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The MH17-judgment

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I. Introduction

November 17, 2022, exactly eight years and four months after the plane crash, the Dutch District Court of The Hague delivered its verdict in the MH17 criminal case.[1] In this regard, the court devoted extensive attention to various procedural issues, including the question of whether the prosecutor was allowed to prosecute the defendants. It addressed not only questions of jurisdiction and combat immunity, but also issues surrounding e. g. the actions of the prosecution and the Joint Investigation Team (JIT) in the press. In doing so, the court tested the right to a fair trial under Article 6 ECHR and found some procedural flaws. However, this did not lead to the inadmissibility of the public prosecutor. Therefore, the court arrived at the substantive hearing of the criminal case. In that regard, the question arose as to what caused MH17 to crash and what was the role of the accused. The verdict contains evidentiary considerations about the usefulness of statements by anonymous and threatened witnesses, about manipulation of footage and tapes, about expert evidence and about the usefulness of evidence from questionable sources. The final conclusion is that flight MH17 undoubtedly crashed due to the firing of a Buk missile from a Buk-TELAR from an agricultural field near Pervomaiskyi. As a result, all 283 passengers and 15 crew members were killed. The court sentenced three of the four suspects to life in prison and held them jointly and severally liable for more than 16 million euros in damages.[2] The fourth defendant was acquitted.[3] The verdict is detailed below.

II. Procedural aspects

Before the court could address whether the charges were legally and convincingly proven, several procedural hurdles had to be taken. The first question was whether the Netherlands had the right to prosecute, since the crash did not take place on Dutch soil and the victims were of different nationalities. The court was brief about this: Ukraine had transferred the

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1 Information about the MH17 trial can be found on www.courtmh17.com/en.

2 District Court of The Hague 17 November 2022, ECLI:NL:RBDHA:2022:14039 (Kharchenko), 14036 (Dubinskiy), 14037 (Girkin).

3 District Court of The Hague 17 November 2022, ECLI:NL:RBDHA:2022:14039 (Pulatov).

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right to prosecute to the Dutch authorities and for that reason alone the Netherlands already had jurisdiction.[4]

A second question was whether this jurisdiction was limited by application of international humanitarian law.[5] After all, the deployment of weapons within an international armed conflict by a member of the armed forces of one of the combatant parties may be permissible under certain circumstances. This member of the armed forces may invoke immunity, thus ruling out criminal prosecution. In this regard, the court first noted that on the day of the disaster an armed conflict took place between Ukraine and the Donetsk People's Republic (DPR). Although it occurred on the territory of Ukraine, it nevertheless qualified as an international armed conflict because, according to the court, there is "*an abundance of evidence*" that the DPR was under the so-called "*overall control*" of the Russian Federation. The court stated that the Russian Federation provided funding for the DPR, supply and training of troops and delivery of weapons and goods. In addition, from mid-May 2014, the Russian Federation had a decisive influence on the filling of senior positions within the DPR and interfered in the coordination of military actions and also took military actions itself on Ukrainian territory. Nonetheless, the court ruled that the suspects were not entitled to invoke immunity. This is quite simply because only members of the armed forces of one of the combatant parties can claim it.[6] And Russia to this day denies any monitoring of and involvement with the DPR during that period. And vice versa. Thus, the combatants of the DPR and therefore the suspects could not be considered part of the armed forces of the Russian Federation. They were not entitled to participate in the hostilities and thus to immunity. Conclusion: no limitation of jurisdiction under international law.

Furthermore, Pulatov (who by the way was the only one to present a defense) stated that the prosecutor had lost the right to prosecute, due to numerous gross violations of statutory and treaty rules and principles of due process.[7] The court brushed aside most of these defenses, but was critical on two points. First, the prosecution and the JIT had been quite adamant in naming in press conferences what allegedly happened to flight MH17 and the suspicion placed on the named and photo-shown suspects thereof. Naming suspects' personal details and showing their photographs in press conferences constitutes a potential violation of their right to privacy and thus a procedural shortcoming. According to the court, it was not immediately clear that this information had to be issued (worldwide) to the general public. The second issue was about the posting of a specifically designed application on the internet by the prosecution, which included evidence "*what happened to flight MH17 and who is responsible for it*." Sharing documents from the criminal file with a broad public while that file is still under judicial review (and therefore 'owned' by the court and no longer by the prosecution) violates the principles of due process. The prosecution deliberately acted in violation of that principle. The fact that the court – to put it mildly – was not amused, was all the more so since less than two hours before the launch of the application it had lifted a restriction on access to documents for the next of kin that had existed up to that moment.

4 Article 8b(1) of the Dutch Criminal Code (DCC).
5 Article 8(d) DCC.
6 Article 43 of Protocol I to the Geneva Conventions.
7 E. g. Article 359a of the Dutch Code of Criminal Procedure (DCCP).

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The court had imposed the explicit condition that the documents may only be used for the purpose of the criminal proceedings for which they were intended. The application itself, but especially the timing of its launch and the inclusion of substantive documents, was therefore characterized by the court as trampling on an express decision of the court: "*The court cannot (…) but see this application as an unsubtle attempt by the Public Prosecutor's Office to convince the world – even outside the hearing – of its rightness. (…) It is unnecessary and seriously detracts from the magisterial action that can and should be expected from the Public Prosecutor's Office*."

The court clearly showed its dissatisfaction on both matters, but neither led to the inadmissibility of the public prosecutor: it did, according to the court, not touch the "*overall fairness*" of the trial within the meaning of Article 6 ECHR. Moreover, with respect to the published photographs, the court ruled that the invasion of privacy was limited because a quick search on the Internet revealed that data just as much (the suspects were and are on international wanted lists). Regarding the application the court noted that it still considered itself able to render unbiased and unprejudiced judgments and that it had not resulted in an obstacle to conducting a defense. Thus: not magisterial, but still admissible.

III. The MH17-crash: course of events

Having tackled aforementioned procedural aspects, the court focused on the cause of the disaster. Based on "*ample evidence*" the court concluded that flight MH17 crashed because it was struck by a Buk missile fired from an agricultural field near Pervomaiskyi. It pointed (amongst others) to smoke/inversion traces, witness statements, satellite images, tapes, transmitter data, imagery and fragments found in the body of a crew member and the aircraft. All these pieces of evidence by themselves already constituted strong evidence for the conclusion that MH17 was actually hit by a Buk missile, but considered together and in context, according to the court no reasonable doubt remained whatsoever. Pulatov's statement that the intercepted telephone conversations were intended to mislead, is qualified as "*completely implausible*". The same applies to the alternative scenario put forward by Pulatov: the story that a Ukrainian Buk-TELAR must have fired a Buk missile from an area slightly east of Zaroschenchenske at an Air India aircraft, is – under the citation of several pieces of evidence – completely dismissed. Accordingly, the research of Almaz Antey (a Russian state-owned company and designer and manufacturer of the Buk weapon system), in which the defense found support for the aforementioned scenario, was put aside as not objective and independent. In this regard, the court also pointed out that the authorities of the Russian Federation repeatedly presented material that was supposed to show that they were not responsible for the disaster, but on several occasions this so-called evidence turned out to be falsified or showed clear traces of manipulation. Concerning the suggestion that was made outside the courtroom that it is precisely the evidence in the present case that is manipulated, the court considered it inconceivable that such a quantity of evidence of various kinds could be fabricated so quickly, soundly and consistently, without leaving any trace: the evidence had been thoroughly examined by various experts, from different disciplines, from different countries not involved in the conflict, and no trace of manipulation had been found.

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IV. The MH17-crash: role of the accused

Now that the cause of the disaster had been legally and convincingly proven, the court had to answer the question of who was responsible. In the verdict, the court described a large number of wiretaps and footage. From these it drew a number of conclusions regarding the defendants' conduct and their roles.

The court first noted that on the night of July 16–17, 2014, a Buk-TELAR was brought in from the Russian Federation by DPR fighters. In the afternoon of July 17, 2014, that Buk-TELAR was deployed in DPR-occupied territory near Pervomaiskyi in their fight against the Ukrainian army. As a result of that deployment, flight MH17 was brought down. After it became clear that this disaster had occurred due to the deployment of the Buk-TELAR, it was quickly removed back to the Russian Federation, in the expectation that an international scandal had thus been avoided.

The actual arrival of the Buk-TELAR was initiated by defendant Dubinskiy and the transport to and from the firing site was organized and directed under his direct instructions. That transport also included a direct and active role for defendant Kharchenko, who actually provided and arranged the escort of the Buk-TELAR. Although it is not clear from the case-file who gave the order to fire the missile and why it was fired – in other words, who pushed which buttons and why – it is clear, according to the court, that Dubinskiy and Kharchenko were directly involved in enabling the deployment of the weapon. Both men are therefore considered classic co-perpetrators.[8] Defendant Girkin is convicted not as a classic co-perpetrator, but as a functional perpetrator. He is held responsible as the supreme army chief (as defense minister he was the military chief of the DPR). Although it cannot be established that he knew about the deployment of this concrete Buk-TELAR, it can be established that he approved and supported (and even made possible through his contacts with the Russian Federation) such anti-aircraft practices, that took place under his responsibility.

In this respect, it must be noted that the court found it completely implausible that a civilian aircraft was shot down *deliberately*. The court assumes that the missile was fired in the belief that the target aircraft in question was military. That this error had been made, however, does not negate intent or premeditation. The intent and premeditation for the death of the occupants is given by the nature of the act (deribately firing a missile at an aircraft). Although it may be considered remarkable that the court said nothing about the foreseeability of a civilian aircraft flying in that specific air space, it is important to note that under Dutch criminal law any error in purpose does not annul responsibilities.[9] The fact that there tend to be more people in a civilian aircraft than in a military aircraft does also (apparently) not detract from this. Hereby, the court considered it paramount that, because of the lack of combat immunity, the defendants, like any other citizen, were not entitled to shoot down *any* aircraft in *any* case, including a military aircraft. The court stated: "*if the intention was to shoot down a plane that was not supposed to be shot down and a plane was shot down*

8 Supreme Court 2 December 2014, ECLI:NL:HR:2014:3474; Supreme Court 24 March 2015, ECLI:NL:HR:2015:718; and Supreme Court 5 July 2016, ECLI:NK:HR:2016:1316.

9 Supreme Court 8 April 1997, ECLI:NL:HR:1997:ZD0681; Supreme Court 29 April 1997, ECLI:NL:HR:1997:ZD0148; District Court of Limburg 13 November 2019, ECLI:NL:RBLIM:2019:10220; Supreme Court 12 June 2018, ECLI:NL:HR:2018:895; Supreme Court 29 April 1997, *NJ* 1997, 654.

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that was not supposed to be shot down, then, at the very least, the probable chance has been accepted that in the process people will be killed who were not supposed to be killed either. Legally, there is no difference between the two planes, nor between the status of the occupants". The three defendants are eventually sentenced to life imprisonment for, among other things, co-perpetration of murder, committed 298 times.

The fourth suspect, Pulatov, is acquitted. He was aware of the arrival and presence of the Buk-TELAR, but at the time of the shooting was (blatantly put) unavailable. He had no direct role of his own in the criminal acts and thus was no co-perpetrator. Pulatov did accept the deployment of the weapon and thus the consequences of that deployment, but because he could not have that deployment at his disposal, he could also not be considered a functional perpetrator.[10]

V. Claims for compensation

Finally, the court had to consider 306 claims for compensation from next of kin. Under the so-called Rome II Regulation the claims were substantively assessed under Ukrainian civil law. The herein applicable exclusion for same-sex partners was disregarded due to violation of the prohibition of discrimination.[11] A painful aspect that the court could not disregard was that (as in Dutch civil law[12]) under Ukrainian civil law siblings who did not live with the deceased are not entitled to a right of action. The court recognized that this impossibility affects many siblings and is experienced as very unjust, now that their lives had also changed dramatically after the disaster – not the least because they sometimes had to take care of orphaned children. Ultimately, the court awarded over 16 million euros in damages.

10 Supreme Court 21 October 2003, ECLI:NL:HR:2003:AF7938; Supreme Court 8 December 2015, ECLI:NL:HR:2015:3487.

11 Article 26 of the Rome II Regulation; Article 1 of Protocol No. 12 to the ECHR; ECtHR 7 November 2013, 29381/09 and 32684/09 (*Vallianatos and others vs. Greece*); ECtHR 21 October 2015, 18766/11 and 36030/11 (*Oliari and others vs. Italy*).

12 Article 51 f. DCCP; Article 6:108 of the Dutch Civil Code.

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