

THE DOWNING OF FLIGHT MH17 IN CONTRAVENTION OF ARTICLE 3*BIS* OF THE
CONVENTION ON INTERNATIONAL CIVIL AVIATION
(AUSTRALIA AND THE NETHERLANDS v. THE RUSSIAN FEDERATION)

MEMORIAL
OF
AUSTRALIA AND THE KINGDOM OF THE NETHERLANDS

14 MARCH 2022

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an agreement to set up a JIT to investigate the downing of Flight MH17 in order to establish the facts, identify those responsible for the downing and collect evidence which could be used in judicial proceedings.⁶ The JIT was established with the cooperation of Malaysia and the European Union Agency for Criminal Justice Cooperation ('EUROJUST'), with Malaysia formally joining as a member in November 2014. The JIT investigations yielded conclusive evidence of the Russian Federation's role in transporting, deploying and using the Buk-TELAR for the purpose of assisting separatist fighters in Ukraine.

1.7 On 25 May 2018, having considered the facts and evidence gathered, verified and validated in the course of the DSB and JIT investigations, the Applicants formally invoked the responsibility of the Russian Federation under international law for its role in the downing of Flight MH17. In direct opposition to the Applicants' position, the Russian Federation has repeatedly denied any responsibility for the downing of Flight MH17.

1.8 In line with widely accepted international dispute settlement practice as reflected in Article 84 of the Chicago Convention, Australia and the Netherlands invited the Russian Federation to enter into negotiations to settle the dispute between them concerning the alleged breach by the Russian Federation of its obligations under Article 3*bis* of the Chicago Convention. The detail of those negotiations is set out in Chapter III of this Memorial. Despite the concerted efforts of Australia and the Netherlands to settle the dispute, the trilateral negotiations did not succeed, and the Russian Federation terminated its participation in those negotiations on 15 October 2020. The Russian Federation has rejected all efforts by the Applicants to re-enliven those negotiations.

1.9 As the Applicants' attempts to settle this dispute with the Russian Federation by means of negotiation have failed, the Applicants now call upon the International Civil Aviation Organization ('ICAO') Council to exercise its jurisdiction in this matter under Article 84 of the Chicago Convention, and to hold the Russian Federation to account for the shooting down of Flight MH17 and the tragic loss of life it entailed.

A. THE DISPUTE

1.10 The Chicago Convention is a landmark treaty that, since its entry into force in 1947,

⁶ Australian Federal Police, *Annual Report 2014-15* (Report, 2015) 48 <www.afp.gov.au/sites/default/files/PDF/Reports/afp-annual-report-2014-2015.pdf>; 'The criminal investigation', *Government of the Netherlands*, (Web Page) <www.government.nl/topics/mh17-incident/achieving-justice/the-criminal-investigation>.

step in preventing such a tragedy from occurring in the future. By contrast, failure to do so can only undermine Article 3*bis*, to the future detriment of the safety of civil aviation.

1.18 In this Memorial, the Applicants will establish that the Russian Federation bears international responsibility for the downing of Flight MH17 in breach of its obligations under Article 3*bis* of the Chicago Convention in two separate and independent ways.

1.19 First, the Applicants will establish that Flight MH17 was shot down by a surface-to-air missile fired from a Buk-TELAR that belonged to the 3rd Battalion of the 53rd Anti-Aircraft Military Brigade ('AAMB'), being a unit of the armed forces of the Russian Federation, and was accompanied by a Russian military crew. They will establish that this particular Buk-TELAR was transported by its Russian military crew from the territory of the Russian Federation into the east of Ukraine on 17 July 2014, following requests from Donetsk Peoples' Republic ('DPR')¹⁵ separatists that the Russian Federation provide a long-range anti-aircraft missile system (together with trained personnel) to support the DPR's efforts in its conflict with Ukraine. They will further demonstrate that this Buk-TELAR was driven to what would become the launch site – an agricultural field in the east of Ukraine – before it was used to shoot down Flight MH17 (something that could only have been achieved by the trained Russian crew of the Buk-TELAR, or at least by persons under their direct instruction). The Buk-TELAR was then returned to the territory of the Russian Federation, where it arrived on 18 July 2014. Those facts establish that the shooting down of Flight MH17 involved a clear contravention of Article 3*bis* of the Convention, which is plainly attributable to the Russian Federation.

1.20 Second, as a separate and independent means to establish a breach of Article 3*bis*, the Applicants will demonstrate that the Russian Federation knew that its own acts had created a serious danger of the use of weapons against civil aircraft in flight, and failed to take measures available to it that would have prevented that serious danger from materialising. That failure contravened the 'obligation to prevent' that is inherent in Article 3*bis*. The Applicants will establish that the Russian Federation was aware that its deployment of a Buk-TELAR to the east of Ukraine carried with it a serious danger that weapons would be used against civil aircraft in flight, because it knew that the airspace above the east of Ukraine was utilised by civil aviation above 32,000 feet ('FL320'), it knew that aircraft flying

¹⁵ Any reference to the Republic of Crimea, or the DPR and its leaders, structures and/or organisation in this Memorial does not constitute any form of formal or informal recognition of the Republic of Crimea or the DPR by the Applicants.

at that height were within the range of missiles launched from a Buk-TELAR, and it knew of the inherent limitations in the Buk-TELAR's targeting system in differentiating between civil and military aircraft. In light of that knowledge, the Russian Federation violated Article 3*bis* because it failed to make use of measures that were available to it that would have eliminated that risk. It failed, for example: to inform the Ukrainian authorities of the risk to civil aviation above FL320, which would have left Ukraine no option but to close the relevant airspace; to close the airspace of relevant flight sectors on the Russian side of the border with Ukraine, resulting in the *de facto* closure of the flight route taken by Flight MH17; to issue a further warning to all civil aircraft of the risks of flying at any altitude above the east of Ukraine; or to ensure appropriate coordination occurred between its military authorities and air traffic services consistent with Annex 11 of the Chicago Convention. The Russian Federation took none of those measures. In all the circumstances of this case, that omission constituted a breach of the obligation to prevent inherent in Article 3*bis*.

1.21 On either analysis, the proper resolution of this dispute comes down to a simple truth. But for the actions and inactions of the Russian Federation, Flight MH17 would not have been shot down on 17 July 2014, and the 298 passengers and crew would have reached their destination safely. The Council should exercise its jurisdiction to its full extent to recognise the breaches of Article 3*bis* that occurred, so as to reduce the prospect of tragedies of the same kind occurring in the future.

B. STRUCTURE AND OUTLINE OF THIS MEMORIAL

1.22 The balance of this Chapter provides an outline of the structure of this Memorial.

I. Chapter II – Statement of Facts

1.23 Chapter II sets out the factual and evidentiary basis for the Applicants' claims, as required by Article 2(c) and (d) of the ICAO Rules for the Settlement of Differences ('the Rules').

II. Chapter III – Jurisdiction and Admissibility

1.24 Chapter III addresses the Council's jurisdiction over the dispute and the admissibility of this application as part of the 'statement of law' required by Article 2(e) of the Rules. It establishes that there exists a disagreement between two or more contracting States relating to the interpretation or application of the Chicago Convention. The Chapter also sets out, as required by Article 84 of the Chicago Convention and Article 2(g) of the Rules, that

on 25 February 2020, noting that it would proceed on the ‘premise that the discussion on agenda item one ha[d] not been completed and [would] continue at the next round of consultations’.²²²

3.17 A fourth round of negotiations was scheduled for March 2020 but was cancelled due to COVID-19 restrictions. In their joint diplomatic note of 15 June 2020, the Applicants emphasised that they remained dedicated to the trilateral talks regarding the downing of Flight MH17 notwithstanding the cancellation due to COVID.²²³

3.18 On 2 October 2020, the Applicants proposed to continue substantive engagement in the trilateral talks either via videoconference or via exchange of diplomatic notes, with a meeting in person in March 2021 should circumstances allow.²²⁴ However, on 15 October 2020, the Russian Federation withdrew from the negotiations. In its note, the Russian Federation explained that the filing by the Netherlands of an inter-State application against the Russian Federation in the European Court of Human Rights (‘ECtHR’) ‘made meaningless the further continuation of trilateral consultations and the Russian side’s participation therein’.²²⁵

3.19 The inter-State application against the Russian Federation in the ECtHR has no bearing on the Council’s jurisdiction over the application submitted to it by Australia and the Netherlands. The decision of the Netherlands to submit the inter-State application in July 2020 occurred after it became apparent that the ECtHR was proceeding with applications made by individuals with respect to the downing of Flight MH17, as well as with the inter-State applications of Ukraine against the Russian Federation concerning events in the east of Ukraine. The Netherlands considered it to be crucial that the ECtHR have at its disposal all the information related to the downing of Flight MH17 that has been collected, verified and validated by the Netherlands. In any event, the case before the ECtHR concerns alleged contraventions of the European Convention on Human Rights. It does not concern the Russian Federation’s violation of Article 3*bis* of the Chicago Convention. Nor have the alleged violations by the Russian Federation of its obligations under the European Convention on Human Rights been considered during the trilateral negotiations. Accordingly,

²²² Diplomatic note from the Russian Federation (no 1886/ledn) to Australia and the Netherlands (25 February 2020) [Annex 72].

²²³ Diplomatic note from Australia (no 140/20) and the Netherlands (MOS-097/2020) to the Russian Federation (15 June 2020) [Annex 73].

²²⁴ Diplomatic note from Australia (no 224/20) and the Netherlands (MOS-139/2020) to the Russian Federation (2 October 2020) [Annex 74].

²²⁵ Diplomatic note from the Russian Federation (no 9266/ledn) to Australia and the Netherlands (15 October 2020) [Annex 75].