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WAYS OF MAKING ACCOUNTABLE FOR CRIMES CONNECTED WITH THE DOWNING OF MALAYSIAN AIRLINES FLIGHT MH 17

The article is devoted to the problem of responsibility for crimes connected with the downing of Malaysian Airlines Flight MH 17 on July 17th 2014 while flying over Eastern Ukraine. The catastrophe reveals a heinous crime in the sphere of air traffic safety. At the same time international community shows inability to impose responsibility on perpetrators for depriving the right to life of 298 civilians. Apparently, the situation in question is of utmost importance for both the parties involved and the international community in general. The article identifies possible legal (both international and national) mechanisms to prosecute the destruction of Malaysian Airlines Flight MH17.

Key words: legal remedy, accountability (responsibility), the Tribunal, the International Court of Justice, the European Court of Human Rights, the International Criminal Court.

The Boeing 777 of Malaysian Airlines, that was making the flight MH 17 from Amsterdam to Kuala Lumpur on 17 July 2014, was downed within the territorial airspace of Ukraine. Its passengers on board were made up of mainly (196) Dutch nationals and 15 crew members. The investigation conducted by the Dutch Safety Board found that the plane was shot down by warhead carried on the 9M38-series of missiles as installed on the Buk surface-to-air missile system¹.

The very catastrophe in question is not in fact of new origin, since in the past 60 years approximately 20 airplanes have been destructed. But it should be said that in most these cases the international accountability for downing of civilian planes has never been sought. The prominent example of successful international justice though, is the ad hoc Scottish tribunal on “Lockerbie bombing” by means of which the criminal responsibility was imposed on perpetrators as well as State accountability was established². However, in most cases states prefer to pay off monetary compensation ex gratia without formally admitting their responsibility for downing of flights³.

We consider, that under modern conditions of the 21st century it’s already necessary to reach international (and/or national) justice for downing of flight MH 17. Actually there has already been made an attempt to create the International Criminal Tribunal for Malaysia Airlines Flight MH 17 for the purpose of prosecuting persons responsible for crimes connected with the downing of Malaysia Airlines flight MH17. The attempt was made by the UN Security Council acting under Chapter VII of the UNO Charter in July 2015. But unfortunately the Security Council failed to adopt the resolution, following use of the veto by the Russian Federation, a permanent member. Therefore, international community should seek another ways of making accountable for this grave crime. It can be realized through both establishing responsibility of corresponding states and criminal prosecution of individuals.

As to responsibility of states in international law, it is not codified, but there are The Draft Articles on Responsibility of States for Internationally Wrongful Acts, which are considered to be a reflection of a custom in international law. The Articles prescribe that a state’s responsibility shall embrace three criteria: a violation of an international obligation, attribution of the conduct to a state and absence of circumstances which may preclude wrongfulness⁴. The responsible state is then obliged to provide a monetary

¹ The Dutch Safety Board Report, Crash of Malaysia Airlines flight MH17 (Oct. 22, 2015), The Hague. <<http://www.onderzoeksraad.nl/uploads/phase-docs/1006/debcd724fe7breport-mh17-crash.pdf>>.

² Wallis, R. (2001). *Lockerbie: The Story and The Lessons*. Westport: Praeger, 9-10.

³ Foont, Brian E. (2007). Shooting Down Civilian Airplanes: Is There an International Law? *Journal of Air Law and Commerce*, 72, 707.

⁴ *Articles on Responsibility of States for Internationally Wrongful Acts*, art. 2 (annex to General Assembly Resolution 56/83 of 12 December 2001, corrected by document A/56/49(Vol.1)/Corr.4). <http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf>.

compensation for caused detriment.

Speaking about our situation it should be mentioned first of all, that downing of Malaysian Airlines Flight MH17 was preceded by the existence of an armed conflict on the territory of Eastern Ukraine and thus, is considered to have a connection thereto. The parties to the conflict itself are considered to be the state of Ukraine and an armed group controlling the eastern part of Ukraine which is alleged to have been highly aided by Russia.

State responsibility cannot establish the responsibility of individuals or non-state groups, but merely the states. Therefore, the responsibility of states will differ according to who actually committed the act of downing Flight MH17 under Article 4 of the Articles of State Responsibility¹. With regard to MH17, Ukraine and Russia are the two most obvious states that may have violated international obligations.

An investigation as to whether Russia had “effective control” over the person or group in question, in accordance with Article 8 of the Articles of State Responsibility will clarify the accurate obligations breached by a state. According to Article 8 of the Draft Articles on State Responsibility for Internationally Wrongful Acts, if it is proven that individuals who are not regarded as organs of a State by its legislation nevertheless do in fact act on behalf of that State, their acts are attributable to the State².

In the Military and Paramilitary Activities in and against Nicaragua (Merits) case, the Court applied the “effective control” test and found that the “financing, organizing, training, supplying and equipping of the contras, the selection of...targets, and the planning of the whole of its operation, is still insufficient in itself, for the purpose of attributing to the United States the acts committed by the contras” as long as such violations “...could well be committed by members of the contras without the control of the United States” (§115)³. The Court also defined, that to give rise to legal responsibility of the United States for this conduct, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.

In 1999 The International Tribunal for the Former Yugoslavia in the Tadić case has overruled the “effective control” test, that was applied in the Nicaragua, and applied the test of “overall control”. Such an ‘overall control’ resided not only in equipping, financing or training and providing operational support to the group, but also in coordinating or helping in the general planning of its military or paramilitary activity (§131, 137).⁴ In its decision the Tribunal defined, that the degree of control may, however, vary according to the factual circumstances of each case (§117): one should distinguish the situation of individuals acting on behalf of a State without specific instructions, from that of individuals making up an organized and hierarchically structured group (such as a military unit or, in case of war or civil strife, armed bands of irregulars or rebels) (par.120). Therefore, it may be assumed that under the doctrine of state responsibility, there are ways to bring a case to the International Court of Justice (hereinafter – ICJ) for the violation of international law by Ukraine and Russia.

The Statute of this international body provides the grounds for its jurisdiction (strictly based on the principle of consent of the states) in article 36⁵. Under article 36 (1) it is unlikely that either Russia or Ukraine will file a compromis to the ICJ as long as it demands consent of both parties; article 36 (2) is also inapplicable since among all parties to this case only the Netherlands may exercise its right to compulsory jurisdiction of the ICJ under its unilateral declaration⁶; the third option provided by article 36 is the forum prorogatum doctrine which is highly unlikely to be applied by Russia or Ukraine in the light of tense political climate between these states; the fourth ground are the compromissary clauses of international

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

² Articles on Responsibility of States for Internationally Wrongful Acts, art. 8 (annex to General Assembly Resolution 56/83 of 12 December 2001, corrected by document A/56/49(Vol.1)/Corr.4). <http://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf>.

³ *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. United States of America) [1986] I.C.J. 14. <<http://www.icj-cij.org/docket/files/70/6503.pdf>>.

⁴ *Prosecutor v. Duško Tadić, United Nations International Criminal Tribunal for Yugoslavia*, The Appeals Chamber. No.IT-94-1-A [1999]. <<http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf>>.

⁵ *Statute of the International Court of Justice*, art. 36 (26 June 1945). <<http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>>.

⁶ *International Court of Justice, Jurisdiction – Declarations Recognizing the Jurisdiction of the Court as Compulsory* (Aug. 19, 2014). <<http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3>>.

conventions which grant the jurisdiction in contentious cases between the contracting parties to the ICJ¹. In particular, the Netherlands, Russia and Ukraine are parties to the Convention on International Civil Aviation 1944 and the Convention for Suppression of Acts Against the Safety of Civilian Aviation 1971 which contain compromissary clauses binding upon the parties thereto.

In our case, on the one hand, we are interested in Article 84 of the Chicago Convention which provides for the possibility to unilaterally submit a dispute to the Council of the ICAO and its decision can then be appealed at the ICJ². Such a procedure of dispute settlement was also declared by the ICJ in the Case Concerning Armed Activities on the Territory of Congo³. Likewise the Netherlands may consider submitting the dispute to the Council of the ICAO with its further appeal at the ICJ.

On the other hand we can appeal to the experience of the “Lockerbie bombing”, where proceedings at the ICJ were initiated by Libya against the United States and the United Kingdom on the basis of article 14 of the Montreal Convention⁴, where regardless of US and UK objections, the ICJ ruled that it had jurisdiction to hear the case on the basis of Article 14 of the Montreal Convention⁵.

The Montreal Convention imposes an obligation on contracting states to protect civilian aviation safety. The Convention, in particular, criminalizes in Article 1 “the destruction of civilian airplane” and failure “to take all practicable measures to prevent such offences”⁶.

Russia may be held responsible for these crimes if it is found to be attributable to the downing of MH17 by knowing that the pro-Russian armed group possessed the BUK missile. Under article 6 of the Montreal Convention Russia may be held accountable for failing “to take into custody any alleged offender in its territory” or the principle of criminal law known as *aut dedere aut judicare*⁷ obligation. Article 3bis of the Chicago Convention provides that “the Contracting States recognize that every State must refrain from resorting to the use of weapons against civilian aircraft in flight,” unless in accordance with a state’s right to self-defense⁸, which is not a viable argument in the situation of MH17 and thus, a breach of this obligation may also constitute a violation by Russia.⁹

Ukraine may be held responsible under article 17 of the Annex 11 to the Chicago Convention and Annex 17 for failure to inform ICAO and member-states about a serious threat posed to civil aviation¹⁰. Likewise in the Corfu Channel case Albania was declared responsible for failure to notify other states of the danger of the minefields¹¹.

Besides that, the Public International Law and Policy Group in its White Paper sees two more other options for adjudication: a) the ICJ may give an Advisory Opinion on any legal question “at the request of whatever body may be authorized by or in accordance with the UNO Charter”; b) the Netherlands could

¹ Alexandrov, S.A. (2006). The Compulsory Jurisdiction of the International Court of Justice: How Compulsory is it? *Chinese Journal of International Law*, 5, 29-31.

² *Convention on International Civil Aviation* (adopted on 7 December 1944, entered into force 4 April 1947) 15 U.N.T.S. 295. <<http://www.icao.int/publications/pages/doc7300.aspx>>.

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

⁴ *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation* (adopted on 23 September, entered into force 26 January 1973) U.N.T.S. 178. <<https://treaties.un.org/doc/Publication/UNTS/Volume%20974/volume-974-I-14118-English.pdf>>.

⁵ *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie* (Libyan Arab Jamahiriya v. United States of America), Preliminary Objections [1998] I.C.J. 115, par. 53. <<http://www.icj-cij.org/docket/files/89/7249.pdf>>.

⁶ *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation* (adopted on 23 September, entered into force 26 January 1973) U.N.T.S. 178. <<https://treaties.un.org/doc/Publication/UNTS/Volume%20974/volume-974-I-14118-English.pdf>>.

⁷ *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, [2012] I.C.J. 422, par. 86. <<http://www.icj-cij.org/docket/files/144/17064.pdf>>.

⁸ *Convention on International Civil Aviation* (adopted on 7 December 1944, entered into force 4 April 1947) 15 U.N.T.S. 295. <<http://www.icao.int/publications/pages/doc7300.aspx>>.

⁹ Legal Remedies for Downing Flight MH 17. *White Paper* (2015), 36. <http://www.vu.nl/nl/Images/Legal_Remedies_for_Downing_Flight_MH17_tcm289-747125.pdf>.

¹⁰ Annex 11 to the Convention on International Civil Aviation: Air Traffic Services, (July 2001) art. 2.17. Annex 17 to the Convention on International Civil Aviation: Security (April 2005) art. 2.1.2. <http://www.icao.int/safety/airnavigation/nationalitymarks/annexes_booklet_en.pdf>.

¹¹ *The Corfu Channel Case (United Kingdom v. Albania)*, Preliminary Objection. [1948] I.C.J. 15, 22. <<http://www.icj-cij.org/docket/files/1/1569.pdf>>.

enter into negotiations with Russia to establish an arbitral tribunal to settle the dispute on the basis of state responsibility.¹

Since the downing of Malaysian Airlines MH17 is closely connected with the violation of provisions of international human rights law (especially depriving the right to life), the European Court of Human Rights (hereinafter – ECtHR) can be another mechanism to seek accountability for the perpetrators. Moreover, both the Netherlands, Ukraine and Russia are parties to the European Convention on Human rights (hereinafter – ECHR). The application to the ECtHR can concern next aspects: a) deprivation of life which is not prescribed by law or necessary for the purposes mentioned in article 2(2) (breach of article 2 ECHR)²; b) failure to investigate murders (also breach of article 2 ECHR); c) lack of due diligence in preventing the violation or failure to investigate and prosecute (like in case *Osman v. UK*, para.115)³.

As we know, applications to the ECtHR concern only liability of a state but not individual liability. The ECtHR can hold a state responsible for ECHR violations in both cases: a) firing the missile by state agents and, b) firing the missile by separatists (non-state) actors. State responsibility of Russia and/or Ukraine may be established by the ECtHR for firing missile by non-state actors, since the principle of “effective control” is explained in the legal practice of ECtHR in detail. In a number of cases the ECtHR has already found the states responsible for violations of the ECHR because of the effective control exercised by the states over certain territories of other states or support of its nationals in committing crimes. In particular, in its cases *Loizidou v. Turkey*, *Behrami and Behrami v. France* and *Saramati v. France, Germany and Norway*⁴ ECtHR followed such criteria as “effective overall control” and “ultimate authority and control”.

Besides, the ECHR foresees two types of an application – inter-state and individual one. On the one hand, relatives of the Flight MH 17 victims can file an application against either Ukraine or Russia (or both). Such proceedings to the ECtHR have already been initiated. In late 2014, the mother of a young woman who was on board the Flight MH 17 brought a case against Ukraine before the ECtHR claiming that Ukraine had failed to close its airspace and had violated the human rights of her daughter (*Ioppa v. Ukraine*)⁵.

On the other hand, there is a possibility to file an inter-state application to the ECtHR. Especially taking into consideration the fact that on 13 March 2014 Ukraine lodged an inter-State application under Article 33 of the ECHR against Russia and as a result the ECtHR under article 39 of the Rules of the Court rendered an interim measure to both states “to refrain from taking any measures, in particular military actions, which might entail breaches of the Convention rights of the civilian population, including putting their life and health at risk, and to comply with their engagements under the Convention, notably in respect with Article 2”⁶. That in aftermath of the downing of MH17 gives the parties additional grounds to file applications to the ECtHR.

Both individual and inter-state application to ECtHR can award the relatives a just compensation if a violation is found. However, the enforcement of ECtHR judgements is jeopardized if the respondent state is Russia since in December 2015 Russia has declared a constitutional act under which it can conduct

¹ Legal Remedies for Downing Flight MH 17. *White Paper* (2015), 29.

<http://www.vu.nl/nl/Images/Legal_Remedies_for_Downing_Flight_MH17_tcm289-747125.pdf>.

² *European Convention for the Protection of Human Rights and Fundamental Freedoms* 213 U.N.T.S. 222 (adopted on 4 November 1950, entered into force 3 September 1953) . <<http://www.refworld.org/docid/3ae6b3b04.html>>.

³ *Osman v. UK*, Application no. 23452/94, Judgment of 28 February 1998.

<<http://www.asylumlawdatabase.eu/sites/www.asylumlawdatabase.eu/files/aldfiles/Osman.pdf>>.

⁴ *Loizidou v. Turkey*, 18 December 1996, no. 15318/89.

<https://www.google.com.ua/?gws_rd=ssl#q=loizidou+v.+turkey+18+december+1996+pdf>.

Behrami and Behrami v. France Application No. 71412/01 and *Saramati v. France, Germany And Norway* Application No. 78166/01 ECHR Grand Chamber Decision As to Admissibility (2 May 2007)

<<http://hei.unige.ch/~clapham/hrdoc/docs/ECHRBehrami.doc>>.

⁵ *Conseil de L'Europe, Ukraine: Flight MH17 crash victim's mother lodges court complaint*, HUMAN RIGHTS EUROPE [December 1, 2014]. <<http://www.humanrightseurope.org/2014/12/ukraine-flight-mh17-crash-victims-mother-lodges-court-complaint>>.

⁶ *European Court of Human Rights, Press Release issued by the Registrar of the Court, Interim measure granted in inter-State case brought by Ukraine against Russia*, ECHR 073 (2014).

<hudoc.echr.coe.int/webservices/content/pdf/003-4699472-5703982>.

constitutional review of the ECtHR judgements¹.

In addition to above stated ways of making accountable for crimes connected with the downing of Malaysian Airlines Flight MH17, we can't help mentioning one more avenue of international justice – namely, the International Criminal Court (hereinafter – ICC). The ICC can be considered as a potential option to seek criminal liability of individuals. The ICC has jurisdiction with respect to the following crimes: a) the crime of genocide; b) crimes against humanity; c) war crimes; d) the crime of aggression. The crime of downing the Flight MH 17 can most likely be referred to the par. “b” – war crimes.

According to the Statute of the ICC, the ICC can acquire jurisdiction by next means: a) referral from a state party; b) referral by the UN Security Council; c) proprio motu investigation; d) declaration according to the article 12(3) of the Statute. We'll try to analyze these options.

If to speak about the referral from a state party, it should be said, that Ukraine, Russia and Malaysia are not state parties to the Rome Statute. As to the Netherlands, they are a member-state of the ICC, but they may refer a dispute to the ICC only if a crime in question took place in this state or the accused is a Dutch national or, as specified in the Statute, if the crime was committed on board of an aircraft registered in the state². Apparently, this way is quite problematic. As to the referral by the UN Security, there is no guarantee, that Russia won't veto the resolution, as it did in the case concerning the establishment of International Criminal Tribunal for Malaysia Airlines Flight MH 17 in summer 2015. The ICC Prosecutor won't be also able to use her proprio motu powers, since the crime wasn't committed: a) on the territory of a state party; b) by nationals of a state party.

At the same time the last point - declaration according to the article 12(3) of the Statute – can be an option in our case. The article 12 (3) prescribes, that a non-member state of the ICC may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question.³ It's important, that Ukraine made a declaration on 8 September 2015, that covers acts committed on the territory of Ukraine from 20 February 2014 onwards (for an indefinite period).⁴ So, the ICC may exercise jurisdiction over alleged crimes that might have been committed on the territory of Ukraine since 20 February 2014 (which also includes the downing of the Flight MH 17). Such a declaration can also be delivered by Malaysia.

These were international ways of making accountable for crimes connected with the downing of Malaysian Airlines Flight MH 17. But of course the other option of prosecution may be domestic courts of the parties related to the downing of the MH17 flight (as it was made in “Lockerbie bombing” case). Domestic court's jurisdiction however is aimed at the individual liability but not state liability.

Jurisdiction of Ukraine may be applied 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 be for example brought in the Netherlands, Malaysia, or Australia.

In conclusion, it should be said that a heinous crime committed on July 17th, 2014 shall not be tolerated by the international community. A number of international bodies and domestic courts provide for the legal remedies both to the states and the relatives of the deceased. Notwithstanding the obstacles, there some possible ways of making accountable for crimes connected with the downing of Malaysian Airlines Flight MH 17. Among such legal remedies it can be both international (ICJ, ECtHR, ICC) and national (domestic jurisdictions of states and civil suit proceedings which are at the state's disposal).

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² *Rome Statute of the International Criminal Court* (adopted on 17 July 1998, entered into force 1 July 2002) 2187 U.N.T.S 90. <http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf>.

³ *Rome Statute of the International Criminal Court* (adopted on 17 July 1998, entered into force 1 July 2002) 2187 U.N.T.S 90. <http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf>.

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