

FOREWORD UPDATE LEGAL ROADMAP MH17

December 2023

On 26 March 2022, Stichting Vliegkamp MH17, through its chairman Piet Ploeg, presented the first copy of the Legal Roadmap MH17 to six bereaved families. This on the occasion of an information meeting for the next of kin. In addition, on the same day, The Foundation also posted the contents of the Legal Roadmap MH17 on its website.

This document has since been widely distributed to the next of kin but also to various organisations at home and abroad. This method of dissemination has resulted in flight MH17 and its effects being a regular topic of conversation in many places.

The informative aspect and keeping this disaster on the agenda are both important objectives Stichting Vliegkamp MH17 has set itself. Relatives still want justice to be done and those responsible for the attack on flight MH17 to be held accountable and punished.

Now that we are dealing with the fact that the District Court of The Hague ruled on 17 November 2022 on the four defendants in this trial, no appeal has been lodged and no appeal has so far been lodged in a so-called Section 12 procedure, there is sufficient reason to provide an update supplementary to the Legal Roadmap MH17. In order to respond quickly to new information from the various proceedings, Stichting Vliegkamp MH17 has decided to publish the update online only, for the time being at www.stichtingvliegkamp17.nl.

Besides the state of affairs the criminal trial, there are also developments to report around two other proceedings. These are the handling of complaints filed with the ECtHR in Strasbourg and the handling of complaints filed with the International Civil Aviation Organization (ICAO). In the first case, it concerns the individual complaints of relatives against Russia and the so-called States Complaint also filed by the Netherlands against Russia. In the second case, it concerns a complaint filed by the Netherlands and Australia against Russia with ICAO. We note here that the complaints to the ECtHR, are part of a judicial procedure and those to ICAO are part of an internal complaints procedure. The latter means that proceedings take place behind "closed doors".

Successively, the following topics are covered:



These three topics are a continuation of chapters in the released Legal Roadmap MH17. Respectively, Chapter 1, Dutch Criminal Proceedings, Chapters 3 and 4, ECtHR (individual) and ECtHR (interstate) and Chapter 6, Additional Proceedings. This update can be read as a stand-alone document. For more (background) information, please consult the Legal Roadmap MH17.

Commissioned by Stichting Vliegkamp MH17, this update was carried out by Van Doorne law firm in Amsterdam. Under the guidance of Jan Leliveld and Eva Sluis, work was done on a carefully constructed update on which the necessary interim communication with Stichting Vliegkamp MH17 took place. In addition, some members of the MH17 Legal Aid Team and the Ministry of Foreign Affairs also read along and provided us with advice.

30 December 2023

The release of this update contributes to information on the substantive progress of the various proceedings and the intention is to come up with another update in 2024. This is based on the expectation that new steps in the proceedings at the ECtHR and ICAO will be made in 2024.

The board of the Stichting Vliegcramp MH17

Piet Ploeg
Leen van der Sar
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JUDGMENT COURT DEN HAAG 17 NOVEMBER 2022

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SECTION 12 CCP PROCEDURE FOR REMAINING CRIMINAL INVESTIGATION

On 17 November 2022, the District Court of The Hague ruled in the MH17 criminal case against four defendants, sentencing three of the defendants to life imprisonment. The District Court's verdict has not been appealed.

Following this judgment, a report by the Joint Investigation Team (JIT) was published on 8 February 2023. In this report, the Public Prosecution Service (OM) explained the investigation into other possible parties involved in the downing of flight MH17. Based on the report, the public prosecutor concluded that there are currently insufficient grounds to prosecute other possible involved parties, and based on the report, the public prosecutor also does not see any other investigation options at this time. Following this conclusion of the Public Prosecution Service, the MH17 Legal Aid Team (hereinafter: RBT) and Stichting Vliegkamp MH17 (MH17 air disaster foundation, hereinafter: The Foundation) investigated whether there were grounds to initiate 'Section 12 CCP proceedings' at the Court of Appeal.

In the following, the District Court's judgment of 17 November 2022 is first discussed. It then turns to the Section 12 CCP proceedings in the light of the remaining criminal investigation and the JIT report.

THE JUDGMENT

Introduction

On 17 November 2022, the District Court of The Hague handed down judgments in the MH17 criminal case against defendants Girkin, Dubinskiy, Kharchenko and Pulatov. The judgments ended the handling of the criminal cases at the District Court.

The District Court finds it proven that flight MH17 was hit by a Buk missile fired from an agricultural field near Pervomaiskiy in Ukraine. The defendants Karchenko, Dubinskiy and Girkin were sentenced by the District Court to life imprisonment for causing the crash of flight MH17 and the murder of 298 occupants. The fourth suspect, Pulatov, was acquitted. Pulatov was the only defendant represented by legal counsels at the hearing. None of the accused were present at the hearing themselves.

This summary is based on the Judgment Document ("Uitspraakdocument") published by the District Court¹, and the individual judgments as published on www.rechtspraak.nl.² Particular attention is given to the District Court's considerations on sentencing and compensation. This is closely aligned with the Judgment Document. This is also because the considerations provide insight into the consequences the disaster had for the next of kin.

¹ Judgment Document criminal case MH17 dated 17 November 2022, courtmh17.com (accessed 19 July 2023).

² District Court The Hague, 17 November 2022, ECLI:NL:RBDHA:2022:12219; ECLI:NL:RBDHA:2022:12217; ECLI:NL:RBDHA:2022:12216; ECLI:NL:RBDHA:2022:12218.



It also briefly addresses the fact that no appeal has been lodged against the District Court's judgments. As a result, the judgments are irrevocable. This information is based on a news release from the Public Prosecutor's Office on its website dated 1 December 2022.³

Offences charged

The trial related to two suspicions. The second suspicion was charged in two variants (murder or manslaughter). The first suspicion boils down to the fact that the defendants, Girkin, Dubinskiy, Kharchenko and Pulatov, whether or not together with (an) other person(s), deliberately caused flight MH17 to crash, killing the occupants of that aircraft, as punishable under Section 168 of the Criminal Code (hereinafter: CC). That suspicion was charged in the indictment in different plea versions.

The second suspicion boils down to the fact that the accused, whether or not together with (an) other person(s), intentionally and whether or not with premeditation, deprived the occupants of flight MH17 of their lives by firing a Buk missile at that aircraft, as a result of which that plane crashed and the occupants died, as punishable under Section 289 CC (murder) and (in the alternative) Section 287 CC (manslaughter).

Procedural aspects

As usual, the District Court first answered four formal questions listed in Section 348 of the Code of Criminal Procedure (hereinafter: CCP):

1. Is the writ of summons valid?
2. Does the District Court have jurisdiction?
3. Is the prosecutor admissible?
4. Are there reasons to suspend the case?

The District Court answers the first two formal questions positively. These questions are also not disputed by Pulatov's defence: (1) the summons is valid and (2) District Court of The Hague has jurisdiction to examine the MH17 criminal case.

The third question (3), whether the Dutch public prosecutor has jurisdiction to prosecute suspects in this case, falls into three parts: jurisdiction, possible limitation of jurisdiction and right to prosecution by the public prosecutor. Regarding jurisdiction, the District Court ruled that the Netherlands, as a state, has jurisdiction. Regarding the possible limitation of jurisdiction, the District Court finds that there is no limitation of jurisdiction in this case. The third part concerns whether the prosecution forfeited its right to prosecute. Pulatov's defence argues that the public prosecutor forfeited the right to prosecution by committing serious violations of statutory and treaty rules and principles of due process (procedural errors or breaches of form) which prevented defendant Pulatov from having a fair trial. In the judgment, the District Court discusses this in detail, concluding that the prosecution did not forfeit the right to prosecute the defendants and therefore had jurisdiction to prosecute the defendants.

The fourth (4) formal preliminary question is whether there are grounds for suspending the criminal case. There are no grounds for suspending the prosecution. Having gone through all the procedural aspects under Section 348 CCP, the District Court now turns to the substantive hearing of the criminal case.

³ 'No prosecution appeal in MH17 criminal case', news report dated 1 December 2022 on om.nl (accessed 19 July 2023).



Assessment of substantive questions by the District Court

After answering the four formal questions, the District Court turns to answering and assessing the substantive questions, which follow from Section 350 CCP:

1. Can the facts be proved?
2. Does this constitute a criminal offence?
3. Is the accused punishable?
4. What is an appropriate punishment?

1. Can the facts be proven?

The District Court finds legal and convincing evidence that flight MH17 crashed because it was hit by a Buk missile fired from an agricultural field near Pervomaiskyi. Important evidence for this are photographs of a smoke trail, expert reports, the testimony of witness M58, satellite images of that firing location, overheard phone calls, transmitter mast data, photographs and videos of a Buk-TELAR being landed and discharged, and examination of fragments found in the body of a crew member and in the plane's truss and rebate. Alternative scenarios, such as that the Buk missile was fired from another area, are ruled out by the evidence.

2. Is there an offence?

The second substantive question is whether the facts mentioned above are criminal offences. Causing the crash of flight MH17, resulting in the death of all its occupants, is punishable under Section 168 CC. In addition, the suspects are charged with the murder or manslaughter of the 298 occupants of flight MH17. Murder is punishable in Section 289 CC and manslaughter (without premeditation) in Section 287 CC. The acts are therefore criminal offences, namely under Section 169, Section 289 and Section 287 CC.

3. Is the accused punishable?

The third substantive question of Section 350 CCP is whether the accused are liable for the offences. If suspects made a substantial contribution to the eventual firing of the Buk missile, then criminal liability for that action and the consequences caused by it comes into play. This is also the case if they bear more remote (indirect) responsibility for the firing of the Buk missile.

The District Court notes that on the basis of the case file, it cannot be established how the crew of the Buk-TELAR acted in firing the Buk missile at MH17. Nor does it become clear who gave the order to fire a missile and why it was done. However, there is something to be said in general terms about the deployment of a Buk-TELAR, according to the District Court. The firing of a Buk missile is neither accidental nor done on a whim; it is a very deliberate and thoughtful act according to a method of operation prescribed (by technical requirements). The District Court thus rules that there was intent and some deliberation in firing the missile at the target in question, MH17. What is clear here is the consequences of this firing, namely the destruction and crashing of an aircraft where there is a high probability of the occupants being killed. The intention of the crew of the Buk-TELAR was to take the lives of the occupants of the plane with premeditation. On this basis, the District Court finds that there was intent and "some deliberation" about firing the missile at the target, where the consequences must have been clear to those who discharged the missile.

The District Court was therefore able to determine whether deliberate firing was done on a civilian aircraft or whether the missile was fired under the assumption that MH17 was a military aircraft. According to the District Court, this does not mean that there was no intent or premeditation.



Role of the defendants

The District Court looked at the specific role of the suspects in relation to the downing of MH17. The District Court finds, unlike the prosecution, that there is no evidence that the suspects formed a tightly cooperating perpetrator group engaged in the shooting down of Ukrainian aircrafts. Therefore, the District Court looks at the actual actions of the individual suspects. In doing so, the District Court first examines for each suspect whether he can be seen as a *co-perpetrator* because he himself contributed to the deployment of the Buk-TELAR. If there is no question of co-perpetration, the District Court looks at whether the accused is responsible for the contributions of *others* to the deployment of the Buk-TELAR. This is called *functional perpetrator*.

Kharchenko

Kharchenko had been ordered by Dubinskiy to transport, escort and guard the Buk-TELAR to the firing site near Pervomaiskyi. In carrying out that order, Kharchenko gave orders to his subordinates in performing tasks. The District Court finds that Kharchenko, insofar as he himself participated in the execution, can be seen as a co-perpetrator of both charges.

Dubinskiy

The transport of the Buk-TELAR to Ukraine in the night and early morning of 16-17 July 2014 was initiated by the accused Dubinskiy and took place under his direction. He left its execution to his subordinates, whom he gave orders to. The District Court finds these behaviours contributed greatly to the execution of the offence. In doing so, he worked closely with Kharchenko and crew. The District Court finds that Dubinskiy can therefore be seen as a co-perpetrator of both charges.

Girkin

According to the District Court, Girkin can be considered a functional perpetrator of the co-perpetrated acts. Girkin was the highest military leader of the DPR and therefore (ultimately) responsible for the use of military means. It cannot be proved of Girkin that he had prior knowledge of the availability of the Buk-TELAR on 17 July 2014 that caused flight MH17 to crash. However, it was possible for Girkin, as the highest military officer, to decide whether or not to deploy a Buk-TELAR. Despite there being no evidence in the file that Girkin was aware of the availability of a Buk-TELAR on 17 July 2014, it can be stated with certainty that Girkin accepted a deployment such as that of the Buk-TELAR on 17 July 2014 resulting in deaths. The District Court concludes that Girkin is a functional perpetrator of the co-perpetrated offences. This leads the District Court to declare proven that Girkin is a co-perpetrator of both offences charged.

Pulatov

Pulatov was acquitted as the only defendant. Pulatov was area commander. Pulatov was aware of the arrival and presence of the Buk-TELAR. According to the District Court, there is no evidence that Pulatov himself actually contributed to the deployment of the Buk-TELAR, and Pulatov was not near the firing site at and around the time the Buk-TELAR fired the missile. Therefore, he cannot be considered a co-perpetrator. Pulatov also cannot be seen as a functional co-perpetrator, according to the District Court. Pulatov is acquitted.

4. What is an appropriate punishment?

The final question of Section 350 CCP is what is an appropriate punishment for defendants for committing the offences. Below, we closely, almost verbatim, follow the District Court's public summary. This addresses (i) the impact, (ii) the defendants' attitude and intent, (iii) the defendants' personal circumstances and roles. This is followed by the District Court's conclusion on appropriate punishment.

(i) Impact⁴

The District Court first notes that the deployment and use of a Buk-TELAR by the separatists can be blamed on more persons than just the defendants in this case. In the District Court's view, each person who played a

⁴ The following closely, almost verbatim, follows the District Court's public summary.



role in this bears, at the very least, moral responsibility for the consequences of deploying such a weapon, which by its nature can only have the all-destructive effect observed at the site visit.

The stories of the next of kin show so clearly how much the victims were still in the middle of life. Their life was not yet finished or had even just begun and it still had a lot to offer them. That future was cruelly taken away from them.

In the District Court's opinion, it is beyond anyone's imagination what it must have been like for the next of kin to have to receive the news that your loved ones have lost their lives as a result of the downing of MH17 and to have to live with that.

For all this suffering, the District Court does not want to fail to mention the impact the disaster had on the local population in eastern Ukraine. They too faced the terrible consequences of the downing of MH17 on 17 July 2014.

Until the day of this verdict, no one has come forward to clarify who is or are responsible for this tragedy. The uncertainty about the cause and motive that led to this catastrophe therefore remains. For bereaved families, this is a frustrating circumstance that actually hinders them in the grieving process.

(ii) Attitude and intent of suspects⁵

Once it became clear what had happened on 17 July 2014 and the suspects realised that a civilian aircraft had been downed, killing hundreds, including dozens of children, all three of them actively engaged in removing the Buk-TELAR to the territory of the Russian Federation, where it had come from earlier that day.

Clearly, this was done to cover up what had happened. An international scandal had to be avoided. That behaviour of the defendants after the downing of MH17 further colours the defendants' actions in a negative sense and contributes in a punitive sense to the level of the sentence to be imposed.

In addition, the District Court considers in its judgment that none of the accused have come forward to the JIT to make a statement in this case, which could shed light on what exactly happened. Outside the hearing, they did comment on this criminal case and the fact that they are accused, but they denied any involvement.

The attitude and position of the accused who only (dare to) react from a distance is labelled by the District Court as devoid of any reality and therefore disrespectful and unnecessarily hurtful towards the relatives. In no way, therefore, can this work in their favour in the amount of the sentence to be imposed.

Intermediate conclusion impact and attitude and intent of suspects

In the District Court's view, the consequences of the crime are so serious and the defendants' attitude about what happened so reprehensible that a temporary prison sentence is not sufficient.

(iii) Personal circumstances and roles of suspects⁶

The hearing did not reveal any personal facts or circumstances that the District Court should take into account in sentencing. However, the District Court does see reason to consider the individual role and position of the accused in determining an appropriate punishment. Therefore, the District Court also further considers the different roles of the defendants, their position and responsibilities within the DPR.

As minister of defence in the armed struggle, Girkin was operationally the highest in rank and as such responsible for his men. While it cannot be established that he knew of the deployment of this concrete Buk-

⁵ The following closely, almost verbatim, follows the District Court's public summary.

⁶ The following closely, almost verbatim, follows the District Court's public summary.



TELAR, it could be established that he approved and supported such anti-aircraft defence practices that took place under his responsibility.

As commanding commander, Dubinskiy was the one who can partly be seen as the coordinator of and cooperating foreman in all activities surrounding the supply, transport, deployment and disposal of the weapon. He therefore not only held a high hierarchical position, just below Girkin, but played a major role and thus contributed significantly to the execution of the crime.

Kharchenko is the one who, by carrying out the orders he received from his commander Dubinskiy, was most directly involved in the actual execution of the proven acts. But he, in turn, also gave orders to his subordinates in that execution. He therefore belonged to middle management in the hierarchy.

The District Court considers that Dubinskiy's high hierarchical position and strong coordinating role in having the Buk-TELAR retrieved from the Russian border on the night of 16-17 July 2014, and its direct deployment the same day as a result of which flight MH17 was brought down, as well as his role in the disposal of the Buk-TELAR, cannot be punished other than with a life sentence.

The District Court questioned whether the fact that it could not be established that Girkin had any knowledge of the deployment of this concrete Buk-TELAR and did not make any concrete contribution to it, makes that a (maximum) temporary imprisonment sentence would suffice for him.

However, the District Court considers that a temporary prison sentence would not do sufficient justice to Girkin's responsibility as defence minister and commander of the DPR armed forces for the deployment of weapons in the conflict. Indeed, it is an established fact with regard to this specific deployment that Girkin not only used to accept such deployments, but even made them possible through his contacts with the Russian Federation. On top of that, he directly interfered and actively promoted the return of the Buk-TELAR to the Russian Federation.

The District Court asked itself the same question with regard to Kharchenko, who occupied a lower hierarchical position and performed his duties at the behest of his superior Dubinskiy. However, also with regard to him, the District Court considers that a temporary prison sentence would not do sufficient justice to his direct and active involvement in the deployment throughout the operation.

After all, he was the one who gave orders to his men, as a result of which the Buk-TELAR arrived at the firing site. He was also personally directly involved in the transport to and guarding of the Buk-TELAR at the firing site, and it was under his direct command that the Buk-TELAR was taken away that same evening and night. His lower hierarchical position therefore does not carry sufficient weight for a temporary prison sentence, despite all the above. The facts are too serious and his role too big for that. This means that the District Court will also impose a life sentence on Kharchenko.

Conclusion appropriate penalty⁷

All the above leads to the conclusion that the District Court imposes a life sentence on Girkin, Dubinskiy and Kharchenko. Considering the seriousness of the proven facts, the sentence imposed and the shaken legal order, the District Court orders the imprisonment of the convicted persons. The District Court acquits defendant Pulatov.

⁷ The following closely, almost verbatim, follows the District Court's public summary.



Claims for damages for surviving relatives⁸

In the judgment, the District Court also addressed the claim for damages filed by the victims' relatives. Following this, it closely, almost verbatim, follows the District Court's public summary.

The District Court has received 306 claims for compensation from surviving relatives (also called: injured party claims). The 304 claims submitted by RBT exclusively concern compensation for immaterial damage (*moral damage*). Two claims for compensation submitted by surviving relatives themselves concern, in addition to immaterial damages, compensation for material damage for the loss of a laptop and compensation for the costs of the trip to the crash site in the summer of 2014.⁹

The District Court first decides that in Pulatov's case, as required by law, the injured parties are declared inadmissible because Pulatov is acquitted. The cases of the three other defendants, who were thus convicted, were tried in absentia.

Assessing the 306 claims under Ukrainian civil law, the District Court ruled that the requests seeking compensation for immaterial damages were admissible. Next, the District Court considered that as defendants Girkin, Dubinskiy and Kharchenko were convicted for both offences charged, the requirements for tort and culpability under Ukrainian civil law were thus also met. It is established that the defendants' wrongful act is causally related to the compensation for immaterial damages claimed by the relatives. Therefore, it only remains for the District Court to consider whether the nature and extent of the compensation claimed are awardable under Ukrainian law. In other words, the type and amount of damages.

Under Ukrainian law, both material and immaterial damages suffered directly by relatives of a deceased person are eligible for compensation.

On 17 July 2014, the aggrieved parties were suddenly confronted with the death of one or more loved ones as a result of the flight MH17 disaster. For the aggrieved parties, it is unpalatable that they have to live with a lingering uncertainty about what took place in the last moments on the plane and to what extent their loved ones were aware of their fate.

Many of the injured parties struggle with persistent complex grief disorder, post-traumatic stress disorder and/or depression. The constant media coverage also contributes to this. In addition, it has been shown that having to bury/cremate (remains) of a loved one multiple times can create a sense of unreality in bereaved families, as if it did not happen while knowing full well that the loved one is no longer alive.

Furthermore, in the District Court's view, there are other circumstances in this case that must be taken into account. Such as the inaccessibility of the disaster site, not only for relatives to visit the place where their loved ones died, but also for aid workers. Flight MH17 came down in a conflict zone and aid workers were denied access to the disaster site in that area, which seriously hampered the recovery of the victims and their belongings.

It further follows from the explanation of the claims of the aggrieved parties that the defendants' procedural conduct has also been distressing. Besides the denial that they had anything to do with the flight MH17 disaster, and their failure to disclose and cooperate with the investigation, they expressed themselves in negative terms about the MH17 disaster on several occasions.

⁸ This entire subject closely, almost verbatim, follows the District Court's public summary.

⁹ Material damage can be directly expressed in monetary terms, for example costs incurred or damage to property. Besides material damage, there is immaterial damage (moral damage). Immaterial damage is damage someone suffers due to mental distress or grief.



These are all aspects that play a role in determining the amount of damages. In making that substantive assessment, the District Court found that the amount of damages was extensively justified. This extent has not been disputed by the defendants. The District Court therefore need only consider whether the claims appear to it to be unlawful or unfounded.

The District Court notes first that the suffering described by the injured parties cannot be expressed in monetary terms in any way. The amount claimed also fits within Ukrainian compensation practice. The amounts claimed for compensation of immaterial damages therefore do not strike the District Court as unlawful or unfounded.

The District Court therefore does not go along with the prosecution's argument to take the (Dutch) Decree on Compensation for Affection Damage (Besluit vergoeding affectieschade) as a starting point when estimating the immaterial damage and to set the damage at a lower amount than claimed.

The District Court therefore finds the claimed compensation for immaterial damages to be fully admissible.

As in Dutch civil law, under Ukrainian civil law, siblings who did not live together with the deceased do not have a right of action. For this reason, no such claims were filed by RBT in this criminal case. The District Court found during the hearings that this impossibility affects many siblings painfully and is perceived as very unfair.

The District Court therefore supports the relatives' call for the position of siblings no longer living together with the victim to be explicitly included in the anticipated evaluation of the Act on Affection Damage (Wet affectieschade).

Under Ukrainian law, the compensation claim for the lost laptop is not subject to inheritance and therefore cannot be considered. The next of kin claiming that compensation are therefore inadmissible in that part of their claim. The claimed travel and accommodation expenses for their visit to the crash site do qualify for reimbursement as funeral expenses. The District Court does not consider these unlawful or unfounded.

This means that the District Court will order defendants Girkin, Dubinskiy and Kharchenko jointly and severally to pay damages to the injured parties totalling more than 16 million euros. The legal interest claimed is also awarded.

The District Court will also impose punitive damages on these defendants for each claim awarded.

No appeal lodged

The prosecution and the convicts did not appeal the District Court's 17 November 2022 judgment. The prosecution had until 14 days after the judgment to appeal. The District Court sentenced Girkin, Dubinskiy and Kharchenko to life imprisonment. This was also what the prosecution had demanded. Unlike the prosecution, the District Court found the fourth defendant, Pulatov, not guilty of bringing down MH17, and Pulatov was acquitted. The prosecution did not appeal this decision.

The elements considered by the prosecution in deciding not to appeal are as follows:

- The prosecution is satisfied with the District Court's verdict because it has brought clarity to the next of kin about the true facts of the downing of flight MH17 on 17 July 2014.
- The verdicts provide clarity on the probative value of witness and expert statements, visual material, tapes and on the conflict that was ongoing in eastern Ukraine and the role of Russian Federation in it.
- An appeal would mean that the next of kin would be left in uncertainty about the outcome of the criminal case for longer.



All the above, therefore, resulted in the prosecution not appealing the District Court's judgment on 17 November 2022.

Adding to the above, it should be noted that on 26 November 2022 (just over a week after the District Court judgment), the board of The Foundation and RBT organised a meeting for the next of kin. Although the next of kin do not have a formal role in lodging an appeal, a poll was taken among about 150 next of kin at that meeting on whether they believed the public prosecutor should appeal the District Court's judgment. The result of this poll was that one next of kin thought that the Public Prosecution Service should file an appeal, compared to 149 next of kin who thought that no appeal should be filed. This result was then announced to the Public Prosecution Service by The Foundation.

Irrevocable judgment

The District Court's judgment became irrevocable after 14 days because the prosecution and convicts did not appeal. This means they can no longer appeal the District Court's judgment. The sentences imposed have been transferred to the Ministry of Justice and Security.

The Central Judicial Collection Agency (CJIB), which is in charge of enforcing the compensation measure, has since paid the amounts imposed to the relatives. Extradition of the convicts to Russia will not be requested, as Russia does not extradite nationals. However, the Fugitive Active Search Team (FAST) will remain involved in identifying and tracking down the suspects so that they will serve their sentences.



SECTION 12 CCP PROCEDURE FOR REMAINING CRIMINAL INVESTIGATION

Introduction

On Thursday 17 November 2022, the District Court of The Hague delivered its verdict in the MH17 criminal case. The District Court found legal and convincing evidence that flight MH17 was downed with a BUK missile on 17 July 2014 from separatist-occupied territory in eastern Ukraine. The District Court ruled that defendants Girkin, Dubinskiy and Kharchenko were guilty, and sentenced all three to life imprisonment. Pulatov was acquitted of the offences. This verdict has not been appealed and the verdict is thus irrevocable.

Following this judgment, a report by the Joint Investigation Team (JIT) was published on 8 February 2023.¹⁰ In this report, the prosecution explained the investigation into other possible involved parties. In particular, it looked at (further) investigation possibilities and prosecution possibilities of (i) crew members of the Buk-TELAR and their superiors, (ii) those responsible for the provision of the Buk-TELAR and (iii) co-responsible for the deployment of the Buk-TELAR.

The public prosecutor concluded that the investigation results obtained up to that point did not provide sufficient grounds for prosecution of other possible persons involved, either because there were formal prosecution obstacles or because the necessary legal and convincing evidence was lacking. The report also explains why, after eight and a half years of investigation, the public prosecutor sees no further investigation possibilities at this time. It adds, however, that the prosecution is not letting the case rest. New information or changed circumstances may give reason to reopen the investigation or still prosecute.

This position of the public prosecutor was reason for RBT and the board of The Foundation to consider whether this information gave cause to initiate "Section 12 CCP proceedings". This assessment looked at whether the public prosecutor rightly concluded that there was not sufficient evidence for further prosecution, and whether the public prosecutor rightly concluded that there were no further opportunities for investigation.

What is an Section 12 CCP procedure?

An Section 12 CCP procedure offers the possibility of filing a complaint with the Court of Appeal (gerechtshof) if it is felt that the public prosecutor wrongly either decided not to pursue criminal proceedings or not to investigate further.

If, as a person directly involved in a criminal case, you disagree with the prosecution decision, you can file a complaint procedure with the Court of Appeal. A person of direct interest is someone who is directly affected by the non-prosecution. Victims and next of kin are included. Given the objective of The Foundation, the foundation can also be considered a directly interested party. Filing a complaint is in some cases subject to a 3-month deadline. This deadline does not apply to the MH17 criminal case because no punishment order has been issued by the public prosecutor to the suspects, nor does it concern suspects who's case has been dismissed.

Once a complaint is filed, it is registered by the Court of Appeal. A copy is sent to the advocate general. An advocate general works at the public prosecutor's office and acts as the public prosecutor at the Court of Appeal. The advocate general then talks to the public prosecutor and asks why it was decided not to prosecute the case (further). The advocate general also contacts the police to request the current status of that case. The prosecutor advises the advocate general on how to handle the complaint. On this basis, the advocate

¹⁰ Report Results of the JIT MH17 investigation into the crew members of the Buk-TELAR and those responsible in the chain of command, Public Prosecutors Service, February 2023.



general makes a report containing his opinion on the complaint filed by the person concerned. He sends this report to the Court of Appeal.

The Complaints Chamber (beklagkamer) of the Court of Appeal then decides how to proceed with the complaint procedure. First, the Complaints Chamber considers whether the complaint is manifestly (prima facie) inadmissible or manifestly unfounded. If the complaint is manifestly inadmissible or manifestly unfounded, the complaint will not be heard at a hearing. The complainant then receives the decision of the Complaints Chamber stating the reason for rejecting the complaint. A complaint is manifestly inadmissible in, for example, the following cases: the officer had not yet learned of the offence prior to the complaint because no report was made, the complainant has no direct interest in the prosecution, the accused has since died. A complaint is manifestly unfounded if at first sight it is immediately clear that the complaint cannot lead to criminal prosecution.

In reaching its decision, the Complaints Chamber considers the technical aspects of the case, such as provability and the public interest in whether or not to prosecute. The Complaints Chamber may choose to hear the complaining party at a hearing to provide additional explanations on their complaint.

After the substantive hearing, the Complaints Chamber of the Court of Appeal may declare the complaint well-founded. If the complaint is upheld and the complainant is found in favour, it only means that the Court of Appeal sees reason to continue the case and the prosecution. The Complaints Chamber then orders the public prosecutor to further investigate the criminal case or prosecute the offence. The Complaints Chamber does not decide on a conviction of the accused or whether the accused is guilty. No appeal or cassation is possible against the decision of the Complaints Chamber of the Court of Appeal.¹¹¹²

Why no Section 12 CCP complaint was filed by RBT and The Foundation¹³

RBT and The Foundation's lawyer studied the available information following the JIT report. Questions were also submitted by RBT and The Foundation to the prosecution, after which consultations were held with the prosecution. On this basis, the prosecution's decision to halt the investigation for the time being is understood.

For now, the conclusion of the JIT and the prosecution, that the options have been exhausted, is a justified one. The RBT and The Foundation are of the opinion that the prosecution has left no opportunity unused in the investigation into the downing of flight MH17. RBT does not expect that an Section 12 CCP procedure can change this, while the now possible untimely initiation of such a procedure does carry the necessary risks, such as the risk that a suspect will be prosecuted when there is not yet sufficient evidence to do so. As a result, the case would result in an acquittal.

That the investigation is being shut down is difficult and painful now that the bottom line to the downing of flight MH17 has not yet been uncovered. That said, the JIT and the prosecution do not rule out the possibility of future opportunities to uncover the truth and prosecute those responsible.

¹¹ Public Prosecution Service, 'Section 12 CCP proceedings', complaint non prosecution (art. 12 CCP).

¹² De Rechtspraak, 'complaint non-prosecution' (Section 12 CCP), procedures criminal law.

¹³ Newsletter RBT 2023-04.



Stichting Vliegramp MH17

Addition to the website of the MH17 Air Disaster Foundation – 2023

The Hague District Court rules on the criminal case against the four suspects.
17 November 2022

The prosecution posted a news release on its website announcing that it would not appeal the District Court's judgment.
1 December 2022

The District Court's judgment has become final. The prosecution and the defendants did not appeal.
2 December 2023

Published JIT report. The prosecution says it will not prosecute any other persons and sees no further opportunities for investigation.
8 February 2023

RBT and The Foundation are launching a joint investigation to see if there are grounds to initiate Section 12 CCP proceedings.
February 2023

Consultation between the Public Prosecution Service, RBT and The Foundation takes place. During the discussion, RBT and The Foundation have the opportunity to ask questions in response to the JIT report and the prosecutions' conclusion not to prosecute any other persons and to halt the investigation.
Beginning of June 2023

RBT sends a newsletter to clients about their conclusion regarding whether or not to initiate Section 12 CCP proceedings.
28 July 2023



COMPLAINTS AGAINST RUSSIA TO THE EHRM

State complaint Netherlands v Russia & individual complaints

Introduction

The European Court of Human Rights (ECtHR/The Court) in Strasbourg has received two types of complaints, respectively from individual relatives against Russia (first one in 2016) and a 2020 State complaint from the Dutch government also against Russia. Both complaints relate to sections in the European Convention on Human Rights (ECHR):

- Section 2: right to life
- Section 3: prohibition of torture and inhuman degrading treatment
- Section 13: right to an effective remedy

The individual complaints also (partly) concern Section 6 ECHR (right to a fair trial) and Section 8 ECHR (right to respect for private, family life).

The ECtHR has decided to hear the Netherlands' State Complaint in the Grand Chamber (17 judges). Once the ECtHR has decided on this, the ECtHR will also rule on the individual complaints in the Chamber (7 judges). No appeal is possible against a decision of the Chamber or Grand Chamber.

Important dates

In 2016, the first individual complaints against Russia were filed with the ECtHR. Two more individual complaints followed in 2018.

On 10 May 2019, the Dutch government took the decision to intervene in the individual complaints procedures of the next of kin.

On 10 July 2020, the Netherlands filed the state complaint against Russia with the ECtHR, and at the same time the Netherlands filed the intervention in the individual complaint procedures.

On 27 November 2020, the ECtHR decided to join the Netherlands' state complaint with two state complaints by Ukraine against Russia.

On 21 December 2020, permission was granted (among others) to the next of kin and The Foundation to intervene in the state complaint in writing as a third party. This written submission was filed on 28 January 2021. It focused on Russia's violation of Section 3 ECHR with regard to the next of kin.

The Court then looked first at the admissibility of the complaint. More specifically, this included whether (1) jurisdiction existed (Section 1 ECHR), whether (2) all remedies had been exhausted and whether (3) the complaint was filed in due time (Section 35 ECHR).

A hearing was held in that context on 26 January 2022. At the hearing, the three admissibility questions were addressed on behalf of the Netherlands. On behalf of The Foundation, an explanation was given on, in particular, the psychological consequences of Russia's actions and omissions for the next of kin. On behalf of Russia, it was stated that the complaint would not be admissible.

On 25 January 2023, the ECtHR declared the Netherlands' state complaint against Russia admissible. With the complaint being admissible, the ECtHR will comment on the substance of the complaint at a later date. The following will elaborate on the substantiation of the Court's decision to declare the complaint admissible.



With regard to the substantive hearing, it is also relevant that on 17 March 2023, in preparation for the substantive hearing, the next of kin and The Foundation were invited to submit a further/supplementary written intervention. This further written intervention was submitted on 28 April 2023. On 17 May 2023, the Court notified that these submissions would still be sent to the litigants who could respond to them by 2 October 2023. The Netherlands submitted a response on 2 October 2023.

It is not yet clear when the substantive hearing will take place.

Substantiation of the decision regarding admissibility¹⁴

In its decision of 25 January 2023, the ECtHR dealt extensively with the various admissibility questions raised by the Dutch state complaint. In the decision, the Court addressed jurisdiction in Chapter V. It then addressed admissibility questions relating to Section 35(1) of the ECHR in Chapter VI; first on the exhaustion of remedies and then on the six-month deadline. The Court also gave its first impression (*prima facie*) of the evidence in respect of the violations alleged in Chapter VII.

Jurisdiction

Regarding jurisdiction, the ECtHR considered that the downing of MH17 took place entirely within the territory controlled by the separatists, over which Russia had effective control, according to the ECtHR. The Court further found that the careful criminal investigation that took place in the context of the Joint International Investigation Team (JIT) provided much clarity regarding circumstances surrounding the downing of MH17. There was no evidence of fighting with the aim of gaining control in the areas directly relevant to the missile launch site or the location where the plane crashed, in such a way that any subsequent chaos could mean that no jurisdiction existed. The Netherlands' complaint was therefore within Russia's jurisdiction.

An objection by Russia regarding the Court's subjective jurisdiction (*ratione materiae*, the type of cases a court may hear) over complaints concerning armed conflict was also rejected. Russia argued that there was an international armed conflict which, according to Russia, meant that the downing of MH17 had to be assessed by applying rules of international humanitarian law¹⁵, and not by applying the ECHR. The Court stressed that the guarantees of the ECHR continue to apply in situations of international armed conflict. However, treaty guarantees must be interpreted in harmony with other rules of international law, including relevant provisions of humanitarian law. In particular, at the substantive stage of the proceedings, the Court will determine how to interpret Section 2 ECHR, taking into account the content of international humanitarian law.

Exhaustion of domestic remedies and six-month rule

Before a complaint to the ECtHR can be considered, all domestic remedies must be exhausted. In addition, a complaint must be filed within six months of the decision of the highest national court. If national remedies cannot be exhausted, the following applies:

- The complaint must be filed with the Court within 6 months of the act complained of; or
- The complaint must be filed with the Court within six months after the applicant was affected by the act or became aware of the act or became aware of the consequences of that act.

The Court first assessed Russia's objection. That objection was that domestic (Russian) remedies had not been exhausted. The Court noted Russia's general denial of any involvement in the downing of the flight, the fact that the events had taken place outside Russia's sovereign territory by perpetrators whose identity was

¹⁴ Much is taken quite verbatim from the ECtHR press release, Eastern Ukraine and flight MH17 case declared partly admissible, dated 25.01.2023.

¹⁵ International humanitarian law is the law that applies during armed conflict. It is also known as 'law of war'.



not known at the time, and the political dimension of the case which implied that state agents were involved in committing a crime condemned by the UN Security Council. The Court ruled that Russia had not shown that an effective remedy was available in Russia in relation to the complaints concerning the downing of MH17.

Russia then argued that the complaint period had expired. The Court considered that the complaint period had not expired. The complaint period exists partly to ensure that cases are dealt with by the Court while they are still fresh. This is to prevent, that with the passage of time, establishing facts and answering legal questions becomes more difficult. There was much ambiguity after the downing of flight MH17 about the exact circumstances under which the plane was brought down, such as the identity of the perpetrators, the weapon used and the extent of Russia's control over the area. As a result, the Court ruled that it was not unreasonable for the Netherlands to wait for sufficient credible and concrete evidence before bringing the case to the Court.¹⁶

Sufficient evidence

The Court then also held that there appears to be sufficient prima facie evidence to support the violations of Sections 2, 3 and 13 ECHR alleged by the Netherlands.¹⁷

We will have to wait and see whether the Court sticks to this verdict at the substantive hearing.

The Court declared the complaints admissible and will now proceed to the substantive hearing.

The substantive hearing

The Court will assess in substance whether Russia actually violated Section 2 (right to life), Section 3 (prohibition of torture and inhuman treatment) and Section 13 (right to an effective remedy) ECHR.

Duration

When the Court's substantive complaint hearing will take place is not yet known. It can sometimes take a long time before the Court actually gets around to considering the substance of a complaint.¹⁸ In its press statement of 26 January 2022, the Court only indicated that a judgment will follow in due course. If a case takes a long time, the Court may well decide to separate the substantive hearing from the question of damages, this will then be dealt with later.¹⁹

¹⁶ ECHR, 'Ukraine and the Netherlands v. Russia (dec.) [GC] - 43800/14, 8019/16 and 28525/20', Legal summary January 2023; and ECHR, 'Eastern Ukraine and flight MH17 case declared partly admissible', Press release ECHR 026 (2023), 25 January 2023.

¹⁷ ECHR, 'Ukraine and the Netherlands v. Russia (dec.) [GC] - 43800/14, 8019/16 and 28525/20', Legal summary January 2023; and ECHR, 'Eastern Ukraine and flight MH17 case declared partly admissible', Press release ECHR 026 (2023), 25 January 2023.

¹⁸ European Court of Human Rights, 'The ECtHR in 50 questions', 2021, pp. 9-10.

¹⁹ European Court of Human Rights, 'Eastern Ukraine and flight MH17 case declared partly admissible', Press release ECHR 026 (2023), 25 January 2023 and Legal Roadmap MH17, Chapter 4 'ECtHR (interstate)'.



Possible outcomes

The Court may dismiss the complaints if it appears that no violation of the ECHR can be found or if the consequences of this violation for the victims or survivors are insignificant.

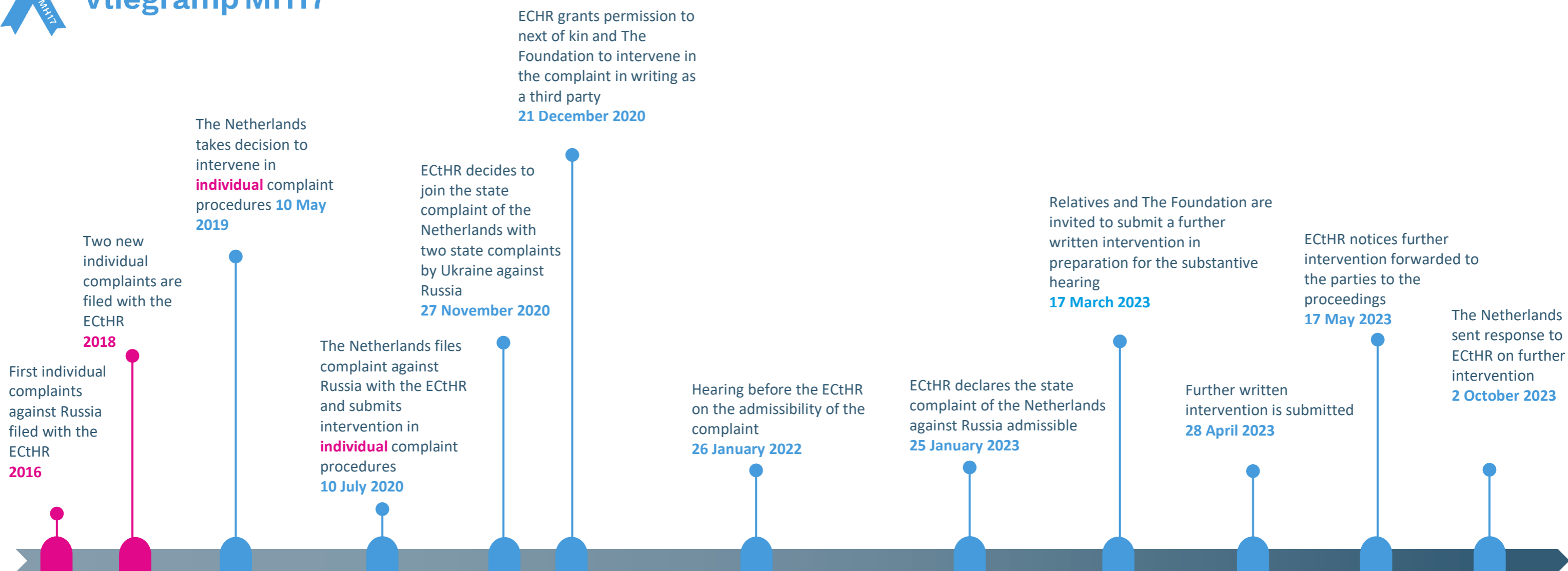
If the Court decides that there is indeed an ECHR violation and the consequences for victims or survivors are significant, the Court may order Russia to pay damages (just satisfaction). However, it is uncertain whether Russia will comply with this possible judgment.²⁰

²⁰ College voor de Rechten van de Mens, 'ECtHR considers Russian role in downing MH17', 2023, mensenrechten.nl.



Stichting Vliegramp MH17

Addition to the website of the MH17 Air Disaster Foundation - 2023





PROCEEDINGS AT INTERNATIONAL CIVIL AVIATION ORGANIZATION

Introduction

On 14 March 2022, the Netherlands and Australia filed a complaint against Russia with the Council of the International Civil Aviation Organization (ICAO). The complaint focuses on Russia's role in the downing of flight MH17.²¹ The following describes the procedure before the ICAO Council and the possible consequences if the ICAO Council rules that Russia is liable for the downing of flight MH17.

The complaints procedure at ICAO

Under the Chicago Convention (1944), states are obliged to ensure the safe conduct of civil aviation in their airspace. Russia is a signatory to this treaty and has thus agreed to refrain from using weapons against civilian aircraft in flight.

The ICAO Council is a body within ICAO that is authorised to adjudicate disputes arising in relation to the Chicago Convention. There are no public hearings for this procedure and these proceedings before the ICAO Council are confidential.²² A decision of the ICAO Council may be appealed by the parties to the dispute to the International Court of Justice²³; the highest judicial body of the UN.

The legal procedure at ICAO is outlined in the Chicago Convention (Sections 84 to 88), also known as the Convention on International Civil Aviation.²⁴ The more specific rules on procedure are contained in 'Rules For the Settlement of Differences, ICAO Doc 7782/2' (hereinafter referred to as the 'Rules'). These Rules describe the procedures for a state to submit a request to the ICAO Council, rules on the substantive hearing and rules on the further conduct of the case.

Following the downing of flight MH17, negotiations took place between Russia, the Netherlands and Australia on Russia's state liability. Russia withdrew from those negotiations on 15 October 2020 and decided not to negotiate a solution that would do justice to the suffering and damage caused by the downing of flight MH17.

Below, based on the Rules, the follow-up to the proceedings initiated by the Netherlands and Australia is discussed. Where possible, the current status of the complaint against Russia is also discussed.

According to the Rules, a number of issues must be included in the complaint being filed, such as the name of the applicant(s) and the states in the dispute in question, the relevant facts and circumstances relating to the complaint and substantiation thereof, what the desired solution would be and a statement of that negotiation between the states has already taken place but was unsuccessful.

After the complaint has been filed, the ICAO Secretary-General will check whether the application is complete and meets the above requirements. If not, he will ask the requesting state or states to complete and submit their complaint.

²¹ De Volkskrant, 'Netherlands and Australia join hands for new MH17 proceedings against Russia', Pepijn de Lange, 14 March 2022. Available at this link: <https://www.volkskrant.nl/nieuws-achtergrond/nederland-en-australie-slaan-handen-ineen-voor-nieuwe-mh17-procedure-tegen-rusland~be029527/>.

²² Ministry of Justice and Security, 'State of affairs MH17, p.2, 3 November 2022, available at this link: <https://open.overheid.nl/documenten/ronl-a99907063d95837b701e9c97af80af4d7b0b3e70/pdf>.

²³ Convention on International Civil Aviation, Chicago, 07-12-1944, art. 84.

²⁴ Convention on International Civil Aviation, Chicago, 07-12-1944, art. 84. Available at this link: https://wetten.overheid.nl/BWBV0005507/2017-10-23#Verdrag_2.



Once the complaint was complete, the ICAO Council was notified of the complaint by the Secretary-General. Copies of the complaint and related documents were then sent to the respondent, Russia, pursuant to the Rules. Russia was additionally invited to submit a defence to this complaint to the Council. For this purpose, the Council sets a deadline within which this defence must be submitted. This deadline is set by the Council on a case-by-case basis. In this case, it is not known what deadline Russia is bound by for submitting the defence.

Russia had the opportunity to question the competence of the ICAO Council to handle the case and object to the ICAO Council's handling of the case. Russia exercised this option and filed an objection. On 17 March 2023, the Council decided to reject Russia's objection to the ICAO Council's consideration of the case.

Before the ICAO Council begins its substantive consideration of the Netherlands' and Australia's complaint, the Council will consider whether the parties should still be invited at this stage to negotiate further in order to resolve the dispute. In this case between the Netherlands, Australia and Russia, the Council chose to indeed invite the parties to resume negotiations. The Dutch Minister of Foreign Affairs informed the House of Representatives by letter on 27 March 2023 that the Netherlands was open to this.²⁵

Substantive consideration by the ICAO Council

For the purpose of substantive consideration of the complaint, which has not yet commenced, the Council may choose to conduct its own investigation, but may also appoint a committee of five people to conduct the investigation. These representatives are drawn from member states that are signatories to the Chicago Convention who are currently sitting on the Council and who are not themselves involved in this conflict in order to avoid conflicts of interest and bias. The same rules apply to the Committee's investigation as to the Council. Following their investigation, the Committee ultimately reports to the Council, summarising the evidence and making recommendations to the Council. If necessary, the Council may then decide that further information is needed and request or examine it if necessary.

The Council or the Committee may also decide to have experts investigate and issue opinions.

The parties may submit evidence to the Council or the Committee in support of their statement. This may include witness statements and expert reports. The Council or the Committee may also request parties to call witnesses or experts to testify at an oral hearing.

At any time, the procedure may be suspended if the Council or the Committee considers that there is still a possibility of resolving the dispute through negotiations between the parties. If such negotiations are unsuccessful, the procedure shall be resumed by the Council or the Committee.

After hearing the arguments of parties to the case or reading the report of the Committee, the Council takes a decision. In the decision, the Council also explains how it came to this decision.

The decision of the ICAO Council may be appealed to the International Court of Justice by parties to the dispute, the Netherlands and Australia, within 60 days of notification of the decision if they disagree with the outcome of this procedure.

²⁵ Letter from Minister of Foreign Affairs, dated 27 March 2023 (*Kamerstukken II 2022/23, 33997, no 178*).



Legal effects

Based on the letter from the Minister of Foreign Affairs and the Minister of Infrastructure and Water Management, one of the possible legal consequences if Russia is found liable by the ICAO Council for the downing of flight MH17 is briefly discussed below.²⁶

After proceedings have taken place at the ICAO Council and the Council has made a decision in this case between the Netherlands and Australia v Russia, a possible legal consequence of state liability is that the liable state must provide full legal rehabilitation. One form of legal rehabilitation is financial compensation for damages suffered, also known as compensation. The Dutch government has incurred costs since the downing of flight MH17. At the request of the Prime Minister, the Court of Audit (Algemene Rekenkamer) is investigating the costs incurred by the Dutch government following the downing of MH17. The publication of the outcome of this investigation is scheduled for 7 December 2023.²⁷ These costs will then also be claimed by the Netherlands through a claim for damages in the ICAO Council proceedings against Russia. The Court is not investigating compensation for relatives, but these damages will be part of the compensation claim to be filed by the Netherlands.

²⁶ House of Representatives, MH17 air disaster 33 997, no 172, 14 March 2022.

²⁷ <https://www.rekenkamer.nl/actueel/lopend-onderzoek/inventarisatie-kosten-mh17>, accessed 26 July 2023.



Stichting Vliegcramp MH17

Supplement website MH17 Air Disaster Foundation - 2023

Russia withdraws from negotiations between Russia, Australia and the Netherlands on state liability
15 October 2020

The Netherlands and Australia file complaint against Russia with ICAO Council
14 March 2022

The Council rejects Russia's objection to the Council's handling of the complaint
17 March 2023

Letter from the foreign minister to the House of Representatives informing that the Netherlands is open to further negotiations with Russia if the Council invites the parties to further negotiations
27 March 2023

The Court of Audit's report on the costs incurred by the Dutch state is expected to be published
7 December 2023