

MH17 AND THE INTERNATIONAL CRIMINAL COURT: A SUITABLE VENUE?

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The downing of Malaysia Airlines flight MH17 on 17 July 2014 killed all 298 people on board and had significant implications for the safety of international civil aviation. Resolution 2166, adopted by the United Nations Security Council on 21 July 2014, condemned the downing of the MH17 and called for a full, thorough and independent international investigation and accountability for those responsible. The focus of the states affected by MH17, including Australia, has been on securing criminal accountability for those responsible for the downing of MH17. There are thus several options for securing criminal accountability for those responsible for downing MH17. This commentary explores these various options. It details the key features, challenges and strengths of five options for prosecution: (1) the International Criminal Court; (2) an ad hoc international criminal tribunal created by the Security Council; (3) an ad hoc international criminal tribunal created by other means; (4) national criminal proceedings; and (5) the possibility of internationalising a national criminal process.

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I INTRODUCTION

The downing of Malaysia Airlines flight MH17 on 17 July 2014 killed all 298 people on board. The incident has significant implications for the safety of international civil aviation, particularly when overflying conflict zones. It also

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raises the issue of criminal accountability for the perpetrators. *Resolution 2166*, adopted by the United Nations Security Council on 21 July 2014, condemned the downing of the MH17 and called for a full, thorough and independent international investigation and accountability for those responsible.¹ Yet, while the *Convention on Civil Aviation* (known as the ‘*Chicago Convention*’)² establishes the framework for the civil aviation investigation, it does not provide the appropriate institutional and legal framework for accountability.

The focus of the states affected by MH17, including Australia, has been on securing criminal accountability for those responsible for the downing of MH17, rather than on other possible options; for example a claims commission, civil liability or a claim based on state responsibility. The main reason for this might be that the most likely scenario is that separatists in Ukraine (a non-state actor) downed MH17. Given the uncertainty as to the extent and nature of Russian involvement in MH17, relying only on mechanisms based on state responsibility will be problematic, as it would be necessary to attribute the acts of the separatists to Russia.

There are also attractions to the criminal justice model. Debates before the Security Council, as well as statements from member states, suggest that criminal accountability would provide justice to the victims, act as a deterrent to future actors contemplating such actions against civilian aircraft and allow for the ‘truth’ of the incident to be told.³ These are acknowledged — although not necessarily always achieved — aims of any criminal justice process. A criminal justice approach is also provided for in the most directly relevant international legal instrument, the *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation* (the ‘*Montreal Convention*’).⁴ However, what is not evident is why an *international criminal justice* approach is required: other incidents of civilian aircraft being shot down have not been the subject of international criminal law.⁵

MH17 was a Malaysian registered flight on a scheduled flight from Amsterdam to Kuala Lumpur. It was flying with authorisation in Ukrainian airspace. It is alleged that Ukrainian, pro-Russian separatists targeted the plane using a surface-to-air missile, destroying the plane and scattering debris over a

¹ SC Res 2166, UN SCOR, 69th sess, 7221st mtg, UN Doc S/RES/2166 (21 July 2014) (*‘Resolution 2166’*).

² *Convention on International Civil Aviation*, opened for signature 7 December 1944, 15 UNTS 295 (entered into force 4 April 1947).

³ See UN SCOR, 70th sess, 7498th mtg, UN Doc S/PV.7498 (29 July 2015) 2 (*‘Draft Resolution Meeting’*).

⁴ *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation*, opened for signature 23 September 1971, 974 UNTS 177 (entered into force 26 January 1973) (*‘Montreal Convention’*).

⁵ Of the five incidents involving civilian airlines being shot down (or possibly shot down) by other states, none have resulted in criminal charges either at a national or international level. These include: Itavia Flight 870 (1980); Libyan Arab Airlines Flight 114 (1973); Iran Air Flight 655 (1988); Korean Air Lines Flight 007 (1983); and Siberia Airlines Flight 1812 (2001). The focus of accountability efforts has been on the basis of state responsibility (including through the International Court of Justice) and/or compensation. More recently, a Metrojet airliner was downed over the Sinai Peninsula on 31 October 2015. The payment of compensation for MH17 is also being pursued through private claims: see, eg, Shine Lawyers, *Malaysia Airlines Flight MH17 Compensation* (October 2015) <<https://perma.cc/ZK6H-ZWA4>>.

wide area within Ukrainian territory. The nationalities of the deceased included: 193 Dutch; 43 Malaysians (including 15 crew); 27 Australians (although 38 victims had connections with Australia); 12 Indonesians; and 10 British.⁶ There are therefore a number of states potentially able to exercise criminal jurisdiction exercising different bases of jurisdiction accepted under international law. In July 2014, the Netherlands Public Prosecution Service started a criminal investigation under Dutch law.⁷ On 7 August 2014, four states (Australia, the Netherlands, Belgium and Ukraine) set up a joint investigation team ('JIT') comprising law enforcement and prosecution officials to conduct a criminal investigation. Malaysia joined the JIT on 28 November 2014.⁸ The JIT is expected to conclude the investigation in late 2015 or early 2016.⁹ Yet the ultimate accountability mechanism has not been determined.

States and civil society actors have called for an international mechanism, an 'MH17 tribunal', or the exercise of jurisdiction by the International Criminal Court ('ICC'). On 29 July 2015, Russia vetoed a draft Security Council resolution, co-sponsored by Australia, to establish an international ad hoc tribunal to investigate and prosecute 'crimes connected with the downing of Malaysia Airlines flight MH17'.¹⁰ Following that veto, negotiations then shifted towards an MH17 tribunal established on the basis of a treaty.¹¹ Yet on 8 September 2015, Ukraine accepted the jurisdiction of the ICC in respect of acts committed on its territory from 20 February 2014.¹² While that declaration does not refer explicitly to MH17, the incident, which occurred in Ukrainian airspace within the expanded time period, now potentially falls within the jurisdiction of the ICC. Whether or not the Court will exercise that jurisdiction remains to be seen, although the Prosecutor has indicated that the incident will 'likely be included in the Office's preliminary assessment relating to alleged crimes committed in Ukraine'.¹³

There are thus several options for securing criminal accountability for those responsible for downing MH17. This commentary explores these various options. It details the key features, challenges and strengths of five options for prosecution: (1) the International Criminal Court; (2) an ad hoc international criminal tribunal created by the Security Council; (3) an ad hoc international

⁶ Dutch Safety Board, 'Crash Involving Malaysia Airlines Boeing 777-200 Flight MH17: Hrabove, Ukraine' (Preliminary Report, September 2014) 12.

⁷ *Letter of 24 July 2014 from the Minister of Foreign Affairs, the Minister of Security and Justice and the Prime Minister to the President of the House of Representatives on the MH17 Air Disaster* (Doc No AVT14/BZ112620, 24 July 2014) 4–5.

⁸ Attorney-General's Chambers, Malaysia, 'Malaysia's Membership in the MH17 Joint Investigation Team' (Press Release, 1 December 2014).

⁹ Brendan Nicholson and Rosie Lewis, 'MH17 Report: Russian-Designed Missile Responsible, Australia Reacts', *The Australian* (online), 19 October 2015 <<https://perma.cc/KBM3-W9T4>>.

¹⁰ *Draft Resolution*, UN Doc S/2015/562 (29 July 2015) annex ('*Statute of the International Criminal Tribunal for Malaysia Airlines Flight MH17 (ICTMH17)*') ('*Draft Statute*'); *Draft Resolution Meeting*, UN Doc UN Doc S/PV.7498, 3.

¹¹ *Doorstop Interview, Julie Bishop — United Nations, New York*, Julie Bishop: Federal Member for Curtin (29 September 2015) <<https://perma.cc/AZ5R-PQKF>>.

¹² *Declaration Made under Article 12(3) of the Rome Statute*, Ukraine, signed and entered into force 8 September 2015, <<https://perma.cc/FN6E-B8ZL>> ('*Second Declaration*').

¹³ Niklas Jakobsson, 'ICC Prosecution "Likely" to Look at MH17 Downing' on Justice Hub (10 September 2015) <<https://perma.cc/XZQ6-Y37U>>.

criminal tribunal created by other means; (4) national criminal proceedings; and (5) the possibility of internationalising a national criminal process. The commentary considers issues such as: the legal basis and jurisdictional limits; the composition of the proposed mechanism; the extent to which various options promote or protect the interests of victims and the fair trial rights of the defendant; the potential to ensure the cooperation of state and non-state actors; applicable substantive and procedural law; and obstacles to trials. It concludes that the focus on an international criminal mechanism has overlooked the primary role played by national jurisdictions and detracted attention from the key challenge of any accountability mechanism: securing accountability in the face of likely Russian non-cooperation.

II THE FACTS SO FAR...

Part of the challenge in establishing criminal accountability for MH17 is that the facts are not fully known. The air safety investigation, led by the Dutch Safety Board,¹⁴ released its final report in October 2015.¹⁵ That investigation was not concerned with determining blame or responsibility. Instead, it considered the causes of the incident so as to adopt any measures required to prevent the occurrence of similar incidents in future. The primary concern for that investigation was the height at which civilian airlines should be able to travel when flying over conflict zones and measures that should be taken in future to minimise risk to civil aviation from conflict.¹⁶

Relevantly for possible criminal responsibility, the final report made several key findings. First, the report found that MH17 was shot down by a single warhead fired from a BUK surface-to-air missile system, a Russian-built weapon, although both Russian and Ukrainian forces possessed these systems. Second, there were no civilian or military aircrafts in the direct vicinity of MH17. Third, the launch site of the missile was within an area of around 320 square kilometres in the east of Ukraine, in an area controlled by the separatists on 17 July 2014. Fourth, during the period from April 2014, when conflict broke out in eastern Ukraine, to the crash of MH17 in July 2014, the separatists had shot down a number of Ukrainian military aircraft, including by surface-to-air missiles.¹⁷ This suggests a strategy of targeting military flights: as the report noted, 'the armed conflict in the eastern part of Ukraine was continuing to extend into the air'.¹⁸ However, while Ukrainian military authorities were aware, prior to the downing of MH17, that armed groups possessed weapons and surface-to-air missiles and that military aircraft were a potential target for such groups, there were no indications that those armed groups would attack a civilian

¹⁴ Also known as the 'Onderzoeksraad voor Veiligheid' or 'OVV': see Government of the Netherlands, *MH17 Black Boxes Handed Over to Dutch Safety Board* (22 July 2014) <<https://perma.cc/4434-EEGA>>.

¹⁵ Dutch Safety Board, 'Crash of Malaysia Airlines Flight MH17: Hrabove, Ukraine, 17 July 2014' (Final Report, October 2015) <<https://perma.cc/M9PA-7MFJ>> ('*Final Report*').

¹⁶ Dutch Safety Board, 'MH17: About the Investigation' (Report, October 2015) 16, 38 <<https://perma.cc/AG73-8XRN>>.

¹⁷ *Final Report*, above n 15, 190: at least 16 Ukrainian armed forces' helicopters and aeroplanes, including fighter aeroplanes, were shot down between the end of April and 17 July 2014.

¹⁸ *Ibid* 185.

aircraft. Changes to the level at which civil aviation could travel in Ukrainian airspace appear to have been related to the decision to increase the height at which military aircraft could safely fly (and thus requiring civil aircraft to fly higher), rather than as a response to anticipated threats to civilian flights as such. In fact, prior to 17 July 2014, the armed conflict had not affected civilian aircraft.

The information so far therefore establishes that MH17 was shot from Ukrainian territory by a surface-to-air missile, but we do not know by whom or in what circumstances. There are at least two key unknowns: the level and nature of Russian involvement and the circumstances that led to the targeting of MH17. It has been suggested that the weapon was provided by Russian forces, or that Russian forces manned the weapon or directed its use by the separatists, a suggestion Russia denies. It is highly relevant to criminal responsibility to determine whether the armed group knew the flight was a civilian plane or mistook MH17 for a military plane, the steps taken to verify that belief and how far up the chain of command the decision to target the flight was taken. As discussed below, both unknowns are relevant to identifying the likely accused and the relevant charges. The following discussion outlines how the factual context will influence the various options for accountability for those responsible.

III OPTION 1: INTERNATIONAL CRIMINAL COURT

The ICC is one option for individual criminal responsibility. As the first permanent international criminal tribunal, it is perhaps also the most obvious. However, a successful prosecution before the ICC faces a number of challenges, including: its jurisdictional and admissibility regime; establishing that the downing of MH17 constituted a crime within the Court's jurisdiction; the application of modes of liability and defences under the *Rome Statute*;¹⁹ and issues concerning trials in absentia and state cooperation.

A Jurisdiction

The ICC is not a court of universal jurisdiction. It may only exercise jurisdiction within the parameters set by the *Rome Statute*. Situations may be brought before the ICC using one of three 'triggering mechanisms' provided in art 13 of the *Rome Statute*: a referral from a state party; a referral from the Security Council; and by the Prosecutor acting on her own initiative (*proprio motu*) to open an investigation. Where there is a state referral or the Prosecutor acts *proprio motu*, art 12 of the *Rome Statute* provides that, for the Court to exercise jurisdiction, the state on whose territory the crime was committed, the state of nationality of the aircraft on which a crime was committed or the state of nationality of the accused must be a state party to the *Rome Statute*.

Article 12(3) creates a mechanism pursuant to which a state that is not a party to the *Rome Statute* may accept the jurisdiction of the ICC in respect of crimes committed on its territory or by its nationals by filing a declaration. Ukraine is not a state party to the *Rome Statute*. Therefore, its September 2015 art 12(3) declaration accepted the Court's jurisdiction with respect to acts committed

¹⁹ *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) ('*Rome Statute*').

within Ukrainian territory from 20 February 2014. This was the second declaration made by Ukraine, with the first, made in April 2014, relating to alleged crimes committed in Ukrainian territory from 21 November 2013 to 22 February 2014 (the ‘first declaration’).²⁰ The Prosecutor opened a preliminary examination into the situation in Ukraine in respect of the period covered by the first declaration in April 2014.²¹ That examination concerns crimes allegedly committed during the Maidan protests,²² including killings, injuries, torture and disappearances. However, in November 2015, the Prosecutor indicated in her preliminary review that the violations did not constitute crimes against humanity under the *Rome Statute*.²³ The Prosecutor has now extended the temporal scope of that examination to include alleged crimes committed on the territory of Ukraine from 20 February 2014 onwards.²⁴ To date, the Court has interpreted an art 12(3) declaration as conferring jurisdiction on the Court that it would not otherwise have, and not as equivalent to a state referral under art 13(a).²⁵ Therefore, unless a state party (for example, Australia or the Netherlands) was to refer the situation concerning MH17, the Prosecutor will have to decide whether to act *proprio motu* and to seek authorisation from the Pre-Trial Chamber to open a formal investigation into the situation in Ukraine. The Prosecutor has received over 35 communications under art 15 of the *Rome Statute* concerning crimes committed after 20 February 2014.²⁶

It must be stressed that while the second Ukrainian declaration provides the ICC with jurisdiction, the declaration is not specific to MH17; in fact, the incident is not mentioned. Nor was MH17 mentioned when the Prosecutor expanded the initial preliminary examination. Thus MH17 is one of a number of possible crimes or incidents to be considered within a broader investigation into the situation in Ukraine during the relevant period. That period would cover the events in Crimea, as well as developments in the east of Ukraine. It should also be noted that the second declaration refers to resolutions of the Ukrainian Parliament that concern only the acts of the separatists and their Russian

²⁰ *Declaration Made under Article 12(3) of the Rome Statute*, Ukraine, signed and entered into force 9 April 2014 <<https://perma.cc/XU7R-B23S>> (‘*First Declaration*’).

²¹ International Criminal Court, Office of the Prosecutor, ‘The Prosecutor of the International Criminal Court, Fatou Bensouda, Opens a Preliminary Examination in Ukraine’ (Press Release, ICC-OTP-20140425-PR999, 25 April 2014).

²² Also referred to as ‘Euromaidan’, these protests erupted in November 2013 when Moscow-backed president Viktor Yanukovich walked away from a trade deal with the European Union, instead seeking closer economic ties with Russia. This triggered protests in Maidan, Kiev, which soon turned violent as police attempted to suppress the demonstrators: ‘Ukraine Crisis: Timeline’, *BBC News* (online), 13 November 2014 <<https://perma.cc/T2LN-SCJT>>.

²³ International Criminal Court, Office of the Prosecutor, *Report on Preliminary Examination Activities (2015)* (12 November 2015) 23 [101] (‘*OTP Preliminary Activities Report 2015*’).

²⁴ International Criminal Court, Office of the Prosecutor, ‘ICC Prosecutor Extends Preliminary Examination of the Situation in Ukraine Following Second Article 12(3) Declaration’ (Press Release, ICC-OTP-20150929-PR1156, 29 September 2015).

²⁵ See *Situation in the Republic of Côte d’Ivoire (Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire)* (International Criminal Court, Pre-Trial Chamber III, Case No ICC-02/11-14, 3 October 2011) [13]. But see Steven Freeland, ‘How Open Should the Door Be? — Declarations by Non-States Parties under Article 12(3) of the *Rome Statute of the International Criminal Court*’ (2006) 75 *Nordic Journal of International Law* 211.

²⁶ *OTP Preliminary Activities Report 2015*, above n 23, 18 [80].

supporters. However, that focus is not incorporated into the formal part of the art 12(3) declaration and does not bind the Prosecutor or the Court. ICC Prosecutors have indicated that when investigating a situation, they will examine potential crimes committed by all parties to a conflict.²⁷

In her November 2015 report, the Prosecutor indicated her intention to ‘closely follow the progress and findings of the national and international investigations’ into MH17.²⁸ The Prosecutor enjoys considerable discretion under the *Rome Statute*. She may decide not to include MH17 in the formal investigation concerning the situation in Ukraine or not to bring specific charges in relation to the incident. However, the following discussion proceeds on the assumption that the Prosecutor will include MH17 in the investigation, which may lead to charges. It demonstrates that a number of legal and procedural challenges remain.

B *Has a Crime within the Jurisdiction of the Court Been Committed?*

To bring charges concerning MH17, the Prosecutor must demonstrate that a crime within the jurisdiction of the Court has been committed. The *Rome Statute* limits the jurisdiction of the ICC to four substantive crimes: genocide; crimes against humanity; war crimes; and (perhaps eventually) aggression.²⁹ This question is therefore fundamental to the ICC’s jurisdiction regarding MH17: if the downing of MH17 cannot be characterised as one of these crimes then the ICC cannot prosecute the incident. The most likely characterisation of the downing as MH17 within the substantive jurisdiction of the ICC is as a potential war crime under art 8 of the *Rome Statute*.³⁰ The main ‘threshold’ requirement for war crimes under art 8 is the existence of an armed conflict.³¹ It is thus necessary to ask whether, as at 17 July 2014, an armed conflict existed in Ukraine. Without exploring the situation in Ukraine in detail, it is clear that the situation in eastern Ukraine was one of armed conflict as opposed to internal disturbance and that a non-international armed conflict existed between the armed forces of the government of Ukraine and the separatists.³²

A related issue is whether the alleged conduct of Russia in supporting the separatists ‘internationalised’ the conflict. For international humanitarian law,

²⁷ International Criminal Court, Office of the Prosecutor, ‘Statement by the Chief Prosecutor Luis Moreno-Ocampo on the Uganda Arrest Warrants’ (14 October 2005) 2–3.

²⁸ *OTP Preliminary Activities Report 2015*, above n 23, 25 [110].

²⁹ *Rome Statute* arts 5–8.

³⁰ It is unlikely that the downing of MH17 would be considered a crime against humanity as it would require demonstrating that the downing of the plane was a widespread or systematic attack against a civilian population, pursuant to a state or organisational policy: see *ibid* art 7. The facts of the downing of MH17, as known, do not easily match these requirements.

³¹ See Preparatory Commission for the International Criminal Court, *Finalized Draft Text of the Elements of Crimes*, UN Doc PCNICC/2000/INF/3/Add.2 (6 July 2000) 18–48 (*Elements of Crimes*).

³² See, eg, International Committee of the Red Cross, *Ukraine: ICRC Calls on All Sides to Respect International Humanitarian Law* (23 July 2014) <<https://perma.cc/2CGZ-MVKH>>; Human Rights Watch, *Eastern Ukraine: Questions and Answers about the Laws of War Update* (11 September 2014) <<https://perma.cc/8ZEL-SRQD>>; Robert Heinsch, ‘Conflict Classification in Ukraine: The Return of the “Proxy War”?’ (2015) 91 *International Law Studies* 323, 357, 360.

the test for internationalising an armed conflict is that of ‘overall’ control, namely:

The control required by international law may be deemed to exist when a State ... *has a role in organising, coordinating or planning the military actions* of the military group, in addition to financing, training and equipping or providing operational support to that group. Acts performed by the group or members thereof may be regarded as acts of de facto State organs regardless of any specific instruction by the controlling State concerning the commission of each of those acts.³³

This is distinct from the test adopted by the International Court of Justice for attributing conduct to a state for the purpose of state responsibility, which is one of ‘effective control’.³⁴ While it is difficult to assess the extent of Russian assistance to the separatists, the best view is that, at least as at 17 July 2014, it had not reached the level of overall control required to internationalise the conflict.³⁵ Thus a non-international armed conflict existed in eastern Ukraine between government forces and the separatists on 17 July 2014. The victims of MH17 were civilians, taking no part in hostilities, and were protected by international humanitarian law.³⁶ As the nexus between the alleged crime and the armed conflict is clear, the threshold elements of war crimes have been fulfilled.

The conduct must still fall within one of the war crimes enumerated in art 8 of the *Rome Statute*. The possible charges in the context of a non-international armed conflict would be: the war crime of murder as a violation of Common Article 3 to the *Geneva Conventions* of 1949;³⁷ and the war crime of ‘[i]ntentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities’, as an ‘other serious violation’ of international humanitarian law applicable in non-international armed conflict.³⁸ The relevant elements of crime for the war crime of murder require that: (1) the accused killed one or more persons; (2) those persons had a protected status (here, civilians); and (3) that the accused was aware of the

³³ *Prosecutor v Tadić (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1-A, 15 July 1999) [137] (emphasis in original).

³⁴ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14, 64–5 [115].

³⁵ See above n 32.

³⁶ *Elements of Crimes*, UN Doc PCNICC/2000/INF/3/Add.2, 31–42. See also *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)*, opened for signature 8 June 1977, 1125 UNTS 609 (entered into force 7 December 1978) art 13; *Geneva Convention (III) Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) art 3(1)(a).

³⁷ *Rome Statute* art 8(2)(c). See *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950); *Geneva Convention Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950); *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (‘*Geneva Convention IV*’).

³⁸ *Rome Statute* art 8(2)(e)(i).

factual circumstances that established this status.³⁹ Similarly, for the war crime of attacking civilians, the elements require that: (1) the accused directed an attack; (2) the object of the attack was a civilian population as such or individual civilians not taking direct part in hostilities; and (3) the perpetrator intended the civilian population as such or individual civilians not taking direct part in hostilities to be the object of the attack.⁴⁰ There is some uncertainty as to whether murder under Common Article 3 would incorporate killings in relation to combat activities. On a narrow view, the war crime of murder only applies to those deaths occurring while civilians are ‘in the power of’ a party to the conflict.⁴¹ Thus, even if MH17 was deliberately targeted in violation of the principle of distinction, because the attack occurred in the context of an armed conflict and would be governed by international humanitarian law rules on the conduct of hostilities, and the civilians were not ‘in the power of’ a party to the conflict, the resulting deaths would not constitute the crime of murder, but must instead be characterised as the war crime of intentionally targeting civilians.⁴² A wider view, which has been applied by the International Criminal Tribunal for the Former Yugoslavia (‘ICTY’), would hold that civilian killings in the course of hostilities would be considered as constituting the war crime of murder.⁴³ Given the uncertainty, this commentary will consider both potential crimes in the context of MH17.

Ascertaining the facts surrounding MH17 and the available evidence will be essential to any assessment of whether it falls within the scope of these charges. As noted above, there are a number of possible scenarios. This analysis will focus on the most likely and widely held view, which is that the separatists fired the missile. The most straightforward scenario is: (1) if the separatists targeted MH17, knowing it was a civilian aircraft, and intended to destroy it. This would satisfy both the conduct and mental elements of the war crimes of murder and intentionally targeting civilians. The more complicated scenarios are therefore those in which: (2) the separatists targeted MH17, intending to destroy it, but believed (mistakenly) it was a Ukrainian military plane; and (3) the separatists targeted MH17, intending to destroy it, but did not take steps to confirm whether it was a civilian or military plane (ie were reckless as to whether it was a lawful target or not).

In both scenarios two and three, the mental elements of the two war crimes considered above are relevant. For murder under art 8(2)(c)(i), the accused must be aware that the victims were civilians.⁴⁴ For intentionally directing attacks at civilians under art 8(2)(e)(i), the perpetrator must intend that the civilian population or individual civilians were the object of the attack.⁴⁵ For scenario two, art 32(1) of the *Rome Statute* also potentially applies. That article provides

³⁹ *Elements of Crimes*, UN Doc PCNICC/2000/INF/3/Add.2, 31, 37–8.

⁴⁰ *Ibid* 41.

⁴¹ See Sarah Knuckey, ‘Murder in Common Article 3’ in Andrew Clapham, Paola Gaeta and Marco Sassoli (eds), *The 1949 Geneva Conventions: A Commentary* (Oxford University Press, 2015) 449, 452–7.

⁴² *Ibid*.

⁴³ *Prosecutor v Strugar (Judgement)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-01-42-T, 31 January 2005) [240].

⁴⁴ *Elements of Crimes*, UN Doc PCNICC/2000/INF/3/Add.2, 37–8.

⁴⁵ *Ibid* 41.

that a mistake of fact will preclude criminal responsibility when it negates the mental element of a crime. This would appear to be the case in scenario two as, had MH17 been a military flight, it would have been a lawful target under international humanitarian law. The accused were operating under a mistake of fact as to the military nature of the plane, which would negate the mental element for both offences. However, art 32 does not indicate whether a mistaken belief of fact must be reasonable or honestly held. Commentators have suggested that a mistake of fact must have been reasonably held and credible, or that the defence may be unavailable where an accused has been negligent or reckless in forming or maintaining that belief.⁴⁶ The ICC, which has not yet considered a mistake of fact, would have to examine how this might apply in the circumstances surrounding MH17, although it is highly unlikely to introduce the concept of reasonableness given its approach to negligence under art 30 of the *Rome Statute*.⁴⁷ The part of the BUK system responsible for firing the missile does not allow the user to distinguish between a civilian and military flight when targeting; all that is seen is a 'blip' on a screen. However, other parts of the missile system should be able to detect a signal from the 'Identification Friend or Foe' transponder on a civilian aircraft that would indicate the civilian nature of the target. It is not known whether those parts of the missile system were operational or if the separatists were aware or trained as to how to use and interpret the information being received. This may affect the reasonableness of the belief that MH17 was a military object.

For scenario three, the issue is whether the *Rome Statute* contemplates recklessness as being sufficient to establish the requisite mental element for the crimes. The answer appears to be no. Unlike other international criminal tribunals, the *Rome Statute* includes a provision specifically addressing the mental element of crimes. Article 30 provides that, unless otherwise specified, 'a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge'. A person has intent where: '(a) In relation to conduct, that person means to engage in the conduct; [or] (b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events'.⁴⁸ In this context, "knowledge" means awareness that a circumstance exists or a consequence will occur in the ordinary course of events'.⁴⁹ It is not clear as to whether the *Rome Statute* incorporates responsibility based on recklessness, with both commentators and Chambers

⁴⁶ Cassese, for example, suggests that a mistake must be reasonable: Antonio Cassese et al, *Cassese's International Criminal Law* (Oxford University Press, 3rd ed, 2013) 222. See also Jens Ohlin, 'Mistake of Fact' in Antonio Cassese (ed), *The Oxford Companion to International Criminal Justice* (Oxford University Press, 2009) 421–2. But see Kai Ambos, *Treatise on International Criminal Law — Volume 1: Foundations and General Part* (Oxford University Press, 2013) 370.

⁴⁷ See *Prosecutor v Lubanga (Judgement)* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/06, 1 December 2014) [447]–[449]. See also below n 50.

⁴⁸ *Rome Statute* art 30(2).

⁴⁹ *Ibid* art 30(3).

divided on the issue.⁵⁰ The ICC Appeals Chamber appears to have confirmed that art 30 does not incorporate recklessness or negligence; rather, there must be virtual certainty that a consequence will occur.⁵¹ This is a high standard for mens rea and most likely means that recklessness as to whether MH17 was a civilian or military aircraft will not suffice for criminal responsibility under the *Rome Statute*. Again, the circumstances in which the missile was fired will be central to this issue. If the separatists employed the missile without all parts of the system being operational and/or with inadequate training, the act could be considered reckless. On the other hand, it could equally be said that because they were inadequately trained they were not even aware of the possibility that MH17 was a civilian flight.

Thus, only scenario one presents a ‘straightforward’ case of a crime within the ICC’s jurisdiction. Even for that scenario, it is also necessary to mention art 8(1) of the *Rome Statute*. That provision states that the ICC ‘shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes’. Although not a strict requirement, the Prosecutor must consider the existence of a plan or policy when deciding to bring charges. This element would not be easy to satisfy in the situation of MH17, even in scenario one, as there is no evidence of a policy to target and destroy civilian aircraft or a pattern of large scale commission of such crimes. The Prosecutor may be able to incorporate MH17 as part of a wider plan or policy of attacking civilians in Ukraine, but MH17 is itself unlikely to fulfil this element.

At the initial stage (ie the decision whether to open an investigation) there is a low evidentiary threshold.⁵² The Prosecutor can proceed to an investigation if the commission of a war crime is only one possible inference from the facts. However, there is a reasonable likelihood that, if the ICC did exercise jurisdiction with regard to MH17, charges would be unlikely to lead to convictions in respect of scenarios two and three, even with solid evidence. Unlike other proposals discussed following, the ICC is not able to rely on crimes under national law (for example ‘ordinary’ murder or offences against aircraft) to supplement its substantive jurisdiction where international crimes are not established. Therefore, one of the risks in relying on the ICC as the mechanism for accountability for MH17 is that there may be a greater chance of charges for MH17 not being brought or being withdrawn as evidence emerges concerning the intent or knowledge of accused, or ultimately of an acquittal.

⁵⁰ See Mohamed Elewa Badar and Sara Porro, ‘Rethinking the Mental Elements in the Jurisprudence of the ICC’ in Carsten Stahn (ed), *The Law and Practice of the International Criminal Court* (Oxford University Press, 2015) 649, 654–5, citing Antonio Cassese, *International Criminal Law* (Oxford University Press, 2nd ed, 2008) 73, Hans-Heinrich Jescheck, ‘The General Principle of International Criminal Law Set Out in Nuremberg, as Mirrored in the ICC Statute’ (2004) 2 *Journal of International Criminal Justice* 38, 45 and Gerhard Werle and Florian Jessberger, ‘“Unless Otherwise Provided”: Article 30 of the ICC Statute and the Mental Element of Crimes under International Criminal Law’ (2005) 3 *Journal of International Criminal Justice* 35.

⁵¹ *Prosecutor v Lubanga (Judgement)* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/06-A5, 1 December 2014) [6], [447].

⁵² See *Situation in the Republic of Kenya (Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya)* (International Criminal Court, Pre-Trial Chamber II, Case No ICC-01/09, 31 March 2010) [27].

C Admissibility

The criteria for admissibility of a case (or cases) related to MH17 are also relevant; in particular the criteria of complementarity and gravity.⁵³ Under the *Rome Statute*, national courts are intended to be the primary mechanism for responding to international crimes. It is only where the affected state has failed to take action to investigate or prosecute, or is unable or unwilling to do so genuinely, that the ICC would exercise jurisdiction. The Prosecutor must consider the admissibility of a case before opening an investigation or bringing a prosecution.⁵⁴ Moreover, the accused and states with a jurisdictional link to the case can challenge the admissibility of a case.⁵⁵ For MH17, this means that Ukraine and any of the states potentially able to exercise jurisdiction (including Russia) could challenge admissibility on the grounds they were already exercising jurisdiction. The Chambers arguably also have an obligation to consider the admissibility of a case, separate to any formal challenge.⁵⁶

To determine whether a case is inadmissible on the basis of complementarity, the Chambers have adopted a two-stage test. First, it is necessary to consider: (a) whether there is an investigation or prosecution;⁵⁷ and (b) whether that investigation or prosecution concerns the ‘same person, same conduct’.⁵⁸ Chambers have recognised that at the early stages of proceedings, where charges have not been brought against individuals, the focus is on the same class of likely accused.⁵⁹ It is also irrelevant whether the national proceedings will characterise the conduct in the same way as the ICC (ie it does not have to be tried as an international crime).⁶⁰ Only where this first step is satisfied will the Court look at

⁵³ *Rome Statute* arts 53(1)(a)–(c).

⁵⁴ *Ibid* art 53.

⁵⁵ *Ibid* art 19.

⁵⁶ See *ibid* art 17: ‘The Court shall determine that a case is inadmissible ...’ (emphasis added).

⁵⁷ *Ibid* art 17(1)(a). See also *Prosecutor v Katanga (Judgment on the Appeal against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case)* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/07 OA 8, 25 September 2009) [78].

⁵⁸ *Prosecutor v Lubanga (Decision Concerning Pre-Trial Chamber I’s Decision of 10 February 2006 and the Incorporation of Documents into the Record of the Case)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/04-01/06-8-Corr, 24 February 2006) [31]; *Prosecutor v Muthaura (Judgment on the Appeal of the Republic of Kenya against the Decision of Pre-Trial Chamber II of 30 May 2011)* (International Criminal Court, Appeals Chamber, Case No ICC-01/09-02/11 OA, 30 August 2011) [39]–[40].

⁵⁹ *Situation in the Republic of Kenya (Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in Kenya)* (International Criminal Court, Pre-Trial Chamber II, ICC-01/09, 31 March 2010) [50]. See also *Prosecutor v Ruto (Judgement on the Appeal of the Republic of Kenya against the Decision of Pre-Trial Chamber II of 30 May 2011)* (International Criminal Court, Appeals Chamber Case No ICC-01/09-01/11 OA, 30 August 2011) [39] (‘*Ruto Admissibility Decision*’).

⁶⁰ ICC Chambers have confirmed that it must be the ‘conduct’ that is substantially the same: see *Ruto Admissibility Decision* (International Criminal Court, Appeals Chamber Case No ICC-01/09-01/11 OA, 30 August 2011) [40]; *Prosecutor v Gaddafi (Judgment on the Appeal of Libya against the Decision of Pre-Trial Chamber I of 31 May 2013)* (International Criminal Court, Appeals Chamber, Case No ICC-01/11-01/11 OA 4, 21 May 2014) [60]–[61].

whether proceedings are genuine.⁶¹ Applying this approach to MH17, the JIT is already conducting a criminal investigation to establish the facts and to bring those responsible for MH17 to justice. Although the JIT has not released public information as to its likely targets, any ICC cases into MH17 will likely be a similar, if not identical, investigation. This would satisfy the ‘same person, same conduct’ test and render the case (or cases) *prima facie* inadmissible. It would then be necessary to look at the unwilling and unable requirements.⁶² The states forming part of the JIT have functioning judiciaries and the relevant legislation to prosecute those responsible (see Part VI below). One factor that might make the ICC view these states as ‘unable’ to prosecute is a requirement that the state have custody of the accused in order for a prosecution to proceed.⁶³ In the absence of cooperation and extradition agreements with Russia (assuming the suspects might be located in Russian territory) it might be impossible to secure custody or for a trial to proceed. This factor was significant in the *Prosecutor v Gaddafi* admissibility proceedings.⁶⁴ However, as discussed below, this is also an issue for the ICC. There is also the possibility that the JIT would cease its investigation once the ICC opens an examination and in effect ‘defer’ to the ICC. This has happened in relation to proceedings in the Democratic Republic of Congo, for example. There, the Chamber accepted that such ‘burden sharing’ between national systems and the ICC was permissible.⁶⁵ That decision was controversial.⁶⁶ Moreover, now that the ICC faces greater constraints on its resources, the Court may be less willing to accept cases where national systems can investigate and are investigating.

A further issue is gravity. The ICC is intended to prosecute the most serious offences under international law. Gravity is included as an admissibility requirement in art 17(c) of the *Rome Statute* and is a factor the Prosecutor must take into account when considering whether to prosecute. In assessing gravity, the Prosecutor considers a number of factors, including the scale, nature, manner of commission of the crimes and their impact.⁶⁷ As of itself, and in no way suggesting that it was not serious, the downing of MH17 may perhaps not be considered one of the *most* serious crimes, warranting the intervention of the ICC

⁶¹ *Rome Statute* art 17(1)(a). See *Ruto Admissibility Decision* (International Criminal Court, Appeals Chamber Case No ICC-01/09-01/11 OA, 30 August 2011) [41]; *Prosecutor v Katanga (Judgement on the Appeal against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case)* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/07 OA 8, 25 September 2009) [78].

⁶² *Rome Statute* arts 17(2)–(3).

⁶³ *Ibid* art 17(3).

⁶⁴ *Prosecutor v Gaddafi (Decision on the Admissibility of the Case)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/11-01/11, 31 May 2013) [215].

⁶⁵ *Prosecutor v Katanga (Judgement on the Appeal against the Oral Decision of Trial Chamber II of 12 June 2009 on the Admissibility of the Case)* (International Criminal Court, Appeals Chamber, Case No ICC-01/04-01/07 OA 8, 25 September 2009) [113].

⁶⁶ See Matthew E Cross and Sarah Williams, ‘Recent Developments at the ICC: *Prosecutor v Germain Katanga and Mathieu Ngudjolo Chui* — A Boost for “Co-operative Complementarity”?’ (2010) 10 *Human Rights Law Review* 336; Carsten Stahn, ‘Perspectives on *Katanga*: An Introduction’ (2010) 23 *Leiden Journal of International Law* 311, 317.

⁶⁷ International Criminal Court, *Regulations of the Office of the Prosecutor*, Doc No ICC-BD/05-01-09 (entered into force 23 April 2009) reg 29(2); International Criminal Court, Office of the Prosecutor, ‘Policy Paper on Preliminary Examinations’ (November 2013) [61] <<https://perma.cc/VMT9-TTKS>>.

and its limited resources. The number of deaths is low when compared to some, but not all, situations in which the Court is operating.⁶⁸ The likely suspects will be the low-level soldiers firing the missile, and their immediate commanders, rather than those higher up the chain of command and any Russian commanders. Yet, the nature and manner of commission of the crime, as well as the broader impact on the safety of civilian air travel, would also be considered in any assessment. In 2015, a Pre-Trial Chamber directed the Prosecutor to reconsider her decision that a single incident, the Gaza Flotilla incident, with a limited number of casualties (10), was not of sufficient gravity.⁶⁹ The majority of the Chamber signalled their view that the incident was significantly grave.⁷⁰ Ultimately, the Prosecutor might determine that MH17 itself is not of sufficient gravity to warrant the intervention of the ICC in terms of specific charges. That decision would not be subject to review by the Pre-Trial Chamber.⁷¹ In addition to considerations of complementarity and gravity, the Prosecutor has discretion to determine that a prosecution would not be in the interests of justice, taking into account all the circumstances,⁷² although that determination is subject to review.⁷³

Therefore, there are jurisdictional and admissibility obstacles before the ICC could try cases in respect of the downing of MH17. A close examination of the *Rome Statute* framework suggests that other fora, particularly national jurisdictions, may be better placed to do so. Moreover, there are other challenges to securing convictions, which are explored next.

D Other Aspects of the International Criminal Court

Three other features of the ICC are relevant to the question of the most appropriate mechanism for accountability for the downing of MH17. The first is the ability of victims to participate formally in ICC proceedings and, should there be a conviction, the ability to seek an order for reparations.⁷⁴ Although the right to participate has been restricted somewhat to protect the right of an

⁶⁸ See International Criminal Court, 'The Office of the Prosecutor of the International Criminal Court Opens Its First Investigation' (Press Release, ICC-OTP-20040623-59, 23 June 2004). The Prosecutor opened its first investigation into the situation in the Democratic Republic of Congo, where there were reports of 'thousands of deaths by mass murder and summary execution ... since 2002'.

⁶⁹ *Situation on Registered Vessels of the Union of the Comoros, the Hellenic Republic and the Kingdom of Cambodia (Decision on the Request of the Union of the Comoros to Review the Prosecutor's Decision Not to Initiate an Investigation)* (International Criminal Court, Pre-Trial Chamber I, Case No ICC-01/13-34, 16 July 2015) [26].

⁷⁰ *Ibid.* The majority found that the Prosecutor had failed to take into account a number of relevant factors, or to give them sufficient weight. The Appeals Chamber declined to consider an appeal from the Prosecutor in November 2015.

⁷¹ This is because the investigation would have been initiated by the Prosecutor acting *proprio motu*. A right to review only exists where the situation was referred by a state party or the Security Council: see *Rome Statute* art 53(3)(a). Moreover, there is no right to review of the individuals and incidents in respect of which the Prosecutor brings charges once an investigation has been initiated.

⁷² *Rome Statute* art 53(2)(c).

⁷³ *Ibid* art 53(3)(b).

⁷⁴ *Ibid* arts 68(3), 75.

accused to a fair and expeditious trial,⁷⁵ this is a benefit for victims — the families of those on board MH17 — that will arise from utilising the ICC.

Second, one of the reasons advanced for an international option is that this would ‘maximize the prospects for securing international cooperation with the tribunal’.⁷⁶ Yet, the ICC’s own record in securing cooperation is far from perfect. Ukraine has committed to cooperate with the ICC with respect to its investigations as if it was a party to the *Rome Statute*.⁷⁷ Australia and the Netherlands, as well as several other states with nationals killed on MH17, are party to the *Rome Statute* and are required to cooperate.⁷⁸ However, where the Prosecutor acts *proprio motu* under art 15, states that are not party to the *Rome Statute* (most importantly Russia, but also Malaysia) have no obligation to cooperate with the Court. The JIT has remarked that the investigation is progressing well and several states, including Russia, have provided or offered to provide evidence.⁷⁹ Thus it appears that getting access to the required physical evidence may be possible, assuming states would also cooperate with the Court. Obtaining access to suspects and witnesses affiliated to or in areas controlled by the armed groups or Russia might prove problematic.

This then leads to the third issue. The *Rome Statute* precludes trials in absentia.⁸⁰ Given that the accused will likely be within territory controlled by the armed groups or in Russia, it will be difficult to secure custody of the accused. This will result in proceedings effectively stalling in the pre-trial stage, as a trial cannot proceed. Ultimately, a failure to secure custody may result in the Prosecutor suspending an investigation, as seen with respect to Darfur.⁸¹ The experience of other international criminal tribunals has demonstrated that, eventually, circumstances may change and lead to an accused being surrendered. For example, it took several years to secure the surrender of Radovan Karadžić and Ratko Mladić to the ICTY. It thus becomes a question of how long the ICC would be prepared to wait to gain custody, and the political and other pressure that states would be prepared to apply to secure custody.

IV OPTION 2: ‘MH17 TRIBUNAL’ ESTABLISHED BY THE SECURITY COUNCIL

The ICC is not the preferred accountability mechanism for the affected states, including Australia. This lack of enthusiasm for the ICC likely reflects the uncertainties reflecting the ability of the ICC to secure accountability for MH17, as outlined above in Part III, and the discretion vested in the ICC Prosecutor, which means that she may decide not to pursue charges for MH17. Instead, the

⁷⁵ Ibid art 68(3).

⁷⁶ *Draft Resolution Meeting*, UN Doc S/PV.7498, 3 (Malaysia).

⁷⁷ *First Declaration*, above n 20; *Second Declaration*, above n 12.

⁷⁸ See *Rome Statute* pt IX.

⁷⁹ Janene Pieters, ‘Prosecutor: MH17 Investigation Going Well’, *Netherlands Times* (online), 30 June 2015 <<https://perma.cc/TCE8-9DKP>>; Landelijk Parket, *Joint Investigation Team’s Reaction to OVV Report* (13 October 2015) Openbaar Ministerie <<https://perma.cc/B96U-XJAM>>; James Massola, ‘MH17 UN Criminal Tribunal Vetoed by Russia in Blow to Australia’, *The Sydney Morning Herald* (online), 30 July 2015 <<https://perma.cc/7T2F-7ZXS>>.

⁸⁰ *Rome Statute* art 63 recognises only limited exceptions.

⁸¹ *Security Council Inaction on Darfur ‘Can Only Embolden Perpetrators’ — ICC Prosecutor* (12 December 2014) UN News Centre <<https://perma.cc/3BQS-YQPK>>.

affected states have sought to establish an ad hoc international mechanism: an ‘international criminal tribunal for MH17’. Although there has not been much recent public discussion, as at April 2016, that option seems to remain the preferred mechanism, although its legal basis and framework may change.

It was initially hoped that an ‘MH17 tribunal’ would be established by a resolution of the Security Council. As outlined above, in July 2015 the five states participating in the JIT tabled a draft resolution.⁸² Although ultimately vetoed by Russia, the draft resolution and the proposed statute for an ‘international criminal tribunal for MH17’ provided guidance as to the issues considered important and what this mechanism might look like. The purpose of the resolution was to create an ad hoc international criminal tribunal for MH17 using the Chapter VII powers of the Security Council. This would have given the MH17 tribunal the same legal basis as the International Criminal Tribunal for Rwanda (‘ICTR’), the ICTY and the Special Tribunal for Lebanon (‘STL’).⁸³

Beyond the strong political statement that this would have made, there are two main advantages of this model. First, this would endow the MH17 tribunal with Chapter VII powers; that is, there would be an obligation on *all* member states of the United Nations to cooperate with the tribunal in accordance with art 25 of the *Charter of the United Nations* (‘UN Charter’). It should be noted that this is not necessarily a result of a Security Council tribunal; the STL does not possess Chapter VII powers although it was established by the Council.⁸⁴ However, it was clearly the intention of the sponsoring states that the MH17 tribunal would be endowed with such powers. Yet it should also be recalled that even the ICTR and ICTY, which did have Chapter VII powers, faced considerable challenges in securing cooperation.⁸⁵ The Council remains reluctant to take action to enforce the obligations of member states to cooperate with international tribunals and, given Russia’s veto on the Council, it is unlikely that the Council would take any enforcement action to support the MH17 tribunal. In this sense, cooperation would be as much of a challenge for the MH17 tribunal as it would be for the ICC, although there would at least be a clear basis for an obligation on Russia to cooperate, which is not provided by the *Rome Statute*.

In response to the likely challenge of securing custody of the accused, the *Draft Statute* included a provision on trials in absentia.⁸⁶ This provision, which is

⁸² *Draft Resolution Meeting*, UN Doc S/PV.7498, 2.

⁸³ See SC Res 955, UN SCOR, 49th sess, 3453rd mtg, UN Doc S/RES/955 (8 November 1994) annex (‘*Statute of the International Tribunal for Rwanda*’); SC Res 827, UN SCOR, 48th sess, 3217th mtg, UN Doc S/RES/827 (25 May 1993), as amended by SC Res 1877, UN SCOR, 64th sess, 6155th mtg, UN Doc S/RES/1877 (7 July 2009) (‘*Statute of the International Criminal Tribunal for the Former Yugoslavia*’); SC Res 1757, UN SCOR, 62nd sess, 5685th mtg, UN Doc S/RES/1757 (30 May 2007) annex (‘*Agreement between the United Nations and the Lebanese Republic on the Establishment of a Special Tribunal for Lebanon*’ or ‘*STL Agreement*’) and attachment (‘*Statute of the Special Tribunal for Lebanon*’ or ‘*STL Statute*’).

⁸⁴ *STL Agreement* art 15. See also Göran Sluiter, ‘Responding to Cooperation Problems at the STL’ in Amal Alamuddin, Nidal Nabil Jurdi and David Tolbert (eds), *The Special Tribunal for Lebanon: Law and Practice* (Oxford University Press, 2014) 134.

⁸⁵ Kenneth Roth and Joanna Weschler, *Letter to Security Council Members: Action Urged regarding Non-Cooperation with ICTR and ICTY* (25 October 2002) Human Rights Watch <<https://perma.cc/MDJ5-R9BG>>.

⁸⁶ *Draft Statute*, UN Doc S/2015/562, art 38.

based on that found in the *Statute for the Special Tribunal for Lebanon*,⁸⁷ would allow a trial to continue without custody of the accused in limited circumstances. This is a further possible advantage of this model over the ICC. The reasoning behind the inclusion of this provision is similar to its inclusion in the STL: where the likely accused will probably be found in territory under the control of a state that is unlikely to cooperate or to surrender the accused, then a trial in absentia at least allows proceedings to proceed. However, this ‘practical’ solution to the likelihood of non-cooperation has serious implications for the fair trial rights of the accused.⁸⁸ It also removes an important feature of an expressivist trial, namely the sight of the accused sitting in the dock, and reinforces the inability of an international mechanism (and the states supporting it) to secure custody.⁸⁹ While the STL has held that a trial in absentia is not inconsistent with the right of the accused to be present at trial,⁹⁰ there remain concerns as to the appropriateness of this mechanism in future tribunals.

A third benefit of the proposed model would have been to accord primacy to proceedings in the MH17 tribunal in respect of national proceedings. That is, the MH17 tribunal could call for related proceedings in *any* UN member state to be suspended and transferred to its own jurisdiction for trial. As noted above, the ICC does not adopt primacy relative to national systems, but applies the principle of complementarity, which recognises that national courts should be given the first option of prosecuting. The MH17 tribunal, having primacy, would likely lead to a single criminal case being heard before the MH17 tribunal, as distinct from different proceedings in each of those national systems that might exercise jurisdiction.

The substantive jurisdiction of the MH17 tribunal also offered an advantage over the ICC. It included jurisdiction for war crimes committed in both international and non-international armed conflicts, as well as the crimes under Ukrainian law (in particular murder) and Malaysian law (crimes against civil aircraft).⁹¹ Thus, if the contextual or mental elements of the war crimes charges could not be established on the evidence, other crimes would be available with

⁸⁷ *STL Statute* art 22.

⁸⁸ See *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 14 (*ICCPR*); *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), as amended by *Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Amending the Control System of the Convention*, opened for signature 13 May 2004, CETS No 194 (entered into force 1 June 2010) art 6; Paola Gaeta, ‘Trials In Absentia before the Special Tribunal for Lebanon’ in Amal Alamuddin, Nidal Nabil Jurdi and David Tolbert (eds), *The Special Tribunal for Lebanon: Law and Practice* (Oxford University Press, 2014) 229; Ralph Riachy, ‘Trials in Absentia in the Lebanese Judicial System and at the Special Tribunal for Lebanon: Challenge or Evolution?’ (2010) 8 *Journal of International Criminal Justice* 1295.

⁸⁹ For this criticism of the STL, see Dov Jacobs ‘The Unique Rules of Procedure of the STL’ in Amal Alamuddin, Nidal Nabil Jurdi and David Tolbert (eds), *The Special Tribunal for Lebanon: Law and Practice* (Oxford University Press, 2014) 111, 132.

⁹⁰ *Prosecutor v Ayyash (Decision to Hold Trial in Absentia)* (Special Tribunal for Lebanon, Trial Chamber, Case No STL-11-01/I/TC, 1 February 2012); *Prosecutor v Ayyash (Decision on Defence Appeals against Trial Chamber’s Decision on Reconsideration of the Trial in Absentia Decision)* (Special Tribunal for Lebanon, Appeals Chamber, Case No STL-11-01/PT/AC/AR126.1, 1 November 2012).

⁹¹ *Draft Statute*, UN Doc S/2015/562, arts 1, 3.

no contextual elements and less onerous mental elements (eg reckless or negligent homicide). It also allows the tribunal to incorporate modes of liability under national law, rather than those found in the *Rome Statute*. The *Draft Statute* does not include an equivalent provision to art 30 of the *Rome Statute*, so criminal responsibility based on recklessness may be permitted. This means it is more likely that charges would succeed and lead to a conviction before the MH17 tribunal than before the ICC.

In any event, Russia elected to exercise its veto, while China abstained from voting.⁹² Russia's main argument (apart from disputing the facts) was that to establish the tribunal at that stage was premature. Russia also questioned the impartiality and independence of the investigation.⁹³ While it is not impossible that a further vote may be held, given the level of tension and the uncertainty regarding Russian involvement, it appears unlikely that Russia will accept, or at least not veto, an MH17 tribunal established by the Security Council. States have now considered establishing the MH17 tribunal by other means.

V OPTION 3: AN MH17 TRIBUNAL ESTABLISHED BY OTHER MEANS?

What then are the remaining options for establishing an MH17 tribunal? Two other possible legal bases remain. One is for the involvement of the UN General Assembly. Yet this suggestion is problematic. The General Assembly has not to date *established* a tribunal. It has *requested* the UN Secretary-General to negotiate arrangements for an internationalised tribunal, including the obligations of the parties and the terms on which the UN would assist.⁹⁴ That tribunal, the Extraordinary Chambers in the Courts of Cambodia, was ultimately established pursuant to Cambodian law, supported by an agreement between the UN and the government of Cambodia.⁹⁵ It was not established as a subsidiary organ of the General Assembly. Moreover, the General Assembly lacks the binding powers of the Security Council under Chapter VII of the *UN Charter* and could not create an institution that could bind states that had not consented to the tribunal. Again, even if it were accepted that the tribunal could exercise jurisdiction over Russian nationals, the tribunal could not create an obligation for Russia — as a non-party — to cooperate with it.

The second option is for the creation of an MH17 tribunal pursuant to a treaty between the affected states, possibly also with the involvement of the United Nations. This would create a separate, international body with distinct legal personality. This provides a highly flexible option, limited only by the creativity

⁹² *Draft Resolution Meeting*, UN Doc S/PV.7498, 3.

⁹³ *Ibid* 5.

⁹⁴ *Situation of Human Rights in Cambodia*, GA Res 52/135, UN GAOR, 52nd sess, 70th plen mtg, Agenda Item 112(b), UN Doc A/RES/52/135 (27 February 1998) para 16; *Khmer Rouge Trials*, GA Res 57/228, UN GAOR, 57th sess, 77th plen mtg, Agenda Item 109(b), UN Doc A/RES/57/228 (27 February 2003); *Khmer Rouge Trials*, GA Res 57/228B, UN GAOR, 57th sess, 85th plen mtg, Agenda Item 109(b), UN Doc A/RES/57/228 B (22 May 2003) annex ('*Draft Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea*').

⁹⁵ *Agreement between the United Nations and the Royal Government of Cambodia concerning the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea*, signed 6 June 2003, 2329 UNTS 117 (entered into force 29 April 2005) ('*ECCC Agreement*').

of the states involved and the ‘inherent’ requirements of a criminal judicial institution. A treaty-based institution now appears to be the option favoured by the states affected, including Australia. There are two options for such a tribunal: first, the MH17 tribunal would not necessarily have to ‘sit’ within the legal system of any of the affected states. The alternative would be to base the tribunal within a national legal system, for example, that of the Netherlands, in the same manner as the Extraordinary Chambers in the Courts of Cambodia (‘ECCC’).⁹⁶ Given the range of affected states, the first option might be more appropriate. Like the Security Council option discussed above, it could also contain a broader range of crimes and different modes of liability to the ICC.

Yet this model also faces the challenge common to all treaty-based institutions of securing cooperation from states that are not party to the agreement and non-state actors beyond the control of the parties to the agreement. As a treaty, the agreement would bind only those states that are party to it and would not create obligations for other states to cooperate with the tribunal in the absence of specific agreements to do so. Thus, a treaty-based tribunal would be in a similar position to the ICC, which is also treaty-based. The inclusion of trials in absentia in a treaty-based mechanism would also be controversial (the STL was established by the Security Council), particularly where that tribunal would potentially seek to exercise jurisdiction in absentia in respect of nationals of non-party states.

Another issue is the inability of a treaty-based tribunal to establish primacy and the ability to concentrate criminal proceedings in respect of MH17 in one institution. While the MH17 tribunal treaty could require primacy in respect of proceedings before courts in the states that are party to it, it cannot do so in respect of proceedings in non-party states.⁹⁷ Thus, while this option minimises to an extent the number of parallel proceedings in national jurisdictions, it does not prevent proceedings taking place in, for example, Russia.

Other key disadvantages of a treaty-based mechanism include it being easier for opponents of the tribunal (ie Russia) to suggest that it is not impartial or independent as it was established by those states most directly affected. This could be countered partially by involving the UN, particularly the Office of Legal Affairs and the Secretary-General, and by requiring the appointment of judges and personnel from other states. The *Draft Statute* for the MH17 tribunal (although premised on Security Council action) created a significant role for the UN in appointing judges, who were to be selected based on experience, with no requirement that judges of the nationality of the affected states be appointed.⁹⁸ That this might in fact occur was signalled by the reference to needing judges familiar with the relevant national laws to be applied by the tribunal (the laws of Malaysia and Ukraine). This is in contrast to arrangements for hybrid tribunals, such as the STL and SCSL, which require the appointment of ‘national’ judges.⁹⁹

⁹⁶ Ibid; *Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone*, signed 16 January 2002, 2178 UNTS 137 (entered into force 12 April 2002) annex (‘*Statute of the Special Court for Sierra Leone*’) art 1 (‘*SCSL Statute*’).

⁹⁷ See *Draft Statute*, UN Doc S/2015/562, art 10; *VCLT* art 34.

⁹⁸ *Draft Statute*, UN Doc S/2015/562, art 23.

⁹⁹ *SCSL Statute* art 12; *STL Statute* art 8.

Similar arrangements could be incorporated in a treaty-based tribunal. However, without a Security Council resolution or the involvement of the UN, there would be no obligation for other states to nominate judges.

Alternatively, the judges and personnel could be drawn exclusively from the affected states, and indeed some should be if national laws form part of the tribunal's applicable law. The instrument could also invite the participation of a judge of Russian nationality or nominated by Russia. The more 'closed' the selection, even of professional and qualified judges, the more vulnerable the institution will be to assertions that it is not fully independent and impartial. However, this view neglects that under the *Montreal Convention* and other principles of international law, the affected states would have the right to prosecute domestically (see below). What they would be doing is creating a tribunal to do jointly what each could do separately. While this does not itself guarantee the independence or impartiality of the tribunal, it does reinforce that national proceedings are acceptable in such circumstances. It also arguably overcomes any objections that the consent of the state of nationality of the accused would be required.¹⁰⁰

It is worth mentioning that only very limited rights of victim participation were included in the *Draft Statute* when compared to the ICC, STL and ECCC.¹⁰¹ Moreover, the power to award reparations, as seen in the ICC and other tribunals,¹⁰² was not replicated in the *Draft Statute*. Instead, such rights are restricted to compensation.¹⁰³ Therefore, the position and role of victims might be stronger before the ICC than before the MH17 tribunal as presently envisaged. While that could be altered in future versions of the *Draft Statute*, it does suggest that the states involved do not see victims as playing a central role, which sits somewhat inconsistently with their reliance on doing justice for 'victims' to justify an international mechanism.¹⁰⁴

VI OPTION 4: NATIONAL PROCEEDINGS

There are several states that could potentially exercise jurisdiction with respect to MH17 under national law. Relevant national legal provisions include: 'ordinary' crimes, such as murder or manslaughter; international crimes, in particular war crimes; and 'aviation-based' crimes incorporating criminal responsibility under the *Montreal Convention*. That convention aims to protect the safety of civil aviation and to provide appropriate measures for punishment of offenders for deterrence. It does so by creating the offence of unlawfully and intentionally destroying a civilian aircraft.¹⁰⁵ Each state party must criminalise

¹⁰⁰ For the contrary view, see Madeline Morris, 'High Crimes and Misconceptions: The ICC and Non-Party States' (2001) 64(1) *Law and Contemporary Problems* 13.

¹⁰¹ *Draft Statute*, UN Doc S/2015/562, art 42.

¹⁰² *Rome Statute* art 75; Extraordinary African Chambers in the Courts of Senegal, *Statute of the Extraordinary African Chambers within the Senegalese Judicial System for the Prosecution of International Crimes Committed on the Territory of the Republic of Chad during the Period from 7 June 1982 to 1 December 1990* (adopted 30 January 2013) art 27; Extraordinary Chambers in the Courts of Cambodia, *Internal Rules (Rev 9)* (adopted 16 January 2015) r 23 *quinquies*.

¹⁰³ *Draft Statute*, UN Doc S/2015/562, art 44.

¹⁰⁴ *Draft Resolution Meeting*, UN Doc S/PV.7498, 3.

¹⁰⁵ *Montreal Convention* art 1(b).

this offence and take measures to establish jurisdiction over the offences. Moreover, all states party to the *Montreal Convention* are subject to an obligation to prosecute where an alleged offender is on their territory and they do not extradite him or her to any other states mentioned.

A *Ukraine — The Territorial State*

The downing of MH17 occurred in Ukrainian territory, thus Ukraine can exercise jurisdiction based on the territorial principle. Territoriality is the primary basis of jurisdiction in international law and one that is clearly indicated by the *Montreal Convention*, to which Ukraine is a party.¹⁰⁶ Ukraine could also exercise jurisdiction based on the nationality of the offender if they are found to be Ukrainian. The relevant charges would be murder and war crimes and, if jurisdiction was based on territoriality, those provisions would apply to *all* victims of MH17. However, Ukraine is an unattractive venue for prosecution due to the security situation, allegations that Ukrainian forces may have been involved and the political tension between Russia and Ukraine. It is unlikely that Russia and the separatists would cooperate with a prosecution under Ukrainian law and the impartiality of the prosecution could be challenged easily.

B *Malaysia — The State of Registration*

Under international law, Malaysia as the state of registration of MH17 is entitled to exercise jurisdiction. The ‘flag state’ principle of jurisdiction is clearly recognised by international law and by the *Montreal Convention*.¹⁰⁷ Malaysia also suffered the second highest number of victims and was the destination country for MH17. The likely substantive crimes would be those under the national legislation implementing the *Montreal Convention*; that is, destroying a civilian aircraft.¹⁰⁸ As Malaysia was the state of registration, this would apply to the vessel, and prosecution could thus address the death of *all* victims regardless of nationality. However, Malaysia may be considered an unsuitable venue for prosecution due to practical concerns, such as its distance from the crash site, and legal arguments that its national carrier should not have been flying over a conflict zone and thus ‘contributing’ to the crime.

C *Netherlands — Passive Personality*

The majority of victims of MH17 were Dutch. The flight departed from Amsterdam. Alongside Ukraine and Malaysia, the Netherlands has the strongest connection to the flight. International law recognises jurisdiction based on the nationality of the victims in some circumstances, although this basis of jurisdiction is not as clearly established as territoriality or the nationality of the offender.¹⁰⁹ This basis of jurisdiction is not expressly recognised by the *Montreal Convention*. Dutch criminal law enables a prosecution to be brought in respect of international crimes, including war crimes, where the victim was

¹⁰⁶ Ibid art 5(1)(a).

¹⁰⁷ Ibid art 5(1)(b).

¹⁰⁸ Ibid art 1(b); *Aviation Offences Act 1984* (Malaysia) ss 9–10.

¹⁰⁹ See, eg, Cedric Ryngaert, *Jurisdiction in International Law* (Oxford University Press, 2nd ed, 2015) 110–14.

Dutch, even in the absence of any other connection to the crime and if the accused is not present in the Netherlands.¹¹⁰ This would apply to the Dutch victims of MH17. Recent amendments to the Dutch penal code appear to suggest that the Netherlands may also exercise passive personality jurisdiction with respect to *any crime* committed against a Dutch national, where that crime attracts a sentence of at least eight years' imprisonment under Dutch law and is also punishable in the territorial state.¹¹¹ This suggests that proceedings could be brought in the Netherlands at least in respect of the Dutch victims for war crimes or 'ordinary' crimes such as murder or aviation crimes (including those under the *Montreal Convention*) if these conditions are met.

Dutch law permits trials in absentia provided certain procedural requirements are satisfied, so it is possible that a trial based on passive personality could continue *without* custody of the accused.¹¹² Dutch law also provides for universal jurisdiction for war crimes in respect of the non-Dutch victims, but this requires the presence of the accused in the Netherlands.¹¹³ Presumably, presence must be voluntary (ie not an arrest orchestrated for the purpose of bringing the accused on to Dutch territory) although it is not clear when or for how long that presence must be established. It appears that jurisdiction may be established at least in relation to the Dutch victims without requiring custody of the accused. Although this raises the same issues as a trial in absentia discussed above in relation to an international mechanism, Dutch courts thus provide a possible forum for a trial to proceed in respect of the majority of the victims of MH17.

D Australia — Passive Personality

Australia's only connection to MH17 is the number of victims that were nationals of or had strong ties to Australia. Australian legislation implementing the *Montreal Convention*, the *Crimes (Aviation) Act 1991* (Cth), criminalises the unlawful destruction of an aircraft.¹¹⁴ However, this does not provide Australia with jurisdiction as MH17 was not registered or downed in the territory of Australia, and the perpetrators are not likely to be Australian and are not present in Australian territory. Australia could exercise jurisdiction on the basis of provisions in the *Criminal Code Act 1995* (Cth) sch ('*Criminal Code*') enabling prosecution for the murder of, or other crimes against, Australian nationals or residents outside Australian territory.¹¹⁵ Such crimes would be subject to applicable national laws concerning intent and modes of liability. Moreover, due to the use of passive personality jurisdiction, proceedings in Australia could only address the Australian victims.

¹¹⁰ *International Crimes Act 2003* (Netherlands) s 2(1)(b).

¹¹¹ See Cedric Ryngaert, 'Amendment of the Provisions of the Dutch Penal Code Pertaining to the Exercise of Extraterritorial Jurisdiction' (2014) 61 *Netherlands International Law Review* 243, 244; *Criminal Code 1881* (Netherlands) s 5.

¹¹² See *Code of Criminal Procedure 1921* (Netherlands) s 280; Evert F Stamhuis, 'In Absentia Trials and the Right to Defend: The Incorporation of a European Human Rights Principle into the Dutch Criminal Justice System' (2001) 32 *Victoria University of Wellington Law Review* 715, 717.

¹¹³ *International Crimes Act 2003* (Netherlands) s 2(1)(a).

¹¹⁴ *Crimes (Aviation) Act 1991* (Cth) s 10.

¹¹⁵ *Criminal Code Act 1995* (Cth) sch s 115.1.

Alternatively, an Australian prosecution could be based on the war crimes provisions in the *Criminal Code*,¹¹⁶ which allows prosecution for war crimes on the basis of universal jurisdiction (see further below). These two options would require the consent of the Commonwealth Attorney-General for ‘proceedings’ to commence,¹¹⁷ but an investigation could start and an arrest warrant be issued prior to consent being sought.¹¹⁸ However, Australia permits trials in absentia in very limited circumstances, so a criminal prosecution would depend on securing the custody of the accused. In considering whether to consent to an Australian prosecution, the Attorney-General would also take into account other proceedings and is likely to defer jurisdiction to states that have a closer connection to the crime.¹¹⁹

E *Russian Proceedings — State of Nationality or Presence*

Russia could bring its own proceedings based on two possible grounds of jurisdiction. First, if Russian mercenaries or forces were involved or the separatists had Russian nationality, Russia could rely on active nationality jurisdiction; that is, based on the nationality of the offender. This is a well-established basis of jurisdiction in international law, and it would be difficult to dispute Russia’s jurisdictional claim, even though it is not incorporated in the *Montreal Convention*.¹²⁰ Alternatively, if the suspects were in Russian territory, Russia could claim jurisdiction based on art 7 of the *Montreal Convention* — ie that where the suspect is present in its territory it could prosecute as an alternative to extradition. However, given the uncertain role of Russia in the downing of MH17, national proceedings in Russia would likely be considered as lacking credibility.

The application of art 7 and the right of the state of nationality/presence to bring a prosecution was at issue in the Lockerbie incident, where Pan Am Flight 103 (a US civilian aircraft) was brought down over Lockerbie, Scotland (in United Kingdom territory) in 1998. Libya, as the state of nationality of the accused and the state in which the accused were present, asserted its right under the *Montreal Convention* to prosecute, rather than extradite, the accused.¹²¹ The dispute concerning the interpretation and application of this obligation to the downed flight was the subject of the proceedings before the International Court of Justice.¹²² These proceedings were discontinued once the political solution was reached, mainly through the use of the Security Council’s Chapter VII

¹¹⁶ Ibid ss 268.24–268.101.

¹¹⁷ Ibid s 268.121(1).

¹¹⁸ Ibid s 268.121(3).

¹¹⁹ See Australian Government, Attorney-General’s Department, *Minimum Guarantees in Criminal Proceedings* <<https://perma.cc/Q5RR-DZ5Z>>.

¹²⁰ See, eg, Ryngaert, *Jurisdiction in International Law*, above n 109, 104–10.

¹²¹ Michael Plachta, ‘The Lockerbie Case: The Role of the Security Council in Enforcing the Principle *Aut Dedere Aut Judicare*’ (2001) 12 *European Journal of International Law* 125, 127.

¹²² *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United States of America) (Request for the Indication of Provisional Measures)* [1992] ICJ Rep 114.

powers to impose sanctions on Libya.¹²³ It will be similarly difficult to dispute Russia's jurisdictional claim under the *Montreal Convention* based on presence. However, unlike the position concerning Pan Am Flight 103, Russia, as a permanent member of the Council, will not realistically be subject to sanctions or other coercive measures to 'persuade' it to give up its jurisdictional claims, as Libya was.

F Other States — Universal Jurisdiction

The exercise of universal jurisdiction by other states is also a possibility. However, universal jurisdiction might be challenging to establish for the downing of MH17, as there is a limited range of crimes for which such jurisdiction is recognised.¹²⁴ Universal jurisdiction certainly does not extend to 'ordinary' crimes like murder or to attacking aircraft under the *Montreal Convention*. It includes grave breaches of the *Geneva Conventions*, but this provision, as noted above, would only apply if the situation in Ukraine is considered to be an international — not internal — armed conflict.¹²⁵ The extent to which war crimes give rise to universal jurisdiction in a non-international armed conflict is less certain.¹²⁶ Thus universal jurisdiction could only be exercised if the war crimes charges were credibly advanced, the relevant national law included universal jurisdiction for such crimes (and any limits) and the court before which proceedings were brought accepted that war crimes in a non-international armed conflict give rise to universal jurisdiction.

G Resolving Jurisdictional Disputes

The previous sections demonstrated that a number of states are potentially able to exercise jurisdiction in respect of MH17. A series of concurrent proceedings is undesirable from a practical perspective as not all states can get custody of the accused and the evidence at the same time. Moreover, multiple proceedings may result in inconsistent legal outcomes due to different legal provisions and procedures, protracted proceedings and duplication of resources

¹²³ International Court of Justice, 'Cases Removed from the Court's List at the Joint Request of the Parties' (Press Release, 2003/29, 10 September 2003) <<https://perma.cc/8YKK-THG3>>.

¹²⁴ William A Schabas, *An Introduction to the International Criminal Court* (Cambridge University Press, 3rd ed, 2007) 60: 'The application of universal jurisdiction is also widely recognised for genocide, crimes against humanity and war crimes, that is, for the core crimes of the *Rome Statute*'.

¹²⁵ Marko Divac Öberg, 'The Absorption of Grave Breaches into War Crimes Law' (2009) 91 *International Review of the Red Cross* 163, 170 n 37: 'Neither the four *Geneva Conventions* nor *Additional Protocol II of 1977* contain provisions relating to grave breaches in non-international armed conflict'.

¹²⁶ The relevant provisions concerning universal jurisdiction in international humanitarian law apply only to international armed conflicts with no corresponding provisions in the instruments regulating non-international armed conflicts: see *Geneva Convention IV* art 146; *Protocol Additional to the Geneva Conventions in 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol 1)*, open for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1978) art 85(1). However, the ICRC Customary International Humanitarian Law study suggests that state practice now supports the exercise of universal jurisdiction in non-international armed conflicts, referring to several instances where national courts have exercised universal jurisdiction without the state of nationality objecting: see Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law: Volume I, Rules* (Cambridge University Press, 2005) 604 (Rule 157).

and efforts, as well as increasing the emotional and financial burden on the families of the victims. It also makes it very difficult for the JIT, as it would need to collect evidence so that it could be used according to the procedural rules of several jurisdictions. Issues of fairness for the accused also arise from multiple proceedings and, given the human rights prohibition against multiple trials for the same conduct,¹²⁷ it might be that the first national system to reach a conviction might well be the only one to have a trial. Thus it would seem sensible to determine whether proceedings in *one* national jurisdiction would be feasible or desirable, and if so, *which* one.

International criminal law does not provide general rules of priority to determine 'competing claims' between jurisdictions,¹²⁸ although a principle of subsidiarity has been argued in relation to at least the exercise of universal jurisdiction.¹²⁹ Normally, other states would be expected to defer to legal processes in Ukraine as the territorial state or Malaysia as the state of registration, or those states most closely affected, in particular, the Netherlands. Similarly, were the accused to be found in the territory of another state party to the *Montreal Convention*, that state would be likely to extradite to one of the affected states rather than initiate its own prosecution. The possible exception here is Russia, as noted above.

Both Ukraine and Malaysia have a significant advantage in their legal regimes in that they can handle cases concerning *all* victims. The Netherlands and Australia appear to be limited to jurisdiction based on the death of their own nationals unless the crime is characterised as a war crime and subject to universal jurisdiction, and also require presence. Yet there are concerns regarding using either the Ukrainian or Malaysian courts. Further, although Australia is not implicated in the downing of MH17, it is remote from the crash site and its connection to MH17 is less strong than that of the Netherlands.

A prosecution under the Dutch legal system therefore may be the best option. There is a clear jurisdictional link based on the Dutch victims and no assertions that the Netherlands is in any way implicated in the downing of MH17. The Netherlands has a functioning, capable and independent judiciary, it led the safety investigation and the JIT is already applying Dutch law to the collection of evidence. Moreover, a trial in absentia is possible under Dutch law, even if not necessarily desirable. This option could be further facilitated by clear agreement from other states with possible jurisdictional claims, expressed through a supporting treaty or joint declaration, to make the Netherlands the venue for prosecution. There is also the possibility that other states could 'delegate' their own bases of jurisdiction to the Dutch, so that a single Dutch trial could address all the victims of MH17 and, possibly, handle any related issues as to compensation or reparations. This might more easily be achieved by internationalising the national proceedings, as discussed in Part VII.

¹²⁷ *Rome Statute* art 20; *ICCPR* art 14(7).

¹²⁸ See Diane F Orentlicher, 'The Future of Universal Jurisdiction in the New Architecture of Transnational Justice' in Stephen Macedo (ed), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law* (University of Pennsylvania Press, 2006) 214.

¹²⁹ See, eg, Fannie Lafontaine, 'National Institutions' in William Schabas (ed), *The Cambridge Companion to International Criminal Law* (Cambridge University Press, 2016) 155.

VII OPTION 5: THE LOCKERBIE MODEL

There is also the option of a ‘Lockerbie style’ approach, as some commentators have suggested.¹³⁰ It is important to note that these arrangements did not create a ‘Lockerbie tribunal’ as a separate international institution. Instead, a criminal trial was conducted under the national law of the UK (the territorial state) before UK judges. The only international dimensions were the location of the court in the Netherlands (a Scottish court sitting extraterritorially in a ‘neutral’ state), funding, the role of the Security Council in securing the arrangement¹³¹ and the presence of international observers during the trial.¹³² The trial itself was not a particularly successful outcome in terms of criminal accountability, although it did ‘resolve’ the underlying political dispute. One of the two suspects, Abdelbaset Ali Mohamed al-Megrahi, was found guilty and sentenced to life imprisonment while the other, Lamin Khalifah Fhimah, was acquitted.¹³³ These men had already been identified as the key direct suspects and were effectively ‘delivered’ to the Court by Libya in exchange for the lifting of sanctions against Libya.¹³⁴ The trial certainly did not target those further up the command chain nor did it question the role of Libya in the bombing or related incidents. It did force Libya into negotiations with the United States regarding compensation and an admission of responsibility for (but not to ordering) the incident by Gaddafi in 2003.¹³⁵ There were some concerns regarding fair trial aspects of the trial, but this may have arisen from those

¹³⁰ Marko Milanovic, ‘The Downing of MH17 and the Potential Involvement of International Courts’ on *EJIL: Talk!* (22 July 2014) <<https://perma.cc/AHR4-942G>>; Anthony Aust, ‘Lockerbie: The Other Case’ (2000) 49 *International and Comparative Law Quarterly* 278; David R Andrews, ‘A Thorn on the Tulip — A Scottish Trial in the Netherlands: The Story behind the Lockerbie Trial’ (2004) 36 *Case Western Reserve Journal of International Law* 307.

¹³¹ The Security Council made a number of resolutions with respect to the Lockerbie situation and Libya’s cooperation. See SC Res 731, UN SCOR, 3033rd mtg, UN Doc S/RES/731 (21 January 1992); SC Res 748, UN SCOR, 3063rd mtg, UN Doc S/RES/748 (31 March 1992); SC Res 883, UN SCOR, 3312th mtg, UN Doc S/RES/883 (11 November 1993); SC Res 1192, UN SCOR, 3920th mtg, UN Doc S/RES/1192 (27 August 1998).

¹³² Five international observers were nominated to attend the trial. See Kofi Annan, *Letter Dated 25 April 2000 from the Secretary-General Addressed to the President of the Security Council*, UN Doc S/2000/349 (26 April 2000). For reports published on the trial by observer Dr Hans Köchler, see Hans Koechler and Jason Subler (eds), *The Lockerbie Trial: Documents related to the IPO Observer Mission* (International Progress Organization, 2002).

¹³³ *H M Advocate v Al Megrahi* (2001) 40 ILM 582, 611 [85], 613 [89] (Scottish High Court of Justiciary at Camp Zeist).

¹³⁴ United Nations Security Council, ‘Security Council Discusses Sanctions Imposed on Libya Following Bombing of Pan Am Flight 103, UTA 772’ (Press Release, SC/6490, 20 March 1998) <<https://perma.cc/2PQX-6KTS>>.

¹³⁵ Kimberley N Trapp, *State Responsibility for International Terrorism* (Oxford University Press, 2011) 235–6; Ahmed A Own (Ambassador), *Letter Dated 15 August 2003 from the Chargé d’affaires a i of the Permanent Mission of the Libyan Arab Jamahiriya to the United Nations Addressed to the President of the Security Council*, UN Doc S/2003/818 (15 August 2003).

unfamiliar with the Scottish trial process.¹³⁶ Concerns were also raised as to the political nature of the trial, although there was no suggestion that judges had behaved improperly.¹³⁷

Despite the limited success of the Lockerbie trial, using some arrangement based on national proceedings but with international elements might provide greater legitimacy and representativeness than purely national proceedings. As the preferred national option is a trial under Dutch law for the reasons outlined above, it might be possible to ‘internationalise’ that process in some way. This would require agreement as to funding support, the legal basis for participation and the roles of nationals of other affected states in the investigation, prosecution and eventual trial. This could be limited to the presence of international observers, providing assistance through the JIT, as is currently the case, or it could be more expansive and include personnel being seconded from other states to be part of the Dutch legal system, including as judges. Depending on the arrangements agreed, this model may approximate the international model discussed in Part V, and would need to be supported by appropriate international agreements, as was the case with Lockerbie.¹³⁸ However, the key difference is that this would be a model based on the national jurisdiction of one state rather than creating a separate mechanism using international law directly.

VIII CONCLUSIONS

Security Council *Resolution 2166* called for an investigation into MH17.¹³⁹ The Security Council demanded that all states cooperate fully with efforts to establish accountability. Yet the resolution did not say which form that investigation or any eventual trial should take. So far, efforts to secure individual criminal responsibility for the downing of MH17 have focused on international criminal mechanisms. The states comprising the JIT preferred to establish an ad hoc international tribunal by the Security Council’s Chapter VII powers. They asserted that this would bring certain benefits: for example, this model was more likely to secure cooperation and international support.¹⁴⁰ Yet it appeared that even this model was unable to secure cooperation from Russia or the separatists to surrender the accused, hence the inclusion of provisions permitting trials in absentia. The Russian veto of this proposal signalled the end for this option.

The ICC has also emerged as a possible forum for accountability resulting from Ukraine’s second art 12(3) declaration. Yet, as discussed above, this option

¹³⁶ See Hans Koechler, ‘Report on and Evaluation of the Lockerbie Trial Conducted by the Special Scottish Court in the Netherlands at Kamp van Zeist’ (2001/P/HK/17032, International Progress Organization, 3 February 2001), reproduced in Koechler and Subler, above n 132, 15–24; Hans Koechler, ‘Report on the Appeal Proceedings at the Scottish Court in the Netherlands (Lockerbie Court) in the Case of *Abdelbaset Ali Mohamed Al Megrahi v H M Advocate*’ (2002/P/RE/17553, International Progress Organization, 26 March 2002), reproduced in Koechler and Subler, above n 132, 25–44.

¹³⁷ See, eg, Koechler, ‘Report on and Evaluation of the Lockerbie Trial Conducted by the Special Scottish Court in the Netherlands at Kamp van Zeist’, above n 136, [4]–[8].

¹³⁸ See *Agreement concerning a Scottish Trial in the Netherlands*, United Kingdom–Netherlands, signed 18 September 1998, 2062 UNTS 81 (entered into force 8 January 1999); SC Res 1192, UN SCOR, 3920th mtg, UN Doc S/RES/1192 (27 August 1998).

¹³⁹ See *Resolution 2166*, UN Doc S/RES/2166.

¹⁴⁰ *Draft Resolution Meeting*, UN Doc S/PV.7498, 3.

raises difficult jurisdictional and substantive issues, including whether an ICC crime has been committed, in addition to the political dimensions and the challenges in securing cooperation and custody of the suspects. It appears that the ICC Prosecutor is keeping her options open for the time being, and merely following the outcome of the joint criminal investigation. Other options, in particular a treaty-based institution, can overcome some of these challenges by clearly conferring jurisdiction and including crimes under national law. However, they will encounter the same obstacles to a trial proceeding as the ICC, namely gaining the cooperation of Russia and custody of the accused.

The MH17 incident is a further example of states, victims and others looking to international criminal justice for a solution it may not be able to provide. The trend is that when an incident occurs with international dimensions or which 'shocks' the international community, we demand that international criminal law and its institutions respond; that is, that the response must be international. This demand may flow from the belief that an international response better represents the varied interests and states affected by a crime such as MH17. Yet the call for international criminal law overlooks that the primary forum for prosecuting such crimes remains national jurisdictions. As has been discussed above, several states are potentially capable of prosecuting those responsible for downing MH17. The states in the JIT have yet to explain fully why they prefer international mechanisms. The most appropriate option appears to be a trial under Dutch law before Dutch courts, perhaps with some 'internationalising' of the proceedings.

The focus on mechanisms has also obscured the question of whether *any* model is capable of securing cooperation from Russia and the separatists. That, rather than where the trial should occur, is the critical issue: whether international criminal justice can offer a solution where a key state, a permanent member of the Security Council, is perhaps directly implicated in the incident. Endorsing a model that relies on trial in absentia masks the impotency of the Security Council and the broader international community to secure such cooperation. As with many other current issues in international criminal justice, the likely problem will not be an absence of law or courts but one of political will.