

Malaysia Airlines flight MH17: the day Russia became a state sponsor of terrorism

by Sascha-Dominik Bachmann

INTRODUCTION

The downing of the Malaysian Airlines Flight MH17 on July 17, 2014 sent shockwaves around the world. The airliner was on its way from Amsterdam to Kuala Lumpur when it was shot down over Eastern Ukraine by a surface to air missile, killing all people on board who comprised 283 passengers (including 80 children), and 15 crew members (<http://www.bbc.co.uk/news/world-europe-28357880>). The victims were the nationals of at least 10 different states, with the Netherlands losing 192 of its citizens (<http://www.malaysiaairlines.com/my/en/site/mh17.html>).

This disaster brought the horrors of the Ukrainian war home to us in Western Europe, a hybrid war which started in March 2014 when Putin firstly annexed the Crimea illegally and then set his eyes on Eastern Ukraine (see Sascha-Dominik Bachmann, "Crimea and Ukraine 2014: a brief reflection on Russia's 'protective interventionism' before the backdrop of NATO's new security concept of hybrid threats", JURIST - Forum, May 18, 2014, <http://jurist.org/forum/2014/05/sascha-bachmann-ukraine-hybrid-threats.php>).

This short article highlights some possible responses to the crime with a particular focus on a potential terrorism argument.

THE EVENTS OF JULY 17, 2014

Strong evidence seems to indicate that the airliner was downed by a sophisticated military surface to air missile system, the SA-17 BUK missile system (<http://www.theguardian.com/world/2014/jul/17/malaysian-airlines-plane-buk-missile>). This self-propelled air defence system was introduced in 1980 to the armed forces of the then Soviet Union and is still in service with the armed forces of both Russia and Ukraine.

There is growing suspicion that the airliner was shot down

by pro-Russian separatist forces operating in the area, with one report by Associated Press having identified the presence of a rebel BUK unit in close proximity of the crash site (<http://www.theguardian.com/world/2014/jul/17/malaysian-airlines-plane-buk-missile>). The US and its intelligence services were quick in identifying the pro-Russian separatists as having been responsible for launching the missile (<http://online.wsj.com/articles/malaysia-airlines-plane-was-hit-by-surface-to-air-missile-u-s-officials-say-1405659584>). This view is supported further by the existence of incriminating communications between the rebels and their Russian handlers (http://edition.cnn.com/2014/07/18/world/europe/ukraine-mh17-intercepted-audio/index.html?hpt=hp_t2) immediately after the aircraft hit the ground and also a now deleted announcement on social media by the self-declared rebel commander, Igor Strelkov. This evidence points to the possibility that MH 17 was mistaken for a Ukrainian military plane and therefore targeted. Given that two Ukrainian military aircraft were shot down over Eastern Ukraine in only two days preceding July 17 (<http://www.kyivpost.com/content/ukraine/ato-spoksmen-eight-people-on-board-downed-an-26-rescue-operation-under-way-355984.html>) this is a not unlikely possibility.

It will be crucial to establish the extent of Russia's involvement in the atrocity: while there seems to be evidence that the rebels may have taken possession of BUK units of the Ukrainian, it seems unlikely that they would have been able to operate these systems without assistance from Russian military experts and even radar assets (<https://www.rusi.org/analysis/commentary/ref:C53C8FCEBEB28/#.U8puWUp-58F>).

Russia was quick to shift the blame on Ukraine itself, asking why civil aircraft hadn't been barred completely from overflying the region, directly blaming Ukraine's aviation authorities during the emergency meeting on the UN Security Council on July 18. (<http://rt.com/news/173972-churkin-malaysia-plane-un/>).

Russia even went so far to blame Ukraine indirectly of shooting down MH 17 by comparing the incident with the accidental shooting down of a Russian civilian airliner en route from Tel Aviv to Novosibirsk in 2001. Despite Russia's call for an independent investigation of the incident, Moscow's rebels reportedly blocked actively international observers from OSCE to access the site (<http://www.aljazeera.com/news/europe/2014/07/ukraine-rebels-accused-blocking-jet-probe-201471981632462296.html>).

While we await the results of an international investigation into the causes of the disaster we have to use the circumstantial evidence we have so far which points at Moscow's complicity in the crime at least. Based on this assumption we will turn to possible international and unilateral responses to the events.

POTENTIAL RESPONSES

While any civilian airliner crash is a catastrophe, and in cases of terrorist involvement an international crime, the shooting down of passenger jets by a state are particularly shocking as they always affect non-combatants and resemble acts which are always outside the parameters of the legality of any military action (such as distinction, necessity and proportionality). Any such act would lead to global condemnation and would hurt the perpetrator state's international reputation. Consequently, there have only been few such incidents over the last 60 years (<http://www.bbc.co.uk/news/world-asia-28361223>).

What could be the possible consequences? The rebels are still formally Ukrainian citizens and as such subject to Ukraine's criminal judicial system, according to the active personality principle. Such a prosecution could extend to the Russian co-rebels as Ukraine could exercise its jurisdiction as the state where the crime was committed under the territoriality principle. In addition, prosecutions could be initiated by the states whose citizens were murdered, under the passive personality principle of international criminal law. With Netherlands as the nation with the highest numbers of victims having a particularly strong interest in swift criminal justice, memories of the Pan Am 103 bombing come to mind, where Libyan terrorists murdered 270 people when an airliner exploded over Lockerbie in Scotland. Following international pressure, Libya agreed to surrender key suspects to a Scottish court sitting in the Netherlands (<http://www.ejil.org/article.php?article=499&issue=34>).

The establishment of an international(-ised) criminal forum for the prosecution of the perpetrators would require Russia's cooperation; something which seems to be unlikely given Putin's increasing defiance of the international community's call for justice (<http://time.com/3007152/ukraine-crash-putin-russia-isolationism/>). A prosecution by the International Criminal Court in The Hague under its statute, the Rome Statute ([\[4757-abe7-9cdc7cf02886/283503/romestatuteng1.pdf\]\(http://www.un.org/apps/news/story.asp?NewsID=47860#.U8wu4kp-6So\)\), is unlikely to happen as neither Russian nor Ukraine have ratified the statute. An UN SC referral to the ICC – if one accepts that the murder of 298 civilians would amount to a crime which qualifies as a crime against humanity or even a war crime under Article 5 of the ICC Statute – would fail given that Russia and its new strategic partner China are Veto powers on the Council and would veto any resolution for a referral \(<http://www.un.org/apps/news/story.asp?NewsID=47860#.U8wu4kp-6So>\).](http://www.icc-cpi.int/nr/rdonlyres/add16852-ae9-</p>
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Other responses could be the imposing of unilateral and international sanctions and embargos against Moscow and high profile individuals. Related to such economic countermeasures is the possibility to hold Russia as a state responsible for its complicity in the shooting down of MH 17: the International Court of Justice would be the forum where such a case against Russia could be brought by a state affected by the tragedy. An example for such an interstate case arising from a breach of international law can be found in the ICJ case *Aerial Incident of 3 July 1988 (Islamic Republic of Iran v United States of America)* (<http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=9c&case=79&code=irus&p3=0>), arising from the unlawful shooting down of Iran Air Flight 655 by the US in 1988. The case ended with an out-of-court settlement by the US in 1996. Again, it seems quite unlikely that Russia will accept any ruling by the ICJ on the matter and even less likely would be any compliance with a damages order by the court.

RUSSIA AS A STATE SPONSOR OF TERRORISM: A US APPROACH

One alternative could be an US solution for closing the accountability gap of Russia's complicity in the disaster. If the US Congress was to qualify the rebel groups as terrorist organisations then this would make Russia a state sponsor of terrorism and as such subject to US federal jurisdiction in a terrorism civil litigation case brought under the Anti-Terrorism Act (ATA-18 USC ss 2331-2338) as an amendment to the Alien Torts Statute (ATS/ATCA - 28 USC s 1350) – the so-called "State Sponsors of Terrorism" exception to the Foreign Sovereign Immunities Act (FSIA Exception-28 USC s 1605 (a) (7)), which allows lawsuit against so called state sponsors of terrorism.

The Foreign Sovereign Immunities Act (FSIA) Exception of 1996 limits the defence of state immunity in cases of state sponsored terrorism and can be seen as a direct judicial response to the growing threat of acts of international state sponsored terrorism directed against the USA and her citizens abroad, as exemplified in the case of *Flatow v Islamic Republic of Iran* (76 F. Supp. 2d 28 (D.D.C. 1999)). In addition, litigation could be directed against the terrorist groups themselves (see Boim litigation cases consisting of the cases *Boim I*, *Boim*

v Holy Land Found. for Relief De, Nos 05-1815,05-1816,05-1821,05-1822 (7th Cir 2007) and *Boim III* (549 F.3d 685, 687 97th Cir 2008); (see also Bachmann, “Terrorism litigation as deterrence under international law – from protecting human rights to countering hybrid threats”, (2011) 87 *Amicus Curiae* 22-25, <http://journals.sas.ac.uk/amicus/article/view/1530>).

The Australian Prime Minister, Tony Abbott, has been the most outspoken public figure to call for the crime to be declared an act of terrorism (<http://www.smh.com.au/federal-politics/political-news/mh17-abbott-government-may-declare-downing-of-plane-a-terrorist-attack-triggering-payments-to-families-20140721-3cajb.html>). Even the domestic laws of both Russia and Ukraine would make it possible to qualify the atrocity as an act of terrorism: Russian Federation, Article 3 of its Federal Law No 35-FZ 6 March 2006, On Counteraction Against Terrorism, defines terrorism as the “practice of influencing the decisions of government, local self-government or international organisations by intimidating the population or using other forms of illegal violent action” (see https://www.unodc.org/tldb/browse_country.jsp?country=RUS&cmd=ad&node=docs).

Article 1 of the Law of Ukraine, On the fight against terrorism, VVR 2003 defines as a “terrorist act – [any] crime in the form of weapons, committing an explosion, arson or other actions for which under Article 258 of the Criminal Code of Ukraine” (https://www.unodc.org/tldb/pdf/Ukraine/UKR_Law_Fight_against_Terrorism.pdf).

Consequently, the question whether the shooting down of a civilian airliner by Ukrainian rebels and/or Russian operatives who acted under operational control from Moscow would qualify as terrorism under international law can be answered in the affirmative, despite the absence of an internationally binding comprehensive definition of the crime of terrorism (see C Powell, “Defining Terrorism: Why and How”, in N LaViolette and C Forcese (eds) *The Human Rights of Anti-Terrorism*, Irwin Law, Toronto (2008), pp 128 -64.)

CONCLUSION

Utilising US law to bring a civil litigation case against Russia as a designated state sponsor of international terrorism would certainly set a strong signal and message to President Putin; it remains to be seen whether the US call for stronger unified sanctions against Russia will translate into such unilateral legal action. At the time of the writing of this short article it seems as if the government of Kiev is winning the upper hand in reconquering lost territory and bringing the secession to an end. Even if Putin was to agree to withholding all support from the rebels and to agree to a peace agreement, Russia has already achieved its strategic objectives of weakening of a pro-Western Ukraine and reasserting Russian influence along the fault lines of a century-old Russian state. What has become clear already is Russia’s potential new role as state sponsor of terrorism.

Sascha-Dominik Bachmann

Associate Professor in International Law (Bournemouth University); State Exam in Law (Ludwig-Maximilians Universität, Munich), Assessor Jur, LL.M (Stellenbosch), LL.D (Johannesburg) (email: saschadominikbachmann@gmail.com).

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