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The "MH17" judgment and its legal implications for the International Court of Justice's ruling in *Ukraine v. Russia*: a critical appraisal

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Abstract

On November 17, 2022, the Dutch District Court of The Hague found three persons liable in connection with the downing of Malaysia Airlines Flight 17, which occurred in the breakaway oblast of Donetsk in July 2014. Drawing on this judgment, the present essay examines whether the Russian Federation can be regarded as a State actively involved in this incident with a view to investigating to what extent it exercised "overall control" over the Donetsk People's Republic's separatists. Afterwards, the analysis is framed in the context of the wider legal dispute between Ukraine and the Russian Federation before the International Court of Justice, where the former maintained, *inter alia*, that the latter failed to honour its obligation under the 1999 International Convention for the Suppression of the Financing of Terrorism —specifically, by providing the separatists with the "fund" (i.e., a BUK TELAR) that forced the aircraft to crash. Ultimately, the legal implications of the findings are assessed to foresee the outcome of the International Court of Justice's decision on the merits.

Keywords: State Responsibility, International Court of Justice (ICJ), MH17, armed conflict, 1999 International Convention for the Suppression of the Financing of Terrorism (ICSFT)

Introduction

On November 17, 2022, the Dutch District Court in The Hague delivered the long-awaited judgment regarding the crash of Malaysia Airlines Flight 17 (hereafter MH17).[1] In a nutshell, a missile fired by a Russian BUK TELAR caused the downing of MH17, which resulted in its crash and the ensuing deaths of all its passengers. The downing occurred in the breakaway oblast of Donetsk, which at the relevant time, was occupied by the Donetsk People's Republic (DPR), and which was engaged in hostilities against the Ukrainian armed forces.[2]

The Dutch court found two Russians and one Ukrainian guilty under the Dutch Criminal Code (DCC)—precisely, under article 168, concerning the intentional crash of an aircraft, and article 289, regarding the murders of 298 people. Each of the guilty individuals received a life sentence.

As expected, this case positions itself in the wider context of the war between Ukraine and Russia. Besides providing valuable legal insight into the 2014 air disaster, the MH17 ruling may shed light on another legal dispute between the same two States. From the international law perspective, it should be kept in mind that the Ukrainian government filed a complaint at the International Court of Justice (ICJ), where, *inter alia*, it argued that the downing

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[1] The Hague District Court, *ECLI:NL:RBDHA:2022:14039*, Nov. 17, 2022, https://www.rechtspraak.nl.

[2] For the sake of clarity, the following should be mentioned: Agreement between the Kingdom of the Netherlands and Ukraine on International Legal Cooperation regarding Crimes connected with the Downing of Malaysia Airlines Flight MH17 on July 17, 2014, July 7, 2017, *Tractatenblad van het Koninkrijk der Nederlanden* [Dutch Treaty Series] 2017, no. 102, https://wetten.overheid.nl/BWBV0006683/2018-08-28.

of MH17 amounted to Russia's failure to honour the international legal obligations enshrined in the 1999 International Convention for the Suppression of the Financing of Terrorism (ICSFT).

After focusing more specifically on these claims, the present essay will provide an assessment of the Dutch court's findings regarding the nature of the conflict that occurred in eastern Ukraine. Afterwards, the threshold of Russian involvement will be discussed with a view to investigating the possible legal implications of the Dutch judgment for the ICJ's future ruling concerning the alleged violation of the ICSFT's provisions.

THE LEGAL CLAIMS OF UKRAINE BEFORE THE INTERNATIONAL COURT OF JUSTICE

On January 16, 2017, Ukraine instituted a legal proceeding against the Russian Federation before the ICJ, primarily alleging that Russia failed to comply with the obligations arising out of the 1999 ICSFT.[3] Absent the Russian Federation's acceptance of the ICJ's compulsory jurisdiction (pursuant to article 36[2] of the Court's Statute), Ukraine was left with no choice but to invoke Russian responsibility (*ex* article 42 of the International Law Commission's Articles on State Responsibility[4]). It did so by relying upon two conventions signed by both parties, which provided the Court with jurisdiction via two compromissory clauses.[5] Specifically, the Applicant submitted that, by failing to act in accordance with the ICSFT, the Russian Federation did not prevent "acts of terrorism committed by its proxies in Ukraine" from occurring, including the downing of MH17.[6] Accordingly, Ukraine asserted that the ICJ should note that the Russian Federation bears international responsibility, and full reparation should be granted for the flight's crash. In particular, Ukraine mainly relied upon the following ICSFT articles: a) article 8(1) regarding the identification, freezing, and seizure of those funds intended to be used or allocated for the purpose of financing terrorism in Ukraine; b) articles 9(1) and 10(1), which deal with the investigation of the alleged acts of terrorism committed in Ukraine, and with the extradition or prosecution of alleged perpetrators; and c) article 12(1), concerning the Parties' obligation to grant "one another the greatest measure of assistance" in relation to criminal investigations over terrorism-related offenses set forth in the ICSFT.[7] The alleged failure to comply with article 18 (concerning cooperation obligations) has also been put forward.[8]

It comes with no surprise that the bone of contention also concerned the 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation (hereafter the Montreal Convention). From this standpoint, Ukraine claimed that the crash of MH17 amounted to a violation of article 1(1)(b) of the Montreal Convention; conversely, the Respondent noted that, for the same article to be applied, "there must be an intent to destroy or cause damage to a civilian aircraft in service."[9]

To fully appreciate the extent of the Dutch court's findings, which will be explored in the next section, the main legal standing of the Russian Federation should be pointed out. According to the latter, the Applicant's allegations describe acts and offenses falling outside the meaning and scope of article 2 of the ICSFT. The Respondent State's reasoning mainly revolves around two arguments: the first, which is a *material* one, highlights the lack of evidence available to substantiate Russian involvement in providing "weaponry to any entity 'with the requisite specific intent or knowledge,' under article 2, paragraph 1, of the ICSFT, that such weaponry would be used to shoot

[3] Application of the International Convention for the Suppression of the Financing of Terrorism (ICSFT) and of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (Ukraine v. Russian Federation) (Application Instituting Proceedings), Jan. 16, 2017 (ICJ Reports 2017).

[4] The Articles on State Responsibility envision two avenues by which it is possible to determine the responsibility of the wrongdoing State: a) invoking its responsibility; b) applying the so-called countermeasures pursuant to arts. 49–54. Cf. International Law Commission, *Responsibility of States for Internationally Wrongful Acts*, 2001.

[5] See, respectively, arts. 24 ICSFT and 22 ICERD.

[6] Application of the International Convention for the Suppression of the Financing of Terrorism (ICSFT) and of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (Ukraine v. Russian Federation) (Judgment) Nov. 8, 2019 (ICJ Reports 2019). Other claims brought by Ukraine relate to the following: a) the shelling of civilians, including in Volnovakha, Mariupol, and Kramatorsk; and b) the bombing of civilians, including in Kharkiv.

[7] Ibid., para. 19. It should be noted that the offenses referred to under the ICSFT are those regulated by arts. 2(1)(a) and (b).

[8] Art. 18 stipulates that "States Parties shall cooperate in the prevention of the offences set forth in article 2 by taking all practicable measures, *inter alia*, by adapting their domestic legislation, if necessary, to prevent and counter preparations in their respective territories for the commission of those offences within or *outside* their territories." (emphasis added).

[9] Application of the International Convention (n6), para. 46.

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down flight MH17"[10]; the second, which is meant to underscore a *legal* position, points to the fact that the ICSFT's provisions, as well as its very nature, are ill-suited to claim the international responsibility of a State for financing terrorism, as they only consider activities carried out by private persons,[11] which the expression "any person" in article 2 would refer to.

Moreover, the Respondent government emphasizes the importance of fully understanding the meanings of the terms "intention" and "knowledge" pursuant to article 2(1) of the ICSFT, in that they relate to the mental elements of the offense (financing terrorism). Suffice it here to note that the interpretation that the Russian Federation provides is the following: "intention" must be understood as "a specific intent requirement," while "knowledge" refers to actual knowledge that the funds will be used to commit acts of terrorism and "not merely that they may possibly be used to do so."[12]

In sum, what is relevant about the legal dispute between the two States is their divergent views on a) the lack of evidence pointing to Russian involvement in the MH17 incident; and (b) the notion of "any person" capable of committing a prohibited act under the convention. The Dutch district court's judgment can shed light at least on the first issue, and for this reason, it must be examined.

THE NATURE OF THE CONFLICT IN EASTERN UKRAINE: THE APPLICATION OF THE OVERALL CONTROL TEST

As already mentioned, the Dutch court held three individuals accountable for the MH17 tragedy under *domestic law* (the DCC).[13] Resorting to a variety of evidence, including eyewitnesses, satellite imagery, photographs, and wiretapped telephone conversations, the Dutch court concluded that a BUK missile was launched from a rebel-held field near Pervomaiskyi (i.e., the launch site), which had been selected for its strategic value to counter Ukrainian shelling.[14] In the aftermath of the incident, the UN Security Council unanimously called for the establishment of an independent and international fact-finding commission for the purpose of investigating the incident in accordance with international civil aviation guidelines.[15] In this regard, the painstaking investigation that formed the basis of the criminal case was conducted by the fact-finding entity known as JIT,[16] alongside the SBU (the Ukrainian investigative entity), which is completely logical considering the place where the crash occurred and the provisions of the Convention on International Civil Aviation (1944, Chicago Convention, in particular article 26, by virtue of which Ukraine requested the Netherlands to carry out the investigation).[17] On the international stage, the establishment of an independent international criminal tribunal called for in a UN Security Council's draft resolution was instead vetoed by the Russian Federation in July 2015.[18]

At this juncture, several observations about the convicted individuals will help clarify several points that are discussed later. Even though the convicted (Kharchenko, Dubinskiy, and Girkin) did not actually fire the missile (the

[10] Ibid., para. 42.

[11] Ibid., paras. 43 and 44. The Russian Federation took the position that the ICSFT is a "law enforcement instrument." To defend such a claim, the Respondent considered the text of the convention alongside its structure and preparatory works.

[12] Ibid., para. 45.

[13] However, the Netherlands attempted to bring the question before international tribunals, such as the European Court of Human Rights (ECtHR). See "The Netherlands brings MH17 case against Russia before European Court of Human Rights," *News* (July 10, 2020), https://www.government.nl/latest/news/2020/07/10/the-netherlands-brings-mh17-case-against-russia-before-european-court-of-human-rights. In January 2023, the Strasbourg-based court announced that it will hear the case on the merits stage. See ECtHR, *Eastern Ukraine and flight MH17 case declared partly admissible*, Press Release EtCHR 026 (2023).

[14] The Hague District Court, (n1) paras. 6.2.2; 6.2.2.2.; 6.2.2.3; and 6.2.2.4.

[15] SC Res. 2166 (2014), July 21, 2014, demanding also that "the armed groups in control of the crash site and the surrounding area refrain from any actions that may compromise the integrity of the crash site, including by refraining from destroying, moving, or disturbing wreckage, equipment, debris, personal belongings, or remains, and immediately provide safe, secure, full and unrestricted access to the site and surrounding area for the appropriate investigating authorities." (para. 6).

[16] The Hague District Court (n1) para. 5.2. The Joint Investigation Team (JIT) was established by the governments of the Netherlands, Ukraine, Belgium, Australia, and Malaysia.

[17] Art. 26 prescribes that the Contracting State in whose territory an incident involving the aircraft of another Contracting State takes place will be responsible for investigating the circumstances of such an incident.

[18] For the draft resolution, see SC Res. S/2015/562 (July 29, 2015). Regarding the Russian position leading to the use of its veto power, see the meeting record, UN Doc. S/PV.7498 (July 29, 2015), p. 21.

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actual perpetrators are identified as the BUK TELAR crew members), they have been held accountable as functional perpetrators and/or co-perpetrators of the above-mentioned offenses[19] because they were directly involved in the disaster, actively playing key roles in relation to the presence of the BUK TELAR.[20]

A comprehensive analysis of the judgment, especially from a criminal law viewpoint,[21] is beyond the remit of the present essay, as its main focus is to cover a very specific topic (i.e., the degree of the Russian Federation's involvement in lending military, logistic, and strategic support to the DPR's activities).

As the ICJ itself has recognized, this analysis entails ascertaining the existence of any possible legal conditions that bar it from delivering its judgment, such as for the case of the immunities conferred upon *lawful* combatants by international humanitarian law (IHL), which regulates the matter at hand.[22] This, in turn, first requires focusing on the *nature* of the conflict that broke out in eastern Ukraine between the Ukrainian armed forces and the separatists, in that combatants are only entitled to privileges and immunities vis-à-vis *international armed conflict* and not with regard to non-international armed conflict.[23]

From this perspective, it should be emphasized that the existence of an *armed conflict* is basically conditioned upon two different features: a) the resort "to armed force between States," which substantiates an *international* armed conflict; or b) the presence of "protracted armed violence between governmental authorities and organized armed groups or between such groups within a State" (i.e., a *non-international* armed conflict).[24] The factual scenario that seemingly best fits the hostilities between Ukraine and the DPR is the latter. As a matter of fact, these two actors had constantly been engaged in "protracted armed violence" since April 2014, with a military escalation occurring in June of the same year. Moreover, considering that the DPR established a precise institutional and military structure, which is also confirmed by the accused who held *lato sensu* government positions, there is room to argue that the separatists were organized in such a way as to meet the notion of an "organized armed group."[25] The presence of these two elements is also relevant in order to distinguish a domestic police action from a non-

[19] For an analysis concerning the basis of the Dutch jurisdiction relying upon "passive personality" and "delegated jurisdiction," see Lachezar Yanev, "Jurisdiction and Combatant's Privilege in the MH17 Trial: Treading the Line Between Domestic and International Criminal Justice," *Netherlands International Law Review* 68, no. 2 (2021):165, 168–74. More generally, reference can be made to Robert Cryer et al., *An Introduction to International Criminal Law and Procedure* (Cambridge: Cambridge University Press, 2019).

[20] Their involvement can be summarized as follows: Kharchenko must be viewed as *a co-perpetrator* of the offenses charged under the Dutch Criminal Code (DCC) in that he actively contributed to them by escorting and guarding the BUK TELAR. Moreover, considering that he gave instructions to his subordinates, he must be seen as a *functional perpetrator* as well. Dubinskiy, as a ranking military commander, organized the transport of the BUK TELAR from the Russian Federation during the night and in the early morning of July 16–July 17, 2014. These actions can be regarded as *co-perpetration*. As for Girkin, despite his military rank (the DRP's commander), he became actively involved only in relation to the return of the BUK TELAR to the Russian Federation, issuing the necessary orders. Therefore, he can be viewed as a *functional perpetrator* of these co-perpetrated offenses. For an in-depth description of the military positions as well as the action carried out by each accused, see The Hague District Court, (n1) para. 6.2.4.3.

[21] Some commentators explored the possibility of seizing the International Criminal Court to prosecute those responsible for the MH17 crash. See, among others, Sarah Williams, "MH17 and the International Criminal Court: a suitable venue?" *Melbourne Journal of International Law* 17 (2016): 210. Despite not being a Party to the ICC's Statute, Ukraine accepted the ICC's jurisdiction by issuing a declaration pursuant to art. 12(3) of the Rome Statute.

[22] The Hague District Court (n1) para. 4.4.3.1. As the court observed, "Under Section 8d DCC, jurisdiction may nevertheless be limited by exceptions recognized in international law." According to the court, persons who have combatant status (i.e., lawful combatants) "are authorized to participate in hostilities and thus to conduct combat operations (combatant privilege)."

[23] Knut Ipsen, "Combatants and non-combatants," in *The Handbook of International Humanitarian Law,* ed. Dieter Fleck (Oxford: Oxford University Press, 2021), 93–128.

[24] ICTY, *Prosecutor v. Tadić*, IT-94-1-AR72, Appeals Chamber, Decision, Oct. 2, 1995, para. 70. See also *Prosecutor v. Blaškić*, IT-95-14-T, Judgment, Trial Chamber, Mar. 3, 2000, para. 149 ("Croatia played the role of occupying Power through the overall control it exercised over the HVO"). See Dapo Akande, "Classification of Armed Conflicts: Relevant Legal Concepts," in *International Law and the Classification of Conflicts,* ed. Elizabeth Wilmhurst (Oxford: Oxford University Press, 2012), 32–79.

[25] On May 11, 2014, the breakaway oblasts of Donetsk and Luhansk declared independence. Afterwards, they proceeded to adopt their constitutions, appoint leaders, and, eventually, claim authority over several cities. See, extensively, The Hague District Court, para. 4.4.3.1.1, https://www.rechtspraak.nl.

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international armed conflict.[26] Thereby, the Dutch court considered itself satisfied with the fact that a *non-international armed conflict* was ongoing when MH17 was forced to crash. In July 2014, the International Committee of the Red Cross (ICRC) had also claimed that, at the very least, the violence in eastern Ukraine could be branded as a non-international armed conflict.[27]

Nevertheless, a relevant point should be interjected and discussed here—namely, the degree of Russian involvement in the present scenario. In fact, even though an armed conflict is non-international in nature, it can later become an international conflict, provided that another State has exerted "overall control" over an armed group (which, in this case, would be the DPR).

The *overall control* test was elucidated first by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY), and it is understood to encompass a degree of control that goes beyond the mere financing and equipping of such a group, as the State's participation is additionally required in "coordinating or helping *in the general planning* of its military activity."[28] Moreover, for the purpose of regarding the members of an armed group as lawful combatants, account must be taken of article 43 of the (I) Additional Protocol to the Geneva Conventions, which identifies two cumulative criteria for such an assessment: a) to be "'under a command responsible to' a State party participating in an international armed conflict"; and b) to be "subject to an internal disciplinary system which shall enforce compliance with the rules of international law applicable in armed conflict."

That being said, the Dutch court noticed that several of the DPR's leaders, including the accused, not only had Russian nationality (except for Kharchenko**)** but also actively and increasingly sought instructions from "Home" (i.e., Moscow, insofar as they were previously affiliated with the Russian armed forces).[29] These instructions were occasionally political (meaning people to be appointed in key institutional areas) or military.[30] Apart from these affiliations, the evidence collected during the investigations pointed to the fact that the Russian Federation provided operational, political, strategic, and military backing to the DPR separatists (including the BUK missile that took down MH17), coordinating its activities and giving key instructions. All these elements led the Dutch court to the conclusion that a full-fledged international armed conflict indeed existed.[31]

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[26] See*, ex multis,* Robert Kolb and Richard Hyde, *An Introduction to the International Law of Armed Conflicts* (London: Bloomsbury Publishing, 2008), 78.

[27] See ICRC, "Ukraine: ICRC Calls on All Sides to Respect International Humanitarian Law," July 23 2014, https://www.icrc.org/en/doc/resources/documents/news-release/2014/07-23-ukraine-kiev-call-respect-ihl-repatriate-bodies-malaysian-airlines.htm. See also Anthony Deutsch, "Trial over Malaysian plane crash not likely at ICC: Dutch," *Reuters*, July 30, 2014, https://www.reuters.com/article/us-ukraine-crisis-airplane-trial-idUSKBN0FZ1MD20140730.

[28] Emphasis added. The Appeals Chamber held that the requisite degree of control by the Yugoslavian "authorities over these armed forces required by international law for considering the armed conflict to be international was *overall control.*" ICTY, *Prosecutor v. Tadić*, IT-94-1-A, Appeals Chamber, Decision, July 15, 1999, paras. 131 and 137. In approaching the very same issue, the Office of the ICC's Prosecutor also relied upon the overall control test. Indeed, the office conducted an investigation devoted to assessing "whether the information available indicates that Russian authorities have provided support to the armed groups in the form of equipment, financing and personnel, and also whether they have *generally directed or helped* in planning actions of the armed groups in a manner that indicates they exercised genuine control over them." (emphasis added). See ICC, Office of the Prosecutor, Report on Preliminary Examination Activities (2016), Nov. 14, 2016, para. 170. The report concluded that a non-international armed conflict and an international one concurrently existed in eastern Ukraine. As for the latter, the Office of the Prosecutor observed that Ukrainian and Russian armed forces directly began several military engagements, including cross-shelling, as early as July 2014. The preliminary assessment officially ended in December 2020, concluding that the criteria underpinning the opening of an investigation were met. See ICC, Office of the Prosecutor, Report on Preliminary Examination Activities (2020), Dec. 14, 2020, para. 71.

[29] For instance, "the accused Girkin, at the time Minister of Defence of the DPR, is a Russian national, served in the Russian intelligence agency (FSB) and took part in the wars in Chechnya, Transnistria and Bosnia." Cf. The Hague District Court (n1) para. 4.4.3.1.3.

[30] The Dutch court emphasized that "the leaders of the DPR regularly requested support such as the manpower, military equipment and requisite training." Cf. *ivi*.

[31] Natia Kalandarishvili-Mueller, "Russia's 'Occupation by Proxy' of Eastern Ukraine – Implications Under the Geneva Conventions," *Just Security*, Feb. 22, 2022, https://www.justsecurity.org/80314/russias-occupation-by-proxy-of-eastern-ukraine-implications-under-the-geneva-conventions/, 3, noting that "[S]tate X would need to exercise control over a de facto

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The finding is certainly noteworthy. In fact, this would mean that the DPR should be looked upon as a *de facto* proxy of the Russian Federation, and that, pursuant to article 43 of the (I) Additional Protocol to the Geneva Conventions, the DPR's separatists are regarded as combatants entitled to combatant status and privileges.[32] However, referring to a less convincing reasoning, the Dutch court denied such status because the DPR militia is not part of the regular Russian armed forces, and "the characterisation of overall control is not, in itself, sufficient to conclude that it was under a command that was responsible to the Russian Federation for the conduct of its subordinates." This was because the Dutch court (mistakenly) relied upon Russia's political claims that the DPR militia was not part of the Russian armed forces.

It is argued that the Dutch court's posture is far from coherent. As some scholars have noted, the court's reasoning produced an "asymmetric situation where two [S]tates were engaged in an IAC [international armed conflict] in that region, yet only the forces of one of those [S]tates were privileged combatants."[33] Despite shedding valuable light on the nature of the conflict, it is still difficult to see the *rationale* behind such reasoning, which lacks a sufficient degree of coherence in asserting that Russian involvement is sufficiently proven and that it meets the overall control test, while at the same time it denies combatant privileges (and the immunities deriving therefrom) for the DRP's separatists. Above all, the Dutch court's finding on this peculiar issue is hinged on arguments that are not germane to the assessment to be carried out. Importantly, political and diplomatic claims have no bearing on defining the status of the Russian Federation; instead, factual elements, which substantiate the overall control test, play a decisive role in shaping its status.[34] Moreover, the Dutch court seemingly did not give enough weight to Ukraine's stance in the ICJ case. As a matter of fact, the Ukrainian government firmly asserted that the rebel forces in its eastern territories are "proxies of Russia, which it uses in a 'hybrid warfare'" to gain control over those territories.[35] Accordingly, in the case where a conflict is internationalized, as the Dutch court concluded, both prisoner-of-war status and combatant immunities are to be bestowed upon the separatists.[36] Contrary to what the court ruled, this author's view is that the accused should be regarded as lawful combatants to whom the full panoply of rights and duties attached to combatant status should be applied.[37]

Without dwelling further on this topic, it is possible to better understand why the Dutch court chose not to assign combatant status and immunities to the accused if the Dutch Prosecutor's judicial stance is briefly highlighted. Indeed, the accused have been sentenced under the DCC, not under international criminal law. In this way, they have

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entity/an armed group (the proxy); and control over the territory as understood in art. 42 of The Hague Regulation of 1907 for the purposes of establishing military occupation needs to be exercised by that intermediary."

[32] See also Rule no. 3, "Definition of Combatants" in the Customary IHL Database prepared by the ICRC.

[33] Lachezar Yanev, "The MH17 Judgment: An Interesting Take on the Nature of the Armed Conflict in Eastern Ukraine," *EJIL:Talk!*, Dec. 7, 2022, https://www.ejiltalk.org/the-mh17-judgment-an-interesting-take-on-the-nature-of-the-armed-conflict-in-eastern-ukraine/, 5.

[34] As pointed out by Yanev (n19) at 179–81, "as a matter of law, the condition that the armed group has to 'belong to'/ 'be under a command responsible to' a State involved in an IAC does not require a public announcement of this relationship." See also Nils Melzer, *Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law*, International Committee of the Red Cross (2009), 23, asserting that requisite of the acceptance need not "be officially declared, but may also be expressed through tacit agreement or conclusive behaviour that makes clear for which party the group is fighting."

[35] Application of the International Convention, (n3) paras. 8–10, 37.

[36] In this vein, see Share R. Reeves and David Wallace, "The Combatant Status of the 'Little Green Men' and Other Participants in the Ukraine Conflict," *International Law Studies* 91 (2015): 360, 400. For the prisoner of war *status*, see, specifically, art. 4(A) of Geneva Convention III, which is concerned with the matter at hand, especially para. 2, affirming that a person shall be considered a prisoner of war if s/he is a member of "other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and *operating in or outside their own* territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions: a) that of being commanded by a person responsible for his subordinates; b) that of having a fixed distinctive sign recognizable at a distance; c) that of carrying arms openly; and d) that of conducting their operations in accordance with the laws and customs of war." (emphasis added).

[37] It should be vehemently stressed that lawful combatants are bound by the principle of distinction as embedded in art. 48, Additional Protocol. For a detailed account, see *ex multis*, Nils Melzer, "The Principle of Distinction Between Civilians and Combatants," in *The Oxford Handbook of International Law in Armed Conflicts,* eds. Andrew Clapham and Paola Gaeta (Oxford: Oxford University Press), 296.

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been prevented from claiming immunities because doing so would have required the accused to openly state and prove that they were actually *de facto* proxies of the Russian Federation, an assertion that, at the relevant time, Moscow persistently did not uphold.[38] To put it differently, charging them for war crimes would have shifted the burden of proof to the Dutch Prosecutor, requiring him to prove "the *actus reus* and *mens rea* elements of these war crimes."[39]

The legal implications of the Dutch Court's findings: What decision can the ICJ possibly render?

Back in 2014, the threshold of Russian involvement in terms of control exerted over the separatists was somewhat debatable due to the lack of evidence substantiating such a hypothesis. Arguably, this was the reason why some authors, while possibly recognizing that eastern Ukraine was an occupied territory, did not go as far as asserting that the armed conflict was an international one, (i.e., it was only a non-international armed conflict).[40]

Therefore, if questions are now raised as to whether the Russian Federation played a role in (i) financing, training, and equipping, or providing operational support to the DPR; and (ii) organizing, coordinating, or planning the DPR's military actions, the answer would be positive, at least in accordance with the evidence collected and exhibited during the MH17 trial—not to mention the ongoing "special operation" and the legally disputable referendum held in Donetsk and other occupied oblasts.[41] The Ukrainian claims, however, which are also partially grounded in political arguments, proved to be true. More specifically, Ukraine was right in arguing before the ICJ that the DPR was waging a war against Ukraine on behalf of the Russian Federation, a finding that some scholars also share.[42] In this respect, upon lodging a complaint before the European Court of Human Rights (ECtHR), the government of the Netherlands contended that Russia violated articles 2, 3, and 13 of the European Convention on Human Rights (ECHR) with respect to the MH17 downing. The ECtHR's Grand Chamber found it established, based on a wide array of evidentiary documentation, that the disaster occurred in rebel-held territories that were under the Russian Federation's (extraterritorial) jurisdiction.[43]

In light of the foregoing, it is interesting to try to foresee what the ICJ will find and declare once its judgment on the merits is rendered. Before focusing on this assessment exercise, a preliminary question should be addressed. The Dutch court maintained that the trove of evidence gathered during the painstaking MH17 investigations resulted in the finding that the DRP was under the Russian Federation's *overall control*. From this viewpoint, it is worth noting that the threshold of control exercised by a State over the proxy can also be evaluated, resorting to the *effective control* test,[44] which is enshrined in article 8 of the International Law Commission's 2001 Articles on State Responsibility.

As the Articles on State Responsibility illustrate, an internationally unlawful act exists when a) the action/omission can be attributed to a State; and b) such act/omission constitutes a violation of an international obligation.[45]

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[38] Yanev (n33) 3.

[39] Yanev (n19) 181–84, arguing that the Prosecutor needed to convincingly prove that "the DPR forces were aware of that protected status. This would have dramatically shifted the Prosecutor's position, who would no longer be able to treat as irrelevant evidence that 'the true intention of these defendants was to shoot down an aircraft of the Ukrainian armed forces.'"

[40] This view is held, among others, by Reeves and Wallace*,* "The Combatant Status of the 'Little Green Men,'" at 374–75, also affirming that "[i]n an effective occupation, therefore, the occupied power is rendered incapable of exercising its governmental authority over the occupied territory, and the occupying power substitutes its own authority for it." See also "International armed conflict in Ukraine," where the following statement is made: "[A]t *the time*. it was not possible to conclude with a degree of certainty that Russia was exercising overall control over the opposition groups operating in Ukraine." (emphasis added). https://www.rulac.org/browse/conflicts/international-armed-conflict-in-ukraine#collapse1accord.

[41] Even before the MH17 judgment, Russian involvement in terms of control exerted over the DPR was clear in 2015. See, e.g., Shaun Walker, "Putin admits Russian military presence in Ukraine for first time," *The Guardian*, Dec. 17, 2015**,** https://www.theguardian.com/world/2015/dec/17/vladimir-putin-admits-russian-military-presence-ukraine.

[42] Robert Heinsch, "Conflict Classification in Ukraine: The Return of the 'Proxy War'?" *International Law Studies* 91 (2015): 323, 354–60, was already arguing that the internal conflict was internationalized by Moscow's support and control.

[43] See Ukraine and The Netherlands v. Russia, ECtHR, no. 8019/16, 43800/14, and 28525/20, Decision of Nov. 30, 2022, paras. 579–697. The Grand Chamber decided to compile three different applications concerning inter-States cases under art. 33 (one brought by the Netherlands, coupled with two Ukrainian applications). Despite no longer being a party to the European Convention on Human Rights (ECHR), the Respondent State can still be held accountable in connection with actions carried out up until the date of Russian denunciation, *ex* art. 58.

[44] Yoram Dinstein, *The International Law of Belligerent Occupation* (Cambridge: Cambridge University Press, 2019), 50.

[45] ILC (n4) art. 2(a) and (b).

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In order to assess whether conduct is imputable to a State, article 8 requires that "a group of persons" is acting (or acted) "on the instructions of, or *under* the direction or *control* of, that State in carrying out the conduct."[46] This article thus applies to situations where State responsibility is capable of being triggered by actions of individuals who are acting on the instructions, or under the direction and control, of the State in question. Moreover, if the act is performed by "insurrectional or other movements," article 10(2) must be considered as well. However, for conduct to be attributable to a "movement, insurrectional or other," an important prerequisite must be satisfied—that is, the establishment of a new State "in part of the territory of a pre-existing State." Since, at the relevant time, the DRP was not on the brink of successfully establishing a new State (nor has it done so in the present), article 10 is not applicable.

More insight into the topic (i.e., the effective control test) is provided by the Articles on State Responsibility's attached commentary. In reference to article 8, the commentary clarifies that a State's responsibility is engaged by acts of persons only when a) the conduct represents an international wrongful act; and b) such State "directed or controlled the *specific operation* and the conduct complained of was an integral part of that operation."[47] This principle is drawn from the ICJ's case law, notably the *Nicaragua* decision. Specifically, on the one hand, the Court recognized the United States' involvement in extensively backing the rebel group known as the *Contras*[48] (which amounted to a violation of international law deriving from the breach of the principle of non-intervention), while also denying that such support was enough to prove that the United States also exerted effective control over the *Contras*' activities, which were eventually attributed to the *Contras* themselves.[49] Additionally, as the commentary made clear, article 8 is characterized by disjunctive language when specifying that the words "instructions," "direction," and "control" are not to be read in a cumulative way, which means that it is sufficient to establish the presence of at least one of them. However, one of the three terms "must relate to the conduct which is said to have amounted to an internationally wrongful act."[50] Therefore, as the ICTY correctly illustrated, the main difference between the two tests is the degree of control: the *effective control* is a much more substantiated test inasmuch as it requires a State to direct, through precise instructions, the performance of a specific conduct, while the *overall control* test is concerned with situations where a State exercises control of a general nature over the acts carried out by hierarchically structured groups. Consequently, in Cassese's words, "If the group or some of its members engage in prohibited acts, the [S]tate must bear responsibility, even if it did not specifically order, organize or instruct the commission of those specific acts."[51]

Interestingly, according to the ECtHR, the areas corresponding to the DPR's territories were under the *effective control* of the Russian Federation. A considerable amount of concurrent information and evidence persuaded this judicial body to underpin this specific argument. For instance, the assessment of reports submitted by the border mission of the Organization for Security and Co-operation (OSCE) indicates that regular Russian armed forces were present in the separatist-held territories, an inference that is also drawn from the fact that the rebels, who in

[46] Ibid., art. 8.

[47] ILC, *Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001*, 47. (emphasis added). The commentary also added that "the principle does not extend to conduct which was only incidentally or peripherally associated with an operation and which escaped from the State's direction or control."

[48] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Judgment), June 27, 1986 (ICJ Reports, 1986), paras. 110–15, where the Court found that the United States supported the *Contras* by "financing, organising, training, supplying, and equipping" them. The Court resorted to the same test in the *Bosnia* case. See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) (Judgment) Feb. 26, 2007 (ICJ Reports 2007), paras. 399–406. On this point, see the insightful remarks of Antonio Cassese, "The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia," *European Journal of International Law* 18, no. 4 (2007): 649. The author convincingly criticised the ICJ's argument that the effective control test would be grounded in customary international law by asserting that, for this test to be a reflection of such a law, it must satisfy the *opinio iuris* and *diuturnitas* requirements, which the Court did not consider. Conversely, the author stressed that the ICTY's overall control is resorted to by several judicial bodies and courts, hence satisfying the said requirements. For a different analysis, centred on the impact of the *Nicaragua* case on compliance with the Court's rulings, see Lori Damrosch, "The Impact of the Nicaragua Case on the Court and Its Role: Harmful, Helpful, or In Between?" *Leiden Journal of International Law* 25, no. 1 (2012): 135.

[49] Military and Paramilitary Activities (n48) para. 109.

[50] ILC, *Draft articles on Responsibility of States* (n47) 48.

[51] Cassese (n4) 661.

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the summer of 2014 were on the brink of defeat, were able to effectively launch an offensive and regain territories. Likewise, they profited from Russian military support, including planning and devising military strategies; coordinating the supply of military equipment; establishing training camps located alongside Ukrainian borders; and providing artillery cover and cross-border shelling, political assistance (in terms of appointing individuals and leaders in the DPR's key institutional posts, which has been proven by several leaked emails), and economic aid.[52] It appears, therefore, that the Dutch court is itself referring to the ICJ's test to conclude that the Russian Federation was directing the rebels' military operations which, *inter alia*, resulted in the downing of MH17.

Having clarified the two tests against which the State's involvement can be assessed, it remains to be seen if the conduct under discussion is *per se* contrary to the ICSFT. In this regard, it is relevant to recall that the ICSFT imposes obligations upon States when a person "by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds," which *intentionally* or *knowingly* are used "in order to carry out acts of terrorism as described in article 2, paragraph 1(a) and (b)."[53] In the ruling concerning the preliminary objections, the ICJ took the position that this convention is concerned with offensess committed by individuals only; consequently, "the financing by a State of acts of terrorism is not addressed by the ICSFT."[54] Among different elements, the Court centred its assessment on the *travaux préparatoires*, which demonstrated that the inclusion of State financing of acts of terrorism was rejected.[55] Also telling is the fact that article 2 refers to offenses committed by "any person."

In interpreting this key expression, the Vienna Convention on the Law of Treaties (VCLT) should be considered: article 31 of that instrument stipulates that a treaty must be interpreted in good faith, taking into account the ordinary meaning of the text alongside its object and purpose. The ordinary meaning of "any individual" (without any further clarification) is to be understood as encompassing private individuals as well as individuals acting in an official capacity and thus as a State organ.[56] The analysis of the international practice also indicates that, when the term "individual" is vague and overarching, it is primarily understood as a person exercising governmental authority. Indeed, Judge Pocar correctly pointed out in his separate opinion, "when a restriction is made, it goes the other way around and excludes private individuals from the scope of the criminal rule, by limiting the establishment of individual criminal responsibility to public officials."[57]

As a result, even though the ICJ ruled out that a State's financing of terrorism is addressed as such by the ICSFT, a State's responsibility may nevertheless be engaged under this convention in the event that an individual assuming and performing public duties commits an act not in accordance with the latter.[58] Additionally, as

[52] The Court needed to consider these additional criteria to prove beyond any reasonable doubt that the DRP was under the effective control, as this conclusion couldn't be reached solely by virtue of Russian military forces. See respectively, *Ukraine and The Netherlands v. Russia* (n43) paras. 588–606, 618–21, 628–39, 643–44, 649–54, 670–75 and 684–89.

[53] Application of the International Convention (n6) para. 59. The Russian Federation also provides an interpretation of art. 2, para. 1(b), of the ICSFT, under which acts of terrorism need to be performed with a specific intention and with the purpose of intimidating a population or compelling a government.

[54] ivi.

[55] See, notably, United Nations, Docs. A/C.6/54/SR.32-35 and 37. The way of proceeding is clearly in line with the Vienna Convention on the Law of Treaties (VCLT). Indeed, for the sake of clarity, the VCLT allows the interpreter to resort to the preparatory works when the outcome of the interpretation is absurd or contradicts itself.

[56] Resorting to a textual interpretation, Ukraine argued that the term "any person" in art. 2, para. 1, includes both private individuals and public or government officials. ICJ, Application of the International Convention, para. 53.

[57] Separate opinion of Judge ad hoc Pocar, Application of the International Convention (n6) para. 7, who, to substantiate his arguments, cited several examples, such as art. 1(1) of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, concluded on Dec. 10, 1984, which defines the crime of torture. He also added that, "even if the conduct of a State lies outside the scope of the ICSFT, that State may still be responsible under customary international law for the commission of the offence."

[58] In sec. II, it is emphasized that, according to the Russian Federation, only private individuals are addressed by the convention; conversely, Ukraine maintains that this conclusion would be "paradoxical," as "the ICSFT would bind a State to prevent the financing of acts of terrorism, but would not prohibit financing by officials of the same State." See Application of the International Convention (n6) para. 53. For an in-depth analysis of whether the ICSFT is meant to also cover a State's activities, see Kimberly N. Trapp, "Holding States Responsible for Terrorism before the International Court of Justice," *Journal of International Dispute Settlement* 3 (2012): 279, arguing that an obligation on States to refrain from sponsoring or supporting terrorism is impliedly inferred from the convention's obligation to prevent the offense that is covered by the same treaty. This conclusion hinges on what the ICJ held in the *Bosnia* decision where a State's obligation not to commit

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rightly pinpointed in the academic literature, the employment of certain means of warfare, which are unable to discriminate between civil and military targets, would be "tantamount to direct targeting of civilians"; this, in turn, would be punishable under the ICSFT if these means correspond to the funds pursuant to article 2, paragraph 1.[59]

For this reason, the question as to whether the convention prohibits the collection or provision of *funds* under article 2, paragraph 1 of the ICSFT, cannot go unnoticed. As can be aptly noted, the term "fund" is somewhat vague and thus calls for an explanation. For this reason, article 1, paragraph 1 of the ICSFT describes funds as "*assets of every kind*, whether *tangible* or intangible, *movable* or immovable, however acquired." Bearing this in mind, the provision of a BUK TELAR by the Russian Federation is liable to meet such a definition. Even before the investigation concerning the MH17 incident was completed, Ukraine not only maintained that the Russian Federation actually supplied the BUK TELAR but also that this supply was in itself contrary to and constitutes an offense under article 2, paragraph 1(a) of the ICSFT. In a nutshell, the Russian provision of the BUK TELAR constitutes a fund within the meaning of the convention. It remains to be seen if the fund was intentionally or knowingly provided in order to commit terrorist acts.[60] In this sense, reference can be made to the provisional measures the ICJ applied in the same legal dispute. While the allegations under the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) have been met with the application of provisional measures, the Court found the claims relating to the ICSFT's offenses—in particular, the *mens rea* requirement—were scarcely articulated.[61]

A third question that calls for explanation relates to the assessment of the MH17 disaster under the 1971 Montreal Convention since the flight (a civil one) was downed by means of the same BUK TELAR.[62]

The 1971 Montreal Convention is intended to specifically cover acts committed by *individuals,* compromising the safety of civilian aviation by imposing legally binding obligations on States to prevent and respond to such acts.[63] Importantly, the convention addresses situations where *any person* "unlawfully and intentionally" destroys (or damages) a civil aircraft or acts in such a way as to facilitate the commission of the primary offene.[64] To achieve such a critical result, the convention establishes, *inter alia*, the applicability of the *aut dedere aut iudicare* principle.[65] Indeed, article 6 provides that each Contracting Party shall take any alleged offender into custody with a view to conducting criminal investigations or extraditing them. Most importantly, pursuant to article 8, States that are not willing to prosecute the alleged offender are nevertheless under an obligation to extradite that offender. That being said, both Ukraine and the Russian Federation are parties to the convention, and moreover, they are parties to the 1944 Chicago Convention. Several annexes to the latter also clarify States' legal obligations. For instance, annex 17 establishes the responsibility of all Contracting Parties to enact regulations and practices intended to secure the safety of civilian aircraft.[66]

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genocide was premised on the argument that, by ratifying the Convention on the Prevention and Punishment of the Crime of Genocide, States accepted the obligation to prevent the commission of genocide. More extensively, see Kimberly N. Trapp, *State Responsibility for International Terrorism* (Oxford: Oxford University Press, 2011), 156.

[59] Iryna Marchuk, Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v Russia), *Melbourne Journal of International Law* 18, no. 2 (2017): 436, 449, where the author points to the ICTY's case law in particular, *Prosecutor v. Galie* IT-98-29-A, Appeals Chamber, Judgment, Nov. 30, 2006, para. 132.

[60] Not surprisingly, the Applicant maintained that the "launching system was 'knowingly provided' to a terrorist organization, and that the requirement of knowledge under art. 2, para. 1, was amply met." Application of the International Convention (n6) para. 49.

[61] Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation) (Order) Apr. 1, 2017 (ICJ Reports 2017) paras. 75–77. However, it should be emphasized that this determination is confined to this stage; additionally, the Court noted that "at least some of the allegations made by Ukraine appear to be capable of falling within the scope of the ICSFT *ratione materiae*" para. 30. To put it differently, this finding is without prejudice for the Court's determination in the merits stage.

[62] Application of the International Convention (n6) para. 49.

[63] See Anthony Aust, "Civil Aviation, Offences Against Safety," *Max Planck Encyclopedias of International Law* (2007), 1.

[64] See Montreal Convention, art. 1, 1(b), and 2(b).

[65] See M. Cherif Bassiouni and Edward M. Wise, *Aut dedere aut judicare: The Duty to Extradite or Prosecute in International Law* (Cambridge: Cambridge University Press, 1995); Michael P. Scharf, "Aut dedere aut iudicare," *Max Planck Encyclopedias of International Law* (2008): 1.

[66] Annex 17 to the Convention on International Civil Aviation Security - Safeguarding International Civil Aviation against Acts of Unlawful Interference, 2.1.2 and 3.1.3.

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Although the present essay focuses essentially on the issue of the possible Russian responsibility in light of the MH17 ruling, a preliminary question should nonetheless be addressed. This question relates to the possible Ukrainian responsibility for not having closed the airspace to civilian aircraft and for not timely sending out a Notification to Airmen (NOTAM), which is required by public international law. As correctly noted, "Ukraine's failure to do so may not only be a violation of *international law* (…) but also a *civil law* violation towards victims, who could claim this in a Ukrainian court of law."[67] Since, during an armed conflict, the security-related situation is inherently volatile and unpredictable, the risk assessment carried out by State authorities should take into account all threats to civil aircraft safety, either real or potential. Importantly, before the MH17 disaster, the situation in eastern Ukraine deteriorated to such an extent that several incidents involving Ukrainian military aircraft occurred beginning in April 2014. Additionally, due diligence obligations deriving from the above conventions dictate that all reasonable steps should be taken to guarantee the safety of civil aviation.

Given Ukraine's failure to close its airspace, hence underestimating the chance that an aircraft could have been downed, there would be room to argue that it has violated international obligations regarding the safety of civil aviation.[68] This would be all the more so since additional precautionary measures are required under the International Civil Aviation Organization's *Manual on Safety Measures* if a State party's army is involved in an armed conflict.[69]

Regarding the Russian involvement, the ICJ could declare it responsible not only under the ICSFT but also under the Montreal Convention if its involvement is sufficiently established. To prove it, the ICJ could take advantage of the MH17 judgment, according to which the DRP's insurgents were under the Russian Federation's overall control, meaning that the acts that the rebels committed are actually imputable to the said State. According to some scholars, Russian responsibility would arise in the case where such State, through its agents, facilitated the deployment and possession of the BUK missile and afterwards did not exercise due regard as to how this weapon should have been used.[70] From this viewpoint, it is essential to emphasize that, according to article 2 of the Articles on State Responsibility, both actions and/or *omissions* are capable of calling a State's responsibility into question as long as they can be attributed to that State and constitute a breach of an international obligation. In relation to the same article, the commentary to the Articles on State Responsibility distinguishes between "subjective" and "objective" responsibility, clarifying to this end that "the content of the primary obligation in question" is one of the criteria instrumental in understanding the nature of such responsibility.[71] Supplementary criteria, such as "degree of fault, culpability, negligence or want of due diligence," can of course be taken into account, but their relevance might "vary from one context to another for reasons which essentially relate to the object and purpose of the treaty provision or other rule giving rise to the primary obligation."[72] It seems plausible to infer from these elements that the ICSFT, by referring to specific mental requirements (the funds must be provided or collected with the intention or the knowledge that they will be used to carry out heinous acts of terrorism), envisages a subjective responsibility (the same holds true with regard to the Montreal Convention).

Be that as it may, this author posits that the omission or inaction of a State's authorities, which failed to take appropriate steps in circumstances where such steps were evidently called for, amounts to a breach of an international legal obligation giving rise to the responsibility of the State's wrongdoing. From this perspective, several of the Montreal Convention's provisions are capable of denoting international responsibility. For instance, article 10(1) explicitly calls upon Contracting States to take precautionary measures with an eye towards "preventing the offences

[67] This topic has been extensively discussed by Marieke de Hoon, "Navigating the Legal Horizon: Lawyering the MH17 Disaster," *Utrecht Journal of International and European Law* 33, no. 84 (2017): 84, 93.

[68] Ibid., at 101–2, where the author highlights that, "[a]lthough 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."

[69] International Civil Aviation Organization, *Manual Concerning Safety Measures Relating to Military Activities Potentially Hazardous to Civil Aircraft Operations*, [1990] Doc. 9554-AN/932, para. 10.2; see also para. 10.3.

[70] As far as the Chicago Convention is concerned, "it can be argued that Russia would have violated art. 3*bis* of the Chicago Convention. art. 3*bis* 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,' unless in accordance with a State's right to self-defence." De Hoon (n67) 104.

[71] ILC, *Draft articles on Responsibility of States* (n47) 34, in which it is further articulated that the intention/knowledge of the State's organs or agents in breaching a rule plays a key role in shaping the subjective nature of the responsibility.

[72] Ivi.

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mentioned in [a]rticle 1." Moreover, article 11 requires States to "afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of the offences."[73] It bears recalling that the ICJ has already addressed a similar scenario in the prominent *Lockerbie* case, where Libya contended that the United Kingdom had violated the obligation set forth in article 11 of the Montreal Convention inasmuch as it did not share relevant documentation and evidence that could have been instrumental when further investigating the alleged Libyan perpetrators.[74]

CONCLUDING REMARKS

According to the District Court of The Hague, Russian involvement appears to be so clear-cut that it meets all the requirements linked to the overall control test, which means that the DRP was waging a war against Ukraine on behalf of the Russian Federation.

Drawing upon these findings, although the State's responsibility through its organs is somewhat debatable under the ICSFT,[75] States parties *are at least* under an obligation to cooperate in good faith with a view to preventing and/or suppressing the offenses amounting to acts of terrorism committed by any "individual." Should a State breach such an obligation, its responsibility under the convention would arise for failing to take preventative and/or repressive measures.

In light of the foregoing, the above considerations pave the way for the ICJ to choose one of the following three alternatives. First, the Court could declare the Russian Federation responsible for failing to comply with the obligation to cooperate as enshrined in articles 12(1) and 18(1) of the ICSFT, read in conjunction with article 2, for having provided assets by which an offense under the convention was committed, and additionally, the Court could find the Russian Federation in violation of article 11, read in conjunction with article 1(b) of the Montreal Convention. In this way, all the circumstances surrounding the MH17 disaster become relevant for interpreting both the ICSFT and the Montreal Convention. Second, even though the Russian Federation provided the BUK TELAR, which has been proven to be a "fund" under the ICSFT, the ICJ should not declare the same State responsible because it has not been conclusively proven that Moscow did so intentionally or knowingly (i.e., with the intention or knowledge that the BUK TELAR would be used to bring down MH17). Finally, if the Court, departing from its settled case law, resorts to the overall control test, it would find that a full-blown international conflict exists, meaning that the acts for which Ukraine seeks redress are to be assessed under IHL rules as *lex specialis.* Accordingly, the ICJ would lack jurisdiction to adjudicate such matters.[76] In fact, it should be emphasized that article 21 of the ICSFT contains a "without prejudice" clause for the applicability of IHL, highlighting that, in circumstances in which an armed conflict is present, this set of rules will prevail over the offenses that are embodied in the convention, effectively bolstering the *lex specialis* status of IHL.

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[73] It also worth citing art. 13, which reads, **"**Each Contracting State shall in accordance with its national law report to the Council of the International Civil Aviation Organization as promptly as possible any relevant information in its possession concerning: (a) the circumstances of the offence; (b) the action taken pursuant to art. 10, paragraph 2; (c) the measures taken in relation to the offender or the alleged offender and, in particular, the results of any extradition proceedings or other legal proceedings."

[74] Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom) (Judgment), Feb. 27, 1998 (ICJ Reports 1998), para. 30. Importantly, the United Kingdom, despite claiming to meet the obligation stemming from the provision at issue, acknowledged that such provision imposes an obligation on other States (para. 32).

[75] Indeed, in the Court's words, the "commission by a State official of an offence described in art. 2 does not in itself engage the responsibility of the State concerned under the Convention." Application of the International Convention (n6) para. 61.

[76] This possibility has also been duly noted by Vice-President Xue in his Dissenting Opinion**,** asserting that "Ukraine's claim as presented in its Application and Memorial, in my opinion, concerns more the alleged military and financial support by the Russian Federation to the armed groups in the course of armed conflict in eastern Ukraine, where violations of international humanitarian law may have occurred, than the Russian Federation's failure in preventing and suppressing the financing of terrorism. The materials submitted by Ukraine do not present a plausible case that falls within the scope of the ICSFT." He then reinforced his argument by noting that, in order "[t]o characterize military and financial support from Russia's side, by whomever possible, as terrorism financing, would inevitably bear the legal implication of defining the nature of the armed conflict in eastern Ukraine, which, in my view, extends well beyond the limit of the Court's jurisdiction under the ICSFT." Dissenting Opinion of Vice-President Xue, Application of the International Convention (n6) paras. 2 and 5.

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Even though the ICJ is likely to confine its assessment to the narrow thematic issue concerning the financing of terrorism under the ICSFT (*ne iudex ultra petita partium*), thus leaving aside Russian responsibility regarding MH17 *sic et simpliciter*, its judgment will help develop the international legal order by clarifying States' legal obligations and responsibilities (e.g., the content of State obligations under the ICSFT) in cases where cross-thematic issues, such as the safety of civil aviation and the financing of terrorism, intertwine with other remarkable legal topics, including the nature of a conflict between a State and an armed group, and the applicability of IHL.

That being said, it is undeniable that once the Russian Federation's responsibility (if any) is established, the ensuing obligation to provide full reparation for the injuries caused by its conduct will arise in accordance with a well-founded rule of international law governing State responsibility. In particular, the wrongdoing State will first be asked to re-establish the situation *quo ante* (i.e., the *restitution ad integrum*). If making such restitution turns out to be materially impossible, as with the MH17 case, the State is bound to provide monetary compensation for the damage caused, unless the State to which the reparation is owed finds itself satisfied with another form of reparation such as satisfaction.[77]

[77] See, specifically, arts. 34–37 of the ILC (n4).

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