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Committee on Legal Affairs and Human Rights

The crash of Polish Air Force Tu-154 transporting the Polish Delegation on 10 April 2010 on the Russian Federation's Territory

Compilation of pertinent background documents prepared by the Secretariat upon the instructions of the Rapporteur

Overview prepared by the secretariat of the Committee on Legal Affairs and Human Rights upon the request of Mr Michael McNamara (Ireland, SOC), Rapporteur on the crash of Polish Air Force Tu-154 transporting the Polish delegation on 10 April 2010 on the Russian Federation's territory

As the Rapporteur on "the crash of Polish Air Force Tu-154 transporting the Polish delegation on 10 April 2010 on the Russian Federation's territory", Mr Michael McNamara, will be leaving the Assembly before having been able to conclude his work, he has requested the secretariat of the Committee on Legal Affairs and Human Rights to prepare an information document compiling all relevant information gathered up till now.

This information document aims at facilitating the follow up work of the Committee and of its forthcoming Rapporteur on this report. On 21 April 2016 the Committee agreed to the declassification of the documents to be found in Sections 1, 2 and 3 of this compilation.

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1. Introductory Memorandum - The crash of Polish Air Force Tu-154 transporting the Polish Delegation on 10 April 2010 on the Russian Federation's Territory

Introductory Memorandum

[Former] Rapporteur: Mr Robert Neill, United Kingdom, European Conservatives Group

1. Introduction

1. On 10 April 2010, a Tupolev Tu-154M aircraft was carrying the Polish State delegation, led by President Lech Kaczyński, from Warsaw to Smolensk, in the Russian Federation, to attend a ceremony marking the 70th anniversary of the Katyń Massacre. The plane crashed at Smolensk Severny Airdrome, killing all 96 persons on board (4 flight crew members, four cabin crew members and 88 passengers). The fatalities included President Lech Kaczyński, his wife Maria and many dignitaries and high-ranking Polish officials, including military chiefs of staff (army, air force, and navy) and the President of the National Bank of Poland.

2. A number of investigations were commenced immediately after the crash in order to determine the factors that led to this tragic event. As the crash occurred on Russian territory, the Russian Federation was tasked with primary responsibility for the investigation, which was carried out – to a certain extent - with international co-operation. Poland set up its own committee to investigate the crash, and prosecutors commenced criminal investigations in both countries.

3. The report of the investigation team of the Russian Inter-State Aviation Committee (Air Accident Aviation Commission) published on 12 January 2011, concluded that *"[t]he immediate cause of the accident was the failure of the crew to take a timely decision to proceed to an alternate airdrome although they were numerous times timely informed on the actual weather conditions at Smolensk Severny Airdrome that were significantly lower than the established airdrome minima; descent without visual contact with ground references to an altitude much lower than minimum descent altitude for go around (100 m) in order to establish visual flight as well as no reaction to the numerous TAWS warnings [Terrain Awareness and Warning System] which led to controlled flight into terrain, aircraft destruction and death of the crew and passengers. According to the conclusion made by the pilot-experts and aviation psychologists, the presence of the Commander-in-Chief of the Polish Air Forces in the cockpit until collision exposed psychological pressure on the PIC's [Pilot-in-Command] decision to continue descent in conditions of unjustified risk with the dominating aim of landing at any means".*¹

4. In the final report of the Polish Committee for Investigation of National Aviation Accidents, issued on 29 July 2011, it is stipulated that *"[t]he immediate cause of the accident was the descent below the minimum descent altitude at an excessive rate of descent in weather conditions which prevented visual contact with the ground, as well as a delayed execution of the go-around procedure. Those circumstances led to an impact on a terrain obstacle resulting in separation of a part of the left wing with aileron and consequently to the loss of aircraft control and eventual ground impact."*²

* * *

5. Now, nearly five and a half years after the accident, the Russian Federation still maintains possession of the plane wreckage, the black boxes with original flight data recordings and other material evidence. This is, *prima facie*, a principal concern expressed by the signatories of the motion on the basis of which the Committee on Legal Affairs and Human Rights has asked me to prepare a report.³ That said, copies of flight

¹ [Commonwealth of Independent States \(CIS\)](http://www.smolenskrashnews.com/reports/russian/russian_final_report.pdf), the Interstate Aviation Committee (IAC) ([Russian](http://www.smolenskrashnews.com/reports/russian/russian_final_report.pdf): Межгосударственный авиационный комитет (МАК)) report, quotation taken from English translation of report written in Russian: http://www.smolenskrashnews.com/reports/russian/russian_final_report.pdf, Conclusions, pages 171 to 184, at pages 182-183. The IAC was established in December 1991 pursuant to the Intergovernmental Agreement on Civil Aviation and Airspace Utilisation (ICAO Registration No. 3720). This regional organisation, provided legal status as an organ of the Russian Federation by Presidential decree, acts on behalf of the Russian Federation for matters in the fields of airworthiness, aircraft accident investigation and prevention, aerodromes and environment.

² [Final Report from the examination of the aviation accident No. 192/2010/11 involving the Tu-154M airplane, tail number 101, which occurred on April 10th, 2010 in the area of the SMOLENSK NORTH airfield](http://www.smolenskrashnews.com/reports/russian/russian_final_report.pdf), at p.318. See also page 236 in which 'factors' of 'key importance in determining the reasons for the accident' are enumerated.

³ [Doc. 13628](http://www.assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=21283&lang=en) of 7 October 2014, last paragraph, at <http://www.assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=21283&lang=en>.

data recordings and a substantial amount of material evidence have been transmitted to the Polish authorities already.⁴ Also, neither the Russian nor the Polish criminal investigations have yet, to the best of my knowledge, been concluded.

2. The Legal Context

6. From a legal point of view the choice of juridical regime covering the investigations is complex and leaves room for interpretation. It suffices, for present purposes, to note that the first, obvious, choice might have been the 1993 Polish-Russian Agreement,⁵ regulating military flights in the two States concerned. Nevertheless, as the 1993 Agreement did not regulate in detail the procedure to be followed in a situation of a 'joint' air safety investigation, it was agreed that the conduct of the investigation would be carried out within the framework of the Convention on International Civil Aviation (the Chicago Convention, of 7 December 1944), in force since 1947 and ratified by both Poland, in 1945, and the Russian Federation (Soviet Union), in 1970, respectively.⁶ More specifically, the experience encountered during on-site work in the first few days after the accident resulted in a proposal of the Russian authorities – despite the fact that the Tu154 was a military aircraft – to conduct the air safety investigation according to Annex 13 of the Chicago Convention, which the Polish government accepted.⁷

7. One point of potential controversy arising from the decision to proceed under the Chicago Convention was that Article 3 of the Chicago Convention stipulates that *"this Convention shall be applicable only to civil aircraft and shall not be applicable to State aircraft"*.⁸ Although there is no strict definition of a State or civil flight, a legal study conducted by the International Civil Aviation Organization (ICAO) Secretariat in 1994 identified criteria to distinguish between the two. It noted that the Chicago Convention utilises a functional approach to distinguish between State and civilian flights in which they examine the totality of the circumstances, particularly *"taking into account a number of factors, which should include [...] the ownership of the aircraft (Is it privately or publicly owned?), [...] the passengers or personnel carried (Are they State officials or members of the public at large? Is the flight open for use by members of the public?), aircraft registration and nationality markings (Is it registered in a civil or State aircraft registry?), [...] the nature of the crew (Are the crew members civilians or employed by military, customs, or police services?), the operator (Is the operator a military, customs, or police agency?) [...]"*.⁹

8. Nevertheless, despite the fact that, in accordance with the above definition, this was a State aircraft transporting high-level government officials, including the President of Poland, operated by military staff and registered as a military aircraft, both States agreed that the main technical investigation be conducted according to the International Standards and Recommended Practices (SARPs), specified in Annex 13 of the Chicago Convention, which normally apply to civil aviation.¹⁰

9. From the detailed list of SARPs, as set out in Annex 13 of the Chicago Convention, the following air safety investigation principles merit specific mention:

9.1. The sole objective of an investigation of an accident or incident shall be the prevention of accidents and incidents. Its purpose is not to apportion blame or liability (Standard 3.1);

9.2. The accident investigation authority shall have independence in the conduct of the investigation and have unrestricted authority over its conduct (Standard 5.4);

⁴ See, for example, information provided on Wikipedia website "2010 Polish Air Force Tu-154 crash": https://en.wikipedia.org/wiki/2010_Polish_Air_Force_Tu-154_crash.

⁵ Agreement between Ministry of Defense of the Republic of Poland and Ministry of Defense of the Russian Federation on terms of bilateral cooperation on military aircraft operations of the Republic of Poland and Russian Federation in the airspace of both States, signed in Moscow on 14 December 1993. <http://bit.ly/1ldxdC9> (unpublished Polish version; also available in Russian).

⁶ Available at: <http://www.icao.int/publications/pages/doc7300.aspx>. List of Parties to the Convention: http://www.icao.int/secretariat/legal/list_of_parties/chicago_en.pdf.

⁷ Confirmed by the then Prime Minister, Donald Tusk, at a press conference on 28.04.2010: <https://www.premier.gov.pl/en/news/news/the-government-and-civil-service-have-passed-this-difficult-test.html>. See also letter, addressed to the Polish Senate from the Polish Ministry of Foreign Affairs, dated 27 January 2015 (in Polish, on file with the Secretariat).

⁸ International Civil Aviation Organization (ICAO) Doc. 7300, available at http://www.icao.int/publications/Documents/7300_orig.pdf.

⁹ LC/29-WP/2-1 of 3/3/1994, 29th Session of the ICAO Legal Committee, Montreal, 4–5 July 1994.

¹⁰ For good overview, see Piotr Kasprzyk. "Legal Ramifications of the Investigations of the 2010 Polish President's Aircraft Accident" in Vol.36 *Air and Space Law* (2011), pp. 201–216. As indicated by Kasprzyk, the binding character and precise legal status of SARPs are subject to various interpretations and opinions.

9.3. Any judicial or administrative proceedings to apportion blame or liability should be separate from any investigation conducted under the provisions of Annex 13 (Standard 5.4.1);

9.4. The State conducting the investigation of an accident or incident should not make specified records collected in the course of the safety investigation available for other purposes unless the appropriate authority for the administration of justice in that State determines that the disclosure of such records outweighs the adverse domestic and international impact such action may have on that or any future investigations (Standard 5.12).¹¹ As concerns Standard 5.12, and its relationship with (possible) criminal investigations, this raises complex and controversial legal questions.¹²

10. As already indicated in paragraphs 3 to 5 above, the final reports of both the Russian Inter-State Aviation Committee and that of the Polish Committee for Investigation of National Aviation Accidents were issued back in 2011, and the criminal investigations in both countries have not yet been finalised. Hence, without the need – at this juncture – to look into the relationship between the two reports and the on-going criminal investigations, it suffices to make two comments of a more general nature.

11. The first concerns issues relating to the crash itself, such as the fact that the Polish report concluded that Russian air traffic control also played a part in the accident by passing incorrect information to the crew regarding the aircraft's position and that there existed deficiencies with respect to Smolensk airport which contributed to the crash. A further element is probably the fact that the Polish authorities' comments on the draft of the Russian Inter-State Aviation report were not taken into account in the final version of the report; according to the Polish authorities *"Poland and Russia did not attain consensus as to the contents of the document prepared by the Russian side"*.¹³

12. The second point relates to the release, from Russian custody, of the aircraft. Article 3.4 of Annex 13 of the Chicago Convention stipulates that *"the State of Occurrence [the Russian Federation] shall release custody of the aircraft, its contents or any parts thereof as soon as they are no longer required in the investigation, to any person or persons duly designated by the State of Registry or the State of the Operator [Poland], as applicable"*. The extent to which this provision has been complied with is at the origin of 'concerns' expressed by the signatories of the motion on the basis of which our Committee has been asked to prepare a report.¹⁴ Of interest to note, in this connection, is the fact that, in so far as the two on-going criminal investigations are concerned, the basis of co-operation of the Polish and Russian prosecutors is the European Convention on Mutual Assistance in Criminal Matters, of 1959, in force since 1962 and ratified by Poland in 1994 and the Russian Federation in 1996, respectively. This Convention allows, specifically, for the exchange of judicial records (without prejudice to issues raised by the (at present non-) return of the wreckage of the aircraft).¹⁵

3. Rapporteur's proposal

13. Before a decision is taken as to how a report on this subject is to be presented, I make the following proposals to the Committee:

13.1. That the Rapporteur be provided with authorisation to seek – from both the Polish and Russian authorities – explanations as to why the wreckage of the aircraft, as well as the original flight data recordings and other material evidence relating to the crash has not been returned to Poland and as to why the criminal investigations have still not been concluded (see paragraphs 5 and 10 to 12 above);

13.2. That Committee authorise the Rapporteur, in the light of replies received from the two States concerned, to ask one or two international aviation law experts to participate in an exchange of views on this subject at its meeting to be held in Paris on 8 December 2015.

¹¹ See Kasprzyk, above, especially at pp.207-209 and 212-214. For the complete list of SARPs, enumerated in Annex 13 to the Chicago Convention, see: [Aircraft Accident and Incident Investigation, ICAO, 10th edition, July 2010](#).

¹² See, in this connection, Article 26 of the Chicago Convention (the Parties agreed to apply procedures enumerated in Annex 13 to the Convention but not the Convention itself, thereby excluding priority application of the national law of the State in which the accident occurred), Standards 5.25 and 5.26 (participation of State of registration/of the operator) and [Attachment E to Annex 13](#).

¹³ Translation, from Polish, of the last part of paragraph 5 of letter sent to Polish Senate from Polish Ministry of Foreign Affairs, see footnote 7, above. See, for more details, the report itself, footnote 2 above.

¹⁴ See footnote 3, above.

¹⁵ <http://conventions.coe.int/Treaty/en/Treaties/Html/030.htm>.

2. Extract from the minutes of the AS/Jur's meeting held in Strasbourg on 29 September 2015

The crash of Polish Air Force Tu-154 transporting the Polish delegation on 10 April 2010 on the Russian Federation's territory

Rapporteur: Mr Robert Neill, United Kingdom, EC

[AS/Jur (2015) 26]

The **rapporteur** presented his introductory memorandum, which concerned not only a matter which had been subject to some controversy, but also a human tragedy. He recalled that it was not for the Assembly to address the potential causes of the crash and that investigations had been conducted both in Poland and in the Russian Federation immediately after the crash. In his introductory memorandum, he had therefore explored those aspects which *prima facie* gave rise to legal issues, in particular (1) whether the investigations carried out by Poland and Russia had been undertaken under the appropriate legal regime; and (2) whether proper procedures had been followed. The rapporteur intended to ask experts on aviation law whether it had been correct to follow the procedure foreseen by the Chicago Convention, which usually applied to civil but not State aircrafts. The second question he wished to address pertained to the apparent lack of explanation as to why, over five years after the crash, the wreckage of the plane had not yet been returned to Poland. That is why he proposed to seek information from the Polish and Russian authorities. He stressed that this was a first stage of preparation of his report and that he was not in a position to conduct a broad inquiry due to the Assembly's narrow remit.

A discussion ensued, with the participation of **Mr Naimski** (who invited the rapporteur to include mention, in his report, to the fact that a group of MPs in the Polish parliament had conducted their own inquiry, had come to conclusions which were different from those of the investigations previously conducted by the Polish and Russian authorities and had concluded that the plane might have exploded before hitting the ground, which had prompted the said group of MPs to call for the investigations to be reopened; he asked the rapporteur to add this information to his introductory memorandum and encouraged him to carry out an information visit to Warsaw in order to meet the persons involved in the work of the said group), the **Chairperson** (who explained that the introductory memorandum was a text prepared by the rapporteur, rather than the Committee), the **rapporteur** (who explained that the reason why he had not included a reference to the Polish parliamentary group's observations was that the scope of his report was fairly narrow; he reiterated that there was a need to first determine the legal issues at stake; he was prepared to talk afterwards to any appropriate stakeholders, including in Warsaw and Smolensk, if need be). **Mr de Vries** invited the Rapporteur and the Committee to refrain from inviting any experts before having received written replies from the authorities, for there may be no need at all for a hearing.

Upon the rapporteur's request, the **Committee authorised** him to obtain, from both the Polish and Russian authorities, explanations as to why the wreckage of the aircraft as well as the original flight data recordings and other material evidence relating to the crash had not been returned to Poland, and why the criminal investigations had still not been concluded in both countries; and to organise a hearing, with the participation of up to two experts in international aviation law, at the Committee's meeting in Paris on 8 December 2015.

3. Minutes of the AS/Jur's hearing held in Paris on 7 March 2016

The crash of Polish Air Force Tu-154 transporting the Polish delegation on 10 April 2010 on the Russian Federation's territory

Rapporteur: Mr Michael McNamara, Ireland, SOC

[AS/Jur (2015) 26]

Hearing with the participation of:

Mr Timothy Brymer, Attorney, Specialist in Aviation and Aerospace Law, Murray, Morin & Herman P.A., London, United Kingdom

Mr Pablo Mendes de Leon, Head of Department, Executive Chair of the Department of Air and Space Law, Leiden University, the Netherlands

The **Rapporteur** welcomed the experts. He reminded the Committee that he had recently taken over the file from the previous rapporteur, Mr Robert Neil. Nearly 6 years after the tragic crash of the Polish aircraft at Smolensk airport in Russia, which killed all 96 passengers, the Russian authorities had not returned to the Polish authorities the plane's wreckage, the black boxes with original flight data recordings and other material evidence. This point was the main issue mandated to the Committee to look into. The Rapporteur also noted that two separate national investigations had been carried out and completed in 2011 by the Russian and Polish authorities, and that prosecutors in both countries were still carrying out criminal investigations. He finally drew the attention of the Committee to the answers received from both countries, which had been made available to committee members at the back of the meeting room.

Mr Brymer explained that, although this accident involved a State aircraft owned and operated by the Polish government, which crashed on Russian territory, both the Polish and Russian Authorities had agreed at the outset that the circumstances of the accident would be investigated pursuant to Annex 13 to the Convention on International Civil Aviation (known as "the Chicago Convention"), both Poland and Russia being Parties to this Convention. In accordance with the provisions of this Annex, but only "insofar as its law permits", the State in which the accident occurs would institute an inquiry into the circumstances of the accident. The sole objective of this investigation should be the prevention of accidents and incidents, and not to apportion blame or liability. In this case, the Russian Federation being the State of occurrence, both the obligation and the right to conduct the investigation rested with that State. Nevertheless, the Polish authorities had the right to participate through their accredited representatives and advisers. Mr Brymer further noted that parallel civil and criminal investigations inevitably arose as a result of aviation accidents. Practical initiatives had been taken to urge States to exercise greater restraint before officials initiate criminal investigations in the wake of aviation disasters with a view to ensuring that prevention rather than prosecution prevailed. He stressed that there was a general conflict between two important public policy objectives: the promotion of aviation safety and the discouragement of criminal conduct, between the goal to determine the cause of the accident and the public demand to hold individuals accountable for misdeeds. Concerns arising from this conflict led to the emergence of what was known as "just culture", defined by Eurocontrol as a culture in which "front line operators or others are not punished for actions, omissions or decisions taken by them that are commensurate with their experience and training, but where gross negligence, willful violations and destructive acts are not tolerated." Mr Brymer remarked that, according to Annex 13 - 3.3., the State of Occurrence had an obligation to protect evidence and to maintain safe custody of the aircraft and its content during a period "as necessary for the purpose of an investigation"; according to paragraph 13.5, it should release the custody of the aircraft and its content as soon as they were no longer required in the investigation; Annex 13 did not specify which investigation was concerned in this context. He, therefore, concluded that, in the Smolensk case, the Russian Federation should release custody of the aircraft, its content and any other parts as they were no longer required in the investigation. He pointed out that it was unclear to which extent the criminal investigations by both the Russian and Polish prosecutors were inhibiting the free exchange of information, documentation and evidence. He also specified that according to paragraph 5.12 of Annex 13, certain records, such as cockpit voice recordings and transcripts from such recordings, were only to be included in the final report or its appendices when pertinent to the analysis of the accident or incident and that parts of the record not relevant to the analysis should not be disclosed. According to paragraph 6.3 of Annex 13, the Polish authorities could have either requested amendments to the report of Russia's Interstate Aviation Committee or appended their comments to it and that such comments were usually restricted to non-editorial specific aspects of the final report on which no agreement could be reached. He concluded that there was a general conflict between promoting safety in aviation and conducting a criminal investigation into the causes of the accident. (The full text of the speech is on file with the Secretariat).

Mr Mendes de Leon started by explaining that, as experts, they had not seen all the reports and agreements. Some reports were in a language they did not speak and some were not made available to

them. He then stressed again that, although the aircraft was a State aircraft, the parties had agreed to use Annex 13 of the Chicago Convention but the circumstances of its application were rather “foggy”. It would indeed seem that there was no written agreement on the basis of which the Polish and the Russian authorities applied Article 26 of the Chicago Convention and the Standards and Recommended Practices (SARPs) laid down in its Annex 13 and that the acceptance of the Polish authorities had come through a statement made by Prime Minister Donald Tusk during a press conference held on 28 April 2011. As the “sole objective” of the investigation was “the prevention of accidents and incidents” (Standard 3.1), the conclusion of the Russian Inter-State Aviation Committee stating that the “immediate cause of the accident was the failure of the crew to take a timely decision” was legally questionable. Mr Mendes de Leon wondered to what extent that body was “independent”, according to Standard 5.4. According to Standard 3.4, the Russian Federation had to release custody of the aircraft after the conclusion of the investigation; in the opinion of the expert, the term “investigation” referred to the investigation concerning the implementation of aviation safety standards and not the criminal investigation conducted by the Russian authorities. In accordance with Chapter 6 of Annex 13, the Russian Federation was responsible for the preparation of the draft final report, which must have been sent for comments to, among others, Poland, whose comments should have been appended to the final report, which should then be sent to ICAO. Mr Mendes de Leon did not know about any comments made by the Polish authorities and understood that there was apparently no agreement on the final report; however, Annex 13 was not clear on whether the lack of such an agreement affected the validity of the final report. According to the expert, there were three avenues to solve the conflicts stemming from the application of the SARPs. The first one was for the Polish government to ask for consultations with the Russian authorities, a normal procedure used in international Air Service Agreements between States; however, the latter regulated the conduct of air services operated by civil, not State aircraft. The second one was to submit a disagreement to the ICAO Council according to Article 84 of the Chicago Convention. Finally, the third avenue was an ad hoc arbitration. (The full text of the speech is on file with the Secretariat).

A discussion ensued with the participation of **Mr Tarczyński** (who deplored that 6 years after this tragic event, nothing had happened and that there was no information on the investigation conducted by the Russian authorities; insisted that the wreckage should be returned to Poland and that the Council of Europe should support this demand as a basic condition for cooperation with Russia; recalled that the European Parliament had already issued a resolution on this issue; wanted to know whether there had been any incident of a plane crash, for which the investigation took so long and in which a head of State had perished; underlined that following the last elections the previous Polish government had paid a high price for its mistake regarding relations with Russia), **Mr Zingeris** (who remarked that some of the people in the plane had been his friends from the time of democratic transition and called for a transparent investigation into the causes of the crash; he wanted to know whether the fact that there were no Polish comments attached to Russia’s final report could be a sign of the lack of good will from the Russian authorities and whether the exchange of information between the two States was satisfactory), **Lord Balfe** (who recalled that the plane crash in which General Sikorski died in 1943 had not yet been elucidated; noted that any plane crash was a result of mistakes and that the authorities should not be involved in a blame game, but carry out a proper investigation; stressed the political dimension of this issue and considered that it was important to press the Russian authorities to set a time scale for their investigation; he also wanted to know whether language could have been an issue in the crash, as English was not the mother tongue of either the aircraft crew or the staff on the ground; and whether the good offices of ICAO could be used to ensure the return of the wreckage and the black boxes), **Ms Taktakishvili** (who thanked the experts for giving the Committee a detailed analysis of the legal framework on aviation; stressed the importance of human rights, including to right to life and to have an effective investigation into a violation of the latter; expressed doubts as to the independence of the Russian prosecution authorities recalling that political murders which occurred in that country had not been properly investigated; wondered whether the crash in question had really been an accident and about the extent of the Russian government’s responsibility for it; noted that the investigation into the causes of the MH 17 crash in Ukraine could be an example of how such inquiries should be conducted), **the rapporteur** (who wanted to know whether the length of the criminal investigations was not excessive and whether it was not unreasonable for Russia not to return the wreckage, as it was not clear to which “investigation” Annex 13 referred), **Mr Omtzigt** (who stressed that in the MH17 case it was difficult to separate the criminal investigation from that on safety conditions and that perhaps Russia had wanted to avoid a diplomatic incident if the TU-154 would not have been allowed to land; wondered what politicians could do to get to the truth in this case and whether there was any reason to keep all the technical information secret in this investigation and observed that, if the information was made available, the parties might not play this blame game), the **Chairperson** (who recalled that, according to the letter of the Polish General Prosecutor Mr Seremet –from which he read-out extracts - Polish prosecutors and experts had been granted unlimited access to the area of the crash and the wreckage, and that the Polish criminal investigation was so complicated that - although it had lasted for more than five years - the Polish Supreme Court had not considered it as excessively long),), **Mr Yemets** (who wondered whether there could be a direct causal relationship between the refusal of returning the wreckage and the fear of the Russian authorities of being

considered responsible), and **Mr Farmanyan** (who wondered how the political interpretations of the event could be used in Poland and Russia) and wanted to know whether there was any way to draw technical conclusions which could be accepted by both parties).

Mr Brymer warned that it was not possible to answer all those complex questions. He confirmed that it was usual for criminal investigations, whose duration depended on that of the civil investigation, to take that long; for instance, the criminal investigations for the Lockerbie crash were still ongoing. In his view, the civil investigation in this case was very thorough but language difficulties could have resulted in some inconsistencies (although it was difficult for him to assess this). He stressed that he had not received any information on the existence of the Polish authorities' comments to the report of the Russian Inter-State Aviation Committee and that he could not make further comments on that point.

Mr Mendes recalled that he was also member of the Dutch government board inquiring into the causes of the MH 17 crash. He further explained that it was difficult for him to comment on the political motives of the two parties. The legal context of the Smolensk accident was quite clear even though he had not seen a written agreement between Poland and Russia. In his view, according to Annex 13, the Russian Federation was under an obligation to return the wreckage if it was no longer needed for the "investigation", i.e. that on air safety issues; as the term "investigation" did not include criminal investigations. He nevertheless added that it was difficult in international law to enforce such an obligation. He agreed that using the good services of another party or referring to the ICAO Council were avenues worth pursuing. Regarding the question on the independence of the Russian Inter-State Aviation Committee, he noted that one could not comment on this issue as long as one did not know to which body this Committee reported. The existence or absence of official or unofficial links with the Government was difficult to assess. Regarding the status of the Russian report, the dual approach of having separate Russian and a Polish reports was unheard of and that it was unclear why the Polish authorities had not attached their comments to the Russian report and whether they had agreed on that with the Russian authorities. This ought to be clarified. The Russian report did not have to be approved by ICAO; it just needed to be sent to it.

A second round of discussion ensued with the participation of **Mr Tarczyński** (who stressed again that it was very important to hear the experts confirm that Russia had to give back the wreckage, and that there was no legal reason for the wreckage to stay in Russia; he suggested that the Committee adopt a resolution urging the Russian authorities to return the wreckage as soon as possible, as a condition for the Russian delegation's return to the Assembly; insisted that access to the wreckage was essential as it was not kept in good conditions, **Ms Taktakishvili** (who supported Mr Tarczyński and considered that it was necessary to ask the Russian authorities to disclose the information referred to in Standard 5.12). and the **rapporteur** (who asked Mr Brymer, whether the wreckage had to be returned to the State of the operator after the conclusion of the civil investigation).

Mr Brymer explained again that Annex 13 was clear in that evidence had to be returned to the State of the operator once the investigation (in the framework of Annex 13, the investigation meant the safety inquiry) had been concluded.

Mr Tarczyński stressed again that the wreckage was kept in very bad conditions and called for a quick adoption of a resolution. **The Chairperson** replied that it was too early and that the Committee would do its best to finalise this report.

The Rapporteur explained that the report was not ready and there was no draft resolution to vote on, which needed to be prepared in accordance with normal procedures. He informed the Committee that this could be his last meeting and wondered whether a new rapporteur could be appointed at this meeting.

Mr Tarczyński was in favour of appointing a rapporteur during the meeting. **The Chairperson** reminded the Committee that Mr McNamara was still the rapporteur for this report and added that a new rapporteur would be appointed as soon as possible, once Mr McNamara had officially left the Assembly.

4. Additional questions (to) & Answers (from) two aviation law experts, Mr Tim Brymer and Mr Mendes De Leon*

- Given that the safety inquiry into the crash was completed in 2011 - in accordance with the International Standards and Recommended Practices specified in Annex 13 of the Chicago Convention – are there, from your own practical experience, objective reasons which may explain the reason why the Russian authorities have not returned to the Polish authorities the wreckage of the aircraft as well as the original flight data recordings and other material.

Given that both the Polish and Russian States agreed that the investigation would be conducted in accordance with the International Standards and Recommended Practices specified in Annex 13 to the Chicago Convention, an obligation exists upon the investigating state (Russia) to release the wreckage. This extends to the FDR and CVR which should be released to any person or persons duly designated by the State of Registry, or the State of the Operator, when no longer required in the safety investigation. In pertinent part, Annex 13 Standard 3.5 provides as follows:

“3.5 – Subject to the provisions of 3.3 and 3.4, the State of Occurrence shall release custody of the aircraft, its contents or any parts thereof as soon as they are no longer required in the investigation to any person or persons duly designated by the State of Registry or the State of the Operator, as applicable. For this purpose, the State of Occurrence shall facilitate access to the aircraft, its contents or any parts thereof, provided that if the aircraft, its contents or any parts thereof lie in an area within which the State finds it impracticable to grant such access, it shall effect removal to a point where access can be given.”

The preceding standards at 3.3 (which require all reasonable measures be taken to protect the evidence and to maintain safe custody of the aircraft and its contents) and 3.4 (which imposes the obligation to ensure that the aircraft, its contents and any other evidence remain undisturbed pending inspection by an accredited representative of the requesting State) do not detract from the obligation in Standard 3.5 cited above. Although it remains unclear, it is my understanding that the Polish Authorities wish the wreckage to be released from custody (per Standard 3.5), rather than that the evidence remain “undisturbed pending inspection ...” (per Standard 3.4). In the event that the safety investigation has been completed then Standard 3.5 applies.

- Annex 13 of the Chicago Convention defines the investigation as being the safety inquiry. Does it, in your opinion, include (subsequent) criminal investigations, or are these a separate issue?

The investigation conducted pursuant to Annex 13 of the Chicago Convention is defined as a safety investigation. As such a safety investigation is entirely separate and distinct from the criminal investigation. Whilst the safety investigation is regulated under Annex 13, the criminal investigation is basically subject to national law, and on some occasions international law. In this respect, it is also noteworthy that Standard 5.11 provides that:

“5.11 If in the course of an investigation it becomes known, or it is suspected, that an act of unlawful interference was involved, the investigator in charge shall immediately initiate action to ensure that the aviation security authorities of the State(s) concerned are so informed”.

- In the context of the investigation having been carried out in accordance with the International Standards and Recommended Practices specified in Annex 13 of the Chicago Convention, is it reasonable for the State in which the accident occurred to hold onto all the material evidence relating to the crash within its jurisdiction until criminal investigations have been completed?

Given that Poland and Russia agreed on the adoption of Annex 13 as the legal basis for the investigation, for the reasons set out in answers to 1 and 2 above, ostensibly the aircraft wreckage and remains should be returned to the title owner (i.e., the Polish State) once the safety investigation has been concluded. However, as a matter of practice, it is the undersigned’s experience that in circumstances where a criminal investigation remains ongoing in the State where a “crime scene” is suspected to exist, the security authorities exercise the law of the locus to retain any evidence which could be material until the criminal investigation file is closed. It is yet another sad example of the general conflict which commonly exists between the aim to establish cause and the demand to hold individuals accountable that I have seen so often following aviation tragedies of this nature.

* Experts invited to hearing on 7 March 2016 (see Section 3, above). Additional questions posed by the Rapporteur, Mr McNamara, reply received on 6 April 2016. Reply provided by Mr Brymer, with respect to which Mr De Leon concurred.

- Based on your professional experience and from a comparative perspective, can a delay of 5-7 years in so doing be considered as reasonable? Are you in a position to indicate whether criminal investigations, in both Poland and Russia, are taking an unreasonable length?

This is an impossible question to answer without full knowledge of the nature and scope of the criminal investigations which have been conducted to date in both Russia and Poland and which remain ongoing. In the absence of such knowledge, regard can only be had to other aviation tragedies such as that involving the Concorde accident near Paris where the criminal investigations were only recently completed, and the Pan Am Boeing 747 tragedy over Lockerbie where the criminal investigation remains open to this day.

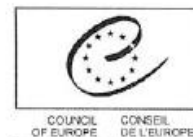
5. Correspondence

- 5.1 *Correspondence between the Rapporteur and the Polish Prosecutor (transmitted through the good offices of the Secretary General of the Parliamentary Assembly and the Permanent Representation of the Republic of Poland to the Council of Europe)*



Parliamentary Assembly
Assemblée parlementaire

<http://assembly.coe.int>



Committee on Legal Affairs and Human Rights
Commission des questions juridiques et des droits de l'homme

Strasbourg, 5 October 2015

Dear Mr Seremet

I have been mandated by the Assembly's Committee on Legal Affairs and Human Rights to prepare a report on "The crash of Polish Air Force Tu-154 transporting the Polish Delegation on 10 April 2010 on the Russian Federation's Territory" (please see Doc. 13628, attached to the present letter).

In this connection, I kindly seek your assistance. I would appreciate it if you were able to provide me with an explanation as to why the wreckage of the aircraft in question, as well as the original flight data recordings and other material evidence relating to the crash has not been returned to Poland and as to why - now over five and a half years later - the criminal investigations undertaken in your country have still not been concluded.

I would appreciate receiving a reply from you, if possible, by 16 November 2015.

Yours sincerely,

Robert Neill
(Rapporteur for "The crash of Polish Air Force Tu-154 transporting the Polish delegation on 10 April 2010 on the Russian Federation's territory")

Mr Andrzej Seremet
Prosecutor General of the Republic of Poland
Rakowiecka str. 26/30
02-528 Warsaw
Poland



RZECZPOSPOLITA POLSKA
PROKURATOR GENERALNY

Warszawa, dnia 22.10. 2015 r.

Reply from the Prosecutor General of the Republic of Poland, Mr Andrzej Seremet, to the letter sent by Mr Robert Neill, (United Kingdom, EC), Rapporteur for the “The crash of Polish Air Force Tu-154 transporting the Polish delegation on 10 April 2010 on the Russian Federation's territory”

[unofficial translation]

Warsaw, 22 October 2015

PG VII G 083/5/15

Mr Robert Neil
Rapporteur
of the Committee on Legal Affairs
and Human Rights
of the Parliamentary Assembly
of the Council of Europe

By the intermediary of Ambassador Extraordinary and Plenipotentiary, Permanent Representative of the Republic of Poland to the Council of Europe in Strasbourg, I received correspondence of 5 October 2015 concerning the report on the crash of Polish Air Force Tu-154 on 10 April 2010 on the Russian Federation's territory, being prepared on the request of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe. In this letter, you have requested assistance and explanation as to "why the wreckage of the aircraft in question, as well as the original flight data recordings and other material evidence relating to the crash has not been returned to Poland and as to why – now over five and a half years later – the criminal investigations (...) have still not been concluded".

With regard to these issues, I would like to kindly inform you that independently from the Russian side, Polish Prosecutor's Office is conducting its own investigation in the case of the plane crash that occurred on 10 April 2010 at about 08:41 Polish time near the Smoleńsk military airport on the territory of the Russian Federation, resulting in death of all the passengers of the Polish Air Forces' Tu-154 plane, side number 101 – including

the President of the Republic of Poland, Mr Lech Kaczyński, and the crew members of the said plane. Investigation in this case was initiated on the day of the catastrophe, *i.e.* 10 April 2010.

In the course of the investigation, Polish Prosecutor's Office, relying on the provisions of the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959, to which both the Republic of Poland and the Russian Federation are parties, and on the agreement between the Republic of Poland and the Russian Federation on legal assistance and legal relations in civil and criminal matters, done at Warsaw on 16 September 1996, has repeatedly submitted rogatory letters to the Russian party aiming at gathering evidence necessary to determine the causes of the catastrophe.

Starting from its first motion of 10 April 2010 (submitted on the day of the crash) Polish Prosecutor's Office requested the Russian side to hand over all the material evidence secured at the scene, in particular the wreck of the plane and data recorders. This request has been repeated in subsequent motions, filed on, *i.e.*, 16 and 20 April 2010, 9 June 2010, 5 August 2010 and 19 January 2011. Irrespective of the above, the issue of returning the wreckage, which is the property of the Polish Armed Forces, was raised on numerous occasions during working meetings between Polish prosecutors and members of the Investigative Committee of the Russian Federation, which is conducting its own investigation into the crash of the Tu-154M plane, side number 101, as well as in the course of the talks with the top executives of the General Prosecutor's Office of the Russian Federation.

The position of the Russian Federation on the handing over of the above-mentioned items remains unchanged. The return of the wreckage and other material evidence may be possible only after the criminal proceedings conducted by the Russian' authorities are concluded.

Nevertheless it should be underlined here that Polish prosecutors and experts were granted unlimited access to the remains of the fuselage and were given the opportunity to take part in all necessary examinations during their numerous visits on the site of the crash. In the course of these visits, visual inspections of the wreckage were carried out, including taking samples for examination and making copies of the records from the flight data recorders. The above-mentioned exercises were performed on numerous occasions, according to on the needs of the Polish investigation.

While it is true that the Polish investigation is ongoing for more than 5 years now, one should keep in mind that investigations into the plane crashes are one of the most complicated and time-consuming. The fact that the catastrophe at hand took place on the territory of the third country is an additional factor contributing to the length of the proceedings. In such situations the international law requires that the procedural steps are performed by the relevant authorities of the requested country in accordance with the formalised procedures specified in the international agreements cited above.

It should be noted that during the investigation Polish authorities requested international legal assistance not only from the Russian Federation (27 motions), but also from the United States of America (3 motions), the Republic of Belarus (3 motions) and the Kingdom of Denmark. More than 1,270 witnesses have been heard and many time and resource-consuming experts' opinions have been prepared. The evidence collected resulted in presenting charges to four people, including two citizens of the Russian Federation, who did not, however, take part in any procedural steps due to their absence in the Polish prosecutor's office.

I would also like to stress that the length of the Polish investigation was examined by the Supreme Court of the Republic of Poland, which on 23 July 2015 found that the proceedings at hand were not protracted. The Supreme Court gave due account to, among other factors, the factual and legal complexities of the case, as well as international conditions objectively determining the length of the investigation.

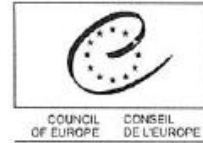
I am certain that the information presented hereby is exhaustive and will help the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe to take the position in the case.

5.2 Correspondence between the Rapporteur and the Russian authorities (transmitted through the good offices of the Secretary General of the Parliamentary Assembly and the Permanent Representation of the Russian Federation to the Council of Europe)



Parliamentary Assembly
Assemblée parlementaire

<http://assembly.coe.int>



COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Committee on Legal Affairs and Human Rights
Commission des questions juridiques et des droits de l'homme

Strasbourg, 5 October 2015

Dear Mr Bastrykin

I have been mandated by the Assembly's Committee on Legal Affairs and Human Rights to prepare a report on "The crash of Polish Air Force Tu-154 transporting the Polish Delegation on 10 April 2010 on the Russian Federation's Territory" (please see [Doc. 13628](#), attached to the present letter). A courtesy translation of this letter is enclosed for ease of reference.

In this connection, I kindly seek your assistance. I would appreciate it if you were able to provide me with an explanation as to why the wreckage of the aircraft in question, as well as the original flight data recordings and other material evidence relating to the crash has not been returned to Poland and as to why - now over five and a half years later - the criminal investigations undertaken in your country have still not been concluded.

I would appreciate receiving a reply from you, if possible, by 16 November 2015.

Yours sincerely,

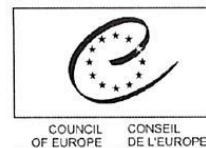
Robert Neill
(Rapporteur for "The crash of Polish Air Force Tu-154 transporting the Polish delegation on 10 April 2010 on the Russian Federation's territory")

Mr Alexander Ivanovich BASTRYKIN
Chairman of the Investigation Committee of the Russian Federation
Colonel General of Justice
Tekhnicheskyy pereulok, Building 2
Moscow
105005
Russia



Parliamentary Assembly
Assemblée parlementaire

<http://assembly.coe.int>



COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

Committee on Legal Affairs and Human Rights
Commission des questions juridiques et des droits de l'homme

Strasbourg, 16 December 2015

Dear Mr Bastrykin

Please permit me to refer to the letter of my predecessor as the Rapporteur on the subject of "The crash of Polish Air Force Tu-154 transporting the Polish Delegation on 10 April 2010 on the Russian Federation's Territory" (Doc. 13628), (copy attached for your convenience).

I would very much appreciate it if you were able to provide me with a reply to the question posed, if possible, by 12 February 2016.

Specifically, I seek your assistance in my attempt to know why the wreckage of the aircraft in question, as well as the original flight data recordings and other material evidence relating to the crash has not been returned to Poland and as to why - now over five and a half years later - the criminal investigations undertaken in your country have still not been concluded.

Yours sincerely,

Michael McNamara
(Rapporteur for "The crash of Polish Air Force Tu-154 transporting the Polish delegation on 10 April 2010 on the Russian Federation's territory")

Mr Alexander Ivanovich BASTRYKIN
Chairman of the Investigation Committee of the Russian Federation
Colonel General of Justice
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105005
Russia



**REPRESENTATION PERMANENTE
DE LA FEDERATION DE RUSSIE
AUPRES DU CONSEIL DE L'EUROPE**

75, allée de la Robertsau, F-67000 STRASBOURG
Tél. (+33) (0) 3 88 24 20 15 Fax(+ 33) (0) 3 88 24 19 74

Strasbourg, 19 February 2016
N235ce

Dear Mr. Secretary General,

I would like to inform you on Mr. McNamara's requests to governmental bodies of the Russian Federation with regard to his reports on human rights in the North Caucasus and the crash of the Polish Air Force Tu-154.

The Statute of the Council of Europe states that the PACE is a deliberative organ of the Council of Europe that debates matters within its competence and present its conclusions in the form of recommendations to the Council of Europe.

The Russian side expresses regrets on temporary suspension of interaction between the Russian parliamentary delegation and the PACE, which does not permit to use the Assembly's channels of cooperation.

As far as PACE routine correspondence concerns we do believe that it will be carried on normally via parliamentary channels and through the parliamentary delegation to the Assembly, when the credentials of the delegation are ratified and the delegation recommences its full activities in the Assembly.

Yours sincerely,

Ivan SOLTANOVSKY
Permanent Representative

Mr. Wojciech SAWICKI
PACE Secretary General
Strasbourg