

# THE DOWNING OF MH17 IN UKRAINE: ANALYSIS FROM THE INTERNATIONAL LAW PERSPECTIVE

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## ABSTRAK

Tulisan ini membahas perihal tragedy jatuhnya pesawat MH17 di Ukraina. Tulisan ini menggunakan metode pendekatan analisis dengan tujuan untuk menjawab pertanyaan yang ada pada tulisan ini. Di tengah kesedihan yang mendalam, terutama dialami oleh para keluarga korban jatuhnya MH17 ini menghadirkan banyak pertanyaan menyangkut hukum internasional. Pada akhirnya salah satu dari tiga kesimpulan yang dapat ditarik dari tulisan ini adalah bahwa Rusia bisa saja bertanggung jawab atas peristiwa tersebut dengan beberapa syarat.

**Kata kunci: MH17, Tanggung Jawab, Negara, Yurisdiksi.**

## ABSTRACT

This paper discusses the horrible incident of MH17 which took place in Ukraine. This paper uses the analytical approach method applied in legal research with the aims of answering question presented in the paper. Beside the miseries faced by the family's victims, the MH17 incident also bring us many international legal issues. In the end of the day, one of the three conclusion that could be drawn upon this paper is that Russia could be held responsible for the incident under several circumstances.

**Keywords: MH17, Responsibility, State, Jurisdiction.**

## I. Introduction

### 1.1. Background

Based upon the Dutch Safety Board Preliminary Report, on 18 July 2014 around 06.00 hrs the National Bureau of Air Accident Investigation of Ukraine (NBAA) sent a notification that on 17 July 2014, at 13.20 hrs, a Boeing 777-200 with registration 9M-MRD of Malaysia Airlines (MH17) disappeared to the west of TAMAK waypoint.<sup>1</sup> The plane was supposedly downed due to a missile fired from the ground. Malaysia Airlines have confirmed that there were 283 passengers on flight MH17 as well as 15 crews.<sup>2</sup> Just a moment after the incident there was already a lot of speculation with regard to the plausible causation of the incident. As reported by The Washington Post, United States (US) intelligence agencies said that the information assembled in the five days since the attack points overwhelmingly to Russian-backed separatist in territory they control in

<sup>1</sup> Dutch Safety Board, *Preliminary report Crash involving Malays Airline Boeing 777-200 flight MH17*

<sup>2</sup> The Telegraph, *Malaysia Airlines plane crashes on Ukraine-Russia border – live* (<http://www.telegraph.co.uk/news/worldnews/europe/ukraine/10974050/Malaysia-Airlines-plane-crashes-on-Ukraine-Russia-border-live.html>). Retrieved 26 September 2014.

eastern Ukraine.<sup>3</sup>

## 1.2. Objective

The objective of this writing is to analyze the MH17 incident as well as to view the event from the international law perspective. It aims to explain and describe who or what must be held responsible for the event and which state has the jurisdiction to try the case at hand.

## II. Content

### 2.1. Research Method

Research method applied within this writing shall be normative legal research combined with comparative, statutory and fact approaches using both primary and secondary authorities.<sup>4</sup> This writing will first examine the facts of the case and then use analytical legal approach to determine whether or not there are answer(s) to questions presented in this writing.

### 2.2. Result

#### 2.2.1. Who cause the downing of MH17?

The assertions that the plane was hit by a missile are now confirmed by the Dutch Safety Board with its report on the preliminary investigation of the incident, stating that large number of high-energy objects "penetrating the fuselage." There are no indications that the MH17 crash was caused by a technical fault or by actions of the crew.<sup>5</sup> At this point, the main question would be who shot MH17 which is obviously not a military aircraft? Even after the event of 9/11 in which former U.S. Vice President Dick Cheney issued an order to shoot down any civilian or commercial aircraft that is suspected as being hijacked,<sup>6</sup> it is hard to believe that the MH17 had been hijacked since there was no reason that MH17 was being hijacked at any point. In addition, the idea of shooting down a suspected hijacked plane is still a controversy.<sup>7</sup>

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<sup>3</sup>The Washington Post, *U.S. discloses intelligence on downing of Malaysian Jet* ([http://www.washingtonpost.com/world/national-security/us-discloses-intelligence-on-downing-of-malaysian-jet/2014/07/22/b178fe58-11e1-11e4-98ee-daea85133bc9\\_story.html](http://www.washingtonpost.com/world/national-security/us-discloses-intelligence-on-downing-of-malaysian-jet/2014/07/22/b178fe58-11e1-11e4-98ee-daea85133bc9_story.html)). Retrieved 26 September 2014.

<sup>4</sup> See Myra A. Harris, 1997, *Legal Research, FUN-damental Principles*, Prentice Hall Paralegal Series, p. 131.

<sup>5</sup>Dutch Safety Board, *Op. Cit.*, p. 1.

<sup>6</sup>"We Have Some Planes" (PDF), *the 911 Commission Report*, 911 Commission, pp. 20–42. Retrieved 28-9-2014.

<sup>77</sup> SEE, 20.1 *Revue québécoise de droit international*, Par Rory Stepen Brown, Shooting Down Civilian Aircraft: Illegal, Immoral and just plain stupid, p. 57.

However, amid the confusion, Igor Girkin, is reported to have claimed that his forces shot down a plane in the Donbass region of eastern Ukraine, shortly before reports emerged the passenger jet was missing.<sup>8</sup> Many world news agencies have also confirmed that Mr. Girkin posted the following sentences on Twitter.<sup>9</sup> “*We have video confirming. The bird fell on a waste heap. Residential areas were not hit. Civilians were not injured.*” The tweet was immediately removed after there was a lot of news with regard to the MH17 downing in Ukraine. However, many states have believed, including United States<sup>10</sup> and Ukraine, that the perpetrator was the Pro-Russia rebels group at Ukraine, this was clear from a statement made by the Ukrainian President Petro Poroshenko who said that the missile was shot from a territory that was firmly controlled by Russian-supported terrorists.<sup>11</sup>

### 2.2.2. Could Russia be held responsible for the incident?

In international relation as in other social relations, the invasion of the legal interest of one subject of the law by another legal person creates responsibility.<sup>12</sup> State responsibility is a fundamental principle of international law, arising out of the nature of the international legal system.<sup>13</sup> This is regulated under international law especially under the International Law Commission Articles on Wrongful Act of State.<sup>14</sup> Now, there will be one big question appearing in the picture. Who will be responsible for the rebel actions, would it be Russia? Or Ukraine?

Let us examine the facts. The Pro-Russian rebel group is consisted of Ukrainian who is still legally holding Ukrainian nationality, thus, these people under the rebel group still have a genuine link to the government of Ukraine. It is also a fact that the Pro-Russian rebel in eastern Ukraine under the command of Igor Girkin seek to have the

<sup>8</sup>The New Zealand Herald, *MH17 :Pro-Russian separatist boasts online about shooting down plane* ([http://www.nzherald.co.nz/world/news/article.cfm?c\\_id=2&objectid=11295584](http://www.nzherald.co.nz/world/news/article.cfm?c_id=2&objectid=11295584)). Retrieved 28-9-2014.

<sup>9</sup> SEE, The Washington Post, *The evidence that may prove Pro-Russian separatists shot down MH17* (<http://www.washingtonpost.com/blogs/worldviews/wp/2014/07/20/the-evidence-that-may-prove-Pro-Russian-separatists-shot-down-mh17/>). Retrieved 28-9-2014; Mail Online, *Now rebel commander blamed for downing MH17 says ‘bodies aren’t fresh’ claiming corpses at crash site have been ‘dead for days’* (<http://www.dailymail.co.uk/news/article-2697895/Now-rebel-commander-blamed-downing-MH17-says-bodies-aren-t-fresh-claims-corpse-dead-days.html>). Retrieved 28-9-2014.

<sup>10</sup> See, Fox News, *Doomed flight likely downed by pro-Russian separatists; at least 1 American aboard, says Obama* (<http://www.foxnews.com/politics/2014/07/18/doomed-flight-likely-downed-by-pro-russian-separatists/>). Retrieved 22-12-2014.

<sup>11</sup> CNN, *Ukraine President: The world must choose sides* (<http://edition.cnn.com/2014/07/21/world/europe/ukraine-poroshenko-interview/>). Retrieved 28-9-2014.

<sup>12</sup> Brownlie, Ian, 1998, *Principles of Public International Law*, Clarendon Press Oxford, p. 435.

<sup>13</sup> Malcolm N. Shaw, 2003, *International Law*, Cambridge University Press, United Kingdom, p. 694.

<sup>14</sup> See for instance the Article 1 of ILC Articles on State Responsibility for Internationally Wrongful Acts UNGA Res 56/83, UN GAOR 56th Sess., Annex, Agenda Item 162, UN U.N. Doc. A/RES/56/83.

eastern Ukraine as an independent state call “Novorussiya” (New Russia) as well as to be an integral part of Russia. However, as a matter of fact, the eastern Ukraine till this second is still an integral part of Ukraine. Hence, if anything, having in mind the genuine link between the rebel group’s member and the government of Ukraine, the action of MH17 downing could be the responsibility of Ukrainian government. Unless these two other scenarios taking place, first, the Pro-Russian rebel group under the command of Igor Girkin is successful in its quest of having eastern Ukraine an independent state and an integral part of Russia, then responsibility would go to the Russian government. Second, the international community declares that the Pro-Russian rebel is a terrorist group, which will make the action of MH17 downing an act of terror which will, by definition, could be brought before international court.

### **2.2.3. Rightful Jurisdiction over the downing of MH17**

State jurisdiction concerns essentially the extent of each state’s right to regulate conduct or the consequences of events.<sup>15</sup> Jurisdiction refers to particular aspect of the general legal competence of states,<sup>16</sup> and in international law when a case is composed by two or more elements of international legal entity the effort to determine the rightful jurisdiction of the case will be not an easy task, especially in cases regarding the downing of civilian airplanes.<sup>17</sup> As stated by many highly qualified international legal publicists<sup>18</sup> there are several principles of international law in determining the rightful jurisdiction of a case. There are several principles of international law in determining the rightful jurisdiction of a case. These principles include but not limited to the principle of territorial, nationality, passive personality, protective; and the flag state jurisdiction principle. Having this lot of principles and also understanding that there is a lot of state’s interests involve in the case. The only way out in determining which state will have the jurisdiction to try the case is by having an agreement and consensus between state parties of the case. This is also the best approach to avoid conflicts and legal dispute with regard to the case (such as: double jeopardy) in the near future.

### **2.2.4. Unsolved Issue**

The matters discussed in this paper are not the endgame. A full and thorough

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<sup>15</sup>Jenings, Sir Robert, 1905, *Oppenheim’s International Law*. Longman, p. 456.

<sup>16</sup>Brownlie, Ian, *Op. Cit.*, p. 301.

<sup>17</sup> See, Case concerning Korean Air Lines Flight 007 (ICAO, 1993); Case concerning Iran Air Flight 655 (ICJ, 1998); Case concerning Arab Airlines Flight 114 (ICAO, 1973); and Case concerning Siberia Airlines Flight 1812 (Pechersk Local Court, 2001).

<sup>18</sup>See, Brownlie, Ian, *Op. Cit.*, pp. 301-320; Malcolm N. Shaw, 2003, *International Law*, Cambridge University Press, United Kingdom, pp. 572-611; Jenings, Sir Robert, *Op. Cit.*, pp. 457-488.

investigations need to be done in order to fully answer the entire question with regard to the downing of the MH17. Thus it should be very well noted that the Government of Ukraine will not be able to conduct the investigation effectively,<sup>19</sup> this is due to the fact that it is part of the conflict, relying on its investigation will have the same meaning as putting independency as well as objectivity of the investigation outcomes at stake. Therefore, having this in mind, Ukrainian government as the “State of Occurrence” is not under international legal obligation to conduct investigation as stated in the Article 5.1 of the Convention on International Civil Aviation.<sup>20</sup>

### III. CONCLUSION

Nevertheless, at this point there are at least three conclusions which could be withdrawn from this discussion. First, under the ongoing investigation on the causal of the MH17 downing incident, there is good reasons to believe that the plane was shot by the Pro-Russian rebel group in the eastern Ukraine under the command of Igor Girkin, and the odds are that final investigation will have the same conclusion with regard to the causal of the incident. Second, in contrast to the popular believe, Russia would only be held responsible for the downing incident if there is any genuine link between of the perpetrator and Russia or that the investigation shows that Russia was planning or backing up the incident. Third, that speaking about which state has the rightful jurisdiction to try the case at hand could be tricky and complex. This is due to the facts that the incident involves many states’ interest especially with regard to the international politics. In addition, there are several theories of state jurisdiction that could be applied at the case. Hence, to solve this issue there must be an agreement between states that become parties to the case to determine where this case would be tried.

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<sup>19</sup>International Progress Organization. *War in Ukraine/Tragedy of Flight MH17: Urgent Call for Independent International Investigation*. 2014, p.1.

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