Australian National University

THE DESTRUCTION OF FLIGHT MH17: ONE YEAR ON

A WORKSHOP REPORT | OCTOBER 2015

Centre for Military & Security Law

ANU College of Law

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1. Introduction

On Friday 17 July, one year after the destruction of Malaysian Airlines flight MH17, the ANU Centre for Military and Security Law (CMSL) facilitated a workshop to discuss the legal issues arising from the MH17 incident, as well as wider implications of the attack and subsequent developments. Representatives from the Attorney-General's Department, the Australian Defence Force, and the Department of Foreign Affairs and Trade shared insight into the response of key government agencies, whilst specialists in aviation law were able to furnish a greater understanding of civil aviation safety and operational risk assessment.

The workshop highlighted the flexibility of international law, the innovation of the lawyers responding to the incident, as well as the increasing prevalence and utility of involvement with non-state actors in certain situations. Comments were also made on the importance of political instruments that were seen to operate with a quasi-legal effect, as a contextual touchstone providing operational parameters and a binding force for various legal instruments.

The workshop focused on three legal issues rising from the destruction of MH17:

i. the retrieval and repatriation of the bodies of Australian citizens;
ii. conducting an air crash investigation; and
iii. conducting a criminal investigation.

**This briefing note has been compiled on a non-attributable basis to provide an outline of the main issues that were considered in the workshop. It does not purport to be a complete record of proceedings, but it does provide a summary of the main issues discussed. The accuracy of the views presented in this summary has not been independently verified, and it should not, therefore, be cited as an authoritative legal source in any academic work.*

2. Recovery Efforts

Australia's deployment to the Netherlands and Ukraine for 'Operation Bring Them Home' met challenges on several legal grounds. Firstly there was a sovereignty issue, as the deployment of Australian personnel without consent of the host state may infringe on principles of sovereignty and non-intervention. Although the right of self-defence under Article 51 of the UN Charter could have provided a potential legal ground for the deployment, the deployment was not considered a military operation as to satisfy this justification. This was due in part to the repatriation efforts lacking the requisite immediacy of danger or urgency.

Ultimately Australia relied on the consent of Ukraine and the Netherlands as the legal basis for the deployment of Australian military, police and civil officials. On 24 July 2014 Australia signed *The Ukraine-Australia Agreement* which secured consent for the deployment of Australian personnel to Ukraine, as well as jurisdictional immunity for Australian personnel operating in Ukraine. Notably this was an asymmetric document, intended to be a binding treaty for Ukraine, but of less than treaty status for Australia. At the time, an armed conflict was occurring in Ukraine, so passing the document through Ukraine's parliamentary process was problematic.

Despite these difficulties, arrangements were made promptly between Australia and Ukraine on the deployment of Australian personnel, with ministerial approval secured simultaneously with drafting of the relevant documents due to the presence of the Australian Foreign Minister in Ukraine at the time. It was noted that Ukraine was very cooperative in providing Australia with support. Ukraine ensured minimal obstacles to Australia's entry and exit, which was critical with the MH17 crash site near Grobovo and the work of Australian personnel often involving passage between Ukraine and rebel-occupied territories.

On 1 August 2014 the *Treaty between Australia and the Kingdom of the Netherlands on the presence of Australian personnel in the Netherlands for the purpose of responding to the downing of Malaysia Airlines flight MH17* also entered into force. This treaty similarly authorised the presence of Australian police, civilian and military personnel, and provided freedom of movement and immunity from the Netherland's criminal and civil jurisdiction.

3. Air Crash Investigation

United Nations Security Council Resolution 2166 was adopted unanimously on 21 July 2014, and was an important foundation for efforts to investigate the destruction of MH17. The resolution called for 'a full, thorough and independent international investigation', and 'that all states cooperate fully with efforts to establish accountability'.[1] Resolution 2166 demanded that armed groups provide safe, secure, full and unrestricted access to the crash site and surrounding area for the 'appropriate investigating authorities' and the Special Monitoring Mission of the Organization for Security and Co-operation in Europe (OSCE).[2] On 7 August 2014 Australia, Ukraine, the Netherlands, Belgium and Malaysia also set up a joint investigation team (JIT) to investigate the crash. This agreement helped facilitate the compilation of information and evidence.

An important legal consideration for this investigation was the 'no fault' principle for air crash investigations, as stipulated in Annex 13 to the *Chicago Convention on International Civil Aviation*.[3] Annex 13, chapter 3.1 of the Convention states that the objective of the investigation is not 'to apportion blame or liability', but 'the prevention of accidents and incidents'.[4]

Nowadays the International Civil Aviation Organisation (ICAO) is responsible for mandating airliner safety management systems. Notable is the fundamental change introduced for regulators in 2009 requiring all international airlines to comply with state approved safety management systems. As a result, the aviation industry often adopts a highly prescriptive approach to regulatory compliance. Because of this, airliners often equate regulatory compliance with safety. This propensity for overly prescriptive regulatory regimes can lead to difficulties such as an inability to predetermine new threats to safety. In addition, the competition between airlines leads to the failure to share safety-based information. The dominance of cost-based decisions in this competitive environment is often seen to detract from greater safety concerns. For example, diverting the flight route of MH17 to safe passage would have cost Malaysia Airlines a mere AUD15,500 to AUD18,750, which was only AUD66 per passenger.[5] Whilst airlines are apt at managing normal hazards, greater flexibility is required to manage risks, particularly more isolated hazards, and to develop systems to share safety related data with other players in the industry.

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1 SC Res 2166, UN SCOR, 7221st mtg, UN Doc S/RES/2166 (21 July 2014), paras 3 and 11.

2 Ibid, para 6.

3 *Convention on International Civil Aviation*, opened for signature 7 December 1944, 15 UNTS 295 (entered into force 4 April 1947).

4 Ibid, Annex 13 ('Aircraft Accident and Incident Investigation').

5 Steve Creedy, '$66 more each was enough to bypass Ukraine', *The Australian* (Sydney), 21 July 2014.

4. Criminal Investigation

Article 3 of the *Chicago Convention on International Civil Aviation* states that 'every State must refrain from resorting to the use of weapons against civil aircraft in flight'. The *Convention for Suppression of Unlawful Acts against the Safety of Civil Aviation* requires states to prosecute or extradite anyone who destroys civilian aircraft.[6] However, the criminal investigation into the destruction of MH17 has met challenges.

First, there is a notable difficulty of attribution of the rebels' conduct, in determining whether those responsible were acting on instruction of Russia. Article 8 of the Articles on Responsibility of States for Internationally Wrongful Acts provides that '[t]he conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons in in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct'.[7] Following the International Court of Justice's judgment in *Nicaragua* a stringent 'effective control' test is then applied in determining state responsibility.[8] The destruction of MH17 was analogous to *Nicaragua*, as it was similarly a situation where international borders were crossed but there was only 'indirect' involvement of a state. The Russian-Ukrainian rebel relationship seemed more tenuous than that which existed between the United States and the Contras.[9] The provision of weaponry then became a contentious issue. Whilst intercepted communications might demonstrate Russian provision of weaponry to Ukrainian rebels, it would not in and of itself be sufficient to satisfy the effective control test. It was thus unlikely that Russia would be held responsible for the destruction of MH17.

Second, there is an issue concerning the appropriate forum in which charges can be laid against those responsible for the destruction of flight MH17. While the International Criminal Court (ICC) may appear the obvious forum for this purpose, neither Russia nor Ukraine had ratified the Rome Statute at the time. There are three exceptions that would support the ICC in examining the crash:

i. Russia or Ukraine could accede to the Rome Statute and recognise the ICC's jurisdiction retrospectively.
ii. Russia or Ukraine could accept the Court's jurisdiction on an *ad hoc* basis under Article 12(3) of the Rome Statute.
iii. The Security Council could refer the matter to the ICC under Article 13(b) of the Rome Statute.

However it is noted that the ICC's jurisdiction under Article 5 of the Rome Statute is 'limited to the most serious crimes of concern to the international community as a whole',[10] and it is questionable whether the downing of a single civilian aircraft would meet this threshold.

Another possible forum is an ad hoc international criminal tribunal established under Chapter VII of the UN Charter. The Australia Government indeed campaigned strongly to establish an ad hoc criminal tribunal; however, the draft resolution failed to secure Russia's vote.[11]

5. Future Developments

At present, two international investigations on the MH17 incident are ongoing: one carried out by the Dutch Safety Board; and another, criminal investigation by the Dutch Public Prosecution Service. It is important these investigations are followed through for the sake of international security. With an expanding range of non-state actors and a burgeoning civil aviation industry, if the impunity for recklessly shooting down a civilian aircraft is allowed to reign a clear message will be sent – that those responsible may fear no consequences. It is feared that this will increase the international threat level to the security of civil aviation. An independent, thorough and transparent investigation is the most appropriate way forward, and worthwhile for both the families of the victims and the international community.

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6 Concluded 23 September 1971, 974 UNTS 177 (entered into force 26 January 1973), Arts 6-7.

7 Articles on Responsibility of States for Internationally Wrongful Acts, GA Res 56/83, UN GAOR, 56th sess, 85th plen mtg, Supp No 49, UN Doc A/RES/56/83 (28 January 2002) Annex.

8 *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 4, para 115.

9 Mark Gibney, 'The Downing of MH17: Russian Responsibility?'(2015) 15 *Human Rights Law Review* 169, 174.

10 Rome Statute of the International Criminal Court, opened for signature 17 July 1998, 2187 UNTS 3 (entered into force 1 July 2002), Art 5.

11 UN SCOR, 70th Year, 7498th mtg, UN Doc S/PV.7498 (29 July 2015), 3 (in which a draft resolution S/2015/562 was vetoed by Russia).

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