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AT THE CROSSROADS OF INTERNATIONAL CRIMINAL LAW, THE MONTREAL CONVENTION, INTERNATIONAL HUMANITARIAN LAW, AND HUMAN RIGHTS: SOME REMARKS ON THE INTERPRETATION OF INTERNATIONAL LAW BY THE HAGUE DISTRICT COURT IN THE MH-17 JUDGMENTS AND THEIR POTENTIAL LEGACIES

Abstract: *This article seeks to answer the question of how international criminal law (ICL), the 1971 Montreal Convention, and international humanitarian law (IHL) influenced the proceedings in the MH-17 case, with particular emphasis on the Dutch Prosecutors' line of reasoning in proceedings before the District Court in The Hague (DCiTH), as well as on the judgments that the DCiTH delivered on 17 November 2022. Notably, the analysis below aims to establish whether, by refusing to grant combatant status to the defendants, the District Court acted within the limits permissible under international law, even though this Court admitted that at the moment of the MH-17's downing, the nature of the conflict in Eastern Ukraine was an international, not a non-international, one. In conclusion, the article argues that, firstly, even though the DCiTH's interpretation of the IHL is not free of certain flaws, the Court's line of reasoning and the sentences it delivered are a pragmatic attempt to bridge the gap between the proper administration of justice and the efficiency of criminal proceedings in a case where an airplane downing takes place during an international armed conflict. Secondly, although most recently the European Court on Human Rights (ECtHR) took note of the MH-17 judgments, for the reasons explained in this article the scope of their potential impact on the further development of international and domestic jurisprudence is uncertain, and remains to be seen.*

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INTRODUCTION

The literature concerning the Malaysian Boeing flight MH-17 downed by the pro-Russian separatists on 17 July 2014 has already been robust.[1] In the shadow of the Russian Federation (RF) aggression against Ukraine, on 17 November 2022, the District Court in The Hague (DCiTH or the Court) delivered its long-awaited judgments[2] against four persons accused of having played a crucial role in the shooting down of the airplane.[3] As none of the defendants appealed against these judgments, they are now deemed final.[4]

At the moment of submission of the present article, numerous authors have already expressed their opinions or commented on different legal aspects of these

[1] *See generally* M. de Hoon, *Navigating the Legal Horizon: Lawyering the MH17 Disaster*, 33(84) Utrecht Journal of International and European Law 90 (2017); L. Yanev, *Jurisdiction and Combatant's Privilege in the MH17 Trial: Treading the Line Between Domestic and International Criminal Justice*, 68 Netherlands International Law Review 163 (2021); M. Gibney, *The Downing of MH17: Russian Responsibility?*, 15 Human Rights Law Review 169 (2015); S. Williams, *The MH-17 and International Criminal Court: A Suitable Venue?*, 17 Melbourne Journal of International Law 210 (2016). In the Polish literature *see* B. Krzan, *Kilka uwag o pociągnięciu do odpowiedzialności karnej za zestrzelenie samolotu MH17* [Some Remarks on Criminal Responsibility for the Downing of MH17], 12 Wrocławsko-Lwowskie Zeszyty Prawnicze 169 (2021).

[2] Technically, the proceedings against the four accused constituted just one case registered under the same number (Zaaknummer 09-748005/19). Still, on 17 November 2022 the DCiTH (in Dutch: *Rechtbank Den Haag*) delivered not just one but four similarly constructed judgments, each concerning each defendant separately. As the Court noted "the judgements in the four cases are phrased as similarly as possible, both owing to their interrelated nature and in order better to inform the reader about the court's assessment of the cases of all four accused" (*see* Part 1, para. 1.1 common for all judgments listed below). As English is the language of this article, the considerations below take as their reference point English translations, which are registered in the official Dutch jurisprudence database (rechtspraak.nl) under different numbers than the original texts recorded in Dutch. All MH-17 judgments are accessible through the special portal concerning the MH-17 legal proceedings (available at: https://www.courtmh17.com/en/about-the-case/verdict-17-november-2022/, accessed 30 April 2023). Therefore it is recommended to obtain access to them through this portal, which offers direct links to the judgments in question posted at rechtspraak.nl. These are the following: (1) ECLI:NL:RBDHA: 2022:14040 (09/748006-19 English) (defendant *Oleg Pulatov*) (2) ECLI:NL:RBDHA: 2022:14039 (09/748007-19 English) (defendant *Leonid Kharchenko*) (3) ECLI:NL: RBDHA:2022:14036 (09/748005-19 English) (defendant *Sergey Dubinskiy*) (4) ECLI:NL: RBDHA:2022:14037 (09/748004-19 English) (defendant *Igor Girkin*). From now on all these judgments will be collectively referred to as the "MH-17 judgments".

[3] The transcript of the oral delivery of the judgment in English is accessible under the title *Transcript of the MH17 judgment hearing* at: https://www.courtmh17.com/en/insights/news/2022/transcript-of-the-mh17-judgment-hearing/ (accessed 30 April 2023).

[4] *See* J. Trampert, *Possible Implications of the Dutch MH17 Judgment for the Netherlands' Inter-State Case before the ECtHR*, EJIL Talk!, 12 December 2022, available at: https://tinyurl.com/2wt777nw (accessed 30 April 2023).

judgments.[5] The considerations below can be placed in line with these comments. Still, as the question of the MH-17 judgments' possible impact on the development of the human rights regime under the European Convention on Human Rights (ECHR)[6] or its consequences for private international law[7] have already been addressed elsewhere, the present contribution discusses other problems. Specifically, the primary purpose pursued here is to establish to what extent the international criminal law, the Montreal Convention,[8] and international humanitarian law influenced the proceedings in the MH-17 case, with particular emphasis on the Dutch prosecutors' line of reasoning in the proceedings before the DCiTH and the judgements the Court delivered on 17 November 2022. Within this framework, I seek to answer the question if, under the circumstances of this case, the DCiTH accepted as proven that the Court could refuse to grant combatant status to the accused persons and base its sentences on the Dutch Criminal Code's paragraphs implementing the provisions of the Montreal Convention.

In November 2023, the European Court of Human Rights (ECtHR), in its Admissibility Judgment,[9] briefly referred to the main findings of the DCiTH in the MH-17 case. Still, inasmuch as at the moment of the submission of this article the MH-17 case brought by the Netherlands and Ukraine against Russia before the ECtHR is still awaiting its merits stage and the DCiTH barely mentioned the European Convention of Human Rights,[10] the issue of the human rights dimension of the MH-17 judgments is omitted from the present analysis.[11]

This article is structured as follows: Part 1 restates the critical elements of the case's factual background and the international legal and institutional framework determining the scope of the proceedings in the MH-17 case at both the international and domestic levels. Part 2 restates the parts of the Indictment and MH-17

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[5] *See e.g.* G. van Calster, *The Dutch MH17 judgment and the conflict of laws. On civil claims anchored to criminal suits, and the application of Article 4(3) Rome II's escape clause,* 19 November 2022, opinion accessible at GAVC Law (https://tinyurl.com/2mx9u8es); L. Yanev, *The MH17 Judgment: An Interesting Take on the Nature of the Armed Conflict in Eastern Ukraine*, EJIL Talk!, 7 December 2022, available at: https://tinyurl.com/2n4h5zze; Trampert, *supra* note 4; M. Milanovic *The European Court's Admissibility Decision in Ukraine and the Netherlands v Russia: The Good, the Bad and the Ugly – Part II,* EJIL Talk!, 26 January 2023, available at: https://tinyurl.com/4tbdv9hj (all accessed 30 April 2023).

[6] *See* Milanovic, *supra* note 5; Gibney, *supra* note 1; Trampert, *supra* note 4.

[7] *Cf.* van Calster, *supra* note 5.

[8] *See* Convention for the suppression of unlawful acts against the safety of civil aviation (signed on 23 September 1971, entered into force on 26 January 1973), 974 UNTS 177 (Montreal Convention).

[9] ECtHR (GC), *Ukraine and the Netherlands v. Russia* (App. Nos. 8019/16, 43800/14 and 28525/20), Admissibility Judgment, 30 November 2022.

[10] MH-17 judgments, para. 4.4.4.1.

[11] For the same reasons, the problem of international responsibility of Russia is out of the scope of the present article, even though in the Conclusion, the extent of the DCiTH findings, which the Strasbourg Tribunal took into account in its Admissibility Judgment, is briefly discussed.

judgments where both the Prosecutors and the DCiTH's judges directly referred to the international rules mentioned above. Part 3 provides a critical analysis of the MH-17 judgments in light of the existing rules of international law within the scope delineated above.

In conclusion, I argue that the way the DCiTH applied the IHL rules on combatant status was not fully convincing. Nonetheless, the MH-17 judgments should be very carefully examined as they demonstrate how a domestic court tried, in a pragmatic way, to cut the Gordian Knot – where on the one hand the nature of the armed conflict makes the IHL's application unavoidable; on the other hand the perpetrators may not be too hastily qualified ordinary criminals because of their apparent combatant status. Secondly, although most recently the ECtHR took note of the MH-17 judgments, for the reasons explained in this article, the scope of their potential impact on the further development of both international and domestic jurisprudence remains to be seen.

1. THE MH-17 CASE: FACTUAL BACKGROUND AND LEGAL FRAMEWORK OF THE PROCEEDINGS

The basic facts of this case are undisputed. On 17 July 2014, the Malaysian Airlines' Boeing 777 was downed when flying over the small village of Hrabove near Donieck. In the wake of this event, 298 persons (including the crew) perished, most of them Dutch nationals (193) and the rest nationals of different countries.[12] When the lethal shot was fired, the region of Hrabove was under the effective military control of the pro-Russian separatists fighting against the Ukraine under the guise of the self-proclaimed "Donetsk People's Republic" (DPR), which was never recognized internationally. On 21 July 2014, the Security Council (SC) adopted a Resolution supporting efforts to establish a full, thorough, and independent international investigation into the incident in accordance with international civil aviation guidelines.[13] The same Resolution also recognized the efforts "to institute an international investigation of the incident and called on all States to provide any requested assistance to civil and criminal investigations related to this incident".[14] Finally, the SC demanded, in no uncertain terms, that "those responsible for this incident be held to account and that all States cooperate fully with efforts to establish

[12] Dutch Safety Board, *Crash of Malaysia Airlines flight MH17 Hrabove, Ukraine, 17 July 2014,* Hague October 2015, p. 27 (Report 2015).

[13] Security Council, Resolution 2166/(2014), 21 July 2014, S/RES/2166 (2014), para. 3.

[14] *Ibidem*, para. 4.

accountability,"[15] and also called on "all States and other actors to refrain from acts of violence directed against civilian aircrafts".[16]

Resolution 2166 left two basic questions unanswered. Firstly, it carefully omitted any suggestions determining the nature of the ongoing conflict in Eastern Ukraine. Secondly, as Sarah Williams noted, the Resolution "did not say which form that investigation or any eventual trial should take".[17] Thus, as the IHL does not provide for any specific regime of international cooperation to prosecute and punish war criminals, and the issue of the nature of the conflict remained unsettled,[18] the early stages of the proceedings had to follow the pattern determined by the general rules of international law, and International Civil Aviation Law (ICAL), even though in the first years after the event the ICL constituted the reference point in the the ongoing discussion on qualification of the crime and the choice of the appropriate forum. What concerned the ICAL was that the separatists refused to secure access to the crash site for the investigators[19] and that the Ukrainian authorities could not efficiently fulfil their duties under the Chicago Convention, which stipulates instituting an inquiry into the circumstances of the accident.[20] On 23 July 2014, in accordance with the conclusion of an agreement between the Dutch Safety Board and its relevant Ukrainian counterpart (NBAAII),[21] the investigation into the technical aspects of the crash was transferred to the Dutch Safety Board (DSB).[22] However, forging the international cooperation scheme to prosecute and try the perpetrators responsible for downing the plane was much more complicated. As the Chicago Convention does not provide any institutional and legal framework for criminal accountability,[23] different options

[15] *Ibidem*, para. 11.

[16] *Ibidem*, para. 12.

[17] Williams, *supra* note 1, p. 236; in the similar vein, de Hoon, *supra* note 1, p. 92.

[18] For more on this issue, *see* Part 2.

[19] *See* Resolution 2166 (2014), Motive 5

[20] *See* Art. 26 of the Convention on International Civil Aviation (signed on 7 December 1944, entered into force on 4 April 1947) (Chicago Convention) 15 UNTS 295. *See also* its Appendix XIII.

[21] Agreement between the National Bureau of Air Accidents and Incidents Investigation with Civil Aircraft (NBAAII) of Ukraine and the Dutch Safety Board of Netherlands on Delegation of Investigation in Respect of Aircraft Accident Involving Boeing 777-200, Registration: 9M-MRD "Malaysia Airlines" Flight MH-17. The full text of this Agreement is accessible at the DSB's homepage https://www.onderzoeksraad.nl/en/media/inline/2018/10/11/agreement_nbaai_and_dsb_website.pdf (accessed on 30 April 2023) In its Art. 1.7 the Parties invoked standard 5.1 of the Chicago Convention's Annex XIII, not as a legal basis for the transfer but rather as a rule permitting them to conclude the Agreement. According to it's Art. 1.4 both Parties declared to be bound by the provisions of the said Annex, and agreed to allow Ukrainian experts to take part in the investigation (Art. 1.9). By reference to the standards 5.18, and 5.23 of the Annex, XIII Art. 1.8 of the Agreement allowed the states mentioned in the both these provisions to appoint accredited representatives.

[22] This information was provided by the Ukrainian governmental sources: *Government to transfer MH17 crash investigation to Holland*, available at: https://www.kmu.gov.ua/en/news/247478062 (accessed 30 April 2023) and confirmed in the DSB final report (*see* Report 2015, *supra* note 12, para. 1.1, p. 14).

[23] *See* Williams, *supra* note 1, p. 211; in the similar vein, de Hoon, *supra* note 1, p. 92.

were considered on how to investigate the MH-17 case effectively and – once the investigation was completed – to bring the suspects before a trial court.

On the whole, the states from which most victims originated (Netherlands, Australia, Belgium, and Malaysia) and Ukraine quickly managed to set up the Joint Investigation Team (JIT). This unit, composed of law enforcement functionaries and prosecutors, was tasked with the international investigation of the MH-17 case. Even though its legal architecture was quite complex,[24] JIT played the leading role in collecting the evidence submitted to the Dutch Prosecutors and – later on – to the DCiTH.[25] The task of determining the jurisdiction competent to prosecute and try the suspected persons took much more time, as the governments hesitated to refer the MH-17 case to an international tribunal or to confer the adjudication to a domestic criminal court. Although in theory an *ad hoc* international criminal tribunal could have been established to proceed with such a complicated case,[26] for political reasons (namely, Russia's veto in the SC), this avenue was effectively ruled out[27]. Nor was it possible or convenient to transfer the case before the International Criminal Court (ICC),[28] even though the ICC's Prosecutor Fatou Bensouda kept

[24] As not all states involved in the investigation were EU Member States, the EU Framework Decision 2002/465 could not deliver a sufficient legal basis for the Team. For more on the legal aspects of this problem and the solution eventually adopted, *see* S. Hufnagel, *Policing Global Regions: The Local Context of Enforcement Cooperation*, Routledge, London, New York: 2021, pp. 97 *et seq.*

[25] JIT continued its activities even after the Court had delivered its judgment. The Dutch Prosecutorial Office decided to suspend the proceedings only on 8 February 2023; *see JIT MH17: strong indications that Russian president decided on supplying Buk*, available at: https://www.prosecutionservice.nl/topics/mh17-plane-crash/news/2023/02/08/jit-mh17-strong-indications-that-russian-president-decided-on-supplying-buk (accessed 30 April 2023).

[26] In this context, see the proposal of a group of states that submitted to the SC a draft resolution to this effect; cf. Draft resolution [on establishment of an International Tribunal for the Purpose of Prosecuting Persons responsible for Crimes Connected with the Downing of Malaysia Airlines flight MH17 on 17 July 2014 in Donetsk Oblast, Ukraine], S/2015/562.

[27] Security Council 7498th meeting Wednesday, 29 July 2015, 3 p.m., UN Doc. S/PV.7498. *See also* Krzan, *supra* note 1, p. 181; S. Williams, *supra* note 23, pp. 212 and 217.

[28] In the literature, one can find many arguments as to why the ICC has never been considered the best option for securing the accountability of the perpetrators, and this is neither the time nor place to discuss all of them once again. For the present article, it suffices to state that the requirement of complementarity could not have been fulfilled, as on 17 July 2014 judiciary organs of states from which most of the victims originated (and Ukrainian and Russian judiciary organs as well) launched their own parallel investigations. (Williams, *supra* note 1, p. 221; de Hoon, *supra* note 1, p. 95). Furthermore, inasmuch as Russia was reluctant to undertake sincere cooperation, notably in the apprehension of the suspects and their transfer before the ICC, there was a genuine risk that the proceedings before the ICC would lead nowhere, as the Rome Statute provides for a trial *in absentia* only in highly exceptional situations (*see* Art. 63 of the Rome Statute) (Williams, *supra* note 1, pp. 221 and 224). The issue of the ICC's jurisdiction was also controversial, as according to Arts. 6-8 and 8*bis* of the Rome Statute, it may prosecute and try only the "core crimes". Furthermore, even assuming that the MH-17 downing could have been qualified as a war crime, some authors opined that the high threshold of the proof of perpetrators' intent, which must be established in proceedings before this Court so that they could be found guilty, was another factor making the ICC's option not recommendable (*ibidem*, p. 220; see the next part of this article). Yanev underlined that the issue of competence of the ICC to try the nationals of non-Parties was the object of endless debates.

this channel open.[29] Other options were examined in the literature, exploring the possibility of transferring the proceedings before an international adjudicative organ or examining some other forms of its "internationalization", but since states accepted none of them we can omit them from the present analysis.[30]

Insofar as concerns the Montreal Convention, this treaty imposes the duty to try and punish anyone who, among other things, "destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight".[31] Theoretically, the rule *aut dedere aut iudicare* strengthens the enforceability of this duty.[32] Still, the application of the Convention to the MH-17 case was not without controversy. As the states execute the Convention's norms, and not only Ukraine and Netherlands had a legal interest in bringing the responsible persons before justice, the issue of "which jurisdiction should prosecute" had to be resolved in order to avoid the undesirable effects of concurrent proceedings before different states' domestic judiciaries.[33] This problem was further exacerbated by the fact that the law enforcement organs of the most affected states could not apprehend the suspected persons, and that Russia did not wish to offer any assistance in their apprehension. As the provisions of the Convention do not provide for any specific rules of priority of jurisdiction (silently giving a more significant say to a state with an offender in hand), one could even argue that its provisions were not practicable in this case.[34]

Thus, on 7 July 2017, the Netherlands and Ukraine concluded the Tallinn Agreement laying the legal basis for transferring the prosecution and adjudication of crimes

This issue – in the context of the MH-17 case, in which most suspected persons (and defendants) were Russian citizens – was of crucial significance. (Yanev, *supra* note 1, pp. 171 *et seq*.). It is thus no surprise that Netherlands' Justice Minister Ivo Opstelten was opposed to the ICC's option, also because not every state involved in the case was Party to the Rome Statute (*see "Verantwoordelijken national vervolgen"* Algemeen Dagblad, 25 July 2014, available at: https://tinyurl.com/rja7ymn3 (accessed 30 April 2023)).

[29] *See* Statement of the Prosecutor, Fatou Bensouda, on the conclusion of the preliminary examination in the situation in Ukraine, 2020, available at: https://www.icc-cpi.int/Pages/item.aspx?name=201211-otp-statement-ukraine; *see also* Krzan, *supra* note 1, p. 181. As for the reasons why Prosecutor Bensouda did not want to close down the proceedings (even though as early as in July 2014 the Dutch authorities signaled they didn't wish to refer the MH-17 case before the ICC (*see* A. Deutsch, *Trial over Malaysian plane crash not likely at ICC: Dutch*, Reuters, 30, July 2014, available at: https://tinyurl.com/4rmve5zb) (both accessed 30 April 2023). Williams argues that it appears that the ICC Prosecutor was keeping her options open for the time being, and merely following the outcome of the joint criminal investigation (Williams, *supra* note 1, p. 237). In retrospect, it seems that this view has been correct.

[30] For more on these issues, *see* Williams, *supra* note 1, pp. 227-229. *See also* briefly, de Hoon, *supra* note 1, p. 94.

[31] Art. 1.1(b) of the Montreal Convention.

[32] *Ibidem*, Art. 7.

[33] This terminology refers to the title of the Eurojust guidelines: "Guidelines for deciding "which jurisdiction should prosecute?" Document accessible at: https://tinyurl.com/3967vetv (accessed 30 April 2023).

[34] Moreover, some scholars doubt that the Montreal Convention was applicable to this case, as the passive jurisdiction principle is not expressly mentioned in its provisions (*see* Williams *supra* note 1, p. 230).

connected with the downing of the Malaysian Airlines flight MH-17 before the former's judiciary[35] and supplementing the existing channels of cooperation in criminal matters.[36] The decision to confer the task to prosecute and try to the Dutch judiciary was not surprising. As the Dutch prosecutor noted, the Netherlands was chosen because it was "the country with the most victims, a country without any involvement in the conflict in eastern Ukraine and a country with considerable experience in prosecuting international crimes".[37] It seems, however, that there was more to it than that. Firstly, although under the Dutch law predating 1 July 2014, the effective prosecution of the MH-17 case could have met not trivial hurdles,[38] still, on that day the amendments to the Dutch Criminal Code (DCC) adopted in 2013 entered into force, with the effect of widening the scope of Dutch courts' passive jurisdiction.[39]

[35] *See* Art. 2 of the Agreement between the Kingdom of the Netherlands and Ukraine on international legal cooperation regarding crimes connected with the downing of Malaysia Airlines Flight MH17 on 17 July 2014, UNTS 55449 (not reported in printed form yet). Other states whose citizens perished due to the downing are not parties to this bilateral agreement. Nonetheless, motive 4 of its preamble stipulates the Dutch and Ukraine governments acted under the apparent assumption that other states participating in the JIT approved – at least silently – the Tallin Agreement's provisions. Moreover the DCiTH, when analyzing the jurisdictional issues, accepted the view that this treaty effectively transferred the jurisdiction over the case to all victims of the crash (thus including non-Dutch citizens), even though no other countries but Netherlands and Ukraine were Parties to it (*see* MH-17 judgments, para. 4.4.2).

[36] The European Convention No 73 constituted the agreement's strong reference point. *See* European Convention on the Transfer of Proceedings in Criminal Matters, ETS No. 73.

[37] *See* Closing speech of the Public Prosecution Service day 1, 20 December 2021, para 2.3. Decisions regarding prosecution, available at: https://tinyurl.com/27a3p4dp (accessed 30 April 2023) (Closing speech, Part I).

[38] The conventional wisdom suggests the prosecutors could have based their indictment on the famous the 2003 International Crimes Act (ICA). However, considering the case-specific features of the Malaysian Airlines Boeing downing, this option was not very promising, as the ICA applies only in cases of core crimes. Considering the MH-17 case-specific facts, had the Dutch prosecutors based their indictment on the ICA they would have had to accuse the perpetrators of a war crime, with all possible consequences of this choice for the final outcome of the proceedings (for more see the analysis on the next page) Moreover, as the ICA does not explicitly allow for proceedings *in absentia* (*see* Yanev, *supra* note 1, p. 171), its application to the MH-17 case was even more problematic. The prosecution of the MH-17 case in the Netherlands based on the provisions implementing the Montreal Convention into the DCC under its version predating 1 July 2014 also posed not trivial difficulties. Although in theory the DCC provided for the extraterritorial jurisdiction of persons accused of committing crimes falling within the scope of this Convention, nonetheless the application of the DCC was permitted only in a case when a serious offense was committed against a Dutch aircraft in service, or a suspected person was present in the territory of the Netherlands. In the MH-17 case, none of these conditions were met.

[39] C. Ryngaert, *Amendment of the Provisions of the Dutch Penal Code Pertaining to the Exercise of Extraterritorial Jurisdiction*, 61(2) Netherlands International Law Review 243 (2014), quoting Act of 27 November 2013 to amend the Penal Code in connection with the review of the regulations on the effect of criminal law outside the Netherlands (review of the regulations concerning extraterritorial jurisdiction in criminal cases), Staatsblad (Bulletin of Acts and Decrees) (Stb.) 2013, 484; According to the new version of Art. 5 of the DCC, the Code is applicable to "any person outside the Netherlands who commits an serious offense against a Dutch national, a Dutch official, a Dutch vehicle, – vessel or aircraft as long as the serious offense is punishable by law with at least 8 years of imprisonment and also punishable by the law of the country where the serious offense was committed. This change should be read together with the new version of Art 6,

By this amendment, inserted at just the right time, the Dutch legislator enabled the judiciary to prosecute and try perpetrators based on domestic legislation targeting not war crimes, but ordinary crimes.[40] Secondly, over time it became evident that none of the suspected persons would appear in person (or be brought) before any judicial organs (whether international or domestic). Thus, it also became apparent that the sole way to empower domestic judicial organs to fulfill their duties would be to authorise proceedings *in absentia*. As the Dutch Code of Criminal Procedure, in its Arts. 278-280, allows for such proceedings to a much greater extent than many other domestic jurisdictions,[41] this factor also militated in favor of conferring the task of prosecuting and trying the perpetrators to the organs of the Netherlands.

2. THE INDICTMENT AND THE JUDGMENTS IN THE MH-17 CASE

Although in the early stages of criminal proceedings in the MH-17 case the discussion among legal scholars and the governments' initiatives at the international level were conducted along the lines of the general *corpus iuris* of international law, as well as the ICAL and ICL,[42] it was clear from the outset that on the day the Malaysian Boeing was downed, the ongoing hostilities in Eastern Ukraine were particularly intense. Therefore the hypothesis that on 17 July 2014, the situation near Hrabove attained the threshold of an international armed conflict (and thus, the downing should have been qualified as a war crime, not as a crime under the Montreal Convention) could not be excluded.[43] As the relevant information on the actual situation in Eastern Ukraine was only partially accessible, the legal qualification of the MH-17 case posed some difficulties for both legal scholars and the governments.[44]

Despite a certain hesitation, the Dutch prosecutors rejected the possibility of relying in their Indictment on the Dutch legal provisions criminalizing war crimes,

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that makes the DCC applicable to anyone (a Dutch or a foreign national) who has committed an offense over which the Netherlands is obliged to establish its jurisdiction pursuant to a treaty or decision of an international organization, while removing all references to specific international legal instruments in the Code" (*see ibidem*, p. 247).

[40] *See* Yanev, *supra* note 1, pp. 168 *et seq*. and 171.

[41] Williams, *supra* note 1, p. 234; but see (more cautiously) de Hoon, *supra* note 1, pp. 98 *et seq*.

[42] *See supra* note 1.

[43] This hypothesis had to be taken into account whenever an author considered the option referring the MH-17 case before the ICC. As this Court is competent only in the cases of crimes enumerated under Arts. 6-8, and 8*bis* of the Rome Statute, the qualification of the MH-17's downing as a war crime was the easiest way to demonstrate that the case fell within the I.C.C. jurisdiction. (*cf.* Williams, *supra* note 1, p. 216; *see also* Krzan, *supra* note 1, p. 177, who also recalls that UN High Commissioner for Human Rights Navi Pillay supported this interpetation).

[44] The hesitation on this issue is clearly demonstrated in the project of the Draft Resolution on the establishment of an International Tribunal for the Purpose of Prosecuting Persons responsible for Crimes Connected with the Downing of Malaysia Airlines flight MH17 on 17 July 2014 in Donetsk Oblast, Ukraine,

for reasons which are easy to identify. As Geert-Jan Alexander Knoops noted "the *mens rea* for an unlawful attack is intention or recklessness; mere negligence will not suffice. This relatively high *mens rea* standard implies that even if the attack is deemed to be unlawful, a prosecution may not be warranted if the attack was committed out of mere negligence".[45]

Therefore, for practical reasons the prosecutors based their Indictment on the Dutch Criminal Code's Art. 168,[46] implementing the Hague and Montreal Conventions.[47] The prosecutors noted that this provision "does not even require any intention to kill those inside the aircraft on the part of the perpetrator, let alone any intention to kill specific categories of people inside (civilian or military)".[48] This is because, "in respect of the evidence for the offenses in the Indictment, it makes no difference whether the defendants intended to shoot down a military or a civilian aircraft".[49] Furthermore, the prosecutors felt the choice of Art. 168 was well-founded in terms of both domestic and international law, as the UN SC Resolution 2166 (2014) interpreted the MH-17 downing along the lines of ICAL and ICL, and not as a case under the IHL.[50] Logically, as the Indictment relied on the anti-terrorist criminal rules (i.e., crimes against civil aviation's safety),[51] the prosecutors' analysis was conducted through the lens of a terrorist attack hypothesis, at the expense of any armed conflict context that was taking place in Eastern Ukraine on 17 July 2014. Put differently, the prosecutors did not deny that an armed conflict was ongoing

(UN Doc. S/2015/562, (*see also* Annex 'Statute of the International Criminal Tribunal for Malaysia Airlines Flight MH17 (ICTMH17)). According to this proposal, the jurisdiction of the future Tribunal was to encompass not only war crimes but also *crimes against the safety of civil aviation* (*cf.* Art. 1(1)(b) of the Statute's project).

[45] *See* G.-J.A. Knoops, *Mens Rea at the International Criminal Court*, Brill/Nijhoff, Leiden, Boston: 2017, p. 71 (footnotes omitted).

[46] Art. 168 states the following: "Any person who intentionally and unlawfully causes any vessel, vehicle or aircraft to sink, run aground or be wrecked, be destroyed, rendered unusable or damaged, shall be liable to: 1°. a term of imprisonment not exceeding fifteen years or a fine of the fifth category, if such act is likely to endanger the life of another person; 2°. life imprisonment or a determinate term of imprisonment not exceeding thirty years or a fine of the fifth category, if such act is likely to endanger the life of another person and the offence results in the death of a person".

[47] Hague Convention for the Suppression of Unlawful Seizure of Aircraft (drafted and signed 16 December 1970, entered into force 14 October 1971, 860 UNTS [1973]105 and Montreal Convention; *See also Legal framework MH 17,* 16 September 2021, AVT/JU-210916-001, p. 11 para. 4.1, available at: https://www.prosecutionservice.nl/documents/publications/mh17/map/2021/legal-framework-mh17 (accessed 30 April 2023). It is noteworthy, that both Conventions are applicable during peacetime, not during the armed conflict, and both target ordinary crimes – not war crimes.

[48] *See Closing Speech Part I, supra* note 37 (*see* para 2.3.4 *The mistake scenario*).

[49] *Ibidem.*

[50] *Closing speech of the Public Prosecution Service, day 3 (22 December 2021)*, available at: https://www.prosecutionservice.nl/topics/mh17-plane-crash/prosecution-and-trial/closing-speech-public-prosecution-service-december-2021/closing-speech-day-3-22-december-2021 (accessed 30 April 2023) (Closing Speech Part III), para. 7.2.1: Applicable provisions of criminal law).

[51] *Ibidem.*

in Southeastern Ukraine, but considering the case's specific circumstances they thought it was in its nature a non-international armed conflict (NIAC), rather than an international armed conflict (IAC).[52] Nobody may claim combatant privilege under the IHL regime regulating a NIAC, and therefore the prosecutors believed Art. 168 could and should be applied to the case at the bar.[53]

Nonetheless, the prosecutorial analysis was not convincing on every point. At the moment of the drafting of the indictment, the discussion on the nature of the conflict had already been ongoing, and the opinions diverged from one another.[54] Later on, Yanev opined that the allegation that the conflict in Ukraine in 2014 was a NIAC should not have been too hastily taken for granted.[55] He counselled to consider the DPR military forces as the RF's *de facto* agents, acting under Moscow's overall control;[56] thus to interpret the case along the same lines as the ICTY adopted in *Tadić* case.[57] He also criticized the prosecutors for their reading of Art. 4(A)2 of the Third Geneva Convention (GC III) and Art. 43 of the Additional Protocol I (AP I), in particular for their opinion that the DPR military forces had to be officially recognized by the RF so that their members could claim combatant

[52] Although the prosecutors did not express their precise opinion on this point, nevertheless some strong indications suggest that in their eyes the conflict in Ukraine fulfilled the criteria of a NIAC at most. For example, they noted that there was no proof that the defendants were regular military personnel operating on behalf of a state (*Closing Speech Part I*, para. 2.3.5: Combatant Immunity). Thus, the prosecutors argued they were self-proclaimed volunteers who took up arms and contributed to the chaos and lawlessness in Eastern Ukraine (*ibidem*). Another argument relied on the rejection by the RF of any responsibility for the acts committed by the separatists in Ukraine. Furthermore, the DPR denied any link between their actions and RF authorities. Finally, the defendants denied that in Eastern Ukraine any armed conflict, whatsoever was taking place (*ibidem*, para 2.3.5: Combatant Immunity). Cf. also *Closing Speech Part III, supra* note 50, para. 7.2.2 (where the prosecutor stated that "In legal terms they (the defendants – added) were ordinary citizens who were not allowed to use any form of force or violence").

[53] *Cf. Closing Speech Part III, supra* note 50, para. 7.2.1.

[54] Originally the ICRC mentioned in one of its communiques the ongoing conflict in Eastern Ukraine as being of a NIAC character (*cf.* ICRC, *Ukraine: ICRC Calls on All Sides to Respect International Humanitarian* Law, 23 July 2014, News Release 14/125, available at: https://www.icrc.org/en/doc/resources/documents/news-release/2014/07-23-ukraine-kiev-call-respect-ihl-repatriate-bodies-malaysian-airlines.htm (accessed 30 April 2023). *But see e.g.* de Hoon, *supra* note 1, p. 96 (who interpreted the ICRC position as an argument in support of the view that "the situation in Ukraine constitutes, at the very least, a non-international armed conflict"). In a similar vein Grzebyk states that "in the beginning (July-August 2014), this conflict could be classified as a non-international one. Still (...) the internationalization (of the conflict in Eastern Ukraine – added) could even have happened earlier if it were confirmed that the insurgents in Eastern Ukraine were from the very beginning inspired and supported by Russia to the extent that Russia had overall control over the dissident forces" (P. Grzebyk, *Classification of the Conflict between Ukraine and Russia in International Law (Ius ad Bellum and Ius in Bello)*, XXXIV Polish Yearbook of International Law 39 (2014), pp. 55 and 56 respectively).

[55] Yanev, *supra* note 1, p. 176.

[56] *Ibidem*.

[57] *Ibidem* (quoting the Appeals Chamber in *The Prosecutor v. Tadić* Judgment, IT-94–1-A), 15 July 1999, para. 137).

status.[58] Still, despite all those critical remarks Yanev also saw some indisputable advantages of the strategy the prosecutors adopted, namely the avoidance of having to submit the proof of intent obligatory in war-crime cases. By relying on the DCC's Art. 168, the prosecutors automatically placed the burden of the evidence of their alleged combatant status on the defendants' side if they wished to adopt this line of defense.[59]

The Court began its analysis with the jurisdictional issues,[60] then embarked *proprio motu* on the defendants' presumed combatant privilege. Specifically, the Court observed that if "combatant immunity does apply [...], it follows that the Prosecutor does not have the right to prosecute"[61] because as long as the persons participating in hostilities conduct their operations following the IHL's rules, "those persons cannot be prosecuted under criminal law for those acts which in peacetime might be considered a crime. This is combatant immunity".[62] Still, as the latter may arise only during an international armed conflict, the DCiTH felt compelled to establish whether the conflict in Ukraine attained this level on the day the Malaysian Boeing was downed. Once this question was answered in the affirmative, the second step was to determine if the defendants' met the criteria that the IHL prescribed for combatant status.

On the first point, the Court noted that a NIAC could transform itself into an IAC "if another country appears to be so heavily involved with the group with which a given country is fighting, (that) the other country actually has overall control over the group". Furthermore, by referring to the *Tadić* test,[63] the Court concluded that as early as 2014 the conflict in the Donetsk region was international.[64] This conclusion relied on many factors, i.e., the employment in the DPR's apparatus of some RF intelligence officers (the defendants Girkin and Dubinsky);[65] Moscow's direct involvement in appointing the DPR Prime Minister and other high-ranking officials; and the daily contacts undertaken between DPR politicians and Moscow, which was considered as the true centre of political power for all the DPR functionaries.[66]

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[58] *Ibidem*, pp. 179 *et seq*., where the Court stated, *i.a.*, that "the existence of such a relationship between Russia and the DPR forces must be determined on the basis of an assessment of the facts on the ground, irrespective of what public statements the parties concerned have made to this effect".

[59] *Ibidem,* pp. 181 *et seq.*

[60] *See* Part 1, notably *supra* notes 42 and 43 and remarks on the practical effects of Arts. 5 and 6 DCC.

[61] *See* MH-17 judgments (*see* the common para. 4.4.3.1: Combatant immunity).

[62] *Ibidem.*

[63] *Ibidem*, para. 4.4.3.1.2: Was there an armed conflict?.

[64] *Ibidem*, para. 4.4.3.1.3: The nature of the armed conflict; *see also* para 4.4.3.1.1: The situation in Eastern Ukraine in July 2014.

[65] *Ibidem*, para. 4.4.3.1.1: The nature of the armed conflict, The background of members of the DPR.

[66] *Ibidem*. *See also* under the same point 4.4.3.1.1, the part entitled Direct involvement of the Russian Federation.

Based on this evidence, the Court considered the allegation that RF organs offered mass support and military training to the separatists as proven.[67] Finally, the judges also concluded that "R.F. assumed a coordinating role and issued instructions to the DPR,"[68] and "R.F. coordinated military activities by the DPR and the Russian Federation".[69] For all these reasons, the DCiTH stated that on 17 July 2014, Moscow exercised *overall control* over the DPR.[70] Thus, contrary to the prosecutors' position, the conflict in Donieck was an IAC, not a NIAC.

Still, even though the DCiTH classified the conflict as an IAC, it stopped short of granting the defendants combatant status. By relying on Art. 43 AP I, and by underlining that the DPR had never been recognized under international law,[71] the Court concluded the defendants could have claimed their combatant status only had it been established that the DPR military forces actually constituted a part of the armed forces of the RF. The Dutch judges ruled that this was not the case. While they found that Russia exercised *overall control* over the DPR[72] and while this fact was sufficient in itself to internationalize the ongoing conflict, it was insufficient to prove the claim the defendants were members of the same Russian military machinery. "For that" – the Dutch judges stated – "the Russian Federation would also have to accept that the DPR was Part of the Russian Federation and take responsibility for the conduct and actions of the DPR fighters under the DPR's command".[73] Finally, and no less significantly, while examining the function of Art. 4A GC III as a source determining the scope and content of the combatant privilege, the DCiTH stated that although "the literature argues that the criteria of art. 4(A) of the Third Geneva Convention should also be considered when assessing whether the accused are entitled to combatant privilege. The Court finds that this is incorrect. *That article is not concerned with combatants and their privileges and immunities but rather with the status of prisoners of war*".[74] For all these reasons, the Court concluded that the defendants could not claim (even had they wanted

[67] *Ibidem*, para. 4.4.3.1: The nature of the armed conflict, Support.

[68] *Ibidem*, para. 4.4.3.1.3: Coordination and instruction.

[69] *Ibidem*, para. 4.4.3.1.3: Direct involvement of the Russian Federation.

[70] *Ibidem*. The DCiTH noted, among other things, that: "In this case due to the position and/or role of the accused within the DPR – the issue is (...) *whether the Russian Federation was involved in the DPR to such an extent that it can be characterized as having had overall control over the DPR*" (emphasis added).

[71] *See* MH-17 judgments, para. 4.4.3.1.4: Combatant status, cf the part *Member of the armed forces of the DPR – Definition of combatant under Article 43 AP I.*

[72] *Ibidem.*

[73] *Ibidem.*

[74] *Ibidem* (emphasis added).

to) their combatant status because they were not members of the Russian military forces (at least not at the moment of the downing).[75]

3. THE MH-17 CASE: THE INDICTMENT AND THE DCITH'S JUDGMENTS IN THE LIGHT OF INTERNATIONAL LAW – A CRITICAL ANALYSIS

A careful analysis leads to the conclusion that international law was not thoroughly examined in either the Indictment or in the MH-17 judgments. The prosecutors invoked SC Resolution 2166/(2014) seemingly to add muscle to their main argument the MH-17 case should be considered an ordinary crime, not a war crime.[76] The attitude of the Court was also restrained. Although in theory some UN resolutions could buttress the DCiTH's findings that the armed conflict in Eastern Ukraine was an IAC, the Court mentioned none of them.[77] Neither the prosecutors nor the DCiTH referred to the Montreal Convention, even though Art. 168 was added to the DCC to fulfil the duties derived from it. At the same time, this apparent reluctance to dwell on international law is at least partially understandable. Insofar as concerns the prosecutors, they undoubtedly wanted to exclude the proceedings from the ICL and IHL regimes to prove the Dutch domestic criminal law constituted a sufficient legal basis for both the proceedings themselves as well as for the Court's sentence. The DCiTH is a domestic criminal court that adjudicates criminal cases. Thus, although the UN resolutions mentioned above could be read as a strong indication that the tensions and fighting between Russia and Ukraine reached the IAC threshold as early as March 2014,[78] still none of them contain the General Assembly's unambiguous position on the nature of the hostilities in Ukraine, let alone confirm that the IAC threshold was reached precisely on 17 July 2014. The Montreal Convention was not invoked at all. Firstly, as Art. 5 DCC drastically extended the extra-territorial jurisdiction of the Dutch criminal courts, there was no need for the prosecutors or the DCiTH to refer to a non-directly enforceable aviation crimes treaty. Secondly, inasmuch as the Court ruled that the conflict was an IAC, any reference to the Montreal Convention would have been potentially inconsistent with the general rules on treaties' application during an international

[75] *Ibidem.*

[76] *See supra* note 56.

[77] *See* UN GA Resolution ES-11/1 of 2 March 2022, *Aggression against Ukraine*; UN GA Resolution ES-11/2 of 24 March 2022, para. 11, *Humanitarian consequences of the aggression against Ukraine,* para 9; UN GA 68/262, *Territorial integrity of Ukraine*, (paras. 1 and 2). *See also* GA 73/194 adopted by the on 17 December 2018, *Problem of the militarization of the Autonomous Republic of Crimea and the city of Sevastopol, Ukraine, as well as parts of the Black Sea and the Sea of Azov* (*cf.* notably paras. 1, 2 and 8).

[78] UN GA 68/262, paras. 1 and 2, read together with the common Art. 2 of 1949 Geneva Conventions.

armed conflict.[79] Overall, the Court's limited tasks determined the scope of its analysis of international law, causing it to not go beyond what was strictly necessary to decide the case at the bar.

Insofar as regards international law (leaving aside jurisdiction over the case), the Dutch judges needed to answer two questions, both regulated under IHL. The first, as previously mentioned, concerned the nature of the armed conflict, and the second (once they concluded it was an IAC) – the defendants' combatant status. Although in theory this was the line of reasoning that the DCiTH precisely adopted, this part of MH-17 Judgments is, perhaps, the most controversial one.

While examining the character of the link between the Donetsk separatists and Russia, the Court used the "overall control" test, echoing the famous *Tadić* judgment.[80] As is generally acknowledged, when articulating this test the ICTY sought to adopt the general criteria of attribution of international responsibility to states for acts of individuals that the International Court of Justice (ICJ) had determined in its famous *Nicaragua* test.[81] Later on, in 2007, the ICJ openly rejected the *Tadić test* as a yardstick of the international responsibility of states;[82] although it did not overtly rule out that a domestic criminal court could apply it to determine the nature of an armed conflict.[83] Although the DCiTH did not address this controversial issue directly,[84] it nonetheless proceeded as if it found it was permitted – under the

[79] *See Draft articles on the effects of armed conflicts on treaties with commentaries*, in: *Report of the International Law Commission on the work of its sixty-third session*, Yearbook of International Criminal Law, 2011, *cf.* commentaries to the Annex *Indicative List of Treaties Referred to in art. 7 lit c) Multilateral law-making treaties and (d) Treaties on international criminal justice.* (pp. 122 *et seq*.), where the latter states explicitly that point d) "does not comprise agreements on issues of international criminal law generally".

[80] *See* ICTY, *Prosecutor v. Dusko Tadic*, IT-94-1-A, 15 July 1999, available at: https://www.refworld.org/cases,ICTY,40277f504.html (accessed 30 April 2023), para. 131, where the Tribunal stated the following: "In order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields overall control over the group, not only by equipping and financing the group but also by coordinating or helping in the general planning of its military activity. Only then can the State be held internationally accountable for any misconduct of the group. However, it is not necessary that, in addition, the State should also issue, either to the head or to members of the group, instructions for the commission of specific acts contrary to international law").

[81] As is generally known, after the ICJ adopted its famous Nicaragua's test (*see* ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America),* Merits, Judgment. ICJ Rep 1986, p. 64, paras. 109 *et seq*. and 115, the ICTY sought to gloss over this position by proposing an alternative set of criteria, the effect of which was to lower the threshold which should have been met to establish the responsibility of a state for private individual acts (*see Tadić*, para. 131.) For more on this issue, *see* A. Cassese, *The Nicaragua and Tadić Tests Revisited in Light of the I.C.J. Judgment on Genocide in Bosnia*, 18(4) European Journal of International Law 651 (2007), p. 663.

[82] See ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro,* Judgment, ICJ Rep 2007, p. 207, paras. 403 and 406).

[83] *Ibidem*, para. 404. In this same vein *see generally* Grzebyk, *supra* note 54, p. 57.

[84] The DCiTH referred directly to the *Tadić* case, only once, and very briefly (*see* MH-17 judgments, para. 4.4.3.1.2).

existing ICJ jurisprudence – to apply the *Tadić test* as a tool to establish the character of the conflict in Ukraine.

More controversially, the Court denied combatant status to the defendants, using arguments that seem hardly acceptable at the theoretical level. Notably the Court, apparently accepting the prosecutors' arguments (against which Yanev had protested),[85] reasoned that since Russia denied any role in the conflict, and the defendants denied having been combatants, further discussion on their alleged status was unnecessary. Commenting on these fragments of the MH-17 judgments, some scholars have argued that the DCiTH's reading of the IHL rules contradicts the International Committee of the Red Cross (ICRC) Commentary to the GC III and some Red Cross teaching materials and leads to untenable results on practical grounds.[86] Although this criticism is perhaps not entirely persuasive,[87] it is true that the Court seriously erred in its analysis on this point. Firstly, the apparent decoupling of Art. 4A GC III and Art. 43 AP I seems to have been based on the misconception

[85] *See supra* notes 58 and 59.

[86] Yanev, *supra* note 5, who in support of this view quotes the Commentary to the Geneva Convention relative to the Treatment of Prisoners of War. Geneva, 12 August 1949. Commentary of 2020 (*cf.* The commentary to art. 4 footnote 1008, available at: https://ihl-databases.icrc.org/en/ihl-treaties/gciii-1949/article-4/commentary/2020#116, accessed 30 April 2023), and N. Melzer, *Interpretative guidance on the notion of Direct participation in hostilities under international humanitarian law*, ICRC, Geneva: 2009, p. 23, and stating the following: "As a result, if e.g. a Ukrainian soldier was captured by the DPR's forces, they will be obliged to treat him as a prisoner of war and afford him all the rights and protections enshrined in Geneva Convention III. Failing to do so would result in, *inter alia*, state responsibility for Russia as the controlling state. By contrast, if a DPR soldier is caught by the Ukrainian army, he could be prosecuted as a common criminal, even for the very use of lethal force against Ukrainian soldiers. This does not seem like a very tenable outcome" (Yanev, *supra* note 5).

[87] The MH-17 judgments may be defended against these criticisms on at least four grounds. Firstly, for the reasons explained below the gist of the Court's reasoning was not based on the GC III but on a (radical) interpretation of Art. 43 AP I. Secondly, the view that once a NIAC becomes internationalized the IHL is automatically applicable to all groups fighting previously against a state seeking to maintain its territorial integrity does not seem to be shared by all authors (*cf. e.g.* Grzebyk, *supra* note 54, p. 57 (and the sources quoted therein). Secondly, the 2020 ICRC *Commentary* to Art. 4A(2) GC III indeed states under its footnote 1008 that "where a Party to a conflict has overall control over the militia, volunteer corps, or organized resistance movement that has a fighting function and fights on the State's behalf, a relationship of belonging for the purposes of Article 4A(2) exists" (para 1008). However, it is not easy to gloss over the chapeau in this fragment, which states that such a link between a group and a State may emerge only *in some cases*. Thus, contrary to the situations determined under paras 1006 *et seq*., the hypothesis invoked in the paragraph under consideration does not suggest an automatic extension of combatant status to all groups under a State's overall control. Consequently, in light of the literal interpretation of this paragraph neither the asymmetric character of the conflict nor the exclusion of the lion's share of pro-Russian separatists fighting against Ukraine in Donetsk and elsewhere from the protection of privileged belligerency (*cf.* Yanev *supra* note 5) should be understood automatically as a breach of the IHL. Actually, under its para. 1008 the Commentary requires the belligerent Parties to conduct a case-by-case analysis, without prejudging its final result. Insofar as concerns Melzer's opinion (who argues that belonging to a Party can "be expressed through tacit agreement or conclusive behavior that makes clear for which Party the group is fighting" – *see supra* note 67), it is not clear whether these conditions were actually met in the realities of Eastern Ukraine in 2014.

that the former relates exclusively to the prisoner of war status, while the latter sets out the eligibility rules for combatant status.[88] Such an audacious position is openly contradicted by the key IHL authorities (not only in the literature[89] (as the Court noted) but also in the jurisprudence, including the ICTY in the *Tadić* case, which the Dutch judges directly referred to.[90] Nevertheless the main problem lies elsewhere; i.e. the reasoning of the Court is based solely upon Art. 43, and the DCiTH interpreted it in complete isolation from other AP I provisions[91]. Even if one accepts this proposition, (i.e. the Court, in its analysis of combatant immunity, could have dispensed with dwelling on other articles of AP I), the *traveaux preparatoire* of the Protocol , and Art. 43's content does not support the Court's reading. One of the main effects of the Protocol's entry into force was the enlargement of the scope of combatant protection beyond the previous limits determined by Art. 4A GC III, and this change concerned precisely irregular combatants.[92] Moreover, as Aldwich once commented on Art. 43, "the key issue for determining whether a person is a member of armed forces under this article is a factual issue, a command link, rather than a political issue, recognition".[93] Thus, if only for these two reasons the Court, by limiting its analysis to accepting the verbal declarations submitted by Russia and the defendants,[94] failed to offer an appropriate reasoning to justify its denial of combatant privilege to the four defendants.

CONCLUSIONS

Although at the early stage of the MH-17 proceedings, international law constituted a significant reference point for the international and domestic organs involved in

[88] *See* MH-17 judgments, common para. 4.4.3.1.4.

[89] *See generally* ICRC, *The 1987 Commentary to the API*, p. 514, para. 1676, where the authors stated clearly that the object of Art. 43(1) "is to establish a common denominator applicable to all, supplementing the specific rules of Article 4 of the Third Convention, without however setting them aside, with a view to defining who are members of the armed forces, as opposed to civilians*". See also* M. Sassòli, A.A. Bouvier, A. Quintin, *How does Law protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law,* Vol. I: *Outline of International Humanitarian Law* (3rd ed.), ICRC, Part I, Chapter 6, fns 94 and 95, available at: https://www.icrc.org/en/doc/assets/files/publications/icrc-0739-part-i.pdf (accessed 30 April 2023).

[90] *See supra* note 81, para. 92; *cf.* also paras. 94-96, where the ICTY derived from the GC III's Art. 4 the concept of a state control over irregular forces.

[91] Notably, it is unclear how to justify the omission in the analysis of the Court of Art. 44(1) of the AP I. This provision establishes the presumption of the combatant status of anybody who *appears to be entitled to such status,* no matter if a state claims such status for them or they claim to be entitled to the combatant privilege.

[92] For more on the issue, *see* G.H. Aldrich, *Guerrila Combatants and Prisoner of War Status. Prospects for United States Ratification of Additional Protocol I to the Geneva Conventions,* 85 American Journal of International Law 1 (1991), pp. 8 *et seq*.

[93] *Ibidem*, pp. 874 *et seq.*

[94] *See* MH-17 judgments, common para. 4.4.3.1.4.

the inquiry and investigation, its role in the Indictment and MH-17 judgments was limited, even though Dutch judges did examine some problems arising under the IHL. This conclusion seems to be the outcome of many different factors. For one, since the states involved in the proceedings decided not to refer the case before the ICC, the initiative to set up an MH-17 international tribunal was blocked by the Russian veto in the SC. Secondly, the Dutch prosecutors were not inclined to qualify the downing as a war crime, rendering the ILC meaningless to the case under consideration. Thirdly, given its nature and the circumstances of the case, the practical impact of the Montreal Convention – a classic aviation crimes treaty – has been non-existent. Fourthly, as the redrafted Art. 5 broadly extended the passive jurisdiction of Dutch organs. the judicial functionaries had even less incentive to waste time analysing those issues which would not help bring the MH-17 case to its final end. Against this backdrop, the limited analysis concerning the nature of the armed conflict in Eastern Ukraine and the problem of the defendants' combatant status carried out by the DCiTH support the general conclusion that international law only to a limited extent influenced the Indictment's content and the MH-17 Judgments. The mere fact that the Prosecutors and Courts rarely referred to international law does not however warrant any strong criticism. After all, all over the world, judiciary organs are created to resolve practical problems, not to discuss remote issues not directly connected with cases they resolve. Nonetheless, given its shortness and cursory discussion, the Court's analysis concerning the defendants' combatant immunity makes its reasoning – at least at the theoretical level – partially unpersuasive. Put differently, keeping in mind the complex circumstances of the case, the DCiTH should dwell more on this issue to exclude the risk of sentence for an ordinary crime person entitled to the combatant privilege.

However, it would be unfair to assess the enormous work done by the Dutch judiciary organs during the investigation, prosecution, and trial of the MH-17 case exclusively through the prism of just one unconvincing element of the final judgment. Therefore, even having these flaws in mind the issue of the MH-17 judgments' legacies or their potential impact on the development of international jurisprudence is difficult to foresee. As Yanev noted, they were "the first judicial determination that the nature of the armed conflict between Ukraine and the DPR's armed forces is international and has been such since mid-May 2014".[95] Will other tribunals follow this opinion? At this moment it is impossible to answer this question in unambiguous terms. Still, it is noteworthy that the ECtHR, in its Admissibility Judgment, recently stated that this issue would be examined during the proceedings on the merits.[96] Moreover, in the same Judgment the Strasbourg Tribunal directly

[95] Yanev, *supra* note 5.

[96] *See Ukraine and the Netherlands v. Russia*, para. 720.

referred to some of the DCiTH's findings.[97] Restating them together with other evidence, the Strasbourg Tribunal concluded that "it is established beyond any reasonable doubt that from the earliest days of the separatist administrations and over the ensuing months and years, the Russian Federation provided weapons and other military equipment to the separatists in eastern Ukraine on a significant scale". The extent to which the ECtHR's conclusion constitutes a harbinger of the MH-17 judgments' future impact on the ongoing proceedings before the ECtHR in the MH-17-case remains to be seen.

The MH-17 judgments are also of interest because they mirror the theoretical and practical problems which a domestic judiciary must cope with in a case where at the centre of the proceeding is a crime that can be qualified – depending on the nature of a conflict – as a war crime or – alternatively – an ordinary crime. The DCiTH, in its verdict, posits that at least in some circumstances it is legitimate for a domestic court to consider perpetrators as common criminals, not war criminals, even though a grave crime is committed during an international armed conflict. The advantages of the pragmatic approach the Court adopted are numerous at both the theoretical and practical levels. If implemented correctly, it would permit circumventing some of the barriers that the IHL and ICL pose on the road to effective prosecution and punishment – in particular the combatant's privilege and the threshold of the proof needed to establish the intent necessary to find defendants guilty of a war crime[98] and thus avoid perpetrators' impunity. However, the MH-17 judgments should also be seen as a *caveat* that this avenue, although promising, is also challenging on theoretical and practical grounds. Whether, in the years to come, another domestic court tasked with trying criminals in like-circumstances will consider the experiences gathered by the Dutch judiciary in the MH-17 case proceedings, or whether the DCiTH verdict will become an isolated instance, remains to be seen.

[97] *Ibidem*, para. 632, where the Strasbourg Tribunal stated, among other things, that "The evidence (submitted to the DCiTH) demonstrates beyond reasonable doubt that the Buk-TELAR used to shoot down flight MH17 was provided by the Russian Federation in direct response to the separatists' call for anti-aircraft weaponry".

[98] On the latter issue see Grzebyk, who notes that "paradoxically, because in Eastern Ukraine there is an armed conflict, it is much easier to avoid responsibility, inasmuch as if the attack was performed in relation to the conflict, it is sufficient to demonstrate that the perpetrator was convinced that he was targeting a military object (*e.g.* a military transport plane) in order to be found not guilty" (Grzebyk, *supra* note 54, p. 54).