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ARTICLE

Jurisdiction and Combatant's Privilege in the *MH17* Trial: Treading the Line Between Domestic and International Criminal Justice

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Abstract

This article focuses on the *MH17* Trial that is currently underway in the Netherlands, dealing with the shooting down of a civilian aircraft over Eastern Ukraine and the resulting deaths of all 298 persons on board. Two legal questions arising from the prosecutorial strategy to charge the four accused with 'ordinary' crimes under the Dutch Criminal Code—instead of with war crimes—are studied here. First, the jurisdictional basis on which the District Court of The Hague is trying *MH17*, and its effect on the applicable laws, is examined. It is argued that, contrary to what the Prosecution has submitted, jurisdiction over the killing of the 93 non-Dutch nationals on board of flight MH17 can only be established on the basis of the less known title of delegated (representative) jurisdiction: a conclusion that also brings certain legal requirements. Second, this paper analyzes the way the *MH17* Prosecutor defined the notion of 'combatant's privilege' under international humanitarian law and his arguments for rejecting a combatant status for the separatist armed forces that shot down flight MH17 over Eastern Ukraine. All this analysis is then used to explain why it was indeed more sensible for the Prosecution to charge the four accused with murder and intentionally causing an aircraft to crash under Dutch criminal law, than with war crimes under international law.

Keywords Combatant's privilege · War crimes · Delegated jurisdiction · Legal standards · Passive personality

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1 Introduction

The future of international criminal justice is domestic. It has been over a decade since scholars first started sharing this narrative, arguing that domestic courts will gradually become the main forum for the prosecution of 'core' international crimes: war crimes, crimes against humanity and genocide.[1] Statistical data reveals that this vision has largely materialized, given that we are nowadays witnessing an ever-growing number of such trials in Europe and beyond.[2] While this is certainly a positive development in the fight against impunity, it has prompted heated debates on the shape that international criminal justice should take in national courtrooms. Many expect domestic courts to start applying international criminal law ('ICL') when trying atrocity crimes, with opinions mostly diverging on the extent to which judges should follow the legal standards and definitions of crimes, modes of liability and defences established by the international courts and tribunals.[3] However, such trials can also be framed differently: in a manner that avoids the complexities of applying ICL and instead couches the proceedings entirely in domestic law, by choosing to try the said international crimes as 'ordinary' offences under the prosecuting States' own criminal codes.[4] This latter approach raises its own challenges and has also been criticized for 'undermin[ing] the fundamental idea on which the international criminal justice system is founded'.[5]

The present article seeks to contribute to this debate by focusing on the *MH17* Trial that is currently underway in the Netherlands and is concerned with the shooting down of an aircraft over Eastern Ukraine, resulting in the death of all passengers and crew members on board. This trial offers a fascinating example of a case in which the domestic authorities have strategically chosen to charge as 'ordinary' crimes conduct that, if proven, likely also constitutes a war crime under international humanitarian law ('IHL'). Two questions that arise from this prosecutorial choice are analyzed here. First, the jurisdictional basis on which the District Court of The Hague is trying *MH17*, and its effect on the applicable laws, is studied. The decision to charge the four accused with domestic crimes under Dutch law effectively precluded the possibility of claiming universal jurisdiction over this case. Instead, the Prosecution argued in the pre-trial proceedings that the court's jurisdiction is based on the passive personality principle, given that most of the victims who died in the downing of MH17 were Dutch nationals.[6] This contention is challenged in the present paper, which argues that Dutch courts' jurisdiction over the killing of non-Dutch nationals on board of flight MH17—if not qualified as a war crime—may only be grounded in a bilateral agreement which Ukraine and the Netherlands signed

[1] Stahn (2009); Van Sliedregt (2020); Du Plessis (2014).
[2] Langer and Eason (2019); Rikhof (2014), pp. 114–123.
[3] Heller (2012), pp 86–88; Kleffner (2003); Van der Wilt (2008); Yanev (2019), pp. 650–657.
[4] Ferdinandusse (2009), pp. 729–734; Vajda (2019), p. 25.
[5] Terracino (2007), p. 439.
[6] See *infra* text accompanying n. 24.

on 7 July 2017.[7] Its provisions envision a possibility that Ukraine would transfer its criminal proceedings over the downing of MH17 to the Netherlands. The legal basis and scope of this jurisdictional title, better known as delegated/representative jurisdiction, as well as some conditions for its application in the *MH17* Trial, will be discussed here.

The second issue examined in this article is the Dutch Prosecutor's interpretation of the notion of 'combatant's privilege' under IHL, which grants combatants immunity from criminal prosecutions for acts that are lawful under the law of war. It will be argued that the Prosecutor's decision to charge the four accused with ordinary crimes is a well calculated strategy that seeks to avoid *inter alia* litigation concerning what the Prosecutor has referred to as 'the error scenario': i.e., the possibility that those who shot down flight MH17 mistakenly believed that it was a military aircraft. If the accused wish to argue this, and thereby also to invoke combatant's immunity under IHL, the burden of proof would now be shifted onto them to establish that they were in fact lawful combatants in the armed conflict in Eastern Ukraine: i.e., they would have to prove that the armed forces they were part of were *de facto* agents of the Russian Federation.

2 The *MH17* Trial: Background and Relevant Facts

The *MH17* Trial is concerned with the prosecution of one Ukrainian (Leonid Kharchenko) and three Russian nationals (Igor Girkin, Sergey Dubinskiy and Oleg Pulatov), who were allegedly implicated in the shooting down of Malaysia Airlines flight MH17 over Eastern Ukraine on 17 July 2014. This incident took place in the region of Donetsk, where an armed conflict had been ongoing between the Ukrainian Government forces and organized armed groups belonging to the self-proclaimed Donetsk People's Republic ('DPR').[8] According to the Prosecution, MH17 was shot down by DPR armed forces using a Buk-TELAR missile installation that had been provided to them by the Russian Federation several days before the incident. The three Russian accused in the case held the most senior positions in DPR's military apparatus at the material time, while Kharchenko was the commander of a DPR unit in the area where the missile installation was positioned.[9] The Prosecution

[7] Agreement between the Kingdom of the Netherlands and Ukraine on International Legal Cooperation regarding Crimes connected with the Downing of Malaysia Airlines Flight MH17 on 17 July 2014, 7 July 2017, *Tractatenblad van het Koninkrijk der Nederlanden* [Dutch Treaty Series] 2017, No. 102 (hereinafter 'Transfer Agreement'), available at: https://wetten.overheid.nl/BWBV0006683/2018-08-28 (accessed 16 June 2021).

[8] T. Sterling and A. Deutsch, 'Trial of Men Accused in Downing of MH17 to Begin in Amsterdam', *Reuters*, 9 March 2020, available at: https://www.reuters.com/article/uk-ukraine-crisis-mh17-idUKKBN20W008 (accessed 16 June 2021); 'MH17 Ukraine Plane Crash: What We Know', *BBC News*, 26 February 2020, available at: https://www.bbc.com/news/world-europe-28357880 (accessed 16 June 2021).

[9] Opening Statement by the Public Prosecutor, *Girkin et al*., District Court of The Hague, 9 March 2020, ECLI:NL:RBDHA:2020, 'Evidence and individual role', available at: https://www.prosecutionservice.nl/topics/mh17-plane-crash/prosecution-and-trial/court-sessions-march-2020/opening-statement-9-march-2020 (accessed on 16 June 2021).

is arguing that although the four accused did not themselves launch the missile that took down flight MH17, they 'played a significant coordinating role in the transportation and positioning of the Buk-TELAR, and in its removal back to Russia'.[10]

All 298 persons who were on board of flight MH17 died in the crash. A total of 196 of them were Dutch nationals,[11] and the remaining victims were nationals of 16 other States.[12] Several weeks after the incident, the Governments of the Netherlands, Ukraine, Belgium and Australia set up a joint investigation team ('JIT'), which was later also joined by Malaysia, in order to carry out a coordinated criminal investigation into the MH17 crash. As the investigation progressed and evidence was gathered that the aircraft was hit by a surface-to-air missile fired from rebel-held territories in Donetsk, early talks started over the possible venues for conducting criminal trials against potential suspects. Understandably, many academics viewed the downing of MH17 as a potential war crime and entertained the possibility of its prosecution before the International Criminal Court, or before a specially established international *ad hoc* tribunal.[13] In fact, acting on behalf of the JIT, Malaysia even presented a draft resolution before the UN Security Council which requested the establishment of 'the International Criminal Tribunal for Malaysia Airlines Flight MH17'.[14] The draft statute of this proposed tribunal stated that it would have jurisdiction over war crimes, as well as over crimes against civil aviation under Malaysian law and certain crimes under Ukrainian criminal law.[15]

The Russian Federation vetoed the proposed creation of an MH17 Tribunal[16] and, with uncertain prospects that the International Criminal Court will ever try those responsible for the incident, it became increasingly clear that the path forward lies in national prosecutions. In July 2017, the 'JIT' countries agreed that the suspects in the MH17 downing would be tried before Dutch local courts, with the Governments of Ukraine and the Netherlands signing a special agreement to this effect.[17] Although the downing of flight MH17 was commonly viewed as a war crime,

[10] Ibid., Section 'Prosecution decisions: the charges'.

[11] Government of the Netherlands, 'Suspects to be Prosecuted for the Downing of Flight MH17', *News*, 19 June 2019, available at: https://www.government.nl/latest/news/2019/06/19/suspects-to-be-prosecuted-for-the-downing-of-flight-mh17 (accessed 16 June 2021).

[12] Government of the Netherlands, 'The Netherlands brings MH17 case against Russia before European Court of Human Rights', *News*, 10 July 2020, available at: https://www.government.nl/latest/news/2020/07/10/the-netherlands-brings-mh17-case-against-russia-before-european-court-of-human-rights (accessed 16 June 2021).

[13] Williams (2016); De Hoon (2017), p. 94.

[14] United Nations Security Council, Draft Resolution (with Annex 'Statute of the International Criminal Tribunal for Malaysia Airlines Flight MH17 (ICTMH17)', S/2015/562, 29 July 2015.

[15] Ibid., Art. 1 of the Draft Statute of the International Criminal Tribunal for Malaysia Airlines Flight MH17.

[16] United Nations Meetings Coverage, 'Security Council Fails to Adopt Resolution on Tribunal for Malaysia Airlines Crash in Ukraine, Amid Calls for Accountability, Justice for Victims', 7498th Meeting (SC/11990), 29 July 2015, available at: https://www.un.org/press/en/2015/sc11990.doc.htm (accessed 16 June 2021).

[17] Government of the Netherlands, 'Minister of Security and Justice signs MH17 treaty with Ukraine', *News*, 7 July 2017, available at: https://www.government.nl/latest/news/2017/07/07/minister-of-security-and-justice-signs-mh17-treaty-with-ukraine (accessed 16 June 2021). See also *supra* n. 7.

including by the UN High Commissioner for Human Rights,[18] the Dutch Prosecution surprised many when it announced, at a press conference on 19 June 2019, that it would charge the above said four accused with two 'ordinary' crimes under the Dutch Criminal Code ('DCC'),[19] namely:

(i) intentionally causing an aircraft to crash, under Article 168 DCC; and
(ii) murdering 298 people, under Article 289 DCC.[20]

The Dutch Prosecutor's decision not to charge the four accused with war crimes, and two legal complications that arise from this choice, are studied immediately below.

3 The Nature and Scope of the Dutch Courts' Jurisdiction over *MH17*

The factual circumstances in the *MH17* Trial, where non-Dutch rebel fighters shot down a non-Dutch civilian aircraft on non-Dutch territory, leading to the deaths of many non-Dutch citizens in the context of an armed conflict, naturally prompt expectations that the principle of universal jurisdiction would form the basis of this trial. However, the Prosecutor's decision to charge the four accused with 'ordinary' crimes under Dutch law—rather than with war crimes—effectively forecloses the possibility of claiming universal jurisdiction over this case. Indeed, international law principally limits States' jurisdiction (both prescriptive *and* enforcement) to acts/omissions that take place on their own territory—i.e., the territoriality principle—with certain recognized titles of extraterritorial jurisdiction then carving out exceptions to the said rule.[21] The principle of universal jurisdiction is one such exception but according to international law its exercise is limited to a narrow set of serious crimes (e.g. genocide, crimes against humanity, war crimes),[22] which does not include domestic offences,[23] as charged in the *MH17* Trial. For those domestic

[18] 'Downing of MH17 Jet in Ukraine "May Be War Crime"—UN', *BBC News*, 28 July 2014, available at: https://www.bbc.com/news/world-europe-28520813 (accessed 16 June 2021). See also *supra* n. 13.

[19] *Wetboek van Strafrecht* [Criminal Code of the Kingdom of the Netherlands], *Staatsblad* (*Stb*.) [Dutch Official Gazette] 1886, no. 6, 30 January 1886, available at: https://wetten.overheid.nl/BWBR0001854/2020-07-25 (accessed 16 June 2021).

[20] Landelijke Eenheid, 'Prosecution of Four Suspects for Downing Flight MH17', *Police*, 19 June 2019, available at: https://www.politie.nl/en/news/2019/june/19/prosecution-of-four-suspects-for-downing-flight-mh17.html (accessed 16 June 2021). It should be noted that, as an alternative to the murder charge under Art. 298 DCC, the Prosecution has also charged the accused with manslaughter under Art. 287 DCC. The document containing the charges in the *MH17* Trial is available online at: https://www.prosecutionservice.nl/topics/mh17-plane-crash/documents/publications/mh17/map/map/charges-against-suspects-downing-mh17 (accessed 16 June 2021).

[21] Ryngaert (2015), pp. 34 et seq.; Mills (2014), pp. 190–200; Sadat (2008), p. 207; Bassiouni (2001), pp. 90–93; Jennings (1957), pp 148–153; Cryer et al. (2019), pp. 51–58.

[22] Randall (1988); Cassese (2003), pp. 591–592; Kress (2006), pp 575–576; Cryer et al. (2019), p. 57.

[23] Colangelo (2006); Green (1980), pp. 570–571; Ambos and Wirth (2001), p. 786; Baxter (1951), pp. 66, 68–70.

crimes under Dutch law, The Hague District Court's jurisdiction in the *MH17* Trial thus *has to* be grounded on any one of the other recognized titles of extraterritorial jurisdiction. It also ought to be noted at this juncture that Article 8d DCC explicitly stipulates that all jurisdictional titles contained in the Dutch Criminal Code must be applied in accordance with the limitations recognized under international law.

So, what precisely has the Prosecution argued on the jurisdictional basis for trying the four accused and how much merit is there to that argument?

3.1 The Scope of Passive Personality Jurisdiction

In his opening statement on 9 March 2020, the Prosecutor informed the judges that:

> When I began this opening statement, I said that we in this courtroom want to achieve, as fully as possible, justice for all the victims and all the families, wherever in the world they are from. For that reason, Ukraine agreed, at the Netherlands' request, to transfer the prosecution of the four defendants to the Netherlands. *This was not in fact necessary in order for this trial to take place*. The Netherlands, after all, has legal jurisdiction over the downing of flight MH17 by virtue of the large number of victims who were Dutch nationals. *That jurisdiction extends to the entire offence*, that is, intentionally causing an aircraft to crash, resulting in the deaths of everyone on board that aircraft, and with that the murder of all passengers.[24]

Put simply, the Prosecutor argued that since 196 of the victims on board of flight MH17 were Dutch nationals, the crimes charged in the indictment fall—*in their entirety*—within the jurisdiction of the Dutch courts. Thus, even if Ukraine had not agreed to transfer criminal proceedings in this case to the Netherlands (a matter discussed further below in this paper), the Dutch courts would still have been entitled to try the four accused for the murder of *all* 298 MH17 passengers. This interpretation of the scope of passive personality jurisdiction merits a careful assessment here, since it has broader implications going beyond the *MH17* Trial.[25]

As is well known, the principle of passive personality allows States to prosecute persons for crimes committed outside their territory if the victim is a national of the prosecuting State.[26] Criticized by many over the years,[27] this title of jurisdiction was only recently *fully* introduced in the Dutch Criminal Code, with a legislative amendment to Article 5 that came into force just several weeks before the downing

[24] Opening Statement by the Public Prosecutor, *supra* n. 9, Section 'With respect to the next of kin' (emphasis added).

[25] At present, for instance, Belgian prosecutors are debating what is the proper scope of prosecutable offences in two cases concerning Belgian priests who were victimized in a broad campaign of killings, torture and enforced disappearances that Guatemala's military government waged against its civilian population back in the 1980s. For more information on the said cases, see Roht-Arriaza (2005), pp. 170–208.

[26] Ryngaert (2015), pp. 110–113; Chehtman (2010), pp. 67–70.

[27] Ryngaert (2015), p. 110; Chehtman (2010), p. 67; Abramovsky (1990), pp. 123 et seq.

of MH17.[28] Its text now stipulates that 'Dutch criminal law is applicable to anyone who commits a crime outside the Netherlands against a Dutch citizen, a Dutch civil servant, a Dutch vehicle, vessel or aircraft', provided that the crime is punishable by at least 8 years of imprisonment and is also a crime in the territorial State.[29]

The crime which the four accused in the *MH17* Trial allegedly committed is, according to the indictment, *first*: 'intentionally causing an aircraft to crash, under Article 168 DCC'. Exercising passive personality jurisdiction over this particular offence is complicated by the fact that MH17 was flying under the Malaysian flag: i.e., it was not a Dutch aircraft, as envisioned in Article 5 DCC. However, one may argue that since the crime of intentionally causing MH17 to crash also victimized Dutch citizens on board of the aircraft, Dutch passive personality jurisdiction may be extended over it. As for the requirement that the charged act must also be a crime in the territorial State, one can note Article 194(2) of the Ukrainian Criminal Code, which states that the wilful destruction of property, by the use of dangerous methods, that results in the death of people is a crime punishable by imprisonment of three to ten years.[30]

It is the *second* crime alleged in the indictment—namely, 'murdering 298 people, under Article 289 DCC'—that is legally problematic: specifically, in the assertion of jurisdiction over the killing of the 93 non-Dutch citizens on board of flight MH17. The interpretation which the Prosecution appears to adopt here is that murder committed against a non-Dutch citizen would fall within the scope of Dutch passive personality jurisdiction if it occurred in the same factual circumstances that also led to the death of a Dutch citizen. Such an expansive interpretation of the passive personality principle, however, goes far beyond the plain text of Article 5 DCC and the Prosecution cited no authorities to support it. If anything, in the Explanatory Memorandum to the 2017 Transfer Agreement that Ukraine and the Netherlands signed, the Dutch Parliament expressly recognized that neither the drafting history of Article 5 DCC nor the relevant Dutch jurisprudence affirm that passive personality jurisdiction could be extended to the non-Dutch victims of the MH17 incident.[31]

[28] The new Art. 5 DCC came into effect on 1 July 2014. Before this legislative amendment, the Dutch Criminal Code did not have a general provision on passive personality jurisdiction: rather, this jurisdictional title was accepted only in relation to a few limited offences. Ryngaert (2014), pp. 243–244.

[29] Original text: '*De Nederlandse strafwet is toepasselijk op een ieder die zich buiten Nederland schuldig maakt aan een misdrijf tegen een Nederlander, een Nederlandse ambtenaar, een Nederlands voertuig, vaartuig of luchtvaartuig, voor zover op dit feit naar de wettelijke omschrijving een gevangenisstraf van ten minste acht jaren is gesteld en daarop door de wet van het land waar het begaan is, straf is gesteld*'. Art. 5 DCC, *supra* n. 19.

[30] Art. 194(2) Criminal Code of Ukraine (Law No. 2341-III), 1 September 2001, available at: https://www.refworld.org/docid/4c4573142.html (accessed 16 June 2021). The double criminality rule does not require establishing that Ukrainian criminal law prescribes the *same* crime (i.e., identical *nomen juris*) as the crime of 'causing an aircraft to crash' in Art. 168 DCC. Rather, what is required is showing that the conduct in question constitutes a criminal offence in both of the jurisdictions concerned, even if there is a difference in its legal classification.

[31] Tweede Kamer der Staten General, 'Goedkeuring van het op 7 juli 2017 te Tallinn tot stand gekomen Verdrag tussen het Koninkrijk der Nederlanden en Oekraïne inzake internationale juridische samenwerking met betrekking tot misdrijven die verband houden met het neerhalen van vlucht MH17 van Malaysia Airlines op 17 juli 2014 (Trb. 2017, 102)—Memorie van Toelichting', *Kamerstukken II* [Par-

State practice could also be identified which rejects such an expansive interpretation of passive personality jurisdiction. In the well-known *Eichmann* Trial, for instance, the Supreme Court of Israel held that although it had passive personality and protective jurisdiction over the atrocity crimes which Eichmann committed against the Jews during World War II, his trial was actually conducted on the basis of universal jurisdiction because 'some of [the charged crimes] were directed against non-Jewish groups (Poles, Slovenes, Czechs and Gypsies)'.[32] The Court thus confirmed that passive personality jurisdiction could not be extended to crimes committed against the latter groups of victims on the sole basis that they were committed in the very same factual circumstances where Jews were victimized. Similarly, in criminal proceedings against Augusto Pinochet, the Spanish courts recognized that trying the accused for the killing and the enforced disappearances of thousands of Chileans in Chile required invoking the universality principle, irrespective of the fact that some of the victims of the underlying 'Operation Condor' were Spanish nationals.[33] The view that passive personality jurisdiction cannot be extended to try extraterritorial crimes committed against non-nationals of the prosecuting State—even when the said crimes were committed in a context wherein nationals of that State were also victimized—finds further support in academia.[34]

Accordingly, while one can reasonably argue that the crime of 'intentionally causing an aircraft to crash' is subject to Dutch passive personality jurisdiction because the conduct prescribed in this particular crime resulted in the victimization of Dutch citizens, the same logic simply does not apply *mutatis mutandis* to the crime of 'murdering 93 non-Dutch nationals' (as part of the second charge in the *MH17* indictment). Causing the death of the non-Dutch nationals on board of flight MH17 did not victimize Dutch citizens and, for the rest, remains an act committed by non-Dutch nationals, against a non-Dutch aircraft, flying over non-Dutch territory.

One final point should be briefly noted here before turning to examine what other head of extraterritorial jurisdiction can be invoked by the District Court of The Hague to try the four accused for the killing of 93 non-Dutch citizens on flight MH17. As noted above, universal jurisdiction is not an option since 'murder', as an ordinary crime under Dutch criminal law, is not amenable to universal jurisdiction.[35] Murder as a war crime under international humanitarian law is,[36] but for the reasons

Footnote 31 (continued)
liamentary Papers II] 2017–2018, 34 915, no. 3, 17 April 2018, p. 3, available online in Dutch only at: https://zoek.officielebekendmakingen.nl/kst-34915-3.pdf (accessed 16 June 2021).

[32] *Attorney General v. Adolf Eichmann*, Case Number 336/61, Supreme Court of Israel, Judgment, 29 May 1962, para. 12.

[33] Roht-Arriaza (2001); Wilson (1999), pp. 951–952; Roht-Arriaza (2007), pp. 117–118.

[34] Orentlicher (2008), p. 137; Wilson (1999), p. 951.

[35] See *supra* n. 23.

[36] If the act of unlawful killing can be qualified as a grave breach of the Geneva Conventions, or as a violation of Common Art. 3 of the Geneva Conventions, it will fall under the categories of war crimes amenable to universal jurisdiction under customary international law. Henckaerts and Doswald-Beck (2005), pp. 604–607.

studied below, the Dutch Prosecutor chose not to pursue such a legal qualification of the charges against the four accused. Having said this, it also has to be recognized that even if the Prosecutor had decided to charge the accused with war crimes (specifically *vis-à-vis* the murder of non-Dutch nationals on board of MH17), this would not have been unproblematic. One core difficulty would then have been that the Dutch International Crimes Act of 2003 ('WIM') does not allow for the exercise of universal jurisdiction *in absentia*.[37] This is significant, considering that the prospects of the four accused being arrested and transferred to the Netherlands prior to the start of the *MH17* Trial (or at any point thereafter) were and remain far from promising.

3.2 Relying on the Notion of Delegated Jurisdiction

We thus arrive at the last jurisdictional juncture in this paper: the possibility of trying the killing of the 93 non-Dutch nationals on the basis of the notion of delegated jurisdiction, and what this would mean for the applicable law in the case at hand. As was pointed out, on 7 July 2017, the Governments of the Netherlands and Ukraine signed an agreement on international cooperation regarding the investigation and prosecution of crimes connected to the downing of flight MH17 (the 'Transfer Agreement').[38] For the purposes of this paper, the two pertinent provisions from the Transfer Agreement are Articles 5 and 6. The former provides that the Netherlands 'shall have competence to prosecute crimes to which the law of Ukraine is applicable, following a transfer of proceedings in accordance with Article 6 of this Agreement'.[39] In turn, Article 6 establishes that such a transfer of proceedings is to be requested by the Netherlands and will be governed by the 1972 European Convention on the Transfer of Proceedings in Criminal Matters ('European Transfer Convention').[40]

In international criminal law circles, the European Transfer Convention came under the spotlight several decades ago, in the context of heated discussions on whether the International Criminal Court ('ICC') can lawfully exercise jurisdiction over nationals of States that are non-Parties to the Rome Statute for committing atrocity crimes on the territory of State Parties. The United States had argued against this[41] and the debate came to revolve around the legal question of whether the territorial State where a US national committed e.g. a war crime must first

[37] Indeed, Art. 2(1)(a) of the WIM provides that Dutch courts can exercise universal jurisdiction over 'anyone who commits any of the crimes defined in this Act [war crimes, crimes against humanity, genocide and torture] outside the Netherlands, *if the suspect is in the Netherlands, or in the public bodies Bonaire, St Eustatius, or Saba*.' Art. 2(1)(a) *Wet Internationale Misdrijven* [International Crimes Act], *Stb*. 2003, no. 270, 1 October 2003, available at: https://ihl-databases.icrc.org/__c1256b1f0053435b.nsf/a42a5edc55787e8f41256486004ad09b/df504fd7fc3ecc02c1256d9f002eea70 (accessed 16 June 2021).

[38] Transfer Agreement, *supra* n. 7.

[39] Art. 5 Transfer Agreement, *supra* n. 7.

[40] Art. 6(1) Transfer Agreement, *supra* n. 7. European Convention on the Transfer of Proceedings in Criminal Matters (ETS No. 73), 15 May 1972.

[41] Scheffer (1999a), p. 18.

obtain the consent of the US before deciding to refer that case to the ICC. Academics aligned with the US Government's position heatedly argued that '[t]here is no ordinary precedent for delegating national criminal jurisdiction to another tribunal, international or national, *without the consent of the affected states*'.[42] The European Transfer Convention was then brought into the debate, with some academics insisting that it requires such consent[43] and others arguing that this is not the case.[44] Interestingly, neither side ever identified an actual case arising from this Convention to support their respective claim on this issue of the consent of third States, and there is no available centralized database of such proceedings that will allow efficient research on this matter.[45] The *MH17* Trial can thus be cited as a first *concrete* example of a case in which a State Party to the European Transfer Convention (Ukraine) has agreed to delegate its criminal jurisdiction over a case to another State Party (the Netherlands), without the consent—and, in fact, over the objections—of a non-Party State (the Russian Federation), of which the accused is a national. As for the question of whether this is lawful, the answer is 'yes'. Neither the drafting history nor the plain text of the European Transfer Convention (analyzed immediately below) expressly establish a requirement of consent by concerned third States.[46] Moreover, state practice arising from other international treaties with provisions on delegated jurisdiction also confirms that such consent is not required.[47] Finally, one could also cite here the *Lotus* principle, adopted by the Permanent Court of International Justice in its landmark 1927 *SS Lotus* case,[48] to argue that in the absence of an explicit rule under international law which prohibits the delegation of jurisdiction without a third State's consent, this should be considered a permissible action.

The question that remains to be answered is whether, in substance, the provisions of the European Transfer Convention enable The Hague District Court to try the four accused also for the murder of the 93 non-Dutch nationals on board of flight MH17. Pursuant to Article 2 of the European Transfer Convention, any State Party to the Convention has jurisdiction to prosecute *under its own criminal laws* any crime to which the law of another State Party applies, provided that the latter State has formally requested to transfer its case proceedings to the former State.[49] This article thus establishes the legal basis for the concept of delegated jurisdiction, also

[42] Wedgwood (2001), pp. 199–200 (emphasis added). See also Scheffer (1999b), p. 71.

[43] Morris (2001), p. 44; Scheffer (1999b), p. 71.

[44] Scharf (2001), p. 114; Akande (2003), p. 624; Van der Vyver (2001), pp. 818–819.

[45] To support his assertion that there have been cases under the European Transfer Convention in which the consent of relevant third States has not been sought for the transfer of criminal proceedings, Scharf cited an interview he had with one of the drafters of the Explanatory Report to the Convention, André Klip, who reportedly stated that 'such cases (in which the consent of the states of nationality was not requested or given] are not unheard of'. See Scharf (2001), p. 114 (at fn. 268). Subsequent authors who have expressed this view have then cited Scharf, also without identifying concrete cases to this effect. See Cormier (2020), p. 42 (at fn.15); Akande (2003), p. 624.

[46] See *infra* the text accompanying nn. 51–53.

[47] Akande (2003), pp. 622–625; Cormier (2020), pp. 42–44.

[48] *The Case of the S.S. Lotus (France v. Turkey)*, Judgment, 7 September 1927, PCIJ (Series A—No. 10), p. 18.

[49] Art. 2 European Transfer Convention, *supra* n. 40.

known as representative or subsidiary jurisdiction. It applies specifically when the requested State does not have jurisdiction over the said crime under its own law, but receives such competence from the requesting State.[50] As Bassiouni also noted, this effectively 'creates a legal fiction allowing the [receiving] state to treat the offence as if it had been committed in its own territory'.[51] The Explanatory Report to the Convention points out that such transfers should take place 'only in the interests of a proper administration of justice'[52] and that:

> usually—but not always—the requesting State will be that in which the offence was committed and the requested State the State of residence of the accused.[53]

This open-ended statement of the types of situations to which the European Transfer Convention applies, and the general silence on the issue of third States' consent, is why most scholars agree that the consent of the accused's State of nationality is not required for the transfer of proceedings between a requesting and a requested State.[54]

Applied to the context of the *MH17* Trial, the above analysis means that the Netherlands is now competent to apply Dutch criminal law to try all four accused *also* for the killing of the 93 non-Dutch citizens on board of flight MH17: competence based on delegated jurisdiction it received from Ukraine, and irrespective of any objections by the Russian Federation. However, there are still several caveats to this conclusion. First, under Article 25 of the European Transfer Convention, the Netherlands would be required to make sure that the sentence imposed after a possible conviction for the murder of the 93 non-Dutch citizens (for which it does not originally have jurisdiction) is not more severe than the one prescribed under Ukrainian criminal law: i.e., the *lex mitior* principle has to be respected.[55] This, of course, is a largely academic point, given the sheer scope of the charges against the accused.

The second caveat is that the Netherlands can exercise delegated jurisdiction only if the double criminality requirement is satisfied: i.e., only if the charged crime is also a crime under Ukrainian law.[56] This may seem a rather trivial point, seeing as we are discussing the crime of murder here, which undoubtedly is also a crime in Ukraine.[57] What makes the matter somewhat more complicated, however, is that the Transfer Convention does not define the principle of double criminality *in abstracto* (i.e., as solely requiring that the charged offence is also a crime in the requesting

[50] Council of Europe, 'Explanatory Report on the European Convention on the Transfer of Proceedings in Criminal Matters' (ETS No. 73), 15 May 1972, at p. 14, available at: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800c9312 (accessed on 16 June 2021).

[51] Bassiouni (2008), p. 516.

[52] Explanatory Report, *supra* n. 50, p. 11.

[53] Ibid., p. 10.

[54] Scharf (2001), p. 114. See also *supra* n. 44.

[55] Specifically, this said article states that '[w]here the competence of the requested State is exclusively grounded on Article 2, the sanction pronounced in that State shall not be more severe than that provided for in the law of the requesting State'. See Art. 25 European Transfer Convention, *supra* n. 40.

[56] Art. 7(1) European Transfer Convention, *supra* n. 40.

[57] See Arts. 116 to 119 of the Ukrainian Criminal Code, *supra* n. 30.

State) but, rather, *in concreto.* This means, as stated in the Explanatory Report to the Convention, that the double criminality principle would be satisfied if:

> an offence which is punishable in a given State would have been punishable if committed in the State requested to prosecute the accused *and if the perpetrator of that offence would have been liable to a sanction under the legislation of the requested State*. Paragraph 1 covers this notion since it refers expressly to the punishability of the particular act, viewed as a complex of objective and subjective elements *as well as to the punishability of the perpetrator*.[58]

Accordingly, when deciding whether to accept the transfer of proceedings over the *MH17* Trial, the Dutch authorities had to determine whether: (i) the alleged behaviour underlying the transfer request was a crime in both jurisdictions; *and* (ii) the defendant had no 'grounds of justification or absolute extenuation (legitimate defence, force majeure etc.)' for engaging in that conduct.[59] If either of these conditions is not met, then Article 10(1) of the European Transfer Convention provides that the requested State must not take action on the transfer of proceedings request.[60] As it happens, there is one potential ground for excluding criminal liability in the *MH17* Trial, which concerns the possibility—reported also by US intelligence agencies several weeks after the incident—that the militants who shot down flight MH17 may have mistakenly believed that it was a military aircraft belonging to the Ukrainian armed forces.[61]

4 Defining the Accused's Criminal Liability in *MH17*: 'The Error Scenario'

The *MH17* Prosecutor acknowledged in his opening statement that '[i]t is perfectly conceivable that the true intention of these defendants was to shoot down an aircraft of the Ukrainian armed forces', calling this 'the error scenario'.[62] However, he informed the court that such a mistake would be immaterial since both the crime of murder under Article 168 DCC and that of intentionally causing an aircraft to crash under Article 289 DCC can be established regardless of the military or civilian status of the individual or aircraft concerned. The Prosecutor thus emphasized that 'any error concerning the target makes no difference in respect of the proof that such offences were committed'.[63]

[58] Explanatory Report, *supra* n. 50, p. 17 (emphasis added).
[59] Ibid.
[60] Art. 7(1) European Transfer Convention, *supra* n. 40.
[61] 'Rebels Likely Downed Malaysian Jet "By Mistake", U.S. Says', *Chicago Tribune*, 22 July 2014, available at: https://www.chicagotribune.com/nation-world/chi-malaysia-plane-ukraine-20140722-story.html (accessed 16 June 2021); 'US Intelligence: Rebels Likely Shot Down MH17 "By Mistake"—As It Happened', *The Guardian*, 22 July 2014, available at: https://www.theguardian.com/world/2014/jul/22/mh17-eu-foreign-ministers-mh17-sanctions-russia-live-updates (accessed on 16 June 2021).
[62] Opening Statement by the Public Prosecutor, *supra* n. 9, Section 'Prosecution decisions: the charges'.
[63] Ibid.

This statement is certainly correct, insofar as it is true that the definitions of the charged two crimes under Dutch criminal law do not contain any limiting characteristics (circumstantial elements) for the respective objects of these crimes: i.e. persons and aircraft. Accordingly, the material element of the crime of murder under Article 168 DCC is fulfilled by causing the death of another individual—irrespective of who they are, or what status may be objectively attributed to them—whereas the subjective element requires that the accused did so intentionally and with premeditation.[64] If the sole ground for excluding criminal responsibility that the *MH17* accused could raise is that they mistakenly believed they were shooting at a military aircraft/personnel, then it will indeed be true that they are still liable for the charged offences. However, the factual circumstances in the *MH17* case prompt a more nuanced argument, which effectively combines two grounds for excluding criminal responsibility. In particular, one can *first* argue that: (i) the accused had a *legal right to shoot at military targets*, before then submitting that, (ii) the accused were genuinely mistaken about the non-military status of flight MH17.

4.1 The Right to Shoot at Military Targets: IHL and the Notion of 'Combatant's Privilege'

The notion of 'combatant's privilege' is established under Article 43(2) of Additional Protocol (AP) I to the Geneva Conventions, to which the Netherlands is a State Party, which states that lawful combatants have 'the right to participate directly in hostilities': i.e., a right to use lethal force against valid military targets.[65] As a logical extension of this right, the rule is that lawful combatants must then be given immunity from domestic prosecution for violent acts committed strictly in accordance with IHL, even though they would normally be crimes under the domestic law of the competent State(s).[66] As the Inter-American Commission on Human Rights put it:

> The combatant's privilege in turn is in essence a license to kill or wound enemy combatants and destroy other enemy military objectives. A lawful combatant possessing this privilege must be given prisoner of war status […] upon capture and immunity from criminal prosecution under the domestic law of his captor for his hostile acts that do not violate the laws and customs of war.[67]

The notion of 'combatant's privilege', and the immunities stemming from it, have also become a firmly established rule of customary international law.[68]

[64] Art. 168 DCC. In the alternative to the murder charge, the Prosecution has also charged the accused with manslaughter under Art. 287 DCC, which does not require proof of premeditation. See *supra* n. 20.

[65] Art. 43(2) Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3.

[66] Melzer (2014), p. 305; Solf (1983), pp. 57–58; Corn (2011), pp. 256, 263–268.

[67] Inter-American Commission on Human Rights, 'Report on Terrorism and Human Rights', 22 October 2002 (OEA/Ser.L/V/II.116), para. 68, available at: http://www.cidh.oas.org/Terrorism/Eng/part.b.htm (accessed 16 June 2021).

[68] Henckaerts and Doswald-Beck (2005), p. 384.

A major question thus arises here: were the DPR armed forces that shot down flight MH17 'lawful combatants' who, to begin with, had a right to shoot at military targets?

4.2 Testing the 'Lawful Combatants' Status of the DRP Forces

Foreseeing this point, the Dutch Prosecutor submitted already in his opening statement that the DPR armed forces which shot down flight MH17 were *not* lawful combatants. He offered some preliminary analysis to this end,[69] which the present author has criticized elsewhere.[70] It was during a subsequent court session held on 10 June 2020 that the Prosecutor informed the court in full detail what the legal requirements are for enjoying combatant's privilege under IHL and, more importantly, why the four accused had no such privilege when shooting down flight MH17.[71]

4.2.1 The Nature of the Conflict in Eastern Ukraine

The status of lawful combatants, with the privileges arising therefrom, only exists in the context of *international* armed conflicts ('IACs').[72] Therefore, if the downing of flight MH17 occurred in the context of a non-international armed conflict ('NIAC')—i.e., protracted armed violence that took place exclusively between the Ukrainian and the DPR rebel forces—then the accused in the *MH17* Trial would certainly not be entitled to claim combatant's privilege. However, if it can be established instead that the DPR forces were *de facto* agents of the Russian Federation, acting under its 'overall control' when fighting against the Ukrainian army, then they would be participants in an IAC between Ukraine and Russia (acting as 'proxy forces' of the latter) and, therefore, *possibly*[73] eligible for the status of lawful combatants. This 'overall control' test was established by the International Criminal Tribunal for the former Yugoslavia ('ICTY') in the *Tadić* case and requires proving that Russia was involved in: (i) 'financing, training and equipping, or providing operational support to' the DPR armed forces; and (ii) 'organizing, coordinating or planning the military actions of' the DPR in the said armed conflict.[74]

The *MH17* Prosecutor readily recognized that the privilege of belligerency only applies in the context of IACs, accurately defined the ICTY *Tadić* Appeals Chamber's 'overall control' for determining when indirect interference by a State in a NIAC internationalizes that conflict, and then submitted the following:

[69] Opening Statement by the Public Prosecutor, *supra* n. 9, Section 'Prosecution decisions: the charges'.
[70] Yanev (2020).
[71] Possible Claims of Immunity, *Girkin et al*., District Court of The Hague, 10 June 2020, ECLI:NL:RBDHA:2020, available at: https://www.prosecutionservice.nl/topics/mh17-plane-crash/prosecution-and-trial/court-sessions-june-2020/investigation-in-the-accused (accessed 16 June 2021).
[72] See *supra* n. 66.
[73] See *infra* Sect. 4.2.2.
[74] *The Prosecutor v. Tadić* (IT-94–1-A), Judgment, Appeals Chamber, 15 July 1999, para. 137.

> there is conflicting information as to whether the defendants and their group were in fact under the control of the Russian Federation, but the strongest indications appear to be that this was indeed the case. In the present case it can therefore not easily be determined that the nature of the armed conflict between Ukraine and the so-called Donetsk People's Republic (hereinafter referred to as DPR) in itself is a reason to dismiss a claim to [combatant's privilege/immunity].[75]

The Prosecution informed the judges that, in spite of the Russian Federation's consistent denials, the investigation made it 'increasingly clear' that Russia was involved in the armed conflict during the indicted period by: (i) providing the DPR with military support (including the BUK missile which took down flight MH17), communication equipment and payments to the DPR fighters; and (ii) 'Russian officials were also involved in the organization and coordination of the armed groups fighting the Ukrainian army'. The Prosecutor stopped short of formally saying that there was, thus, an IAC between Ukraine and Russia, with the latter using the DPR as its proxy army. Given the chosen strategy to charge the accused with ordinary crimes under Dutch law, and his submission that the accused did *not* have combatant's privilege during the indicted period, the Prosecutor is certainly not obliged to establish that the conflict in Eastern Ukraine was an IAC. Nevertheless, the analysis he presented to the judges clearly signalled an understanding that this was likely the case: an understanding also shared by the ICC Office of the Prosecutor.[76] So, if not the nature of the conflict, what then can be the reason for denying combatant's privilege to the DPR armed forces in Eastern Ukraine?

4.2.2 The Legal Conditions for Lawful Belligerency in an IAC and the Prosecutor's Arguments for Rejecting 'Combatant's Privilege' for the DPR Forces

It does not automatically follow from a finding that an armed conflict is an IAC that all parties involved therein have the privilege of belligerency. IHL establishes requirements that an armed group in an IAC must satisfy in order for its fighters to be lawful combatants and enjoy the privileges and immunities stemming from that status. For States that are *not* parties to Additional Protocol I of the Geneva Conventions, the requirements stated under Article 4(A) of Geneva Convention III apply.[77] For States which are parties to AP I, the conditions for lawful belligerency are found in Article 43 of AP I, which requires that the identified armed group must be:

[75] Possible Claims of Immunity, *supra* n. 71, Sect. 1.3.1.

[76] The Office of the Prosecutor, 'Report on Preliminary Examination Activities (2018)', 5 December 2018, para. 73.

[77] Art. 4(A) Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 12 August 1949, 75 UNTS 135. See also Mačák (2018), pp. 164, 170–176.

(i) 'under a command responsible to' a State party in the identified IAC; and
(ii) 'subject to an internal disciplinary system [which] shall enforce compliance with the rules of international law applicable in armed conflict'[78]

Since both Ukraine and Russia have signed and ratified AP I, these are the applicable conditions for testing the status of the DPR forces as lawful combatants, entitled to combatant's privilege.

During the 10 June court session, the Prosecutor argued that the four accused can claim combatant's privilege/immunity only if they could prove that the following legal requirements were satisfied at the material time:

> [1] the defendant's group (recognizably) belonged to the armed forces of a (State) party to the armed conflict (the requirement of 'belonging to a party to the conflict');
> [2] the defendant's group was under a command that was responsible to a (State) party to the armed conflict for the conduct of its subordinates (a 'responsible command');
> [3] the defendant's armed group or unit was subject to an internal disciplinary system which, inter alia, must enforce compliance with the rules of international law applicable in armed conflict;
> [4] the defendant carried his arms openly; and
> [5] the charges brought were in accordance with the rules of IHL.[79]

Several problems can be discerned in this statement of the applicable law. First, it is inaccurate to treat requirements [1] and [2] as two distinct, cumulative conditions for lawful belligerency, since they are actually alternative standards derived from the aforesaid two separate provisions on the concept of 'combatant' under IHL: i.e. Article 4(1)(2) of Geneva Convention III and Article 43 of AP I. The former establishes the '*belonging to* a Party to the conflict' requirement, while the latter lays down the '*under a responsible command to* that Party' requirement. They both have the same function, which is to establish a *de facto* relationship between the concerned armed group and a State that is involved in an IAC. The difference, *if any*, between them is that the 'belonging to' standard arguably establishes a weaker linking threshold than the one provided in the 'under a command responsible' test: i.e., the degree of autonomy which an armed group can have arguably differs under these two legal standards.[80] In any event, quoting both standards as separate requirements for lawful combatancy improperly conflates the definitions set in Article 4(A)(2) of Geneva Convention III and Article 43 of AP I.

What is more problematic, however, is the Prosecutor's assertion that, under condition [1], the DPR must have *recognizably* belonged to Russia's armed forces—in the sense that this relationship must have been 'apparent to others involved in the

[78] Art. 43 Additional Protocol I, see *supra* n. 65. See also Ipsen (2021), pp 99–101; Mačák (2018), pp. 177–180.
[79] Possible Claims of Immunity, *supra* n. 71, Sect. 1.1.2.
[80] Mačák (2018), pp. 178–180.

conflict'—in order for the four defendants to be considered lawful combatants.[81] The Prosecutor further stressed this point when he informed the judges that:

> The necessary relationship between the defendant's group and the (State) party […] must also be apparent to other parties in the armed conflict. The latter is necessary because IHL requires State parties to armed conflicts to accept responsibility for the acts of violence of their combatants and, if necessary, to compensate damages. Accountability and compensation are impossible if the relationships between States and those who fight for them are concealed. IHL has therefore always required that it be clear for which party a combatant is fighting, even if that combatant belongs to an armed group that is deployed by a state in addition to, or instead of, its regular armed forces. […] This requires openness on the part of both the armed group and the state under whose responsibility that group is fighting. Not only must there be control by the state, but that control must also be apparent to the opposing party.[82]

Based on this interpretation of the law, the Prosecutor then stated his *first argument* for rejecting combatant's privilege for the defendants: namely, that Russia and the DPR leadership have denied publicly and on numerous occasions that the DPR is under the command of Russia. In his view, since 'no (hierarchical) relationship that is apparent to others existed between the DPR and the Russian Federation [nor] did the Russian Federation accept responsibility for the actions of the DPR', condition [1] is not satisfied and the accused cannot be qualified as lawful combatants who enjoy immunity from criminal prosecution.[83]

This argument is not convincing for two reasons. First, as a matter of law, the condition that the armed group has to 'belong to'/ 'be under a command responsible to' a State involved in an IAC does not require a public announcement of this relationship. True, the said condition requires acceptance by the State that the armed group in question is fighting on its behalf. The commentaries to the Geneva Conventions do specify, however, that such acceptance need not be officially declared but could be 'expressed through tacit agreement or conclusive behaviour that makes clear for which party the group is fighting'.[84] Moreover, it has also been noted that:

> In some cases, the acceptance of the Party to the conflict that the group has a fighting role and fights on its behalf, will be demonstrated by the control that the State has over the group. Where a Party to a conflict has overall control over the militia, volunteer corps or organized resistance movement that has a fighting function and fights on the State's behalf, a relationship of belonging for the purposes of Article 4A(2) exists.[85]

[81] Possible Claims of Immunity, *supra* n. 71, Sect. 1.1.2.1.

[82] Ibid.

[83] Ibid., Sect. 1.3.2.

[84] Melzer (2009), p. 23; ICRC, *Commentary on the Third Geneva Convention: Convention (III) Relative to the Treatment of Prisoners of War* (Geneva, 2nd edition, 2020), paras. 1007–1008.

[85] ICRC Commentary, *supra* n. 84, para. 1008.

and also,

> Without any doubt, an organized armed group can be said to belong to a State if its conduct is attributable to that State under the international law of State responsibility.[86]

During the wars in the former Yugoslavia, for instance, Serbia (at the time the 'Federal Republic of Yugoslavia', 'FRY') publicly denied controlling the so-called 'Army of Republika Srpska' ('VRS') in its secessionist war against the state forces of Bosnia and Herzegovina.[87] This, however, did not prevent the ICTY from concluding that the VRS was a *de facto* organ of the Federal Republic of Yugoslavia, acting under its 'overall control'.[88]

The official statements which Russia and the DPR leadership have made on the lack of hierarchical relationship are, by themselves, no more determinative of whether condition [1] is satisfied than they are for establishing whether the conflict in Eastern Ukraine is an IAC. To be sure, one may challenge the view whether the 'overall control' test should be used to determine whether the DPR forces 'belonged to' the Russian Federation. It may be that a stronger factual link, expressed in a higher degree of control (e.g., 'effective control'), is in fact required, especially for the 'under a command responsible to' test under Article 43 of AP I.[89] In either case, however, the existence of such a relationship between Russia and the DPR forces must be determined on the basis of an assessment of the facts on the ground, irrespective of what public statements the parties concerned have made to this effect. Moreover, it also has to be noted that the Prosecutor's assertion that 'no (hierarchical) relationship that is apparent to others existed between the DPR and the Russian Federation' is exaggerated. The Ukrainian Government, in particular, has long publicly announced its understanding that the rebel forces in its eastern territories are 'proxies' of Russia, used by it in a 'hybrid warfare' to gain control over those territories.[90]

The *second ground* on which the Prosecutor argued that the accused are not entitled to combatant's immunity is because the DPR forces did not satisfy the

[86] Melzer (2009), p. 23. See also Mačák (2018), pp. 173–174.

[87] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections, Judgment, 11 July 1996, ICJ Reports 1996, p. 595 at p. 605.

[88] *Tadić* Appeals Judgment, *supra* n. 74, para. 162. It has to be noted that the International Court of Justice later made the opposite finding: i.e., it found that the VRS was *not* an organ of the Federal Republic of Yugoslavia. However, this conclusion was based on the use of the stricter 'effective control' test, and not on a consideration of whether the FRY officially acknowledged any relationship with the VRS, or whether such a relationship was 'recognizable' to all parties to the conflict. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, ICJ Reports 2007, p. 43 at pp. 205–206, paras. 393–395.

[89] Mačák (2018), pp. 178–180.

[90] *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)*, Application Instituting Proceedings, ICJ, 16 January 2017, paras. 8–10, 37; Permanent Mission of Ukraine to the United Nations, 'Russian Aggression', *Web: Ukraine and the UN*, available at: https://ukraineun.org/en/ukraine-and-un/russian-aggression/ (accessed 16 June 2021).

above-cited condition [3]. Specifically, the Prosecutor stated that 'in and around July 2014 the DPR violated IHL on such a large scale and so systematically that it cannot be said that there was a functioning internal disciplinary system within the DPR'. One thing that merits caution when interpreting the said requirement under Article 43 of AP I is the propensity to view it as an obligation of result: i.e., that it requires the presence of an internal disciplinary system that, in fact, effectively prevents the members of the armed group from violating IHL. This view was expressed by Israel during the drafting of this provision,[91] and appears to be what the Prosecution is arguing, but it has not received much traction and has been criticized for being unrealistic. Meltzer, for instance, has pointed out that:

> As violations of IHL invariably occur on all sides participating in an armed conflict, such an absolute requirement would introduce unacceptable uncertainty regarding the status of all armed actors involved in the hostilities, including uniformed governmental soldiers. Therefore, the status of armed forces must depend on factual 'organ-ship' for a recognized party to an international armed conflict and not on compliance with IHL while exercising this function. Consequently, while non-compliance with IHL exposes members of armed forces to prosecution under international criminal law, it generally does not terminate the combatant privilege.[92]

Thus, Article 43 of AP I is understood as establishing a requirement that the said armed group has an internal disciplinary system that ensures the group's *overall* compliance with IHL. Large-scale and systemic violations of IHL have been committed, for instance, by US forces in detention centres across Afghanistan (and beyond),[93] yet it would be fanciful to argue that as a result US soldiers generally lost their combatant's privilege in that conflict. It does not matter that one is a regular armed force, while the other is irregular (i.e., the DPR as a 'proxy' Russian armed force), since such a distinction is rejected in Article 43 of AP I and the legal requirements for lawful combatancy apply equally to both. Only if the evidence shows that the DPR generally conducted its military operations in an inherently criminal manner will the aforesaid condition [3] not be satisfied, thereby justifying a blanket rejection of a 'combatant's privilege/immunity' for all DPR fighters.

4.3 The Prosecutorial Advantages of Avoiding 'War Crimes' Charges in *MH17*

Although not entirely convincing, the Prosecutor's analysis rejecting combatant's privilege for the DPR forces in Eastern Ukraine should be appreciated in light of what he is actually required to prove under the present construction of the *MH17* Trial. Given that the accused are charged with ordinary crimes, it is decidedly not

[91] Pictet et al. (1987), p. 513.

[92] Melzer (2008), p. 308 (at fn. 43). See also Mačák (2018), pp. 174–175.

[93] *Situation in the Islamic Republic of Afghanistan* (ICC-02/17-138 05-03-2020), Judgment on the Appeal Against the Decision on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, ICC Appeals Chamber, 5 March 2020, paras. 4, 62, 65–78.

the Prosecutor's job to prove beyond reasonable doubt that the accused were *not* lawful combatants, or that they were aware of MH17's civilian status. He is generally required to inform the court of his position on the non-applicability of potential excuses or justifications in the case at hand, but the actual burden of proving those excuses or justifications lies with the accused. To clarify this point, and also more generally to underscore the prosecutorial advantages of charging the *MH17* accused with ordinary crimes, it is useful to contrast and explain what would have happened in the situation where *MH17* took the form of a war crimes trial.

If the Prosecutor had decided to charge the four accused with murder and with directing attacks against civilians/civilian objects, as serious violations of the laws and customs of war,[94] he would have had the burden of proving the definitional elements of these crimes. Establishing their contextual requirements—i.e. the existence of an armed conflict (NIAC or IAC) in Eastern Ukraine and a nexus between the downing of MH17 and that conflict—would not have been a challenge.[95] The problem would have been the *actus reus* and *mens rea* elements of these war crimes. Objectively, they both require establishing the protected status of MH17 and of the victims on board as 'civilians/not taking an active part in the hostilities': a simple task in this case.[96] Subjectively, however, the Prosecutor would now also have incurred the burden of proving that the DPR forces were aware of that protected status.[97] This would have dramatically shifted the Prosecutor's position, who would no longer be able to treat as irrelevant evidence that 'the true intention of these defendants was to shoot down an aircraft of the Ukrainian armed forces'.[98] He may do so in the present trial for domestic crimes, where any litigation on mistaking the status of

[94] The legal basis for the charges of murder and directing an attack against civilians would have been provided in, respectively, Art. 6(1)(a) and Art. 6(3)(a) of the International Crimes Acts (*supra* n. 37), if the Prosecution did not wish to prove that the armed conflict in Eastern Ukraine is an IAC, but rather sought to qualify it as a NIAC. In this scenario, there would have been a slight complication with qualifying the targeting of the aircraft itself also as the war crime of directing an attack against a civilian object, since *conventionally* (and under Art. 5(5)(a) of the International Crimes Act) the protection of all civilian objects from direct attacks is only established in IACs. In NIACs, on the other hand, only a limited list of civilian objects are protected from direct attacks (Art. 6(3)(d) of the International Crimes Act) and a civilian aircraft is not included within that list. The *MH17* Prosecutor would thus have had to argue that the general protection of all civilian objects from direct attacks is extended also to NIACs under customary international law. See *The Prosecutor v. Strugar* (IT-01–42-T), Judgment, Trial Chamber, 31 January 2005, paras. 223–226. See also Zamir (2015). For a more critical view on whether customary international law generally extends the war crime of directing attacks against civilian objects to NIACs, see e.g., Akande (2012), pp. 36–37.

[95] For these contextual legal elements of 'serious violations of the laws and customs of war'—i.e., 'armed conflict' and 'nexus' requirements—and their legal definition, see e.g. *The Prosecutor v. Mladić* (IT-09-92-T), Judgment Vol. III, Trial Chamber, 22 November 2017, paras. 3012–3017; *The Prosecutor v. Bemba* (ICC-01/05-01/08-3343), Judgment, Trial Chamber, 21 March 2016, paras. 126–144.

[96] On the 'protected status of victims' element, see *The Prosecutor v. Karadžić* (IT-95-5/18-T), Judgment, Trial Chamber, 24 March 2016, para. 444; *Mladić* Trial Judgment, *supra* n. 95, para. 3017.

[97] *The Prosecutor v. Katanga* (ICC-01/04-01/07-3436-tENG), Judgment, Trial Chamber II, 7 March 2014, para. 793; *The Prosecutor v. Boškoski and Tarčulovski* (IT-04-82-A), Judgment, Appeals Chamber, 19 May 2010, para. 66; *Mladić* Trial Judgment, *supra* n. 95, para. 3017; *Karadžić* Trial Judgment, *supra* n. 96, para. 444.

[98] See *supra* n. 62.

MH17 can be shaped solely as a possible ground for excluding criminal responsibility that: (i) must be proven *by the accused*; and (ii) requires *the accused* to first also prove that the DPR forces were lawful combatants.[99]

Aside from this shift in the burden of proof, the actual litigation on the requisite degree of awareness, which the DPR forces must have had concerning the victims' protected status, would have been complicated. As a point of departure, it should be noted that the preparatory works of the International Crimes Act, which implements the Rome Statute in the Dutch legal order and will offer the legal basis for war crimes charges in *MH17*, directs judges to define both the objective and subjective elements of war crimes in conformity with international law.[100] The problem is, however, that two legal standards exist in ICL on this point. Under *customary* international law—as applied by the UN *ad hoc* Tribunals—the *mens rea* element of the relevant war crimes in *MH17* would require proving that the perpetrators had acted, at a minimum, with *dolus eventualis*: i.e., they were aware of a substantial likelihood that MH17 was a civilian aircraft and accepted the risk that shooting at it might result in the charged war crimes.[101] The ICC Rome Statute, on the other hand, establishes a stricter general *mens rea* element that rejects *dolus eventualis* and requires proving that the shooters acted with a *dolus directus*, either in the first or in the second degree.[102] Proving that the DPR forces were, at least, aware of a 'virtual certainty' that MH17 was a civilian aircraft would clearly have been an evidentiary nightmare for the Prosecution.[103] If the customary ICL *mens rea* standard can be applied instead, it will be more feasible to argue that the DPR were aware of and accepted such a risk (possibility). Even then, however, difficult questions would have arisen as to whether evidence of a genuine mistake of fact (unreasonable as it may have been) precludes a finding that the perpetrators had acted with

[99] The notion of 'combatant's privilege', with the right that it grants to shoot at military targets, can be read as a ground for excluding responsibility under Arts. 42 and 43 DCC, which state that the commission of offence in the execution of a statutory requirement, including an official order by a proper authority, shall not entail criminal responsibility. See De Hullu (2015), pp. 337–338.

[100] Parliamentary Papers II, Session year 2001/02, 28337, No. 3, p. 5 ('*Memorie van Toelichting*', legislative history of the '*Wet Internationale Misdrijven*' available only in Dutch).

[101] This is the general subjective element that the Tribunals established for most crimes under their jurisdiction. Olásolo (2009), p. 78. For the war crime of directing an attack against civilians, the ICTY has further held that 'the perpetrator has to act consciously and with intent, willing the act and its consequences. This encompasses the concept of recklessness but not negligence'. See *Karadžić* Trial Judgment, *supra* n. 96, para. 456; *The Prosecutor v. Strugar* (IT-01-42-A), Judgment, Appeals Chamber, 17 July 2008, para. 270.

[102] *The Prosecutor v. Lubanga* (ICC-01/04-01/06-3121-Red), Judgment, Appeals Chamber, 1 December 2014, paras. 447–448.

[103] The ICC has described *dolus directus* in the second degree to apply when the accused does not have 'the actual intent or will to bring about the material elements of the crime, but […] he or she is aware that those elements will be the almost inevitable outcome of his acts or omissions'. *The Prosecutor v. Bemba* (ICC-01/05-01/08-424), Decision on the Confirmation of Charges, Pre-Trial Chamber II, 15 June 2009, para. 359. The legal elements of this form of intent are thus defined in order to require that the accused is aware of and accepts that his conduct will result in the commission of a crime 'in the ordinary course of events': i.e. a standard of foreseeability equated to 'virtual certainty'. *Lubanga* Appeal Judgment, *supra* n. 102, para. 447.

dolus eventualis when targeting MH17.[104] All these legal complexities and evidentiary challenges were avoided when the Prosecutor opted to charge the accused with the ordinary crimes of murder and intentionally causing an aircraft to crash under Dutch law.

There is one final point about the Prosecution's strategy not to charge the accused with war crimes that merits consideration here. If the Prosecutor had decided to construct *MH17* as a war crimes trial, he would have completely removed an important legal obstacle that the four accused are now facing when possibly pleading a mistake of fact in the case: i.e., the 'combatant's privilege' concept. This is because in war crimes trials it is completely immaterial whether the accused were lawful combatants. If a participant in a NIAC (e.g., a rebel fighter), who is *not* a lawful belligerent, kills an enemy government soldier participating in that NIAC, this is *not* a war crime under the Geneva Conventions. This can only be a crime under the domestic criminal law of the competent State.[105] Such a rebel fighter can therefore directly rely on a mistake of fact to defend himself against war crimes charges if it transpired that the soldier he believed he was targeting was actually a civilian. In *MH17*, when the Prosecution charged the four accused with murder under Dutch law, it effectively placed them in a situation where, if they wished to plead a mistake of fact for the downing of MH17, *they* first have to prove that the DPR armed forces were lawful combatants: i.e., have these accused argue that they were *de facto* agents of Russia, fighting in an IAC against Ukraine.[106] Unconvincing as the Prosecutor's analysis of the notion of 'combatant's privilege' may be,[107] the fact remains that he did more than what was required of him under the present case, which was to inform the judges that he does not see any excuses or justifications that may exclude the accused's responsibility for the charged offences.[108] It is for the defence to prove the opposite and to establish that the DPR forces were lawful combatants, if it wished to plead a mistake of fact. Considering what Russia's official position has been on its relationship with the DPR and who the four accused are, it is unlikely that they would choose to go down that road. This may have been quite different if *MH17* was shaped as a war crimes trial and the accused were thereby given *carte blanche* to plead a mistake of fact without first having to prove that the DPR was a *de facto* organ of Russia.

5 Conclusion

The prosecution of core international crimes as domestic offences has been criticized by many who believe that 'ordinary crimes do not represent the scope, scale and gravity of the conduct' captured in the concepts of war crimes, crimes against

[104] For an analysis on this issue, see Heller (2014); Whiting (2014).
[105] Melzer (2014), pp. 305–306; Greenawalt (2018), pp. 10–11.
[106] See *supra* the text accompanying nn. 65–68 and 77–78.
[107] See *supra* Sect. 4.2.2.
[108] De Hullu (2015), pp. 375–377.

humanity and genocide.[109] In their eyes, opting to prosecute the accused for international crimes gives this trial a greater expressive value and is in line with the fair labelling principle, pursuant to which 'the label applied to an offence ought fairly to represent the offender's wrongdoing'.[110] The present author has much sympathy for this narrative, yet it should also be stressed that the pursuit of such legal expressivism must be reasonably balanced against the prospects of efficiently and successfully meting out criminal justice. Legal and practical challenges that can derail a war crimes trial should rightly factor in the prosecutor's decision on how to qualify the charges against the accused.

The *MH17* Trial offers a very good example to this end. Jurisdictionally, one of the main advantages of charging conduct as a core international crime is that this enables reliance on the universality principle to overcome any jurisdictional barriers for trying the accused.[111] This is not a problem in *MH17*, where the Dutch courts can establish a jurisdictional nexus to the charged ordinary crimes by relying on other titles of extraterritorial jurisdiction. What the present paper has argued, however, is that contrary to the Prosecutor's submission, The Hague District Court's competence to try the accused cannot be *exclusively* based on the passive personality principle. Rather, competence over the murder of the non-Dutch nationals on board of flight MH17 might only be asserted on the basis of delegated jurisdiction, as envisioned in the Transfer Agreement that Ukraine and the Netherlands signed in 2017. This is important to note not just to avoid an impermissible judicial expansion of the accepted parameters of passive personality jurisdiction. Recognizing the proper jurisdictional basis for the killing of all non-Dutch victims on board of MH17 will also make the judges mindful of the following: (i) the double criminality rule, defined *in concreto*, when confirming jurisdiction over the 93 non-Dutch victims, and (ii) the role that Ukrainian criminal law has to play when potentially sentencing the accused in relation to those charges.

Substantively, charging the four accused in *MH17* with war crimes would have put the Prosecutor in a much less favourable, potentially even losing, position than it is presently in. Not only would he have incurred the burden of proving that the accused were aware of the protected status of the aircraft and the persons inside it—a matter that he can currently treat as irrelevant for the charged domestic crimes—but the degree of such awareness that he would have had to prove may be prohibitively high under the applicable international *mens rea* standard for the relevant war crimes. This would be especially so under the ICC Rome Statute's *mens rea* element, which requires proving that, at the very least, the DPR forces were virtually certain that MH17 was a civilian aircraft, the shooting down of which would result in the commission of the charged war crimes. Moreover, qualifying the charges against the accused solely as war crimes would have allowed them to plead a mistake of fact, *without* first having to prove that they were 'lawful combatants'

[109] Bergsmo et al. (2010), p. 801. See also Heller (2012), p. 131; Doherty and McCormack (1999), p. 166.
[110] Ashworth (1981), p. 53. See also Heller (2012), p. 131.
[111] Baxter (1951), pp. 67–68; Heikkilä (2013), pp. 143–144.

who had a right to open fire against military targets. Although the legal analysis that the Prosecutor has offered to the court on this concept and its non-application to the accused is very questionable, it is perfectly sufficient given the present construction of the *MH17* Trial. The burden of proof is on these accused to establish that they have, under IHL, immunity from criminal prosecution by virtue of having been lawful combatants at the material time, while the Prosecution has only had to adduce a reasonable explanation as to why this is not the case. It has done exactly so and if the accused wish to challenge this account, they certainly have the opportunity to do this by establishing *inter alia* that the DPR's forces in Eastern Ukraine are *de facto* organs of the Russian Federation.

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