

International Law and Fundamental Human Rights - Ensuring Accountability for the Downing of Flight MH 17

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ABSTRACT: The Parliamentary Assembly of the Council of Europe (PACE) started in January 2020 its work on the draft report entitled: "Ensuring accountability for the downing of flight MH 17" (rapporteur Titus Corlatean, SOC, Romania). The future report will have as main task to inquire about the extent to which countries have carried out investigations required under the European Convention on Human Rights and co-operated with one another as instructed by the United Nations Security Council and to make appropriate recommendations. Essentially, the facts under investigation are related to the shot down of the Malaysia Airlines flight MH 17 over Eastern Ukraine on 17 July 2014, during a decisive phase of the conflict between separatists, backed by Russia, and the Ukrainian military. A first Introductory memorandum was presented by the rapporteur in January 2020 to the PACE Legal Affairs and Human Rights Committee, underlining the key elements of his mandate for ensuring the accountability for the shot down of flight MH 17 and the terrible loss of the life of 283 passengers and 15 crew members. The committee accepted to declassify the memorandum. The main initial conclusions and the guidelines for the future work to finalize the report are presented as follows.

KEYWORDS: flight MH 17, shot down, accountability, European Convention on Human Rights, Ukraine, Russia, Netherlands, separatists, Security Council

Introduction

On 17 July 2014, Malaysia Airlines flight MH 17 was shot down over eastern Ukraine, during a decisive phase of the conflict between separatists, backed by Russia, and the Ukrainian military. Flight MH17 was on its way from Amsterdam to Kuala Lumpur. All 298 people on board died, including 196 Dutch nationals. It became quickly apparent that this was not an ordinary accident. After one week, the UN Security Council unanimously demanded that those responsible shall be held to account and called on all States to cooperate in the investigation. As after every air disaster, two parallel strands of investigation must be distinguished: the air safety investigation under the Chicago Convention, which shall determine the causes of the disaster and draw lessons from any shortcomings in safety arrangements for purposes of improving future air traffic safety. In parallel, the competent law enforcement bodies shall attempt to establish criminal responsibility of individual perpetrators of any negligent or intentional crime. For MH17, the air safety investigation was delegated to the Dutch OVV (Onderzoeksraad Voor Veiligheid - "Investigation Council for Safety"), on proposal of the National Bureau of Air Accidents Investigation of Ukraine, on account of the large number of Dutch victims and the fact that the flight originated in Amsterdam. The Dutch OVV presented its final report on 13 October 2015. It concluded that flight MH 17 was brought down by a BUK missile originating from Russia (Ensuring accountability for the downing of flight MH 17, Introductory memorandum, PACE 2020, 1).

The parallel criminal investigation by the Joint Investigation (JIT) led by the Dutch Prosecution Service and the Dutch National Police in co-operation with their colleagues from Australia, Belgium, Malaysia and Ukraine is still ongoing. The Dutch prosecution service recently announced that they would prosecute four suspects: Igor Girkin, Sergey Dubinski, Oleg Pulatov and Leonid Kharchenko, one having Ukrainian nationality and three Russian nationals. Both countries' Constitutions do not allow the extradition of their nationals. They must be prosecuted in their home countries, according to the principle of "dedere aut iudicare" (extradite or prosecute) enshrined in international law.

Article 2 of the European Convention on Human Rights

Based on a motion for a resolution (Doc. 14929/ 27 June 2019) of the Parliamentary Assembly of the Council of Europe (PACE) the Bureau of PACE decided to seize the Committee on Legal Affairs and Human Rights for a report on this dramatic event. At its meeting from 1 October 2019 in Strasbourg the Committee appointed a Rapporteur and at its next meeting from 10 December 2019 in Paris the same Committee heard a statement of the rapporteur explaining his understanding of his European mandate for a future action (Ensuring accountability for the downing of flight MH 17, Introductory memorandum, PACE 2020, 2).

According to the positions expressed by the authors of the motion for the report, shared by the rapporteur, it is of “utmost importance that justice be done and that all member States fully co-operate with the efforts in this respect by those States that have jurisdiction. Suspects of serious crimes should be either extradited on the request of the State undertaking the investigation and prosecution or prosecuted in the home State, if this State does not extradite its own nationals” (Doc. 14929/ 27 June 2019). Under Article 2 of the European Convention on Human Rights (right to life), as amended by Protocols 6 and 13 (European Convention on Human Rights, 6), all States Parties have the duty to carry out effective investigations to identify and punish those responsible for the loss of life that occurred under their jurisdiction (Doc. 14929/ 27 June 2019, 1).

In line with the motion, the main task for the PACE report is to inquire about the extent to which countries have carried out investigations required under the European Convention on Human Rights and co-operated with one another as instructed by the United Nations Security Council (Resolution 2166/21 July 2014) and to make appropriate recommendations. The report stated within the committee that will not attempt to second-guess or anticipate the results of the air safety investigation or the findings of the JIT. The PACE has neither the mandate, nor the expertise, nor the resources to do such a thing. But it is mandated to inquire and assess whether all States Parties to the European Convention on Human Rights have fulfilled their duty, under Article 2, to properly investigate and sanction any loss of human life.

Content of the Introductory memorandum

In the Introductory Memorandum, the rapporteur briefly presented the investigations carried out so far at national and international level, focusing on progress made and obstacles encountered by the investigators. The Dutch OVV, the Joint Investigation Team and the investigative site Bellingcat, which carried out extensive open-source research, published their results successively, step-by-step. They successively provided more detail and further corroboration of the now seemingly well-documented narrative according to which a BUK missile originating from Russia, launched from separatist-held territory in eastern Ukraine, was used to shoot down MH17.

Essentially, after the catastrophe, and the diffusion in the international media of the horrible images of the wreckage of the plane and the human remains scattered over a large area in the conflict zone in eastern Ukraine, it soon “became clear that the cause of the crash was not a malfunction of the plane or pilot error, but the impact of a weapon, or weapons of war. Investigations were hampered by the fact that the crash site was located in a zone under the effective control of separatist militias supported by Russia. There were even reports of looting of the personal belongings of crash victims. Only in the days after the crash, investigators from Ukraine, Malaysia and Australia and journalists, accompanied by OSCE observers, could access the crash site” (Ensuring accountability for the downing of flight MH 17, Introductory memorandum, PACE 2020, 2).

In accordance with the international regulations in this domain, two types of investigations needed to be carried out urgently and independently from one another. The first, on air safety investigation, having the target to identify the causes of the crash. The second, on criminal investigations trying to establish any criminal responsibilities.

A. The air safety investigation under the Convention on International Civil Aviation (Chicago Convention)

The objective of the technical investigations conducted under the international requirements established by Annex 13 to the Chicago Convention is not to apportion blame, but to draw appropriate lessons from any air disaster for the sake of improving air traffic safety in future (ICAO 2015).

As mentioned previously, the Dutch OVV received the competence for fulfilling the task of the air safety investigation. The OVV presented its final report on 13 October 2015. “It concluded that flight MH 17 was brought down by a BUK missile, more precisely by a 9N314M-type warhead of a 9M38M1-type surface-to-air missile, mounted on Russian-built BUK mobile air defense systems. The warhead was identified beyond doubt by characteristic (bow-tie shaped and square) fragments found in the wreckage and in the remains of crew members. The fuselage had suffered the impact of more than 800 high energy objects originating from one spot outside the plane, their shape excluding air-to-air cannon shot. The OVV report also carefully considers and excludes any other causes for the crash, like, for instance, lightning strike, hit by a meteorite or space debris, explosion on board, expansive engine failure, lack of airworthiness of the plane and the crew” (Ensuring accountability for the downing of flight MH 17, Introductory memorandum, PACE 2020, 2- 3).

According to the OVV report, as reflected in the Introductory memorandum, “the investigators identified characteristic sound peaks in the last 20 milliseconds of the CVR (Cockpit Voice Recorder) recording and located their source as being outside the plane, above the left side of the cockpit. The OVV report also establishes that no alerts or warnings of technical malfunctions were recorded on the CVR and the FDR (Flight Data Recorder). The OVV notes that the flight recorders could not be recovered by the Annex 13 investigation team. They were removed by two unknown officials and handed over only on 21 July 2014 to a Malaysian official in separatist-controlled Donetsk.” On the other hand, “radar data made available to the OVV by the Ukrainian and Russian authorities show that no other planes were in the vicinity of MH17, with the exception of three other commercial airliners, the closest at a distance of about 30 km. The OVV notes that the Russian authorities provided only video recordings of radar screens and not the raw radar data, which Russia claimed were not stored as they did not concern Russian airspace. The OVV recalls that this violates ICAO standards.”

The OVV report emphasizes that “it was first given access to the crash area only on 4 November 2014 and could only recover the wreckage in two missions starting on 16 November 2014 and 20 March 2015. It was however given access to information collected by other investigators given access earlier. But the OVV also notes that some pieces of wreckage identified as having been in the wreckage area shortly after the crash were not found during the recovery missions. The conditions of the transfer of the human remains for purposes of identification are not described in the report” (Ensuring accountability for the downing of flight MH 17, Introductory memorandum, PACE 2020, 3).

Finally, as concerns the air safety investigation, an important part of the OVV report is dedicated to “describing and analyzing the degree of risk of flying over a conflict zone such as that in eastern Ukraine (but also Afghanistan, Syria, Iraq, South Sudan, which commercial airliners overfly routinely in altitudes considered safe, as being out of the effective range of weapons used in these conflicts, such as “MANPADS” (portable surface-to-air missiles)” (Ensuring accountability for the downing of flight MH 17, Introductory memorandum, PACE 2020, 3).

B. Criminal investigations by the Joint Investigation Team (JIT)

The JIT is made up of police officers and forensic experts from Australia, Belgium, Malaysia, the Netherlands and Ukraine (see the informative official website on the MH17 crash at <https://www.om.nl/onderwerpen/MH17-crash/> featuring explanations on various aspects of the JIT’s work , in particular, forensic research into debris in Gilze-Rijen, the field office in Kyiv, the collection of soil samples in the areas suspected as the missile’s launch site, the investigation into the weapon

system used to bring down MH17 and the use of international legal assistance). It is led by the Dutch national police and has a field office in Kyiv. “The JIT, set up under the auspices of Europol, is currently 50-strong (according to MH17 Magazine 03, ‘Incomparable investigation’, hundreds of people were initially working on this investigation under the supervision of eight prosecutors; depending on the needs, people have joined over time whereas others left the investigation) and has access to the full array of forensic, aviation and military expertise (including radar, missiles, weapons and explosives experts). The JIT has carried out extensive forensic analysis of the human remains, and aircraft debris transported to the Netherlands, stored and analysed at Gilze-Rijen Air Force Base. The JIT also has access to information collated by the OVV. It may use information from all sources, but its task is to gather evidence in accordance with the high standards of evidence required for use in criminal court proceedings” (Ensuring accountability for the downing of flight MH 17, Introductory memorandum, PACE 2020, 4).

According to the PACE Introductory memorandum, “on 30 March 2015, the JIT released a video calling for witnesses in eastern Ukraine to come forward with information regarding the transport of a Buk anti-aircraft system through eastern Ukraine on July 17th (the day of the MH17 crash) and 18th, 2014. In the video, the JIT summarize the transport route of the BUK from Donetsk, through Zuhres and Torez to Snizhne, to Luhansk, and back to Russia with photographs and videos of the BUK along with intercepted phone calls between separatists. The majority of this information has been in the public domain since a report by Bellingcat dated 8 November 2014. In addition, this video presents intercepted phone calls made after the downing of MH17 that further implicate Russia and the separatists supported by Russia. In these three previously unpublished phone calls, separatists discuss a Volvo low-loader truck hauling a BUK from Snizhne to Russian territory shortly after the downing of MH17.

On 28 September 2016, the JIT announced that MH 17 was shot down by a missile from the 9M38 series, launched from a BUK TELAR system, which had been transported from Russia to an agricultural field near Pervomaiskyi, in eastern Ukraine, from where the missile was launched. After firing – with one missile missing – the system was transported back to Russia. On 24 May 2018, the JIT announced its conclusion that the BUK TELAR system used to shoot down MH17 belonged to the Russian armed forces’ 53rd Anti-Aircraft Missile Brigade stationed in Kursk. The JIT also launched a call for witnesses such as members of the 53rd Brigade in question.

On 19 June 2019, the Dutch authorities announced that based on the investigation conducted by the Joint Investigation Team (JIT) the Public Prosecution Service of the Netherlands would prosecute four suspects for bringing down the airplane, namely Igor V. Girkin (aka Strelkov), Sergey N. Dubinskiy, Oleg Y. Pulatov and Leonid V. Kharchenko. The first three are Russian nationals, Mr. Kharchenko is Ukrainian. Mr. Girkin is a former colonel of the FSB. On 17 July 2014, he was “Minister of Defense” and commander of the army of the self-proclaimed Donetsk People’s Republic (“DPR”), from where MH17 was shot down. As the highest military commander, he also maintained contact with the Russian Federation. Mr. Dubinskiy is a former military officer of the GRU (the Russian military intelligence service). He was one of Girkin’s deputies in 2014. He headed the intelligence service of the “DPR” and also maintained contact with the Russian Federation. Mr. Pulatov is a former military officer of the Russian “Spetsnaz-GRU”, the special units of the Russian military intelligence service. At the relevant time, he was one of the deputies of Dubinskiy. Mr. Kharchenko, the only Ukrainian suspect, has no military background. Receiving orders directly from Dubinskiy, he was commander of a combat unit in the Donetsk region.

The four suspects became by that subjects of prosecution for causing the crash of flight MH17, resulting in the death of all persons on board, punishable under Article 168 of the Dutch Criminal Code; and the murder of the 298 persons on board of flight MH17, punishable under Article 289 of the Dutch Criminal Code.

On 14 November 2019, the JIT “released another witness appeal, linked to the publication of several intercepted telephone calls on its website. The JIT announced that recent analysis of

information obtained by the JIT, including witness statements by former “DPR” members, revealed that Russian influence over the “DPR” went beyond military support, as supported by recorded telephone conversations between the leaders of the “DPR” and high-ranking Russian officials. In its latest witness appeal, the JIT reveals details about secure means of communication used between “DPR” fighters and Russian officials. The telephone numbers, used daily, were from the same series and appeared to be provided by the FSB. The JIT called for information on who used these telephone numbers and witnesses who can share information about those who commanded the deployment of the BUK TELAR in question.

International arrest warrants had been issued and the four suspects have been placed on national and international lists of wanted persons. Three of the suspects have Russian nationality, the fourth is Ukrainian. As the constitutions of both countries did not allow extradition of nationals, extradition would not be requested. The trial was scheduled to start on 9 March 2020 before the District Court of the Hague” (see <https://www.om.nl/onderwerpen/mh17-vliegramp/>; Ensuring accountability for the downing of flight MH 17, Introductory memorandum, PACE 2020, 4,5).

On 2 December 2019, “the Dutch Public Prosecution Service (PPS) announced that it had informed the Russian authorities of its request for the provisional arrest of a fifth suspect (“person of interest”), Mr Vladimir Tsemakh. He was arrested in Ukraine for other criminal offenses. The investigation into his role in the downing of flight MH17 is still ongoing. The JIT, who questioned him several times, considers him a suspect. But it could not prevent him from being transferred to the Russian Federation on 7 September 2019 as part of a prisoner exchange. The PPS had immediately requested from Russia to arrest Mr Tsemakh for the purpose of extradition to the Netherlands. The PPS received confirmation of receipt of its request before the plane even landed in Moscow. But he was not arrested, despite repeated indications by the PPS that he might flee to the “DPR”. On 23 September 2019 and several more times later, the Russian authorities requested additional information, which the PPS said it provided, even though it had no relevance for the arrest of Mr Tsemakh. The request for his arrest was repeated at the highest political and diplomatic levels, to no avail. On 19 November, the PPS received notification from the Russian authorities that the request for the arrest of Mr Tsemakh could not be executed because his whereabouts were unknown. According to media reports, Mr Tsemakh had already returned to his residence in eastern Ukraine. The PPS concluded that: “Russia willingly allowed Mr Tsemakh to leave the Russian Federation and refused to execute the Dutch request. While under the European Convention on Extradition, it was obliged to do so.” (see Press release Netherlands Public Prosecution Service concerning Mr Vladimir Tsemakh, 2 December 2019, available at <https://www.om.nl/onderwerpen/mh17-crash/@107214/press-release/>; Ensuring accountability for the downing of flight MH 17, Introductory memorandum, PACE 2020, 5).

The PACE rapporteur concludes on this chapter that “the issue of the alleged failure of the Russian authorities with the JIT clearly falls within (his) mandate as Rapporteur, and (he) will not fail to verify these serious allegations.” (Ensuring accountability for the downing of flight MH 17, Introductory memorandum, PACE 2020, 5).

Separately, just for the record, valuable other reports of investigation were released by Bellingcat, a collective of researchers specializing in fact – checking and Open Source Intelligence, founded by a British journalist. For instance, Bellingcat’s most recent detailed report – “A Birdie is Flying Towards You” – Identifying the separatists linked to the downing of MH 17 (Bellingcat 2019) “establishes the identities of most of the individuals heard or mentioned on the intercepted conversations released by the Ukrainian SBU and the JIT. Bellingcat, again, based itself on open (mostly digital) sources, trawling through social networks, online forums, reading leaked messages, using facial recognition tools and analyzing interviews given by separatist soldiers and published telephone conversations. The researchers thereby established the hierarchy of the “DNR” forces involved in obtaining and making use of the Buk system used in the downing of MH17. According to Bellingcat, the “GRU DNR” led by Sergey Dubinsky (one of the four suspects named by the Dutch OPP) was responsible for procuring the Buk missile

launcher in question, and for guarding the Buk at the launch site around the time when MH17 was shot down. Dubinsky's group also oversaw the transport of the Buk back to Russia in an attempt to hide evidence of its deployment – which was “seemingly approved by the DNR's most senior commander – Igor Strelkov.” Strelkov is one of the aliases of Igor Girkin, another of the four suspects named by the OPP. According to Bellingcat, the other two suspects named by the OPP, Oleg Pulatov and Leonid Kharchenko, also played key roles in procuring and guarding the Buk. Valery Stelmakh, a member of another group of separatists first spotted the aircraft (the “birdie”) and misidentified it as a target; he first reported this information to his commander, Igor Bezler, shortly before the downing. As of Bellingcat's report, it remains unclear who channeled this message to the BUK crew - which, according to intercepts, had come from Russia” (Ensuring accountability for the downing of flight MH 17, Introductory memorandum, 2020, 6). Bellingcat also concluded in a separate rapport that “if the Russian Ministry of Defence (MoD) deliberately provided misleading satellite imagery (presented at a press conference on 21 July 2014), this would be a clear violation of the Russian Federation's duty to cooperate with the investigation into the causes of and responsibilities for the MH 17 disaster” (Ensuring accountability for the downing of flight MH 17, Introductory memorandum, PACE 2020, 6).

Position of the Russian authorities

By contrast, in brief, Russia has spread different “versions” of the tragedy, successively and even simultaneously, according to which a Ukrainian fighter jet or a Ukrainian BUK missile brought down the plane. Russia rejects entirely the findings of the Dutch OVV, the accusations made by the Joint Investigation Team and the information and analysis published by Bellingcat outright.

In particular, “the Russian MoD stated that no Russian army missile system had ever crossed the Ukrainian border. At a press conference on 21 July 2014, the MoD presented satellite imagery to show that a Buk battery belonging to the Ukrainian military might have brought down MH 17 (see rebuttal by Bellingcat, above). In June of 2015, Almaz-Antey (the State-owned Russian manufacturer of Buk missile systems) held a press conference in Moscow presenting the results of their own investigation into the destruction of MH17, confirming it was hit by a BUK 9M38M1 surface-to-air missile armed with a 9H314M warhead. Shrapnel holes in the plane were consistent with that kind of missile and warhead, it said. Such missiles had not been produced in Russia since 1999 and the last ones were delivered to foreign customers, it said, adding that the Russian armed forces now mainly use a 9M317M warhead with the BUK system. Almaz-Antey also said that Ukraine's armed forces still had nearly 1,000 such missiles in its arsenal in 2005, when it held talks with Almaz-Antey on prolonging their lifespan. But the Russian military still has 9H314M warheads for BUK missiles, too (see Bellingcat report of 17 July 2017, 60). The Almaz-Antey study also postulates an alternative zone for possible launch sites (Ensuring accountability for the downing of flight MH 17, Introductory memorandum, 2020, 7).

To further bolster the thesis that a Ukrainian BUK brought down MH17, the Russian MoD presented additional radar data “accidentally discovered” in September 2016 during “scheduled maintenance” which purports to show the missile coming from Ukrainian Government – held territory, namely in the area of Zaroshchenske. But this radar data is considered inconclusive by the JIT and other international experts, and given the fact that Zaroshchenske itself and its surrounding areas were held by separatist forces around 17 July 2014, this location would have been an unlikely choice for the Ukrainian military to expose a vulnerable and valuable missile system (Bellingcat 2015). As to the “motive” for Ukrainian forces shooting at an airliner mentioned by Russian sources – namely that Ukraine wanted to shoot down a plane carrying President Putin (who was travelling around this time from Moscow to Warsaw) – experts pointed out that a missile from Zaroshchenske could not possibly reach a plane flying much further north between Moscow and Warsaw (Ibidem).

Another “version” spread by Russian officials was that flight MH17 was shot down by a Ukrainian fighter jet. But that version was widely rejected by international experts. The type of

aircraft allegedly used (a SU-25 ground attack plane) was technically not capable of carrying out such a high-altitude attack, and the purported “witness”, Evgeny Agapov, who described how a Ukrainian pilot (Captain Voloshin) shot down MH17 did not withstand scrutiny, as did the radar and satellite imagery and the tweet of a Spanish air traffic controller in Kyiv presented in support of this version (Polygraph.info 2017).

In the Introductory memorandum, the rapporteur stated that “as part of (his) fact-finding, (he) intend(s) to ask the competent Russian authorities for clarification regarding the apparent contradictions between different “versions” and supporting materials presented to the international investigators. Any intentionally misleading statements, let alone manipulated data, would clearly contravene Russia’s international obligations to cooperate in the establishment of the truth (Ensuring accountability for the downing of flight MH 17, Introductory memorandum, PACE 2020, 7).

The Malaysian position

On 17 July 2019, Malaysian Prime Minister Mahathir Mohamad was quoted by TASS as claiming that the Malaysian investigators had been excluded from the investigation, that the case was political and that investigators were blaming Russia from the beginning without examination. He had been awarded the Russian Order of Friendship by Vladimir Putin in 2003.

By contrast, the Malaysian prosecutor Mohamad Hanafiah bin Zakaria, who was part of the JIT, said at a press conference in the Netherlands on 19 June 2019 that the findings of the investigation “are based on extensive investigations and also legal research,” adding: “We support the findings.” (Polygraph.info 2019).

Public international law and the rule of law *versus* individual criminal responsibility

Individual criminal responsibility in International law became well founded during the past decades through both the international doctrine and international norms and case law respectively (Cassese 2008).

The rise of “individual criminal responsibility directly under International law marks the coming together of elements of traditional International law with more modern approaches to Human rights law and humanitarian law, and involves consideration of domestic as well international enforcement mechanisms”, mainly courts of law (Shaw, 2010, 397).

The criminal responsibility and accountability for the crimes committed in relation with the downing of the flight MH 17 is engaged first of all by the Resolution 2166(2014) of the Security Council of the United Nations adopted on 21 July 2014, demanding that those responsible be held to account and that all States co-operate to ensure accountability (UN Security Council Resolution 2166 (2014)). Both the doctrine and the case law of the International Court of Justice consecrates the primacy of the decisions of the Security Council and the legally binding obligations for the member States to obey to the requirements of the Council (Tchikaya 2015, 134). In this case, the Security Council:

- underlined the “need for a full, thorough and independent international investigation into the incident in accordance with international civil aviation guidelines”
- called on “all States and actors in the region to cooperate fully in relation to the international investigation of the incident, including with respect to immediate and unrestricted access to the crash site as referred to in paragraph 6”
- demanded that “those responsible for this incident be held to account and that all States cooperate fully with efforts to establish accountability” (UN Security Council 2166 (2014)).

At the European level, as mentioned previously, under Article 2 of the European Convention on Human Rights (right to life), all States Parties have the duty to carry out effective investigations to identify and punish those responsible for the loss of life that occurred under their

jurisdiction. In this case, the facts prove an obvious violation of the right to life (Article 2 of the European Convention).

In the same time, the requirements for a full, thorough and independent international investigation simultaneously with the full co-operation of all the States concerned by the matter are directly related with the European established standards of the Council of Europe concerning the *rule of law*. Briefly, the member States are requested to fulfill the rule of law criteria for their membership, as a general rule. This commitment is even more obvious valid in dramatic circumstances, such as the downing of the flight MH 17. It is important to recall in this context the Rule of Law Checklist consecrated by the European Commission for Democracy Through Law (Venice Commission 2016), adopted at its 106th plenary session, Venice, 11-12 March 2016, (Report on the rule of law (CDL-AD (2011)003 rev). Among the key benchmarks established by the Venice Commission relevant for the obligations of some European Member States in the context of downing the flight MH 17 it is worth to mention:

- *Legality, with its specific items, such as the supremacy of the law, compliance with the law, relationship between International law and Domestic law, exceptions in emergency situations provided for by the law (that in any case doesn't allow derogations to the right to life), duty to implement the law etc.;*
- *Legal certainty;*
- *Prevention of abuse of powers;*
- *Equality before the law and non-discrimination, with inter alia its specific items such as the guarantees for equality in law and equality before the law respectively;*
- *Access to Justice, with its specific items, such as independence and impartiality (sub-items such as independence of the judiciary, independence of individual judges, impartiality of the judiciary, the prosecution service: autonomy and control), fair trial (sub-items such as access to courts, presumption of innocence, additional fair trial standards, effectiveness of judicial decisions);*
- *Some other particular challenges to the rule of law, with specific items such as corruption and conflict of interest, collection of data and surveillance.*

As a consequence, the directly concerned European Member States must fulfill their duties according to all these legally binding obligations, both at the Universal and European levels.

Conclusions

The Dutch OVV, the Joint Investigation Team and Bellingcat published their results successively, step-by-step, always providing more detail and further corroboration of the narrative according to which a *BUK missile originating from Russia, launched from separatist-held territory in eastern Ukraine, was used to shoot down MH17*. By contrast, Russia has been spreading different “versions”, even simultaneously, according to which a Ukrainian fighter jet, or a Ukrainian BUK brought down the plane. *It is alleged by international investigators that much of the data presented by Russia in support of these versions lacks any credibility. If that were the case, the Russian authorities failed in their duty to cooperate with international investigators in establishing the truth.*

In the PACE Introductory memorandum, the rapporteur expressed “the need to learn more about the working methods of the international investigations and their specific needs for international cooperation, in particular any requests for information, data etc. that have not been fulfilled, in particular the OVV’s and JIT’s requests for primary radar and satellite data to be provided by Russia, Ukraine and NATO. For this purpose, (he) would like to carry out fact-finding visits to the Netherlands and to Ukraine. In the Netherlands, (he) intend(s) to meet with representatives of the Dutch OVV and of the Joint Investigation Team, as well as the prosecutors at the International Criminal Court. In Ukraine, (he) would like to speak with the Ukrainian investigators who worked on the case and, in particular, obtain first-hand information from them

on their cooperation with the authorities exercising de facto control over the site of the crash... in particular...to discuss the early stages of the work on identification and autopsy of the crash” (Ensuring accountability for the downing of flight MH 17, Introductory memorandum, PACE 2020, 8).

As regards other countries, in particular Russia, and the United States (who might dispose of yet undisclosed satellite and radar data), the PACE rapporteur obtained the Committee’s approval for authorisation to address written questions to them on any relevant issues (AS/Jur (2020) PV 01/3 March 2020, Committee on Legal Affairs and Human Rights, Draft Minutes for the meeting held in Strasbourg (Palais de l’Europe) from, PACE 27 to 30 January 2020).

As a general conclusion, the future PACE report will represent an important European contribution, despite the fact that these investigations probably will face serious challenges, for ensuring accountability for the downing of the flight MH 17, according to the requirements of the UN Security Council’s Resolution 2166 (2014) and all the other pertinent international norms, including the European legal standards in this domain.

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