

Judicial Avenues for Upholding the International Rule of Law: *The Downing of MH17 Case*

The paper seeks to identify the means in which the key principles of the international rule of law are applied in practice. It postulates that the development of the international rule of law is fostered by the plurality of legal remedies that can be invoked upon a single event. Thus, the paper evaluates the ongoing and potential legal proceedings against States in relation to the downing of flight MH17. It provides an outline of the case-relevant obligations entrenched in international law of treaties, international human rights law and law governing civil aviation. The paper will primarily focus on the judicial means of dispute settlement in international law and connect them to the basic principles of State responsibility enshrined in public international law.

The rule of law is perceived as a political ideal of governing modern societies. The concept is premised on three key elements – regulation of State power by law (government of laws), independence of the judiciary that regulates the application of law to the sovereign (supremacy of the law), and equality of all persons before the law (equality before the law). Albeit “thin”, such a formalistic view on the rule of law has been upheld in international fora, where it is understood as the cornerstone of human rights protection, economic development, and peace and security.¹

Taking into account the idiosyncrasies of the international order, particularly the lack of vertical integration and structural hierarchy, James Crawford adapts the definition into five core elements: formal equality of States, democracy and accountability, legal constraints imposed on authorities, international constitutionalization, and the availability of remedies to social injustice.² Analogous to an international constitution, the UN Charter incorporates the rule of law in its preamble and sets foot on the duty of States to peaceful means of dispute settlement, including judicial remedies.³ Furthermore, the United Nations General Assembly Resolution 67/1 (2012) goes on to acknowledge the contribution of international courts and tribunals, alongside the International

¹ Chestermann, Simon. *Rule of Law*. Max Planck Encyclopedia of Public International Law, July 2007, para. 15

² Crawford, James. *Chance, Order, Change: The Course of International Law*. Pocketbooks of the Hague Academy of International Law, December 2013, para. 441

³ Chestermann, Simon. *Rule of Law*, op.cit. para. 39

Court of Justice (ICJ), the “centre of gravity” of a non-hierarchically organised international system, to the advancement of the rule of law at international and national levels.⁴

After making preliminary theoretical remarks on the notion of an international rule of law, this paper goes on to examine its existence in practice through the prism of a single event – the downing of MH17. On 17 July 2014, the crash of Malaysia Airlines Flight MH17 on the territory of the Donetsk Oblast in Eastern Ukraine caused the death of 298 people. The airplane was routed from Amsterdam to Kuala Lumpur, and the majority of victims were nationals of the Netherlands, followed by Malaysia and Australia. The incident was followed by Dutch-led investigation into the cause of the crash conducted in a complex environment and alongside difficulties of obtaining evidence stemming from the ongoing armed conflict in Eastern Ukraine. Moreover, the event caused a plethora of proceedings aiming to establish both individual and State responsibility for the crash. The complexity of the case was aggravated by the uncertainties related to the degree of Russia’s involvement in the armed conflict, suggesting the existence of a “proxy war” against Ukraine through the armed forces of the Donetsk People’s Republic (DPR).

Oriented towards the governance of inter-State relations, this paper will focus on the analysis of currently existing avenues for seeking State responsibility on various accounts. Starting with the ICJ, it will assess the conclusions of the Judgment delivered in the case of *Ukraine v. Russian Federation*, in relation to the provisions of the International Convention for the Suppression of the Financing of Terrorism (ICSFT). The paper will tackle the issues concerning the interpretation of treaty norms and jurisdiction *ratione materiae* of the Court, seeing these questions were brought up by the parties during the proceedings.⁵

Turning to the human rights realm, the paper will shift to another forum – the European Court of Human Rights (ECtHR). It will provide an overview of the current proceedings - namely, the recently lodged inter-State application of the Netherlands against the Russian Federation, on

⁴ United Nations General Assembly Resolution 67/1, Declaration of the High-level Meeting of the General Assembly on the rule of law at the national and international levels, A/RES/67/1, 30 November 2012, available from <https://www.un.org/ruleoflaw/files/A-RES-67-1.pdf> 24.08.2020.

⁵ International Court of Justice, Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (*Ukraine v. Russian Federation*), (Judgment), 8th November 2019

account of providing the BUK missile used to shoot down the airplane and thus being responsible for violations of the right to life, prohibition of torture and inhuman or degrading treatment, and the right to an effective remedy – human rights enshrined in the articles of the European Convention of Human Rights (ECHR).⁶ Likewise, it will consider the individual proceedings lodged against Ukraine and Russia on similar accounts before the ECtHR.⁷

In its final observations, the paper will provide a brief outlook on some of the alternative approaches for establishing jurisdiction of the ICJ in cases adjudicating, *inter alia*, the downing of MH17 and moving towards establishing the responsibility of Russia and/or Ukraine. Firstly, it will analyse the rules governing civil aviation – the 1944 Chicago Convention and the 1971 Montreal Convention. Then, it will turn to contingent international human rights breaches – the right to life embedded in the International Covenant on Civil and Political Rights (ICCPR). Finally, it will review the question of attributability of acts of the separatist forces to Russia and assess the claims on the State responsibility of Russia for the event.

⁶ European Court of Human Rights, New inter-State application brought by the Netherlands against Russia concerning downing of Malaysia Airlines flight MH17, Press Release, ECHR 213 (2020), 15 July 2020

⁷ European Court of Human Rights, *Ioppa and Others v. Ukraine* [2016], Application No. 73776/14 (ECtHR)

European Court of Human Rights, *Ayley and Others v. Russia* [2016], Application No. 25714/16 (ECtHR)

European Court of Human Rights, *Angline and Others v. Russia* [2018], Application No. 56328/18 (ECtHR)