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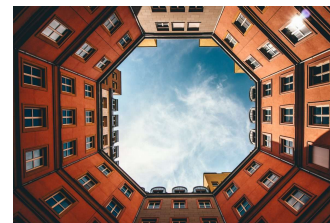
Possible Implications of the Dutch MH17 Judgment for the Netherlands' Inter-State Case before the ECtHR

ejiltalk.org/possible-implications-of-the-dutch-mh17-judgment-for-the-netherlands-inter-state-case-before-the-ecthr/

By Joëlle Trampert

December 12, 2022

On 17 July 2014, Malaysia Airlines flight 17 (MH17) from Amsterdam to Kuala Lumpur was shot down above eastern Ukraine, resulting in the death of all 298 persons on board. Eight years later, the victims' next of kin as well as their respective governments are pursuing multiple avenues to achieve justice and accountability and establish the truth. Due to the fact that most of the persons on board flight MH17 were Dutch nationals, the Netherlands has taken a prominent position in this pursuit. One of the Netherlands' efforts is the prosecution of four individuals part of the separatist Donetsk People's Republic (DPR) in eastern Ukraine. Another is the inter-State application against the Russian Federation before the European Court of Human Rights (ECtHR or Court), which has been joined with two applications previously submitted by Ukraine against Russia (nos. 8019/16, 43800/14 and 28525/20) (for more context, see [here](#)).



The district court of the Hague pronounced judgment in the criminal case on 17 November 2022, finding three defendants guilty of destruction of an aircraft and murder (for an English transcript of the judgment hearing, see [here](#)). As none of the verdicts have been appealed, the judgment is now final. One preliminary point the Dutch court had to address, was the Prosecutor's right to institute criminal proceedings against the accused. To do so, the court had to determine whether the accused had 'combatant immunity'. This has been discussed in detail by Lachezar Yanev (see [here](#)). As combatant immunity only applies to those who have the right to participate directly in the hostilities between States, the court had to examine the role of another State – in this case, the Russian Federation. This contribution focuses on some of the possible implications of the Dutch court's judgement for the Netherlands' case in Strasbourg.

The Dutch court's findings regarding Russia's role

Combatant immunity prevents the prosecution of 'combatants' for conduct committed during armed conflict, save in the case of alleged war crimes. As Yanev has explained, defence counsel for Pulatov (the only defendant who was represented by lawyers and therefore not tried *in absentia*) did expressly not invoke this. Nonetheless, the Dutch court was still obliged to consider this matter, as the conclusion would have bearing on all cases. Combatant privilege and immunity applies exclusively to combatants, a status that only exists in international armed conflicts. The court first established that in July 2014, the conflict in eastern Ukraine between the Ukrainian armed forces and the DPR was a non-international

armed conflict. The next question was then whether the conflict had become *internationalised*, which would be the case 'if a certain level of involvement of another country can be established.' (judgment section 4.4.3.1.3) The court observed:

This would mean a large degree of involvement of the Russian Federation. In this case – because of the position or role of the accused within the DPR – the question is not whether the Russian Federation itself may have used force directly against Ukraine (*direct* involvement of the Russian Federation), but whether the Russian Federation was involved in the DPR to such an extent that it could in fact be considered to have exercised *overall control* over the DPR. In that case, the non-international armed conflict between the DPR and the Ukrainian armed forces must still be regarded as an international armed conflict and the question of combatant immunity can still be raised. In assessing whether the Russian authorities had *overall control* over the DPR, the court can, incidentally, take into account facts and circumstances that indicate direct involvement of the Russian Federation in the hostilities, as will be discussed below. [Translation by author, emphasis in original]

This is a direct reference to the 'overall control' test articulated by the International Criminal Tribunal for the former Yugoslavia (ICTY) in *Tadić*. Overall control requires that the control exercised by a State over a non-State actor '[goes] beyond the mere financing and equipping of [that non-State entity] and [involves] participation in the planning and supervision of military operations.' (*Tadić* §145) The Dutch court applied this test to Russia's relationship with the DPR. Besides the evidence concerning some of the DPR leaders' close ties with the Russian Federation and military and financial support (including manpower, materiel and training) provided by Russia, there was an 'abundance of indications' that 'the Russian Federation had taken on a coordinating role and issued instructions to the DPR.' According to the court, the many intercepted conversations between the DPR members and (people working for) 'Moscow' about the situation on the ground, demonstrate the planning of military operations by the Russian authorities.

In these conversations, mention was made of the role of Moscow in relation to concrete operations. A few days after the crash, Borodai, who was Prime Minister of the DPR at the time, called a Russian number to speak to 'the boss', as he needed 'advice and instructions' on how to deal with the MH17 disaster. The court held that the fact Borodai asked to speak to 'the boss' while he himself held the highest position within the DPR, together with his statement that 'our neighbours' would surely want to say something about the case, confirm that 'the boss' was a representative of the Russian Federation. In addition to Russia's overall control over the DPR, the court also considered Russia's 'direct participation', concluding that there was not only evidence of 'parallel direct involvement', but especially of 'mutually coordinated military operations by the DPR and the Russian Federation'. In a final paragraph (still in section 4.4.3.1.3), the court concluded:

The Russian Federation financed the DPR, supplied and trained troops, and supplied arms and [other] goods. Furthermore, since at least mid-May 2014, the Russian Federation had *decisive influence* on the composition of several high positions within the DPR, including those of Prime Minister and Minister of Defence. With this, the Russian authorities had *substantial influence* on the DPR's administration. That the Russian Federation *actually also used this influence* is clear from the fact that the Russian authorities were (directly) involved in the coordination and implementation of military action before the crash of flight MH17. [Translation and emphasis by author]

The language in this paragraph is striking. While the findings on Russia's role were made for the purpose of classifying the conflict in July 2014 and eventually establishing individual criminal responsibility under Dutch law (and obviously not for establishing State responsibility under international law), they do provide an authoritative account of Russia's role. Moreover, in this paragraph, it almost seems as if the Dutch court is speaking directly to the ECtHR, by using words – i.e., 'decisive influence' – that strongly resemble language used by the ECtHR in cases which have some similarities with the present one.

'Decisive influence' in the ECtHR's case law

For the rest of this contribution, it must be kept in mind that the ICTY and the Dutch court both used the 'overall control' test for the purpose of attribution of conduct in the context of conflict classification. The ECtHR has adopted its own control standard, namely 'effective overall control', but has not always applied it clearly and consistently, complicating matters further by apparently using the same or a similar test for attribution as well as for 'jurisdiction' in the sense of Article 1 of the European Convention on Human Rights (ECHR or Convention), or even merging these concepts (on the difference, see [here](#)).

In their inter-State application, the Netherlands alleges that flight MH17 was shot down from the sky by a Buk-TELAR surface-to-air missile system which belonged to and was provided by the Russian Federation to the DPR along with a Russian crew. The Dutch court has confirmed that a Buk-TELAR missile system was brought in from Russia by members of the DPR and that it was transported back over the border afterwards. It has also confirmed that the missile launched from the Buk-TELAR caused the crash. But before determining whether this qualifies as a breach of the substantive limb of Article 2 ECHR, it must first be determined whether Russia exercised jurisdiction over the individuals who lost their lives as a result of the downing of flight MH17 in the sense of Article 1 ECHR, since the missile's deadly impact with the plane and the subsequent crash happened not in Russia but in (and above) eastern Ukraine.

In a series of cases dealt with by the ECtHR concerning Russia's control over Transdniestria in Moldova (and its responsibility for conduct committed by the authorities of the separatist Moldovan Republic of Transdniestria (MRT) in Moldova), the Court used a control test as

well as a ‘decisive influence’ test to establish Russia’s extraterritorial jurisdiction under Article 1 ECHR. In Ilaşcu and Others v Moldova and Russia, the Court held:

the “MRT”, set up in 1991-92 with the support of the Russian Federation, vested with organs of power and its own administration, remains *under the effective authority, or at the very least under the decisive influence*, of the Russian Federation, and in any event that it *survives by virtue of the military, economic, financial and political support* given to it by the Russian Federation. [§392, emphasis by author]

The Court repeated this in the subsequent cases of Ivanțoc and Others, Catan and Others, and Mozer, all against Moldova and Russia. As observed by Gibney (2015) and De Hoon (2017), the Court could draw on this jurisprudence for the MH17 case. It is important to recall here that the Court used this language to establish Russia’s extraterritorial jurisdiction; not necessarily to attribute the separatists’ conduct for the purpose of establishing Russia’s direct responsibility under the Convention. However, besides Mozer, these cases could be read to apply this standard for the purpose of attribution too (see Talmon (2009) and Milanovic (2020)). If ‘decisive influence’ and ‘survives by virtue of’ is used by the ECtHR as an attribution test similar to or as part of ‘overall control’, this would mean that Russia would be *directly responsible* under the ECHR for conduct amounting to a breach of the negative duty of the right to life by the separatists.

The ‘effective authority’ test in Ilaşcu in the paragraph cited above (or ‘effective control’ in Mozer §110) is presumably the same as the ‘effective overall control’ test first articulated by the Court in Loizidou v Turkey. The ICTY actually referred to the ECtHR’s ‘effective overall control’ test developed in Loizidou as proof for its own ‘overall control’ test used in Tadić, instead of the International Court of Justice (ICJ)’s stricter ‘effective control’ test, which requires State control of the specific act in question. It is this ‘overall control’ test that the Dutch court applied. Strictly speaking, the ECtHR’s control test in Loizidou was used for the purpose of establishing jurisdiction, but it can also be understood as an attribution test (cf Catan §115). The rest of this contribution looks at the Netherlands’ arguments in their pleadings in Strasbourg on the point of Russia’s jurisdiction, before offering some thoughts on attribution.

The Netherlands’ arguments regarding Russia’s jurisdiction

A brief recap on extraterritoriality – according to the ECtHR’s jurisprudence, a person is within the State’s jurisdiction if that State exercises *effective control over an area* (the ‘spatial model’) or *authority and control over a person through its agents* (the ‘personal model’). These models have been summarised in Al-Skeini v UK, and despite Georgia v Russia (II), where the Grand Chamber held that neither effective control over an area nor State agent authority and control can be established in the ‘active phase of hostilities’, both models continue to be relevant in the context of armed conflict (on this point, see here). The ‘decisive influence’ / ‘survives by virtue of’ tests discussed above have both been used for the spatial

model of extraterritorial jurisdiction. At the Grand Chamber's [hearing](#) in January 2022 (from 1:58:42), the Netherlands argued that Russia had been exercising effective control over the area in question at the time of the incident and that as flight MH17 was shot down by Russian agents, the people on board had been under their authority and control. To start with the spatial model, the Netherlands submitted that Russia at the time of the downing of flight MH17 had established effective control over the DPR area. To support this point, the Netherlands argued that the separatists were able to maintain control of that area only by virtue of the support of the Russian Federation. This sounds like a direct reference to the ECtHR's case law on Russia's responsibility for conduct committed by the MRT, where the Court held that the MRT 'survive[d] by virtue of the military, economic, financial and political support given to it by the Russian Federation.' The ECtHR may very well reach a similar conclusion in the MH17 case.

Alternatively, the Court could use the personal model of jurisdiction. It is actually rather surprising that the Netherlands also relied on this approach, as it might go against their own interest in cases brought against the Dutch State for harm caused by military operations abroad (think of [Hawija](#)). But in light of [Carter v Russia](#), this model provides another possible basis for Russia's jurisdiction. In *Carter*, the Court addressed the question whether those who poisoned Mr Litvinenko in the London hotel bar 'exercised physical power and control over the life of Mr Litvinenko in a situation of proximate targeting'. This 'control over rights' approach is quite similar to the 'functional model' of jurisdiction as articulated in the UN Human Rights Committee's [General Comment No. 36](#) on the right to life. If the Grand Chamber would follow the personal model in the same manner as the Chamber did in *Carter*, or even adopt a more functional approach, Russia's jurisdiction would be established: it cannot be disputed that those who shot down flight MH17 – if indeed acting as agents of the Russian State – had control over the lives of the people on the plane. It is however far from certain that the Court will conclude this in the MH17 case; can the downing of an aircraft be qualified as 'proximate targeting'? There is of course no reason for the Court to limit this approach to assassinations as proximate as shooting or poisoning, although it must be recalled that the Grand Chamber appears to have rejected a broader functional model in the recent case of [H.F. and Others v France](#) (for an analysis, see [here](#)). Moreover, in its oral arguments the Netherlands did not rely on the functional model; in fact, it explicitly rejected it in its [written comments](#) on General Comment No. 36. For obvious reasons, governments are hesitant to adopt this approach.

Some thoughts on attribution

The Chamber's judgement in *Carter* is an example of a case where the Court did properly distinguish jurisdiction from attribution: after dealing with Russia's jurisdiction, it turned to the question whether the two men who poisoned Mr Litvinenko had acted 'as State agents', and more specifically, whether their 'conduct was directed or controlled by' the Russian authorities. In this context, the ECtHR referred to Article 8 of the ILC's Articles on State Responsibility (ASR). Article 8 ASR states that conduct of a person or group shall be

considered conduct of a State if the person or group is acting on the instructions of, or under the direction or control of, that State in carrying out the act. Although the ECtHR did not rely on the ICJ's 'effective control' test, it did conclude that Russia had directed and controlled the specific act in question, i.e., the poisoning, which is required by the 'effective control' test too. The ECtHR could take a similar approach in the MH17 case. One element of comparison is the murder weapon: the radioactive isotope polonium-210 in *Carter*; the Buk-TELAR missile system in the MH17 case. Both are an 'unlikely murder weapon for common criminals and must have come from [the State].' (*Carter* §163) One key difference, however, is that the physical perpetrators in *Carter* did not act on their own initiative. This is an open question with regard to the members of the DPR, although there is ample evidence of Russia's support, coordination and instructions. It will of course be for the Court to decide if the relationship between the DPR and the Russian Federation was such that it merits attribution of conduct for the purpose of establishing Russia's direct responsibility for breaching the substantive limb of Article 2 ECHR.

Conclusion

The Dutch court has not established who pressed the button or who gave the orders to launch the missile. But it has confirmed that the Buk-TELAR was meant for and used in the DPR's operations and was launched from an area under the DPR's control. Importantly, it has found three persons criminally responsible for their involvement in the downing of flight MH17. Although the judgment does not concern the international responsibility of the Russian Federation, the Dutch court said more than many anticipated. Applying the ICTY's 'overall control' test, it attributed the conduct of the DPR to Russia. Before embarking on any attribution test, the ECtHR will have to deal with the thorny issue of Russia's extraterritorial jurisdiction. It is virtually unimaginable that the Grand Chamber will declare the MH17 case inadmissible on this point. But it is difficult to predict how the Court will proceed. Will it establish Russia's jurisdiction on the basis of the spatial model and apply the 'under the decisive influence' test developed in the MRT cases, which the Dutch court may have hinted towards in the MH17 judgment? Or will it (also) expand the personal model or even adopt a functional model, following *Carter*? As for Russia's responsibility for the alleged breach of the substantive limb of Article 2 ECHR, the Court could attribute the conduct of the DPR to Russia on the basis of Russia's control and influence, as the Dutch court has done for the purpose of classifying the conflict between Ukraine and the DPR in July 2014. The Court could also build on its findings in *Carter*. Alternatively, as discussed in the [*Amicus Curiae Brief*](#) submitted to the ECtHR by the Human Rights Law Centre of the University of Nottingham in 2020, the Court could use the notion of complicity or obligations of due diligence.

The Court is expected to deliver its admissibility decision soon. However, it might join many of the issues regarding jurisdiction with the merits and not answer these questions until a later date. The fact that Russia is no longer part of the Council of Europe and the problem

with execution of judgments notwithstanding, the ECtHR's judgment will be an important milestone for the Court, as well as for the next of kin of the victims of flight MH17.