



Declassified*
AS/Jur (2020) 04 Rev
3 February 2020
ajdoc04 2020 Rev

Committee on Legal Affairs and Human Rights

Ensuring accountability for the downing of flight MH 17

Introductory memorandum

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1. Introduction

1.1. *The downing of flight MH 17 and its initial consequences*

1. On 17 July 2014, Malaysia Airlines flight MH 17 was shot down over eastern Ukraine. The plane was en route from Amsterdam to Kuala Lumpur. On board were 283 passengers and 15 crew members. Among the passengers were 196 Dutch nationals. All 298 people on board died.

2. On 21 July 2014, the United Nations Security Council unanimously adopted Resolution 2166 (2014) demanding that those responsible be held to account and that all States co-operate to establish accountability.

3. After every air disaster, two parallel strands of investigation must be distinguished: the air safety investigation under the Chicago Convention (Annex 13) shall determine the causes of the disaster and draw lessons from any shortcomings in safety arrangements found for purposes of improving future air traffic safety, without apportioning any blame or responsibility. In parallel, the competent law enforcement bodies shall attempt to establish criminal responsibility of individual perpetrators of a (negligent or intentional) offense. The international competence for criminal investigations and prosecutions can derive from the place where the crash occurred or from where it was caused (*locus delicti*), the place of origin of the flight, and the nationalities of the perpetrators or the victims of the offense.

4. As far as the downing of MH 17 is concerned, the air safety investigation under the Chicago Convention was delegated to the Dutch OVV¹, on proposal of the National Bureau of Air Accidents Investigation of Ukraine (NBAAI), on account of the large number of Dutch victims and the fact that the flight originated in Amsterdam.² The OVV presented its final report on 13 October 2015. It concluded that flight MH 17 was brought down by a BUK missile.

5. The parallel criminal investigation by the Joint Investigation (JIT) led by the Dutch Prosecution Service and the Dutch National Police in co-operation with their colleagues from Australia, Belgium, Malaysia and Ukraine has the purpose of holding to account persons who may bear criminal responsibility for the catastrophe. The JIT investigation is still ongoing. The Dutch prosecution service recently announced that they would prosecute four suspects: Igor Girkin, Sergey Dubinski, Oleg Pulatov and Leonid Kharchenko. Separate criminal investigations are also ongoing in Ukraine and in the Russian Federation. Both countries' constitutions do not allow the extradition of their nationals. Three of the four suspects named by the Dutch prosecution service (see below) have Russian nationality and one is Ukrainian. As they cannot be extradited to the

* Document declassified by the Committee on 28 January 2020.

¹ Onderzoeksraad voor Veiligheid ("Investigation Council for Safety"), Dutch Safety Board.

² See OVV statement, at <http://onderzoeksraad.nl/en/onderzoek/2049/investigation-crash-mh17-17-july-2014/onderzoek/1559/questions-and-answers-concerning-the-investigation-into-flight-mh17#fasen>

Netherlands, they must be prosecuted in their home countries, according to the principle of “dedere aut iudicare” (extradite or prosecute) enshrined in international law.

1.2. *Interpretation of the mandate and objectives of the report*

6. In the words of the authors of the motion underlying this report³, it is of “utmost importance that justice be done and that all member States fully co-operate with the efforts in this respect by those States that have jurisdiction. Under Article 2 of the European Convention on Human Rights, all States Parties have the duty to carry out effective investigations to identify and punish those responsible for the loss of life that occurred under their jurisdiction. Suspects for serious crimes should be either extradited on the request of the State undertaking the investigation and prosecution or prosecuted in their home State, if this State does not extradite its own nationals.”

7. In line with the motion, I see it as my task to “inquire about the extent to which countries have carried out investigations required under the European Convention on Human Rights and co-operated with one another as instructed by the United Nations Security Council and to make appropriate recommendations”.

8. I will not attempt to second-guess or anticipate the results of the air safety investigation or the findings of the JIT. The Assembly has neither the mandate, nor the expertise, nor the resources to do such a thing. But it is mandated to inquire and assess whether all States Parties to the European Convention on Human Rights have fulfilled their duty, under Article 2, to properly investigate and sanction any loss of human life. This assessment, which I intend to submit to the Assembly in my final report shall be political, not judicial, as the Assembly is not a court of law. But I will base myself solely on objective facts, which I will interpret impartially.

9. In this introductory memorandum, I will briefly present investigations carried out so far and national and international level, focusing on progress made and obstacles encountered by the investigators.

2. **Investigations at international and national levels – progress and obstacles**

10. After the catastrophe, and the diffusion in the international media of the horrible images of the wreckage of the plane and the human remains scattered over a large area in the conflict zone in eastern Ukraine, it soon became clear that the cause of the crash was not a malfunction of the plane or pilot error, but the impact of a weapon, or weapons of war. Investigations were hampered by the fact that the crash site was located in a zone under the effective control of separatist militias supported by Russia. There were even reports of looting of the personal belongings of crash victims. Only in the days after the crash, investigators from Ukraine, Malaysia and Australia and journalists, accompanied by OSCE observers, could access the crash site.

11. As after every air disaster, two types of investigations needed to be carried out urgently, and independently from one another, namely an air safety investigation to identify the causes of the crash and criminal investigations to establish any criminal responsibilities (see above).

2.1. *The Air Safety Investigation under the Chicago Convention*

12. The objective of the technical investigations conducted under the international requirements established by Annex 13 to the Convention on International Civil Aviation (Chicago Convention) is not to apportion blame, but to draw appropriate lessons from any air disaster for the sake of improving air traffic safety in future.⁴

13. On proposal of the National Bureau of Air Accidents Investigation of Ukraine (NBAAI) the air safety investigation under the Chicago Convention was delegated to the Dutch OVV⁵ because of the large number of Dutch passengers and the fact that the flight originated in Amsterdam.⁶ The OVV presented its final report on 13 October 2015.

14. It concluded that flight MH 17 was brought down by a BUK missile, more precisely by a 9N314M-type warhead of a 9M38M1-type surface-to-air missile, mounted on Russian-built BUK mobile air defense systems. The warhead was identified beyond doubt by characteristic (bow-tie shaped and square) fragments found in

³ Doc. 14929 dated 27 June 2019; at its meeting on 28 June 2019, the Bureau decided to seize the Committee on Legal Affairs and Human Rights for a report. At its next meeting, on 1 October 2019 in Strasbourg, the Committee appointed Mr Titus Corlăţean (Romania/SOC) as rapporteur. At its meeting on 10 December 2019 in Paris, the Committee heard a statement from him explaining his understanding of his mandate, as explained below.

⁴ See <https://www.icao.int/Newsroom/Pages/ICAO-Welcomes-MH17-Accident-Investigation-Final-Report.aspx>

⁵ Onderzoeksraad Voor Veiligheid (“Investigation Council for Safety”), Dutch Safety Board, see <https://www.onderzoeksraad.nl/en/page/3546/crash-mh17-17-july-2014>

⁶ See OVV statement, at <http://onderzoeksraad.nl/en/onderzoek/2049/investigation-crash-mh17-17-july-2014/onderzoek/1559/questions-and-answers-concerning-the-investigation-into-flight-mh17#fasen>

the wreckage and in the remains of crew members. The fuselage had suffered the impact of more than 800 high energy objects originating from one spot outside the plane, their shape excluding air-to-air cannon shot. The OVV report also carefully considers and excludes any other causes for the crash (lightning strike, hit by a meteorite or space debris, explosion on board, expansive engine failure, lack of airworthiness of the plane and the crew).

15. The investigators identified characteristic sound peaks in the last 20 milliseconds of the CVR (Cockpit Voice Recorder) recording and located their source as being outside the plane, above the left side of the cockpit. The OVV report also establishes that no alerts or warnings of technical malfunctions were recorded on the CVR and the FDR (Flight Data Recorder). The OVV notes that the flight recorders could not be recovered by the Annex 13 investigation team. They were removed by two unknown officials and handed over only on 21 July 2014 to a Malaysian official in separatist-controlled Donetsk.

16. Radar data made available to the OVV by the Ukrainian and Russian authorities show that no other planes were in the vicinity of MH17, with the exception of three other commercial airliners, the closest at a distance of about 30 km. The OVV notes that the Russian authorities provided only video recordings of radar screens and not the raw radar data, which Russia claimed were not stored as they did not concern Russian airspace. The OVV recalls that this violates ICAO standards.

17. The OVV notes that it was first given access to the crash area only on 4 November 2014 and could only recover the wreckage in two missions starting on 16 November 2014 and 20 March 2015. It was however given access to information collected by other investigators given access earlier (see above). But the OVV also notes that some pieces of wreckage identified as having been in the wreckage area shortly after the crash were not found during the recovery missions. The conditions of the transfer of the human remains for purposes of identification are not described in the report (see pages 83-86 and 164-165). The description of the likely effect of the impact and the subsequent disintegration of the plane into three main segments (cockpit, cabin, tail) on the passengers makes for chilling reading (page 165).

18. A large part of the OVV report is dedicated to describing and analyzing the degree of risk of flying over a conflict zone such as that in eastern Ukraine (but also Afghanistan, Syria, Iraq, South Sudan, which commercial airliners overfly routinely in altitudes considered safe, as being out of the effective range of weapons used in these conflicts, such as “MANPADS” (portable surface-to-air missiles). It notes that in the months and days preceding the downing of MH17, the Donbass conflict had indeed extended into the air. A number of Ukrainian helicopters, transport planes and even fighter jets were downed by the separatists supported by Russia, who clearly had “MANPADS” at their disposal. Most of the Ukrainian military aircraft shot down were hit at low altitudes.⁷ But in two cases, a military transport plane (Antonov AN-26) and a fighter jet (Sukhoi SU-25) were hit at altitudes nearing the prescribed cruising altitude for commercial aircraft.⁸ These incidents, which were well-known also to Western observers, did not give rise to the complete closure of the airspace for commercial aircraft by Ukraine (lower altitudes had been closed beforehand), or to warnings by Governments addressed to their national carriers to avoid flying over this region. The OVV merely states the facts, without apportioning blame to the one or other Government. It does however state that the Dutch authorities were neither obliged nor even legally entitled to prevent Malaysian Airlines from using the route over eastern Ukraine mapped out in the flight plan, even though flight MH17 was a “code share” with the Dutch national carrier, KLM, and originated in the Netherlands. The airspace over the eastern part of Ukraine was heavily travelled on the day of the MH17 crash. Until the airspace was closed, 160 commercial airliners flew over the area.

⁷ See table in the OVV report, page 182; on 17 July 2014, a AN-26 transport plane flying at 6.500 meters was shot down. According to a Ukrainian statement, it must have been hit by a more powerful weapon than a MANPAD. On 16 July, two SU-25 fighter jets were hit, one most likely by a MANPAD. The other, shot down near Amvrosiivka, by the Russian border, was hit at 8250 meters (later corrected to 6.250 meters). The Ukrainian authorities suspected that either a Pantsir ground-to-air missile, or an X-24 air-to-air missile were used, in either case launched from Russian territory or airspace (see OVV report pages 182-184).

⁸ A “NOTAM” (Notice To Airmen) in force since March 2014 by the Ukrainian authorities advised against flying below FL 260 (Flight Level 26000 feet or about 7900 meters). A Russian NOTAM published on 16 July 2014 (no. UUUUV6158/14) applicable to the Rostov area bordering eastern Ukraine was internally contradictory: whilst advising FL 260 (as in the Ukrainian NOTAM), it also indicated that it applied from ground level to FL 530, i.e. over 16000 meters; see OVV report, page 180.

2.2. Criminal investigations by the Joint Investigation Team (JIT)

19. The Joint Investigation Team (JIT) is made up of police officers and forensic experts from Australia, Belgium, Malaysia, the Netherlands and Ukraine.⁹ It is led by the Dutch national police and has a field office in Kyiv. The JIT, set up under the auspices of Europol, is currently 50-strong¹⁰ and has access to the full array of forensic, aviation and military expertise (including radar, missiles, weapons and explosives experts). The JIT has carried out extensive forensic analysis of the human remains, and aircraft debris transported to the Netherlands, stored and analysed at Gilze-Rijen Air Force Base. The JIT also has access to information collated by the OVV. It may use information from all sources, but its task is to gather evidence in accordance with the high standards of evidence required for use in criminal court proceedings.

20. On 30 March 2015, the JIT released a video calling for witnesses in eastern Ukraine to come forward with information regarding the transport of a Buk anti-aircraft system through eastern Ukraine on July 17th (the day of the MH17 crash) and 18th, 2014. In the video, the JIT summarize the transport route of the BUK from Donetsk, through Zuhres and Torez to Snizhne, to Luhansk, and back to Russia with photographs and videos of the BUK along with intercepted phone calls between separatists. The majority of this information has been in the public domain since a report by Bellingcat dated 8 November 2014 (see below). In addition, this video presents intercepted phone calls made after the downing of MH17 that further implicate Russia and the separatists supported by Russia. In these three previously unpublished phone calls, separatists discuss a Volvo low-loader truck hauling a BUK from Snizhne to Russian territory shortly after the downing of MH17.

21. On 28 September 2016, the JIT announced that MH 17 was shot down by a missile from the 9M38 series, launched from a BUK TELAR system, which had been transported from Russia to an agricultural field near Pervomaiskyi, in eastern Ukraine, from where the missile was launched. After firing – with one missile missing – the system was transported back to Russia.

22. On 24 May 2018, the JIT announced its conclusion that the BUK TELAR system used to shoot down MH17 belonged to the Russian armed forces' 53rd Anti-Aircraft Missile Brigade stationed in Kursk. The JIT also launched a call for witnesses such as members of the 53rd Brigade in question.

23. On 19 June 2019, the Dutch authorities announced that based on the investigation conducted by the Joint Investigation Team (JIT) the Public Prosecution Service of the Netherlands would prosecute four suspects for bringing down the airplane, namely Igor V. Girkin (aka Strelkov), Sergey N. Dubinskiy, Oleg Y. Pulatov and Leonid V. Kharchenko. The first three are Russian nationals, Mr. Kharchenko is Ukrainian. Mr. Girkin is a former colonel of the FSB. On 17 July 2014, he was "Minister of Defense" and commander of the army of the self-proclaimed Donetsk People's Republic ("DPR"), from where MH17 was shot down. As the highest military commander, he also maintained contact with the Russian Federation. Mr. Dubinskiy is a former military officer of the GRU (the Russian military intelligence service). He was one of Girkin's deputies in 2014. He headed the intelligence service of the "DPR" and also maintained contact with the Russian Federation. Mr. Pulatov is a former military officer of the Russian "Spetsnaz-GRU", the special units of the Russian military intelligence service. At the relevant time, he was one of the deputies of Dubinskiy. Mr. Kharchenko, the only Ukrainian suspect, has no military background. Receiving orders directly from Dubinskiy, he was commander of a combat unit in the Donetsk region.¹¹

24. The four suspects will be prosecuted for causing the crash of flight MH17, resulting in the death of all persons on board, punishable under Article 168 of the Dutch Criminal Code; and the murder of the 298 persons on board of flight MH17, punishable under Article 289 of the Dutch Criminal Code.¹²

⁹ See the informative official website on the MH17 crash at <https://www.om.nl/onderwerpen/mh17-crash/> featuring explanations on various aspects of the JIT's work (in particular, forensic research into debris in Gilze-Rijen, the field office in Kyiv, the collection of soil samples in the areas suspected as the missile's launch site, the investigation into the weapon system used to bring down MH17 and the use of international legal assistance).

¹⁰ According to MH17 Magazine 03, 'Incomparable investigation', hundreds of people were initially working on this investigation under the supervision of eight prosecutors. Depending on the needs, people have joined over time whereas others left the investigation.

¹¹ See press release of the Dutch prosecutor's office dated 19 June 2019, at: <https://www.om.nl/onderwerpen/mh17-crash/@106096/prosecution-four/>

¹² Section 168 of the Dutch Criminal Code reads:

"Any person who intentionally and unlawfully causes any vessel, vehicle or aircraft to sink, run aground or be wrecked, be destroyed, rendered unusable or damaged, shall be liable to:

1°. a term of imprisonment not exceeding fifteen years or a fine of the fifth category, if such act is likely to endanger the life of another person;

2°. life imprisonment or a determinate term of imprisonment not exceeding thirty years or a fine of the fifth category, if such act is likely to endanger the life of another person and the offence results in the death of a person."

25. On 14 November 2019, the JIT released another witness appeal, linked to the publication of several intercepted telephone calls on its website. The JIT announced that recent analysis of information obtained by the JIT, including witness statements by former “DPR” members, revealed that Russian influence over the “DPR” went beyond military support, as supported by recorded telephone conversations between the leaders of the “DPR” and high-ranking Russian officials. In its latest witness appeal, the JIT reveals details about secure means of communication used between “DPR” fighters and Russian officials. The telephone numbers, used daily, were from the same series and appeared to be provided by the FSB. The JIT called for information on who used these telephone numbers and witnesses who can share information about those who commanded the deployment of the BUK TELAR in question.

26. International *arrest* warrants had been issued and the four suspects have been placed on national and international lists of wanted persons. Three of the suspects have Russian nationality, the fourth is Ukrainian. As the constitutions of both countries did not allow extradition of nationals, extradition would not be requested. The trial is scheduled to start on 9 March 2020 before the District Court of The Hague.¹³

27. On 2 December 2019, the Dutch Public Prosecution Service (PPS) announced that it had informed the Russian authorities of its request for the provisional arrest of a fifth suspect (“person of interest”), Mr Vladimir Tsemakh. He was arrested in Ukraine¹⁴ for other criminal offenses. The investigation into his role in the downing of flight MH17 is still ongoing. The JIT, who questioned him several times, considers him a suspect. But it could not prevent him from being transferred to the Russian Federation on 7 September 2019 as part of a prisoner exchange. The PPS had immediately requested from Russia to arrest Mr Tsemakh for the purpose of extradition to the Netherlands.¹⁵ The PPS received confirmation of receipt of its request before the plane even landed in Moscow. But he was not arrested, despite repeated indications by the PPS that he might flee to the “DPR”. On 23 September 2019 and several more times later, the Russian authorities requested additional information, which the PPS said it provided, even though it had no relevance for the arrest of Mr Tsemakh. The request for his arrest was repeated at the highest political and diplomatic levels, to no avail. On 19 November, the PPS received notification from the Russian authorities that the request for the arrest of Mr Tsemakh could not be executed because his whereabouts were unknown. According to media reports, Mr Tsemakh had already returned to his residence in eastern Ukraine. The PPS concluded that “Russia willingly allowed Mr Tsemakh to leave the Russian Federation and refused to execute the Dutch request. While under the European Convention on Extradition, it was obliged to do so.”¹⁶

28. Rather astonishingly, Mr Tsemakh has recently turned to the European Court of Human Rights to complain about the conditions of his detention and interrogation in Ukraine.¹⁷

29. The issue of the alleged failure of the Russian authorities with the JIT clearly falls within my mandate as Rapporteur, and I will not fail to verify these serious allegations.

2.3. *Investigations by Bellingcat*

30. Bellingcat, a collective of researchers specializing in fact-checking and “OSINT” (Open Source Intelligence) was founded by British journalist Elliot Higgins and started making a name for itself for investigating the use of chemical weapons in Syria. It describes itself as “an independent international collective of researchers, investigators and citizen journalists using open source and social media investigation to probe a variety of subjects – from Mexican drug lords and crimes against humanity, to tracking the use of chemical weapons and conflicts worldwide. With staff and contributors in more than 20 countries around the world, we operate in a unique field where advanced technology, forensic research, journalism, investigations, transparency and accountability come together.”¹⁸ Regarding the downing of flight MH17, Bellingcat carried out several investigations.

31. On 8 November 2014, Bellingcat published a report on the “Origin of the Separatists’ Buk”. Based on social media posts, in particular photographs posted online, using different tools permitting to identify the

Section 289 of the Dutch Criminal Code reads:

“Any person who intentionally and with premeditation takes the life of another person shall be guilty of murder and shall be liable to life imprisonment or a determinate term of imprisonment not exceeding thirty years or a fine of the fifth category.”

¹³ at <https://www.om.nl/onderwerpen/mh17-crash/>

¹⁴ Reportedly, he was arrested in “DPR” territory and transported to Kyiv by Ukrainian special forces.

¹⁵ As Mr Tsemakh is a Ukrainian citizen, the Russian Constitution would not prevent his extradition.

¹⁶ Press release Netherlands Public Prosecution Service concerning Mr Vladimir Tsemakh, 2 December 2019, available at <https://www.om.nl/onderwerpen/mh17-crash/@107214/press-release/>

¹⁷ See CoE news item of 19 December 2019, “MH17 case: Tsemakh files lawsuit against Ukraine”.

¹⁸ See <https://www.bellingcat.com/about/>

location where the photographs were taken, and individualizing one particular BUK missile launcher (“3x2”, the x representing the illegible middle number) by comparing its distinctive features with others, Bellingcat documented the transportation route of a Buk system originating from the base of the 53rd Anti-Aircraft Missile Brigade in Kursk, via a larger convoy from which it separated and moved close to a separatist-held border crossing. “3x2” was inside separatist-controlled territory on 14 July 2014, moving from Donetsk via Zhures and Torez to Snizhne, where it was unloaded from the (allegedly stolen) civilian low-loader truck about three hours before the downing of MH 17 and taken under its own power to a field near the village of Pervomayskyy, from where the fateful missile was fired. A video taken in the early morning of 18 July 2014 shows the BUK being transported on top of the same low-loader truck through Luhansk, in the direction of the Russian border – missing one missile.¹⁹

32. Bellingcat’s 31 May 2015 report on “Forensic Analysis of Satellite Images Released by the Russian Ministry of Defense” analysis satellite images showing Ukraine’s Military Unit A-1428 north of Donetsk on 14 and 17 July 2014 presented by the Russian Ministry of Defence (MoD) at a press conference on 21 July 2014. Bellingcat compares the Russian images with satellite images acquired by Bellingcat from Digital Globe of the same location on 17 July and images available on Google Earth showing the same location at several different dates during 2014. Bellingcat finds that:

“It is clear from these comparisons that there are multiple differences between the Digital Globe 17 July imagery and the Russian MoD’s 14 July 2014 and 17 July 2014 imagery. These discrepancies can only be explained if the Russian MoD imagery is incorrectly dated. Similarities between the Russian MoD imagery and Google Earth satellite imagery from May and June clearly demonstrate that the Russian MoD imagery was at least a month old on 17 July 2014.”

33. In its conclusion, Bellingcat excludes that the Russian Ministry of Defence misdated the images accidentally. In a reply to previous allegations of misrepresentation, the Ministry of Defence made the following statement:

“The images released by the Russian Defence Ministry on July 21 are absolutely accurate in terms of the location and time.”²⁰

34. If the Russian MoD deliberately provided misleading satellite imagery, this would be a clear violation of the Russian Federation’s duty to cooperate with the investigation into the causes of and responsibilities for the MH 17 disaster.

35. On 17 July 2017, Bellingcat presented its report “MH17, The Open Source Investigation, 3 Years Later”²¹. It sums up the information establishing the transport path and launch site of the Russian Buk that was used to shoot down flight MH17. The report also includes information on narrowing down the possible launch site of the missile, including through geolocation of a photographed missile smoke trail. The researchers also present detailed information and analysis disproving several “alternative scenarios” presented in the meantime by the Russian authorities and the manufacturer of the Buk system, Almaz-Antey. These include the use of one of the Buk systems in the possession of the Ukrainian army and the downing of MH17 by a Ukrainian fighter jet. Last but not least, the Bellingcat researchers also took a first look at the roles and identities of potential suspects.

36. Bellingcat’s most recent detailed report “A Birdie is Flying Towards You’, Identifying the Separatists Linked to the Downing of MH17” (19 June 2019) establishes the identities of most of the individuals heard or mentioned on the intercepted conversations released by the Ukrainian SBU and the JIT. Bellingcat, again, based itself on open (mostly digital) sources, trawling through social networks, online forums, reading leaked messages, using facial recognition tools and analyzing interviews given by separatist soldiers and published telephone conversations. The researchers thereby established the hierarchy of the “DNR” forces involved in obtaining and making use of the Buk system used in the downing of MH17. According to Bellingcat, the “GRU DNR” led by Sergey Dubinsky (one of the four suspects named by the Dutch OPP) was responsible for procuring the Buk missile launcher in question, and for guarding the Buk at the launch site around the time when MH17 was shot down. Dubinsky’s group also oversaw the transport of the Buk back to Russia in an attempt to hide evidence of its deployment – which was “seemingly approved by the DNR’s most senior

¹⁹ See ‘A Birdie is Flying Towards You’, Identifying the Separatists Linked to the Downing of MH17, A Bellingcat Investigation, 19 June 2019, page 74 (available at: <https://www.bellingcat.com/news/uk-and-europe/2019/06/19/identifying-the-separatists-linked-to-the-downing-of-mh17/>).

²⁰ ‘Comparison of Digital Globe 17 July Satellite Imagery with Russian Ministry of Defense 17 July Satellite Imagery’, A Bellingcat Investigation,

²¹ Available at: <https://www.bellingcat.com/news/uk-and-europe/2017/07/17/mh17-open-source-investigation-three-years-later/>

commander – Igor Strelkov.”²² Strelkov is one of the aliases of Igor Girkin, another of the four suspects named by the OPP. According to Bellingcat, the other two suspects named by the OPP, Oleg Pulatov and Leonid Kharchenko, also played key roles in procuring and guarding the Buk. Valery Stelmakh, a member of another group of separatists first spotted the aircraft (the “birdie”) and misidentified it as a target; he first reported this information to his commander, Igor Bezler, shortly before the downing. As of Bellingcat’s report, it remains unclear who channeled this message to the Buk crew - which, according to intercepts, had come from Russia.

2.4. *Different versions of the events spread by Russian authorities and media*

37. Russia rejects the findings of the Dutch OVV, the accusations made by the Joint Investigation Team and the information and analysis published by Bellingcat outright.²³

38. In particular, the Russian MoD stated that no Russian army missile system had ever crossed the Ukrainian border. At a press conference on 21 July 2014, the MoD presented satellite imagery to show that a Buk battery belonging to the Ukrainian military might have brought down MH 17 (see rebuttal by Bellingcat, above). In June of 2015, Almaz-Antey (the State-owned Russian manufacturer of Buk missile systems) held a press conference in Moscow presenting the results of their own investigation into the destruction of MH17, confirming it was hit by a BUK 9M38M1 surface-to-air missile armed with a 9H314M warhead. Shrapnel holes in the plane were consistent with that kind of missile and warhead, it said. Such missiles had not been produced in Russia since 1999 and the last ones were delivered to foreign customers, it said, adding that the Russian armed forces now mainly use a 9M317M warhead with the BUK system. Almaz-Antey also said that Ukraine’s armed forces still had nearly 1,000 such missiles in its arsenal in 2005, when it held talks with Almaz-Antey on prolonging their lifespan. But the Russian military still has 9H314M warheads for Buk missiles, too.²⁴ The Almaz-Antey study also postulates an alternative zone for possible launch sites.

39. To further bolster the thesis that a Ukrainian Buk brought down MH17, the Russian MoD presented additional radar data “accidentally discovered” in September 2016 during “scheduled maintenance” which purports to show the missile coming from Ukrainian Government – held territory, namely in the area of Zaroshchenske. But this radar data is considered inconclusive by the JIT and other international experts,²⁵ and given the fact that Zaroshchenske itself and its surrounding areas were held by separatist forces around 17 July 2014, this location would have been an unlikely choice for the Ukrainian military to expose a vulnerable and valuable missile system.²⁶ As to the “motive” for Ukrainian forces shooting at an airliner mentioned by Russian sources – namely that Ukraine wanted to shoot down a plane carrying President Putin (who was travelling around this time from Moscow to Warsaw) – experts pointed out that a missile from Zaroshchenske could not possibly reach a plane flying much further north between Moscow and Warsaw.

40. Another “version” spread by Russian officials was that flight MH17 was shot down by a Ukrainian fighter jet. But that version was widely rejected by international experts. The type of aircraft allegedly used (a SU-25 ground attack plane) was technically not capable of carrying out such a high-altitude attack, and the purported “witness”, Evgeny Agapov, who described how a Ukrainian pilot (Captain Voloshin) shot down MH17 did not withstand scrutiny, as did the radar and satellite imagery and the tweet of a Spanish air traffic controller in Kyiv presented in support of this version.²⁷

41. As part of my fact-finding, I intend to ask the competent Russian authorities for clarification regarding the apparent contradictions²⁸ between different “versions” and supporting materials presented to the international investigators. Any intentionally misleading statements, let alone manipulated data, would clearly contravene Russia’s international obligations to cooperate in the establishment of the truth.

2.5. *The Malaysian position*

42. On 17 July 2019, Malaysian Prime Minister Mahathir Mohamad was quoted by TASS as claiming that the Malaysian investigators had been excluded from the investigation, that the case was political and that

²² Ibid., page 87.

²³ See for example statements referred to in Bellingcat’s article dated 22 April 2016, available at: (<https://www.bellingcat.com/resources/articles/2016/04/22/the-russian-ministry-of-foreign-affairs-presents-its-evidence-of-mh17-fakery/>) and <https://news.sky.com/story/putin-dismisses-mh17-findings-and-says-of-course-russia-is-not-to-blame-for-tragedy-11385434>)

²⁴ See Bellingcat report of 17 July 2017, page 60

²⁵ See for example <https://www.om.nl/@98014/mh17-investigation/>

²⁶ See in detail : https://www.bellingcat.com/wp-content/uploads/2015/07/Zaroshchenske_ENG.pdf

²⁷ See <https://www.polygraph.info/a/Russian-military-channel-produces-new-mh17-theory/28920956.html>

²⁸ See Bellingcat, 5 January 2018, “The Kremlin’s Shifting, Self-Contradicting Narratives on MH17”.

investigators were blaming Russia from the beginning without examination. He had been awarded the Russian Order of Friendship by Vladimir Putin in 2003.

43. By contrast, the Malaysian prosecutor Mohamad Hanafiah bin Zakaria, who was part of the JIT, said at a press conference in the Netherlands on 19 June 2019 that the findings of the investigation “are based on extensive investigations and also legal research,” adding: “We support the findings.”²⁹

3. Preliminary conclusions and proposals for fact-finding

44. The Dutch OVV, the Joint Investigation Team and Bellingcat published their results successively, step-by-step, always providing more detail and further corroboration of the narrative according to which a Buk missile originating from Russia, launched from separatist-held territory in eastern Ukraine, was used to shoot down MH17. By contrast, Russia has been spreading different “versions”, even simultaneously, according to which a Ukrainian fighter jet, or a Ukrainian Buk brought down the plane. Allegedly, much of the data presented in support of these versions lacks credibility. If that were the case, the Russian authorities failed in their duty to cooperate with international investigators in establishing the truth.

45. I need to learn more about the working methods of the international investigations and their specific needs for international cooperation, in particular any requests for information, data etc. that have not been fulfilled, in particular the OVV’s and JIT’s requests for primary radar data to be provided by Russia, Ukraine and NATO (for data likely to be collected by AWACS flights over the conflict zone, warships participating in a naval exercise taking place in the Black Sea at the time). Similarly, the OVV and JIT investigations have lacked satellite data that should be available given the fact that the downing of MH17 took place in a conflict zone that was likely to have been under close surveillance from several sides.

46. For this purpose, I would like to carry out fact-finding visits to the Netherlands and to Ukraine. In the Netherlands, I intend to meet with representatives of the Dutch OVV and of the Joint Investigation Team. On the same occasion, I would like to meet with prosecutors at the International Criminal Court, which has reportedly been seized of this affair (and of other possible crimes related to the conflict in the Donbass) by Ukraine. In Ukraine, I would like to speak with the Ukrainian investigators who worked on the case and, in particular, obtain first-hand information from them on their cooperation with the authorities exercising de facto control over the site of the crash. I would in particular like to discuss the early stages of the work on identification and autopsy of the crash victims (including asking for possible explanations for the initial “mix-up” of the pilot and co-pilot and the alleged mishandling of transport conditions of the human remains) and possible reasons why personal objects belonging to the crash victims collected at on site were rendered to the investigation only with some delay.

47. As regards other countries, in particular Russia, and the United States (who might dispose of yet undisclosed satellite and radar data), I would ask the Committee for authorisation to address written questions to them on any relevant issues.

²⁹ See “Malaysian Investigator Contradicts Nation’s PM on MH-17 Findings, at <https://www.polygraph.info/a/malaysia-pm-mh17-russia-jit/30059031.html>)