes and is traditionally referred to as an *aut dedere aut judicare* obligation. In a recent case between Belgium and Senegal on prosecuting or extraditing former President of Chad Hissène Habré who was present on Senegalese territory, the ICJ assessed this obligation under the Convention against Torture.⁹⁶ 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.⁹⁷ 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.⁹⁸ The case has to be submitted to those authorities within a reasonable time. The ICJ found Senegal to be in violation of both these obligations and ordered it to immediately submit the case to its competent authorities.⁹⁹

3. Other Relevant Obligations under International Law and Providing the Weapon

IHL applies to any situation of armed conflict.¹⁰⁰ As was noted above in the discussion on war crimes, 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'.¹⁰¹ Only military objects may be the target of an attack. In addition, parties to any armed conflict must take constant care to spare the civilian population, civilians, and civilian objects: the 'precautionary principle'.¹⁰² The shooting down of a civilian airliner appears a clear violation of these core principles of IHL if principles of distinction and precaution have been disregarded. A civilian airliner does not 'make an effective contribution to military action' nor does its destruction offer a 'definite military advantage'.¹⁰³ Therefore, depending on the evidence on whether preventive measures were taken, the shooting down of Flight MH17 may qualify as a violation of IHL. This not only allows individuals to be prosecuted for committing war crimes (see Section III), but also means that if such violations can be attributed to a State, this State has violated its international legal obligations if it failed to take measures to prevent and investigate.

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.¹⁰⁴ 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 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 section, a few considerations on the right to life under the ICCPR are due here, should it arise in the context of a claim of State responsibility in either a case or arbitral procedure.

The ICCPR provides that no one shall be arbitrarily deprived of his life.¹⁰⁵ States have the (negative) obligation to refrain from taking anyone's life, unless 'necessary' and 'proportional'.¹⁰⁶ The shooting down of a

⁹⁴ *ibid* art 6(1).

⁹⁵ *ibid* art 7.

⁹⁶ *Questions Relating to the Obligation to Prosecute or Extradite* (n 39).

⁹⁷ *ibid* para 86.

⁹⁸ *ibid* para 94.

⁹⁹ *ibid* para 121.

¹⁰⁰ See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1959) 75 UNTS 287, art 2.

¹⁰¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (Protocol I), art 48; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (Protocol II) art 13.

¹⁰² International Red Cross, Customary IHL, Rule 15: Precautions in Attack. See <https://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter5_rule15> accessed 17 March 2017.

¹⁰³ Protocol I, art 52(2).

¹⁰⁴ See eg *Case Concerning Military and Paramilitary Activities In and Against Nicaragua* (n 83); *Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of Congo)* (Judgment) [2010] ICJ Rep 639.

¹⁰⁵ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, art 6.

¹⁰⁶ Nigel S Rodley, 'Integrity of the Person' in D Moeckli, S Shah and SSD Harris (eds), *International Human Rights Law* (2nd edn, OUP 2014) 186.

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* –IHL– and thus whether the required precautionary measures were taken.¹⁰⁷ These possible violations of the right to life and IHL can be attributed to the State if those directly responsible were State organs or under the effective control of a State. Moreover, similar as in the civil aviation conventions, States have a positive obligation to conduct an effective investigation into cases of apparently unlawful killings¹⁰⁸ and they have a due diligence obligation to protect people from death from third parties.¹⁰⁹

If evidence shows that Russia can be held responsible for providing the weapon that was used to shoot down Flight MH17, this may amount to an additional violation of international law.¹¹⁰ Russia has not ratified the Arms Trade Treaty that imposes certain obligations upon States when supplying weapons to non-State actors. However, if it can be shown that the separatists have committed a war crime by violating IHL, should the Russian State be attributable for having provided or transported 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.¹¹¹ 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' that genocide would be committed.¹¹² This criterion thus requires a standard of proof below that of knowing that a crime would be committed.¹¹³

4. The 2017 *Ukraine v Russia* Application at the ICJ

On 16 January 2017, Ukraine instituted proceedings against Russia at the ICJ with regard to alleged violations of international law in Eastern Ukraine and Crimea under the 1999 International Convention for the Suppression of the Financing of Terrorism and the 1965 International Convention on the Elimination of All Forms of Racial Discrimination.¹¹⁴ Both States are members to these treaties and these treaties allow jurisdiction at the ICJ because they contain compromissory clauses and neither State has made reservations to exclude the ICJ's jurisdiction on disputes relating to these treaties.

Because it had to find a way to assert the ICJ's jurisdiction, Ukraine had to phrase its legal questions so as to fit the treaties concerned, rather than asking explicitly to adjudicate the entire Ukraine-Russia dispute, including the entire legal responsibilities concerning MH17. Ukraine made claims with regard to MH17 as part of its allegations that Russia has financed groups in Eastern Ukraine in violation of the financing terrorism treaty. Specifically, Ukraine claims that Russia failed to take precautionary measures, failed to prevent and/or failed to investigate and punish financiers of groups that were involved in downing MH17. The ICJ does not need to address the complex legal discussion of what is terrorism, because the treaty concerned directly refers to offences provided for by the Montreal Convention, among others. Ukraine must prove (i) that prohibited financing has taken place with the required knowledge that this would possibly be used for downing a civilian plane and (ii) that Russia failed to take required measures to prevent or afterwards investigate such. It remains to be seen whether the ICJ will have to (and will be willing to) explore the entire chain of finance to the actual perpetrators of downing MH17, or whether it will find a way to keep the scope of the legal question posed to that of the question of whether it can be proven that financing has taken place and that Russia violated its obligations to prevent or investigate this. Moreover, although Ukraine requests the ICJ to order Russia to make full reparation for MH17, this likely stretches the scope of the financing terrorism treaty too far, since the case is due to that route in principle limited to whether Russia failed to take

¹⁰⁷ *Legality of the Threat or Use of Nuclear Weapons* (n 39), para 25.

¹⁰⁸ *Abubakar Amirov and Aïzan Amirova v Russian Federation* (Comm No 1447/2006).

¹⁰⁹ Rodley (n 106); HR Committee, 'General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' adopted at the Eightieth session (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13, para 8.

¹¹⁰ 'MH17 Crash: Dutch Investigators to Assess New Study Implicating Russian Soldiers' *The Guardian* (London, 4 January 2016) <<http://www.theguardian.com/world/2016/jan/04/mh17-dutch-investigators-to-study-citizen-journalist-claims-over-russians-involved-in-crash>> accessed 17 March 2017.

¹¹¹ See *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (n 89) para 432.

¹¹² *ibid* para 436.

¹¹³ See for the argument that this applies to delivering weapons to non-State actors, Andrew Clapham, 'Weapons and Armed Non-State Actors' in S Casey-Maslen (ed), *Weapons Under International Human Rights Law* (CUP 2014) 163–164.

¹¹⁴ ICJ, 'Ukraine Institutes Proceedings Against the Russian Federation and Requests the Court to Indicate Provisional Measures' (Press Release, 17 January 2017) <<http://www.icj-cij.org/docket/files/166/19310.pdf>> accessed 17 March 2017.

measures to prevent the financing of terrorism or investigate such financing afterwards, rather than for actually financing as a State, let alone the taking down of MH17 itself. Whatever reparation may be awarded, after the many years this case is likely to take, it remains to be seen whether Russia would then also pay.

If jurisdiction is indeed awarded, the ICJ will provide a legal decision that concerns a link between Russia and the downing of MH17, although it is likely to limit itself to the narrow question that relates to the financing rather than explore the responsibilities of Russia concerning MH17 in full. Nevertheless, it may contribute to truth-seeking, provide diplomats with an authoritative ruling in their interstate relations, and help develop the international legal order by clarifying the legal responsibilities of States in a complex and globalising international society.

C. Concluding Observations

Although limited, lengthy and legally complex, the doctrine of State responsibility provides the Netherlands and other States some openings to make claims. There appear reasonably strong arguments to claim that Russia and Ukraine have violated their obligations to communicate information, investigate 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 meets the standards of attributability to indicate a relationship between those that fired the missile and Russia. 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.¹¹⁵ This declarative function of the Court's judgments may serve to publicly characterise the conduct of the respondent State or even provide a degree of satisfaction for the relatives of the victims.

V. Legal Options Against States at the European Court of Human Rights

The above section provides analysis on the general framework of public international law and the doctrine of State responsibility. It is characterised by its consensual basis and (thus) for lacking in many enforcement and accountability mechanisms. In the European context, however, a more developed legal order has matured in the past decades and it concerns the responsibility of States for violations of the ECHR. This provides more precise and broader obligations and appears more viable for holding Ukraine and Russia accountable for possible violations of their legal responsibilities, if investigations indicate such. Another distinction with regard to general public international law is that the ECtHR allows submissions both from individuals and States. This section analyses the legal responsibilities under Article 2 of the ECHR –the right to life– which may have been violated concerning MH17, as well as how to pursue such legal action.

A. European Court of Human Rights

An application before the ECtHR is an avenue to secure the responsibility of a Member State of the Council of Europe for violations of the ECHR.¹¹⁶ A procedure at the ECtHR may result in binding judgments and the awarding of just satisfaction. The Netherlands, Ukraine and Russia are all party to the ECHR. Although the ECtHR potentially has jurisdiction over the violations, it is required to first exhaust domestic remedies. Moreover, again, it may be difficult to secure the requisite evidence, and the process is likely to take a number of years to complete.

The ECHR permits both individual and interstate applications, which means that individuals (all relatives of the MH17 victims)¹¹⁷ as well as States may submit a claim at the ECtHR.¹¹⁸ 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.¹¹⁹ Article 35 of the ECHR provides that individuals need to file a case in the State against which it raises its application before

¹¹⁵ See *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (n 89).

¹¹⁶ Ukraine, Russia, and the Netherlands are member States of the Council of Europe and the European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953, as amended) 213 UNTS 222 (ECHR).

¹¹⁷ ECHR, art 34 enables individuals to claim a violation of a right under the Convention provided that such violation occurred within the jurisdiction of a member State. Any individual or legal entity may exercise the right to individual application, regardless of nationality, place of residence, civil status or capacity.

¹¹⁸ *ibid* arts 33–34.

¹¹⁹ *ibid* arts 35(1), 35(3)(b) and 34.

filing an individual application with the ECtHR. The rationale behind this rule is that the State should have the opportunity to remedy its wrongs before being judged by the ECtHR.¹²⁰ However, the ECtHR consistently applies this rule with 'some degree of flexibility and without excessive formalism' in the sense that these domestic remedies need to be accessible in practice and offer reasonable prospects of success.¹²¹

In addition to individuals, any Member State may also refer an alleged breach of the ECHR by another Contracting State pursuant to Article 33 ECHR.¹²² For an interstate application, the exhaustion of domestic remedies is also required, but is much less strictly applied. Interstate applications differ from individual applications in that they generally aim at 'bringing before the [Court] an alleged violation of the public order of Europe'.¹²³ 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.¹²⁴ Member States can use the interstate application in favour of individuals regardless of their nationality, meaning that the range of potential beneficiaries is not limited to the nationals of the complaining State.¹²⁵ Consequently, interstate applications allow the Netherlands (or any other Member State of the Council of Europe) to file an application potentially benefiting all relatives of MH17 victims, regardless of their nationality.

B. MH17 and Possible Violations of the Right to Life (Article 2 ECHR)

Article 2 ECHR prohibits arbitrary killing or deprivation of life that is not prescribed by law or absolutely necessary for certain prescribed purposes. The shooting down of a civilian airliner, whether deliberate or accidental, by agents of a Member State or non-State actors under the decisive influence of a Member State, constitutes a violation of the right to life under Article 2 ECHR. 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.¹²⁶ Moreover, the ECtHR may find a State responsible where the State lacked due diligence in preventing the arbitrary killing or deprivation of life or failing to investigate and prosecute.

It deserves noting that Russia adopted domestic legislation on 14 December 2015, which it claims allows the overruling of decisions of the ECtHR.¹²⁷ In the first significant case based on this law, Russia's constitutional court held on 17 January 2017 that Russia should not pay the award that the ECtHR ordered for the Yukos shareholders, on the grounds that the ECtHR's ruling was an illegal infringement of Russian sovereignty.¹²⁸ 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.

1. Ukraine's Obligation to Close its Airspace

With regard to the responsibility of Ukraine under Article 2 ECHR, the question arises whether failing to close the airspace over the Donetsk region violates their substantive obligations under Article 2. On 24 November 2014, an application entitled *Ioppa v Ukraine* was lodged with the ECtHR.¹²⁹ The applicant is the mother of one of the victims of the MH17 crash.¹³⁰ The contents of the application are not public knowledge but it is believed that the case addresses Ukraine's due diligence responsibility.¹³¹ The ECtHR has confirmed

¹²⁰ *Schenk v Germany* App No 42541/02 (ECtHR, 9 May 2007) (Admissibility).

¹²¹ *Sejdovic v Italy* (2006) ECHR 181, para 46. See eg also *Ringeisen v Austria* (1971) 1 EHRR 455, para 89.

¹²² ECHR, art 33.

¹²³ *Cyprus v Turkey* (2014) ECHR 715, para 37.

¹²⁴ See *Austria v Italy* (1961) 7 DR 23.

¹²⁵ *id.*

¹²⁶ See *McCann and Others v the United Kingdom* (1995) 21 EHRR 97; Douwe Korff, 'The Right to Life: A Guide to the Implementation of Article 2 of the European Convention on Human Rights' (2006) Council of Europe Human Rights Handbook No 8, 25 <http://www.echr.coe.int/LibraryDocs/HR%20handbooks/handbook08_en.pdf> accessed 17 March 2017.

¹²⁷ Vladimir Soldatkin, 'Putin Signs Law Allowing Russia to Overturn Rulings of International Rights Courts' (*Reuters*, 15 December 2015) <<http://www.reuters.com/article/us-russia-court-putin-idUSKBN0TY17H20151215>> accessed 17 March 2017.

¹²⁸ See eg Ivan Philippov, 'Russian Constitutional Court Denies Enforcement of ECHR Decision on Yukos' (*CIS Arbitration Forum*, 25 January 2017) <<http://www.cisarbitration.com/2017/01/25/russian-constitutional-court-denies-enforcement-of-echr-decision-on-yukos/>> accessed 22 March 2017; 'Council of Europe in Dispute with Russia over Yukos Case' *BBC News* (London, 20 January 2017) <<http://www.bbc.com/news/world-europe-38691148>> accessed 22 March 2017.

¹²⁹ 'Ukraine: Flight MH17 Crash Victim's Mother Lodges Court Complaint' (*Human Rights Europe*, 1 December 2014) <<http://www.humanrightseurope.org/2014/12/ukraine-flight-mh17-crash-victims-mother-lodges-court-complaint/>> accessed 17 March 2017.

¹³⁰ 'Mother of German MH17 Victim Sues Ukraine' *Al Jazeera* (Doha, 30 November 2014) <<http://www.aljazeera.com/news/europe/2014/11/family-german-mh17-victim-sues-ukraine-20141129233051954730.html>> accessed 17 March 2017.

¹³¹ *id.*; Burkhard Uhlenbroich, 'Familien der Deutschen Opfer Verklagen Ukraine' *Bild* (Frankfurt am Main, 21 September 2014) <<http://www.bild.de/politik/ausland/flug-mh-17/familien-der-deutschen-opfer-verklagen-ukraine-37748032.bild.html>> accessed 17 March 2017.

that the case is now under examination and is being treated as priority.¹³² It remains to be seen whether this case will be heard, as it is unclear whether the requirement to exhaust domestic remedies has been met.¹³³

As for the legal evaluation of whether Ukraine was under the obligation to close its airspace under the ECHR, the ECtHR has held in *Osman v UK* 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.¹³⁴ The analysis in the previous section provides a possibly viable legal claim against Ukraine.

However, the criteria laid out above by the ECtHR in *Osman v UK* may pose an obstacle for a successful claim concerning MH17 because the ECtHR said that there needs to be an immediate risk to the life of an 'identified individual'.¹³⁵ In *Osman* 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.¹³⁶ 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.¹³⁷ A broader approach was believed to place a disproportionate burden on the State.¹³⁸ However, applying this standard to the downing of MH17 means a need to demonstrate that prior to the downing of the plane, Ukraine knew or ought to have known specifically that there was a real risk to the lives of those onboard MH17, which would seem problematic. Since the rationale behind the requirements to take precautionary measures to protect the airspace seems incongruent with this *Osman* standard since in practice there could then hardly ever be a violation of this duty, applicants could try and argue that this threshold cannot apply in similar manner with regard to civil aviation.

The analysis in the previous section applies here to meet the second criterion stemming from *Osman v UK*, namely that the authorities failed to take all necessary measures to avoid the risk. In short, the DSB concluded that Ukrainian authorities had not taken sufficient notice of the possibility that civil aircraft could encounter a missile, given the information in their possession at the time.¹³⁹

Although Malaysia Airlines, as operator of Flight MH17, also allowed the plane to fly into a known conflict zone and may well have been negligent in its own obligations (see Section VI), it would appear that regardless of this, Ukraine would still be held accountable under the ECHR for failing to close its airspace. International law generally does not reduce State liability in cases of concurrent causation, as seen *e.g.* in the *Corfu Channel* case.¹⁴⁰

2. Possible Involvement of Russian State Agents

In addition to possible violations by Ukraine for failing to close its airspace, Article 2 ECHR provides for a number of legal obligations that Russia may have violated. Whether and to what extent this is the case and can be proven in a court of law, remains to be seen and, as in the previous discussion on State responsibility, mostly depends on the role Russia may have had or not had in relation to those involved in downing MH17.

The highest responsibility would exist if Russian State agents were involved, for instance if military were complicit in launching the BUK missile. Article 2(2) ECHR permits the use of lethal force when absolutely necessary, and thus 'strictly proportionate' to achieve a legitimate aim.¹⁴¹ 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 organisation of the operation.¹⁴² 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 fac-

¹³² See note 129.

¹³³ In total, four applications have been submitted and registered. See *Ioppa and Others v Ukraine* Apps No 73776/14, No 973/15, No 4407/15, and No 4412/15 (ECtHR, 5 July 2016). See also 'Dutch Government Will Only Consider Liability of Ukraine after Criminal Investigation JIT Has Finished' (26 October 2016) <<http://www.whathappenedtoflightmh17.com/dutch-government-will-only-consider-liability-of-ukraine-after-criminal-investigation-jit-has-finished/>> accessed 17 March 2017.

¹³⁴ *Osman v the United Kingdom* (1998) 29 EHRR 245, para 115.

¹³⁵ *ibid* para 116.

¹³⁶ *id.*

¹³⁷ Bernadette Rainey, Elizabeth Wicks and Clare Overy, *Jacobs, White & Ovey: The European Convention on Human Rights* (6th edn, OUP 2014) 154.

¹³⁸ *id.*

¹³⁹ MH17 Report (n 2) 209.

¹⁴⁰ *Corfu Channel Case (United Kingdom v Albania)* (Merits) [1949] ICJ Rep 4, 17–18 and 22–23.

¹⁴¹ *McCann and Others* (n 126) para 149.

¹⁴² *ibid* para 150.

tor leading to a violation of the duty under Article 2 to protect the right to life 'by law'.¹⁴³ This would likewise apply to the use of a BUK missile. Moreover, the State is also responsible for providing for a margin of error with respect to exercising 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'.¹⁴⁴ The ECtHR considered the authorities' lack of appropriate care regarding the control and organisation of a military operation, and their failure to consider the possibility that their intelligence assessments may have been erroneous, a violation of Article 2 by the State.¹⁴⁵

In addition, with regard to the planning and conduct of a military operation, the ECtHR previously 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'.¹⁴⁶ The Court held that the use of heavy free-falling, high explosion aviation bombs in civilian areas is difficult to reconcile with the standard of care expected from a Member State, even in an internal armed conflict.¹⁴⁷ Interestingly, and contrary to most other responsibilities, the procedures of the ECtHR require the respondent State to produce sufficient evidence on the careful planning and organisation of a military operation, training of soldiers and taking of precautions for the civilian population rather than having to prove that they failed to do so.

It is moreover important to note that if Russian State agents have indeed been involved in downing MH17, Ukraine may possibly also bring a claim against Russia for violating the interim measure by the ECtHR in the context of the *Ukraine v Russia* interstate application at the ECtHR (lodged on 13 March 2014 in the context of Crimea). This interim measure 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 with respect to Article 2'.¹⁴⁸ Pursuant to the Court's case law, measures under Rule 39 (interim measures) are binding upon States.¹⁴⁹

3. Obligations for Acts of Non-State Agents

Russia may also be held responsible for the unlawful actions of non-State actors (of whatever nationality), provided that a sufficiently 'close link' or relationship is established between the actions of the non-State agent and the State in question (Russia). While general public international law's doctrine of State responsibility strictly defines the requirement of effective control of the State over the group's actions,¹⁵⁰ the ECtHR uses a less stringent test. The ECtHR assesses such a link based on the State support (military, economic and political) provided to the private party,¹⁵¹ or whether it had decisive influence.¹⁵² The ECtHR considers political, financial and economic support as a sufficient ground for establishing the jurisdiction of a Member State.

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. As discussed above, since 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'.

4. Duty to Conduct Effective Investigations

In addition, State Parties to the ECHR are under an obligation to conduct an effective investigation into killings allegedly committed by their agents or in their jurisdiction.¹⁵³ 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

¹⁴³ *Makaratzis v Greece* (2004) 41 EHRR 49, para 70.

¹⁴⁴ *McCann and Others* (n 126) para 211.

¹⁴⁵ *ibid* paras 211–214.

¹⁴⁶ *Isayeva v Russia* (2005) 41 EHRR 38, para 189.

¹⁴⁷ *ibid* paras 189–191.

¹⁴⁸ European Court of Human Rights, 'Interim Measure Granted in Inter-State Case Brought by Ukraine Against Russia' (13 March 2014) Press Release ECHR 073 <<http://hudoc.echr.coe.int/webservices/content/pdf/003-4699472-5703982>> accessed 17 March 2017.

¹⁴⁹ *Mamatkulov and Askarov v Turkey* (2005) 41 EHRR 25, para 125.

¹⁵⁰ Regarding effective control and jurisdiction, see also *Al-Skeini and Others v the United Kingdom* (2011) 53 EHRR 18; *Al-Jedda v the United Kingdom* (2011) 53 EHRR 23.

¹⁵¹ *Ilaşcu and Others v Moldova and Russia* (2005) 40 EHRR 46, paras 380–382; *Ivanțoc and Others v Moldova and Russia* (2011) ECHR 1915, paras 118–119.

¹⁵² *Ilaşcu and Others* (n 151) para 392.

¹⁵³ *McCann and Others* (n 126) para 161.

give rise to the procedural duty to investigate under Article 2 ECHR.¹⁵⁴ If Russia did not investigate whether their State agents were involved, whether their State support (military, economic, political) was a factor in the crash of MH17, or if they failed to take steps to ensure that it would not occur again, Russia may have breached their due diligence obligation by not conducting effective investigations.

The ECtHR defines 'effective investigation' as an investigation capable of identifying those responsible and committing them to justice.¹⁵⁵ An investigation is effective if 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.¹⁵⁶ Importantly, the difficulties that come with the security conditions during ongoing armed conflict do not dilute the standards of investigation¹⁵⁷ or preclude the authorities from conducting prompt investigations into the unlawful use of lethal force.¹⁵⁸

In addition, the ECtHR may consider as unlawful any attempt to undermine the effectiveness of investigations conducted by other parties, such as through the JIT. Consequently, if it can be proven that any State has tried to hinder the effectiveness of such investigations, these States may also be held to account for these actions under Article 2.

C. Concluding Observations

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 interstate applications, may be difficult to secure and the evidence would need to prove the requisite elements to establish a violation of the ECHR. While still a high threshold, the standard of proof is lower before the ECtHR than under general public international law in several respects. It is also lower than under criminal law since it determines the responsibility of States and not individual criminal liability. Recent legislative changes to Russia's constitutional law and the constitutional court ruling on *Yukos* will have ramifications for a successful case against Russia. Moreover, like any other legal route regarding MH17, ECtHR proceedings are likely to take a number of years to complete, as they have a large backlog.

VI. Civil Litigation

The primary purpose in a civil litigation proceeding is to hold another party liable for a wrongdoing and seek compensation for resulting losses suffered. In order to do so, it must be established that the inability to ensure the safety of the passengers onboard was due to a wrongdoing of one or multiple of the parties involved. With regard to MH17, this pertains in particular to Ukraine, as the sovereign whose airspace Flight MH17 was in when downed, and to Malaysia Airlines, as the operator of the flight, and KLM, as code-sharer, for those passengers that bought their ticket directly with KLM. The purpose of this section is explicitly not to imply any liability of any of the parties listed above, nor to pass any judgment on the cases that are ongoing or have been decided or settled. Rather, the purpose of this section is to complement the foregoing for sake of comprehension and to provide analysis for possible future situations as well as articulating the responsibilities of parties with an eye on improving their practice for the benefit of the flying public at large.

A. Civil Liability of States

The responsibilities that Ukraine may have violated are analysed in Section IV. Victims' relatives may try to litigate against the Ukrainian State under its domestic civil law. Article 26 of Ukraine's Constitution grants the same rights and freedoms enjoyed by Ukrainian citizens to foreigners that are legally present in Ukraine.¹⁵⁹ 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.¹⁶⁰ 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

¹⁵⁴ See generally *Ergi v Turkey* (2001) 32 EHRR 18.

¹⁵⁵ *Kelly and Others v the United Kingdom* (2001) ECHR 328, para 94.

¹⁵⁶ Alastair R Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing 2004) 31–35.

¹⁵⁷ *ibid* 40.

¹⁵⁸ *Al-Skeini and Others* (n 150) paras 176–177; *Khashiyev v Russia and Akayeva v Russia* (2006) 42 EHRR 20, para 155; *Kerimova and Others v Russia* (2011) ECHR 744, para 265. See also *Tanrikulu v Turkey* (2000) 30 EHRR 950, para 103.

¹⁵⁹ Constitution of Ukraine [1996].

¹⁶⁰ *id.*

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 and that victims' relatives may claim negligence on the part of Ukraine for failing to do so in a Ukrainian court of law. Article 55 of the Ukrainian Constitution provides for legal equality between non-nationals and nationals, according to which everyone is allowed to challenge decisions, actions, and omissions of bodies of State power.¹⁶¹ 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'.¹⁶² Ukraine's obligations enshrined in the ECHR, and the Chicago Convention and related documents are directly applicable in the Ukrainian legal system,¹⁶³ and generally take precedence over conflicting national legislation.¹⁶⁴ 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'.¹⁶⁵

Malaysia, as the State of incorporation of the airline in question, may also have violated their obligations to conduct risk assessments and ensure the safety of proposed flight routes. However, these obligations are not clear and it differs per State how involved the relevant authorities are in the establishment of flight routes of its airlines. 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 Malaysia's that claim that there is no legal requirement for them to provide airlines with any information on the safety of foreign airspace.¹⁶⁶ 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.¹⁶⁷ Other States share information with airlines, and some States produce risk analyses specific for civil aviation activities.¹⁶⁸

B. Civil Liability of Airline Operators

The Chicago Convention establishes that flight operators, as users of the airspace, bear responsibility for safe flight operations. Where there are no restrictions on the use of airspace by the State involved, it is to the flight operator to decide whether a particular flight path is safe for civil aviation. Annexes 6, 17 and 19 to the Chicago Convention in particular set out security and safety management recommendations applicable to civil aviation. In accordance with Article 3(1)(3) and Appendix 2 of Annex 19 to the Chicago Convention, the 'hazard identification' in airlines' safety management systems (SMS) 'shall be based on a combination of reactive, proactive and predictive methods of safety data collection'.

According to the DSB, the Flight Operations Department of Malaysia Airlines (or Flight Ops) relied primarily on NOTAMs in identifying and assessing the safety hazards of the requested flight plan for Flight MH17.¹⁶⁹ NOTAMs are safety warnings entered into a global database (Sabre) by the national aviation authorities. Flight Ops only 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.¹⁷⁰ During the preparation for Flight MH17 on 17 July 2014, Flight Ops followed standard procedures, the scheduled flight path stayed clear of the restricted airspace in accordance with the relevant NOTAM and no further action was taken.¹⁷¹ Interviews with employees of Flight Ops reveal that Malaysia Airlines was aware that the situation in Ukraine was unstable. 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.¹⁷² 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

¹⁶¹ *id.*

¹⁶² Civil Procedural Code of Ukraine [2005] art 410.

¹⁶³ Gennady M Danilenko, 'Implementation of International Law in Russia and Other CIS States' (1998) NATO Academy Fellow Research Paper, 36 <www.nato.int/acad/fellow/96-98/danilenk.pdf> accessed 17 March 2017.

¹⁶⁴ *id.*

¹⁶⁵ Civil Code of Ukraine [2003] art 201.

¹⁶⁶ MH17 Report (n 2) 221.

¹⁶⁷ 49 U.S.C. § 44701 (1994). See also MH17 Report (n 2) 221.

¹⁶⁸ MH17 Report (n 2) 221.

¹⁶⁹ *ibid* 215.

¹⁷⁰ *id.*

¹⁷¹ *ibid* 217–218.

¹⁷² *ibid* 218.

17 of the Chicago Convention. Non-restricted airspace was considered safe without any further enquiry done.

The DSB 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.¹⁷³ The question arises, however, whether in making no additional efforts, Malaysia Airlines –and apparently ‘most major airlines’– can be said to have fulfilled the safety requirements as set in the Chicago Convention of taking a reactive, proactive and predictive approach towards risk assessment as required by Article 2(1)(2) of Appendix 2 to Annex 19 of the Chicago Convention, particularly in light of knowledge at the time of an ongoing conflict on the ground.

Flight MH17 was code-shared 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.¹⁷⁴ 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.¹⁷⁵ 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 DSB 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.¹⁷⁶ However, legally speaking, the factual circumstance that KLM had no part in the preparation for Flight MH17 on 17 July 2014 does in no way relieve it from its legal duties towards passengers with which it has contracted, including safety and security. In accordance with Article 41 Montreal Convention, KLM is liable towards its passengers as if it had been the actual carrier.

For damages not exceeding 100,000 Special Drawing Rights (SDR) for each passenger, Article 21 Montreal Convention does not allow Malaysia Airlines or KLM to exclude or limit its strict liability, unless the damage is (partly) a result of negligence by the passenger.¹⁷⁷ The value of SDRs and conversion rates to local currencies are established by the International Monetary Fund.¹⁷⁸ In accordance with Articles 17 and 25, a carrier may increase the amount of its strict liability. 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.¹⁷⁹ 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.¹⁸⁰ Airlines may thus be liable for higher damages if negligence can be established. Negligence encompasses 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.¹⁸¹ Given the above analysis, the question that is relevant not only to MH17 victims but also for current and future standards of case in civil aviation, is whether the standard that most major airlines apparently used at the time of the MH17 crash meets the legal obligations they have under the Chicago Convention to take a reactive, proactive and predictive approach towards risk assessment. This question is particularly relevant since both air traffic and conflicts where missiles are used are and will likely remain in the increase.

VII. Conclusion – The Lawyer’s Strategic Use and Abuse of Law: Navigating the Political Sphere

It follows from the above that although none are uncomplicated or certain, there are a number of legal avenues and viable legal claims that could address various aspects of what went so terribly wrong on 17 July 2014. However, importantly, this is not the end of considerations, or at least, it shouldn’t be. Having a legal

¹⁷³ *ibid* 244.

¹⁷⁴ *ibid* 213–214.

¹⁷⁵ Brian F Havel and Gabriel S Sanchez, *The Principles and Practice of International Aviation Law* (CUP 2014) 279.

¹⁷⁶ MH17 Report (n 2) 214.

¹⁷⁷ Convention for the Unification of Certain Rules for International Carriage by Air (adopted 28 May 1999, entered into force 4 November 2003) 2242 UNTS 309 (Unification Convention) art 21; Ronald IC Bartsch, *International Aviation Law: A Practical Guide* (Routledge 2012) 25.

¹⁷⁸ See Bartsch (n 177).

¹⁷⁹ KLM General Terms of Carriage, art 19.2.1; Malaysia Airlines General Terms of Carriage, art 16.2.2.

¹⁸⁰ Unification Convention, art 21.

¹⁸¹ Bartsch (n 177) 112–115.

option does not necessarily mean having to use that legal option. There can be a variety of reasons why it may be more prudent to withhold from fighting a battle in a court of law. And even if law is the language through which a problem is addressed, there are considerations on which legal option or court to prefer over another. Legal considerations can therefore not be separated from considerations of strategy, prudence, ethics and politics.

The different actors that are involved on different levels in the MH17 situation each have their own objectives and interests. This not only complicates the legal analysis, which the previous sections attempted to make somewhat more accessible, but also navigating the political sphere: what to do with the legal options available? While victims may have as main and sole objective to have those responsible be held accountable, even among them there is dissent on how much to push for it or be involved, since every new attention and effort revives the grief and may even cause re-traumatisation; for one more than for another.

Moreover, other actors' interests are usually more diverse and not necessarily aligned to the victims' interests. This only adds to the frustration MH17 victims have in their (diminishing) hopes that those responsible will be held accountable. Malaysia Airlines, for example, not only sympathised with victims' families and expressed great grief and sorrow to them, and was itself also victim (losing its plane, personnel and reputation), it was also an adversary when it concerned civil claims. When it came to accountability, their lawyers used the usual lawyering techniques (time pressure, silence agreements, persuasion that their offer was very generous) to settle the cases on agreements to compensate in exchange for the agreement not to pursue further legal claims regarding Malaysia Airlines' possible negligence.

The Netherlands, on their end, also expressed great outrage as victim State, and promised the victims' relatives that they would not rest until those responsible would be held to account. Yet, while on the one hand, the Netherlands has a responsibility vis-à-vis the victims, society-at-large, and the global flying public to strive for justice for what has occurred and ensure the enforcement of precautionary measures in the future, they also have a somewhat conflicting responsibility to manage diplomatic relations with those States it could file charges against. This plays out particularly in the government's reluctance to prepare and discuss submitting applications at the ICAO and ECtHR against Russia and Ukraine.

It is simply impossible to consider legal action against another State in a vacuum separate from geopolitical consequences. Similar observations can be made for Ukraine, which, in its existential conflict with Russia has a clear interest in ensuring that Russia garners as much blame as possible and Ukraine as little as possible, while Ukraine simultaneously plays an important role in the JIT investigations. Conversely, Russia can readily use this conflicting role of Ukraine to buttress their narrative that the MH17 investigations are biased and should therefore be dismissed.

Despite many lawyers' own hopes and aspirations of occupying a non-political space in a political world, 'law' is not the antithesis to 'politics'.¹⁸² Law is inherently political and is practiced in a political sphere, the more so with international law. All the legal options that are discussed regarding MH17 are surrounded by political considerations. This does not mean law can be equated with politics. Legal language is a particular form of politics. Rather than holding and presenting objective solutions to society's problems, law is a practice that also requires choice. Consequently, lawyers have a responsibility in guiding the decision-making on what consequences these choices may have and unveil the politics of these choices. By presenting law as a mechanism through which all relevant factors can and are taken into account, and by presenting justice as its only outcome, lawyers and politicians create an image of law that law cannot deliver, with unmet expectations as consequence.

This article aims to enhance understanding for victims' relatives, States and the wider flying public on the potential pathways for legal accountability and the responsibilities that not only may have been neglected on that tragic day in 2014, but may well incur unnecessary danger to anyone boarding a flight on a regular basis. It highlights legal, political and practical hurdles that have occurred and that are likely to cause challenges in the various ongoing and future legal proceedings. The families of the victims know better than anyone that legal remedies of any kind will never begin to compensate them for their losses. At a minimum, they deserve, as does the rest of the flying public, answers as to what happened. As the families have already experienced, the road to justice for MH17 is long and arduous. The very least that those involved can do for them, is to present the legal options well and to be fair about the related political considerations and choices that are made, so that victims know what to expect. And so they understand why lawyering justice for a situation like MH17 is so exceedingly complex.

¹⁸² See for a further elaboration eg Marieke de Hoon, 'The Law and Politics of the Crime of Aggression' (PhD Dissertation, Vrije Universiteit Amsterdam 2016).

Acknowledgements

The legal analysis in this article draws on and expands the research conducted for PILPG's white paper 'Legal Remedies for Downing Flight MH17'. Many contributed to the research and writing thereof, and should be duly accredited: in particular, Margaux Reynaud, who led the analysis on the ECHR, and Sander Couch and Robin de Ruiter, who focussed on civil litigation and Ukraine's responsibilities. Other key contributors were Julie Fraser, Brianne McGonigle Leyh, Jolien Quispel, Tjebbe Geldof, Rok Jamnik, Ilina Georgieva, Ksenia Kutyreva, Andrew Merrylees, Adina Nistor, Maite van Rinsum, Thomas Verstege, Mike Videler, and Nina Bang Jensen. The author, moreover, had several conversations with victims' relatives, politicians, and other close followers of the MH17 developments during the course of this research. These conversations are used throughout this article to provide wider context to the legal analysis.

Competing Interests

The author serves as Director and Senior Counsel for the Netherlands Office of the Public International Law & Policy Group. The article, however, was written in a personal capacity and does not necessarily reflect the position of PILPG.

Bibliography

Treaties and Instruments

- 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 (adopted 18 September 1998, entered into force 8 January 1999) 2062 UNTS 81.
- Charter of the United Nations (adopted 24 October 1945) 1 UNTS XVI.
- Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (adopted 23 September 1971, entered into force 26 January 1971) 974 UNTS 178.
- Convention for the Unification of Certain Rules for International Carriage by Air (adopted 28 May 1999, entered into force 4 November 2003) 2242 UNTS 309.
- Convention on International Civil Aviation (adopted 7 December 1944, entered into force 4 April 1947) 15 UNTS 295.
- European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953, as amended) 213 UNTS 222.
- Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949, entered into force 21 October 1959) 75 UNTS 287.
- International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171.
- Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3.
- Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609.
- Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90.
- Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 15 UNCTAD 355.
- Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

Cases

International Court of Justice

- Appeal Relating to the Jurisdiction of the ICAO Council (India v Pakistan) (Judgment) [1972] ICJ Rep 46.
- Case Concerning Aerial Incident of 3 July 1988 (Islamic Republic of Iran v United States of America) (Discontinuance) ICJ Press Release 1996/6 <<http://www.icj-cij.org/docket/index.php?pr=624&code=irus&p1=3&p2=3&p3=6&case=79&k=9>>.
- Case Concerning Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of Congo) (Judgment) [2010] ICJ Rep 639.
- Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation) (Preliminary Objections) [2011] ICJ Rep 14.

Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Rwanda) (Jurisdiction and Admissibility) [2006] ICJ Rep 6.
 Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States of America) (Merits) [1986] ICJ Rep 14.
 Case Concerning the Application of the Convention of the Prevention and Punishment of Genocide (Bosnia and Herzegovina v Serbia and Montenegro) [2007] ICJ Rep 43.
 Corfu Channel Case (United Kingdom v Albania) (Merits) [1949] ICJ Rep 4.
 Corfu Channel Case (United Kingdom v Albania) (Preliminary Objections) [1948] ICJ Rep 15.
 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Rep 136.
 Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion) [1996] ICJ Rep 226.
 Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal) (Merits) [2012] ICJ Rep 422.

International Criminal Court

The Prosecutor v Saif Al-Islam Gaddafi and Abdullah Al-Senussi (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 (24 July 2014).

European Court of Human Rights

Al-Jedda v the United Kingdom (2011) 53 EHRR 23.
 Al-Skeini and Others v the United Kingdom (2011) 53 EHRR 18.
 Colozza v Italy (1985) 7 EHRR 516.
 Cyprus v Turkey (2014) ECHR 715.
 Ergi v Turkey (2001) 32 EHRR 18.
 Ilaşcu and Others v Moldova and Russia (2005) 40 EHRR 46.
 Ioppa and Others v Ukraine Apps No 73776/14, No 973/15, No 4407/15, and No 4412/15 (ECtHR, 5 July 2016).
 Isayeva v Russia (2005) 41 EHRR 38.
 Ivanțoc and Others v Moldova and Russia (2011) ECHR 1915.
 Kelly and Others v the United Kingdom (2001) ECHR 328.
 Kerimova and Others v Russia (2011) ECHR 744.
 Khashiyev v Russia and Akayeva v Russia (2006) 42 EHRR 20.
 Makaratzis v Greece (2004) 41 EHRR 49.
 Mamatkulov and Askarov v Turkey (2005) 41 EHRR 25.
 McCann and Others v the United Kingdom (1995) 21 EHRR 97.
 Osman v the United Kingdom (1998) 29 EHRR 245.
 Ringeisen v Austria (1971) 1 EHRR 455.
 Schenk v Germany App No 42541/02 (ECtHR, 9 May 2007) (Admissibility).
 Sejdovic v Italy (2006) ECHR 181.
 Tanrikulu v Turkey (2000) 30 EHRR 950.

European Commission of Human Rights

Austria v Italy (1961) 7 DR 23.

Human Rights Committee

Abubakar Amirov and Aïzan Amirova v Russian Federation (Comm No 1447/2006).

High Court of Justiciary at Camp Zeist

HM Advocate v Abdelbaset Ali Mohmed Al Megrahi and Al Amin Khalifa Fhimah [2001] Case No 1475/99 (Opinion of the Court).

UN Documents

HR Committee, 'General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant' adopted at the Eightieth session (26 May 2004) UN Doc CCPR/C/21/Rev.1/Add.13.
 ILC, 'Draft Articles of Responsibility of States for Internationally Wrongful Acts' UN GAOR 53rd Session Supp No 10 UN Doc A/56/83 (2001), corrected by UN Doc A/56/49(Vol.1)/Corr.4.

UNSC Res 1067 (26 July 1996) UN Doc S/RES/1067.

UNSC 'Security Council Condemns Use of Weapons Against Civil Aircraft; Calls on Cuba to Comply with International Law' (27 July 1996) Press Release SC/6247.

ICAO Documents

ICAO 'Annex 11 to the Convention on International Civil Aviation: Air Traffic Services' [2001].

ICAO 'Annex 15 to the Convention on International Civil Aviation: Aeronautical Information Services' [2013].

ICAO 'Annex 17 to the Convention on International Civil Aviation: Security' [2005].

ICAO 'Manual Concerning Safety Measures Relating to Military Activities Potentially Hazardous to Civil Aircraft Operations' [1990] Doc 9554-AN/932.

Other Reports

Dutch Safety Board, 'Crash of Malaysian Airlines Flight MH17' (The Hague, 22 October 2015) <<https://www.onderzoeksraad.nl/uploads/phase-docs/1006/debcd724fe7breport-mh17-crash.pdf>>.

ICC-OTP, 'Report on Preliminary Examination Activities' (14 November 2016) <https://www.icc-cpi.int/icc-docs/otp/161114-otp-rep-pe_eng.pdf>.

Literature

Abeyratne R, *Convention on International Civil Aviation: A Commentary* (Springer 2014).

Alvarez JE, *International Organizations as Law-Makers* (OUP 2006).

Arzt DE, 'The Lockerbie 'Extradition by Analogy' Agreement: 'Exceptional Measure' or Template for Transitional Criminal Justice?' (2002) 18 *American University International Law Review* 163.

Bartsch RIC, *International Aviation Law: A Practical Guide* (Routledge 2012).

Cassese A, 'The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia' (2007) 18 *European Journal of International Law* 649.

Clapham A, 'Weapons and Armed Non-State Actors' In: Casey-Maslen S, (ed.), *Weapons Under International Human Rights Law* (CUP 2014).

Danilenko GM, 'Implementation of International Law in Russia and Other CIS States' (1998) NATO Academy Fellow Research Paper <www.nato.int/acad/fellow/96-98/danilenk.pdf>.

de Hoon M, 'The Law and Politics of the Crime of Aggression' (PhD Dissertation, Vrije Universiteit Amsterdam 2016).

Havel BF and Sanchez GS, *The Principles and Practice of International Aviation Law* (CUP 2014).

ICC, *Rules of Procedure and Evidence* (2nd edn, ICC 2013).

Korff D, 'The Right to Life: A Guide to the Implementation of Article 2 of the European Convention on Human Rights' (2006) Council of Europe Human Rights Handbook No 8 <http://www.echr.coe.int/LibraryDocs/HR%20handbooks/handbook08_en.pdf>.

Lemnitzer JM, 'International Commissions of Inquiry and the North Sea Incident: A Model for a MH17 Tribunal?' (2016) 27 *European Journal of International Law* 923.

Mowbray AR, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing 2004).

Rainey B, Wicks E and Overy C, *Jacobs, White & Ovey: The European Convention on Human Rights* (6th edn, OUP 2014).

Rodley NS, 'Integrity of the Person' In: Moeckli D, Shah S and Harris SSD, (eds.), *International Human Rights Law* (2nd edn, OUP 2014).

Shaw MN, *International Law* (CUP 2015).

Trapp KN, *State Responsibility for International Terrorism* (OUP 2011).

Newspapers, Websites, and Blogs

'Council of Europe in Dispute with Russia over Yukos Case' *BBC News* (London, 20 January 2017) <<http://www.bbc.com/news/world-europe-38691148>>.

Deutsch A, 'Trial Over Malaysian Plane Crash Not Likely at ICC: Dutch' (*Reuters*, 30 July 2014) <<http://www.reuters.com/assets/print?aid=USKBN0FZ1MD20140730>>.


'Dutch Government Will Only Consider Liability of Ukraine after Criminal Investigation JIT Has Finished' (26 October 2016) <<http://www.whathappenedtoflightmh17.com/dutch-government-will-only-consider-liability-of-ukraine-after-criminal-investigation-jit-has-finished/>>.

- European Court of Human Rights, 'Interim Measure Granted in Inter-State Case Brought by Ukraine Against Russia' (13 March 2014) Press Release ECHR 073 <<http://hudoc.echr.coe.int/webservices/content/pdf/003-4699472-5703982>>.
- ICC, 'ICC Prosecutor Extends Preliminary Examination of the Situation in Ukraine Following Second Article 12(3) Declaration' (Press Release, 29 September 2015) <https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1156.aspx>.
- ICJ, 'Advisory Jurisdiction' <<http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=2>>.
- ICJ, 'Organs and Agencies of the United Nations Authorised to Request Advisory Opinions' <<http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=2&p3=1>>.
- ICJ, 'Ukraine Institutes Proceedings Against the Russian Federation and Requests the Court to Indicate Provisional Measures' (Press Release, 17 January 2017) <<http://www.icj-cij.org/docket/files/166/19310.pdf>>.
- International Committee of the Red Cross, 'Ukraine: ICRC Calls on All Sides to Respect International Humanitarian Law' (23 July 2014) News Release 14/125 <<http://www.icrc.org/eng/resources/documents/news-release/2014/07-23-ukraine-kiev-call-respect-ihl-repatriate-bodies-malaysian-airlines.htm>>.
- Matta A and Scarlat A, 'Malaysia Airlines Flight MH17 – Possible Legal Avenues for Redress (Part 2)' (*Opinio Juris*, 28 August 2015) <<http://opiniojuris.org/2015/08/28/guest-post-malaysia-airlines-flight-mh17-possible-legal-avenues-for-redress-part-2/>>.
- 'MH17 Crash: Dutch Investigators to Assess New Study Implicating Russian Soldiers' *The Guardian* (London, 4 January 2016) <<http://www.theguardian.com/world/2016/jan/04/mh17-dutch-investigators-to-study-citizen-journalist-claims-over-russians-involved-in-crash>>.
- 'MH17 Crash: Russia Vetoes UN Resolution for International Tribunal' *BBC News* (London, 29 July 2015) <<http://www.bbc.com/news/world-europe-33710088>>.
- 'Mother of German MH17 Victim Sues Ukraine' *Al Jazeera* (Doha, 30 November 2014) <<http://www.aljazeera.com/news/europe/2014/11/family-german-mh17-victim-sues-ukraine-20141129233051954730.html>>.
- Openbaar Ministerie, 'MH17' <<https://www.om.nl/onderwerpen/mh17-crash/>>.
- 'Operation Pawn Storm: Fast Facts and the Latest Developments' (*Trend Micro*, 22 October 2015) <<http://www.trendmicro.com/vinfo/us/security/news/cyber-attacks/operation-pawn-storm-fast-facts>>.
- Philippov I, 'Russian Constitutional Court Denies Enforcement of ECHR Decision on Yukos' (*CIS Arbitration Forum*, 25 January 2017) <<http://www.cisarbitration.com/2017/01/25/russian-constitutional-court-denies-enforcement-of-echr-decision-on-yukos/>>.
- Prosecutor General's Office of Ukraine, 'Russian Citizen, Member of the LNR Terrorist Organization Prosecuted' (Press Release, 15 January 2016) <http://www.gp.gov.ua/ua/news.html?_m=publications&_c=view&_t=rec&id=167878>.
- Soldatkin V, 'Putin Signs Law Allowing Russia to Overturn Rulings of International Rights Courts' (*Reuters*, 15 December 2015) <<http://www.reuters.com/article/us-russia-court-putin-idUSKBN0TY17H20151215>>.
- 'The Long Road to Trial' *BBC News* (London, 3 May 2000) <http://news.bbc.co.uk/2/hi/world/monitoring/media_reports/733755.stm>.
- 'The Situation at the MH17 Crashsite Since July 17' (20 October 2014) <<http://www.whathappenedtoflightmh17.com/the-safety-of-the-crashsite/>>.
- Uhlenbroich B, 'Familien der Deutschen Opfer Verklagen Ukraine' *Bild* (Frankfurt am Main, 21 September 2014) <<http://www.bild.de/politik/ausland/flug-mh-17/familien-der-deutschen-opfer-verklagen-ukraine-37748032.bild.html>>.
- 'Ukraine: Flight MH17 Crash Victim's Mother Lodges Court Complaint' (*Human Rights Europe*, 1 December 2014) <<http://www.humanrightseurope.org/2014/12/ukraine-flight-mh17-crash-victims-mother-lodges-court-complaint/>>.
- United Nations News Centre, 'Eastern Ukraine: UN Rights Chief Says Downing of Plane May Be 'War Crime,' Urges Probe' (*UN News Centre*, 28 July 2014) <http://www.un.org/apps/news/story.asp?NewsID=48360#.U_jverxdUcg>.
- UN Office of the High Commissioner for Human Rights, 'Intense Fighting in Eastern Ukraine "Extremely Alarming", Says Pillay, as UN Releases New Report' (Press Release, 28 July 2014) <<http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=14908&LangID=E>>.
- Whiting A, 'How to Prosecute the Perpetrators of the Malaysian Jet Downing' (*Just Security*, 25 July 2014) <<https://www.justsecurity.org/13269/prosecute-perpetrators-malaysian-jet-downing/>>.

How to cite this article: Marieke de Hoon, 'Navigating the Legal Horizon: Lawyering the MH17 Disaster' (2017) 33(84) *Utrecht Journal of International and European Law*, pp. 90-119 DOI: <https://doi.org/10.5334/ujiel.368>

Submitted: 07 November 2016 **Accepted:** 29 March 2017 **Published:** 12 April 2017

Copyright: © 2017 The Author(s). This is an open-access article distributed under the terms of the Creative Commons Attribution 4.0 International License (CC-BY 4.0), which permits unrestricted use, distribution, and reproduction in any medium, provided the original author and source are credited. See <http://creativecommons.org/licenses/by/4.0/>.

 *Utrecht Journal of International and European Law* is a peer-reviewed open access journal published by Ubiquity Press. **OPEN ACCESS** 