**Pleadings of the Government of the Kingdom of the Netherlands in Application no. 28525/20**

**The Netherlands**

**v.**

**Russia**

**Admissibility Hearing**

European Court of Human Rights

Grand Chamber

Strasbourg, 26 January 2022

Introduction

1. Mr President, distinguished members of the Court,
2. Today, seven years, six months and nine days have passed since the downing of Flight MH17 over the east of Ukraine. The downing of Flight MH17 resulted in the loss of life of two hundred and ninety eight innocent men, women and children.
3. Among the victims were nationals or residents of seventeen different States from all corners of the world. One hundred and ninety six of them were Dutch.
4. The large number of Dutch victims has had and continues to have a profound impact on the Dutch society. Almost everyone knows someone who lost a family member or a close friend.
5. Shortly after the incident, it became apparent that the crash of Flight MH17 had not been an incedent but that the aircraft had been shot down.
6. Ever since, my Government has committed itself to the pursuit of truth, justice and accountability for the victims of the downing of Flight MH17 and their next of kin. To this date, no one has taken responsibility. This has added and continues to add to the already tremendous grief of the next of kin.
7. Many steps have been taken in this pursuit of truth, justice and accountability. First, investigations were carried out into the circumstances of the downing. Second, criminal proceedings against four suspects commenced while the criminal investigation continues. Third, legal action against Russia is being pursued. Australia and the Netherlands invoked the responsibility of Russia under international law**.** Also, over 400 next of kin have filed individual applications to this Court. With this inter-State application, my Government fully supports these individual applications. I stand here today on behalf of all two hundred and ninety eight victims and their next of kin.
8. I will not repeat the facts and observations that were already submitted to the Court in my Government’s application and the subsequent memorials. Instead, I would like to draw your attention to a few points which we believe should be highlighted during this hearing.
9. Before turning to the application of my Government, I wish to observe the following. We have just listened to Russia’s oral submissions. The pleadings of Russia, and in particular the part focusing on the downing of Flight MH17 seems to be – I must say again - an attempt to cause confusion. Unfortunately, this narrative is well-known by my Government and illustrates Russia’s conduct ever since the downing. The statement just now that the Public Prosecution Office of The Netherlands stated that the conflict in the east of Ukraine is not an international conflict is yet another example. It is simply not true. And I refer to the transcripts of the proceedings, available via the internet. If the Court wishes my Government can provide a copy of the statement of the Public Prosecution Office of the Netherlands.
10. Now, I will turn to our application. First, I will address the core of our case, namely the role of Russia in the downing of Flight MH17. Second, I will make a few remarks with respect to the evidence submitted to this Court. Third, I will address the admissibility requirements of the application and the jurisdiction of Russia. Finally, a representative of the next of kin will use the opportunity to address the Court.

[The role of Russia in the downing of Flight MH17]

1. Mr President, members of the Court,
2. My Government has come to the conclusion that the downing of Flight MH17 is caused by the detonation of a Buk-missile launched from a Buk-TELAR. This Buk-TELAR was provided by Russia with a crew to the separatists. The Buk-missile was launched from an area under the effective control of Russia and by, or at least with the assistance of, Russian state agents.
3. The Buk-TELAR was delivered by Russia to the separatists upon request. It was first transported from its base in Kursk in Russia to the border with the east of Ukraine. From there, the Buk-TELAR was transported into the east of Ukraine. Subsequently, it was brought to an agricultural field south of Snizhne and west of Pervomayskyi, all in the east of Ukraine. All in the so-called the Donetsk People’s Republic, also referred to as the DPR. This DPR was under the effective control of Russia.
4. From the agricultural field, the Buk-TELAR launched a missile. This missile detonated at the left-hand side of the cockpit of Flight MH17. The detonation caused the front of the airplane, roughly comprising of the cockpit and business class area, to tear off from the rear of the aircraft. As a result of this in-flight break-up, Flight MH17 crashed over a large area which was under the control of the DPR.
5. Immediately after the launch, the Buk-TELAR was returned to Russia. These are the facts at the heart of our application.

[Evidence]

1. I would like to make a few remarks with respect to the evidence submitted to this Court.
2. Since the downing of Flight MH17, various extensive investigations have been carried out. These investigations have led to the establishment of various facts, including those I just addressed. These facts are corroborated by compelling and convincing evidence, which has been verified and validated.
3. The evidence presented by my Government to this Court focuses on various issues. These issues include:
	* The involvement of Russia in the conflict in the east of Ukraine;
	* The identification of the Buk-TELAR of the fifty-third Anti-Aircraft Missile Brigade of the Russian armed forces;
	* The location of that Buk-TELAR on 17 July two-thousand -fourteen; and
	* The Russian crew of that Buk-TELAR.
4. The evidence submitted to this Court originates from various sources. These sources include:
	* Open sources;
	* Information from intelligence services; and
	* Information from the criminal investigation, such as:
		1. Intercepted telephone conversations;
		2. Visual material, such as videos and photos; and
		3. Witness statements.
5. The Government has submitted conclusive evidence to this Court in support of the mentioned facts. The evidence submitted is a result of tireless efforts of various independent institutions and organizations that have committed themselves to establishing the truth.
6. I would like to emphasize that all evidence submitted has been verified and validated. For every piece of evidence, its authenticity and evidentiary value has been examined meticulously by the competent authorities. Validated evidence has subsequently been placed in the context of other validated evidence. This allows for an assessment whether and how all single pieces of evidence relate to each other. This has painted a clear picture of the circumstances of the downing of Flight MH17.
7. According to my Government, the evidence submitted satisfies the standards of this Court. In any case, my Government holds that the *prima facie* threshold that is relevant at this stage of the proceedings is met.
8. To this day, Russia has failed to effectively cooperate with the investigations into the downing of Flight MH17. Russia has failed to put forward any convincing evidence that contradicts the facts as presented by my Government. I wish to highlight that some of the evidence lies primarily within the exclusive knowledge of Russia. One striking example is the refusal to provide any information about the identified Buk-TELAR, including its location.
9. Russia continues its narrative that the evidence used is manipulated. However, Russia has failed to submit any convincing evidence in support of these statements. Even worse, Russia has even tried to mislead investigators by submitting manipulated information.

[Admissibility]

1. Mr. President, members of the Court,
2. Our hearing today is focused on admissibility. In the application and additional memorials, my Government has extensively addressed the admissibility aspects of its application. Russia has replied to these submissions, but has failed to contest the admissibility with solid arguments. My Government submits that the objections of Russia must therefore be rejected.
3. I will briefly discuss the admissibility requirements in turn. I will start with the exhaustion of domestic remedies, and continue with the six-month rule. I will conclude with the issue of jurisdiction.

[Exhaustion of domestic remedies]

1. First, the exhaustion of the domestic remedies.
2. In its written submissions, my Government has made several arguments that led to the conclusion that this requirement does not render the application inadmissible. First and foremost, there were no remedies in Russia that could have been exhausted. Second, four special circumstances exist which entail that the obligation to exhaust domestic remedies should not be applied. I will briefly discuss these arguments in turn.
3. First: there were no effective, adequate and accessible domestic remedies. Given the constant and continuing policy of denial, any action of the next of kin to avail themselves of local remedies would be, to use the wording of the Court: bound to fail.
4. I wish to note that the domestic procedures that Russia referred to in its memorial only provide a remedy to hold individuals to account. These do not provide any remedy to hold the State Russia accountable for human rights violations.
5. Also, while evidence demonstrates that the missile was launched by members of the Russian armed forces, it is yet unclear who exactly they are. This makes it impossible to pursue legal action against them even if the Public Prosecution Office of Russia would be willing to co-operate.
6. The second reason why in this case there is no obligation to exhaust local remedies is the existence of special features. There are in this case four special features that call for an exemption from this obligation. I will only briefly touch upon these four special features.
7. The first special feature is connected to the conduct of Russia. Russia has:
* Consistently denied involvement;
* Refused to effectively cooperate; and
* Continuously discredited the investigations carried out and the conclusions reached.

This calls for an exemption from the obligation to exhaust domestic remedies.

1. The second special feature concerns the personal circumstances of the next of kin. This group is large and very diverse. There are so many nationalities, so many grades of kinship and so many differences in wishes and desires. It is unfeasible for this group to join efforts and pursue domestic remedies in Russia under the given circumstances.
2. The third special feature is the lack of a relevant connection between the victims and Russia. In this case there is no consent or voluntary act that created a relevant connection between the victims of the downing of Flight MH17 and Russia. In line with the Draft Articles of the International Law Commission on Diplomatic Protection in such a case, the domestic remedies do not need to be exhausted.
3. The fourth and final special feature lies in the hybrid character of the application. In the past, the Court has recognized two types of inter-State applications, namely cases of diplomatic protection and cases involving an administrative practice. As elaborated upon in the Additional Memorial of last May, the present application contains aspects of both types of inter-State applications. The current application covers both an isolated event, that is the downing of Flight MH17 itself, as well as the subsequent element of official tolerance, namely the official policy of denial of the involvement of Russia in the downing of Flight MH17. My Government concludes accordingly that its application can be considered a hybrid application and submits that the domestic remedies’ rule should not be applied. This would be in line with the practice with respect to inter-State applications concerning administrative practices because of the existence of an official policy of denial.

[*Conclusion with respect to domestic remedies]*

1. In sum, under the given circumstances of this particular case, the obligation to exhaust domestic remedies does not render the present application inadmissible.

[Six month rule]

1. With respect to the six-month rule, my Government first holds that the violations of the procedural elements of Article 2 of the Convention and the violations of Articles 3 and 13 of the Convention are ongoing. This is not contested by Russia.
2. Russia questions, however, whether the Government has complied with the six-month rule with respect to the violation of the substantive element of Article 2 of the Convention. These objections of Russia must be dismissed. I will explain why.
3. Invoking the responsibility of a State under international law and submitting a dispute to an international court are steps that my Government does not take lightly. In our view, before taking such a step, a Government must be fully convinced of its reasons to do so. This process may take considerable time. The time it may take is also dependent on the precise circumstances of the particular case.
4. Since 17 July two-thousand-fourteen, my Government has committed itself to establishing the truth, justice and accountability. Various tracks are being pursued. The magnitude of the downing of Flight MH17 and the geo-political context in which it has taken place, make this case highly complex. This has had and continues to have a profound impact on the development and progress of the case.
5. On twenty-four May two-thousand-and-eighteen, the Joint Investigation Team presented its conclusions that the Buk-TELAR that caused the downing of Flight MH17 belonged to the Russian armed forces. This pointed to the direct involvement of Russia in the downing of Flight MH17 and several breaches of international law by Russia.
6. Following this announcement, Australia and the Netherlands invoked the responsibility of Russia under international law. Subsequently, my Government, together with Australia, first sought to negotiate a settlement with Russia.
7. These negotiations were aimed at finding a solution that does justice to the tremendous suffering and damage caused by the downing of Flight MH17. My Government notes that it took considerable time for these negotiations to commence. In March two-thousand-nineteen, it was announced that a first meeting had taken place. Unfortunately, on fifteen October two-thousand-twenty, Russia unilaterally decided to withdraw from these negotiations. Since then, Australia and the Netherlands have called upon Russia several times to reconsider its decision.
8. The Government’s decision to submit the inter-State application in July two-thousand-twenty was prompted by developments at this Court. It became apparent that the Court was moving on with the individual applications as regards the downing of Flight MH17 and the inter-State application of Ukraine against Russia concerning the east of Ukraine. My Government considered it to be crucial that the Court would have at its disposal the information related to the downing of Flight MH17 obtained by my Government.
9. The primary purpose of the six-month rule is to maintain legal certainty by ensuring that cases under the Convention are examined within a reasonable time. This is to prevent that the authorities concerned are being kept in a state of uncertainty for a long time.
10. Mr President, In this case, it cannot be said that Russia has been kept in any state of uncertainty.
11. There have been particular circumstances and factors that severely delayed and continue to delay the process. It is important to take these circumstances and factors into account. One important delaying factor has been the conduct of Russia itself.
12. My Government has relentlessly and continuously undertaken all steps and efforts to establish the facts surrounding the downing of Flight MH17. Our goal is to achieve justice for the victims and their next of kin.
13. Meanwhile, my Government has been confronted with the unabashed attempts of Russia to discredit the investigations carried out and to delay progress made. In addition, Russia has failed to effectively cooperate with the investigations. Not only has Russia refused to share relevant information with the relevant authorities, it has actively attempted to hinder the investigations.

*[Conclusion with respect to six-month rule]*

1. Ever since the downing of Flight MH17, my Government has continuously taken action in order to discover the truth. Since compelling evidence regarding the role of Russia in the downing of Flight MH17 emerged, efforts have been directed at finding a settlement. However, now we stand here before your Court. And we submit that all circumstances regarding this case should not be ignored in the assessment of the application of the six-month rule.

*[Conclusion with respect to admissibility requirements]*

1. Mr President, distinguished members of the Court. Based on the arguments in our written submissions and as set out here today, my Government is convinced our application must be declared admissible in whole. The objections of Russia must be dismissed.

[Jurisdiction]

1. I now turn to jurisdiction.
2. The only issue at hand is the extraterritorial jurisdiction by Russia over the persons on board Flight MH17 in relation to the substantive element of Article 2 of the Convention.
3. At the time of the downing, the persons on board Flight MH17 were within the jurisdiction of Russia. The principal reason for this conclusion is that Russia exercised effective control over the DPR area. The downing of Flight MH17 took place in this area. Furthermore, the persons on board Flight MH17 were within the jurisdiction of Russia, through the use of force by its State agents.
4. I will first address the exercise of effective control by Russia over the DPR area. Then I will address the exercise of jurisdiction through the use of force by Russian State agents.

[Effective Control over the DPR Area]

1. As of March two-thousand-fourteen, separatists became active in the south and east of Ukraine. They were able to secure effective control, first over government buildings, and by April over an area that included several large cities in the east of Ukraine. And then, in early April, separatists proclaimed the Donetsk People’s Republic, the DPR.
2. The separatists were able to secure, maintain and expand their control over the DPR area by virtue of the support of Russia. Through its political, military and economic support to the separatists, Russia established effective control over the DPR area.
3. Convincing and compelling evidence with respect to the political, military and economic involvement of Russia in the DPR area has been submitted to your Court.
4. This evidence paints a clear and irrefutable picture of the Russian involvement in the day-to-day operations of the DPR. Furthermore, the evidence clearly demonstrates that the separatists were able to maintain control over the DPR area only by virtue of the support given by Russia. Without Russia, there would be no DPR; there would be no DPR area.
5. Russia has not submitted any convincing arguments or compelling evidence to the contrary.

[State Agents]

1. The jurisdictional link between the passengers and crew of Flight MH17 with Russia is not only a result of the fact that Russia exercised effective control over the DPR. It is also a result from, and even enhanced by, our conclusion that it must have been Russian Stage agents who launched the missile that caused the downing of Flight MH17.
2. Intercepted telephone conversations demonstrate that separatists requested – and I quote – “decent anti-aircraft defense manned with trained personnel”. It needs no explanation that a Buk-TELAR qualifies as such. It follows from the evidence that, after this request was made, a Buk-TELAR was brought into the east of Ukraine with a Russian crew.
3. This Russian crew was crucial for the deployment of the Buk-TELAR and the launch of the missile. The launch of a Buk-missile namely requires knowledge of the operational and technical aspects of a Buk-TELAR. The simple fact that a missile was launched indicates that the Buk-TELAR was operated by individuals trained to launch such a missile. And we know that the separatists did not have such specialists nor did they have the time to train them.

*[Conclusion with respect to State Agents]*

1. According to my Government, the only logical conclusion derived from all the relevant evidence is that the Buk-TELAR was deployed by members of the Russian armed forces. Thus, the missile that caused the downing of Flight MH17 was launched by, or at least with the assistance of, Russian State agents.

[MAIN CONCLUSION]

1. Mr. President, distinguished members of the Court, I will now conclude.
2. On 17 July two-thousand-fourteen, two-hundred-and-ninety-eight innocent individuals lost their lives. Families, loved ones, and friends were torn apart. Children lost their parents, parents lost their children, and siblings lost their brothers and sisters.
3. Ever since, my Government has committed itself to establishing truth, justice and accountability for the victims of the downing of Flight MH17 and their next of kin. After more than 7 years, this quest is not over and no one has assumed responsibility.
4. The proceedings before this Court are of great importance for the next of kin and are followed with great interest not only in the Netherlands but also internationally.
5. My Government stands here today on behalf of all victims and all next of kin. The loss of their loved ones is heartbreaking and has left deep wounds. The downing and its aftermath continue to have a deep and extensive impact on their lives. The sorrow and pain caused by the downing of Flight MH17 has been further intensified by the continuous denial of Russia of its involvement. The fact that, to this day, no responsibility for the downing has been taken, withholds next of kin of finding closure.
6. This became again abundantly clear in the addresses of many of the next of kin to the Dutch Court during the recent hearings in the criminal trial. Almost all speakers explicitly referred to the fact that the conduct of Russia – its denial and obstruction – compounds to the grief that is felt.
7. However, I am not in a position to fully convey the impact of the downing of Flight MH17 and its aftermath on the next of kin or the importance of these legal proceedings for them. Allow me to give the floor to the representative of the next of kin, Piet Ploeg. Piet Ploeg lost his brother, his sister-in-law and his nephew in the downing of Flight MH17. He is Chair of the Foundation Air Disaster MH17.

[Pleidooi Piet Ploeg]

**Reply**

1. Mr President, distinguished members of the Court,
2. I will reply to some questions posed and will then give the floor to my colleague Mr René Lefeber.

1. In reply to the question posed by Judge Yudkivska, I wish to reply the following.
2. In *Georgia v. Russia (II)*,the Court distinguished between events during an ‘active phase of hostilities’ and during a period following that phase. The Court considered that between 8 and 12 August 2008 there was an armed confrontation and fighting between enemy military forces seeking to establish control over an area in a context of chaos. That was a quote. According to the Court, under these specific circumstances, Russia did not exercise effective control over the area during said period.
3. The situation in the east of Ukraine at the time of the downing of Flight MH17, as explained before, is fundamentally different from the situation in Georgia between 8 and 12 August 2008.
4. Unlike the situation in Georgia, in the east of Ukraine, independent republics were declared that survived by virtue of the support of Russia. The efforts of the separatists to take over vast areas in the east of Ukraine, supported by Russia, led to the establishment of a new *status quo*. By April 2014, separatists controlled the DPR area. This *status quo* consisted of Russian control, through the separatists, over the area of the DPR.
5. It is important to note that armed clashes continued to take place. These did not, however, affect the established control. Therefore, there was no ‘active phase of hostilities’ in the sense of an ‘armed confrontation between enemy military forces seeking to establish control over an area in a context of chaos’. Russia already had established such control over the area and was able to maintain this control. It follows from the Court’s established case-law, as cited in our written submissions, that armed clashes do not render it impossible to establish or maintain control.
6. The Convention is applied to the use of military force, both territorially as well as extraterritorially. The present case is and should be no exception to this. Any other appraisal of the applicability of the Convention would seriously compromise its purpose and effectiveness. If the existence of jurisdiction is dependent on whether hostilities in an area die down or flare up again, this may lead to situations in which there would be jurisdiction one day but not the next, only to be present again the following day. The protection offered by the Convention could then be switched ‘on’ and ’off’ at the initiative of one or more States engaging in hostilities.
7. With respect to the question of Judge Lobov with respect to the requests for legal assistance. I want to mention the following.
8. As set out in the application of 10 July 2020, it is our position that Russia did not effectively cooperate with the criminal investigations.
9. This is an important distinction. It is not argued that Russia has done nothing.
10. However, several requests for mutual legal assistance have remained unanswered. The responses to other requests have been incomplete or only responses to parts of the requests.
11. For the reasons set out in its application, my Government submits that Russia has not adequately responded to the requests for mutual legal assistance. This is extensively elaborated upon in Chapter 4.3 of the Statement of Facts which is Annex 1 to the Application submitted to your Court on 10 July 2020.
12. Furthermore to be complete, I wish to make clear that all information collected in the course of the criminal investigation, including all material that has been provided by Russia, has been thoroughly examined by appropriate means and methods.
13. The fact that the JIT or Public Prosecution Service of the Netherlands did not reach the same conclusions on the basis of the information as Russia did, does not mean that the information shared has been ignored.
14. With respect to the second question of Judge Lobov:
15. My Government’s aim is to find a solution that does justice to the tremendous suffering and damage caused by the downing of Flight MH17.
16. We open to any modalities that may bring us closer to such a solution.
17. Therefore, I would like to reiterate our call on Russia to return to the trilateral negotiations.
18. I will now give the floor to Mr Lefeber to answer the remaining questions.
19. Mr President, distinguished members of the Court.
20. I will first answer questions of Judges O’Leary and Wojtyczek and then, with your permission, make a few comments on Russia’s pleadings today.
21. With respect to the question of Judge O’Leary on the continuing criminal investigation and proceedings in relation to the procedural and substantive elements of Article 2 of the Convention, my Government would like to stress that the criminal investigation and the Government’s investigation into the potential involvement of a State in the downing of Flight MH17 are carried out separately.
22. The criminal proceedings focus on the role of individuals, rather than the role of a State, on the basis of the independent criminal investigation of the Dutch Public Prosecutor.
23. According to my Government, there is convincing and compelling evidence regarding the involvement of the Russian State in the downing of Flight MH17, amounting to a violation of the substantive as well as the procedural elements of Article 2 of the Convention.
24. These proceedings against Russia separate from the criminal proceedings against individuals and can, in my Government’s view, proceed pending the criminal investigation and proceedings.
25. With respect to the question of Judge Wojtyczek on investigations in the DPR, a technical investigation into the causes of the downing was carried out by the Dutch Safety Board, including the gathering of evidence for the purposes of investigations. For this purpose, arrangements were made with local entities.
26. With respect to the Russian statements made here today, I will limit myself, for the sake of time, to one of the issues raised.
27. According to Russia, the Netherlands is misleading the Court because Russia was in fact willing to take over the criminal proceedings against three Russian suspects, but the Netherlands did not let them.
28. My Government firmly rejects the suggestion that it is misleading the Court.
29. Russia requested the transfer of criminal proceedings in October 2019. That is more than five years after the downing of Flight MH17, and only after three Russian nationals had been indicted by the Public Prosecution Office of the Netherlands.
30. My Government is of the view that Russia should have effectively cooperated or carried out its own effective investigation long before Russia requested the transfer of criminal proceedings.
31. My Government considered that the transfer of proceedings to Russia was not in the interest of the proper administration of justice. Various considerations were taken into account:
	* First, not only was it considered unlikely that Russia would now start a serious investigation, it was also considered very late. Russia’s request came five years after the start of the criminal investigation by the JIT into the downing of Flight MH17. Russia had failed to effectively cooperate with this investigation and had failed to carry out its own effective investigation. It is hard to believe that all of a sudden Russia would start an effective investigation.
	* Second, by joint decision of the States participating in the JIT, it was decided in 2016 that the prosecution of persons involved would take place in the Netherlands. Since then, logistical and financial arrangements had been made with a view to the trial that started in March 2020.
	* Third, my Government felt it important to take into account the position of the next of kin and in particular their right to address the District Court.
32. Mr President, members of the Court, I will conclude.
33. It has been more than seven years since the downing of Flight MH17 over the east of Ukraine. It has been more than seven years that two-hundred-and-ninety-eight innocent persons lost their lives. And it also has been more than seven years without someone taking responsibility for this.
34. During all these years, my Government has committed itself to pursue truth, justice and accountability for the victims of the downing of Flight MH17 and their next of kin. The hearing today is an important step in this quest.
35. During the past seven years, my Government has also been confronted with the continuous attempts of Russia to create confusion and distract from the truth. However, the core of this case is the question who is responsible for the downing of Flight MH17. In its application, my Government has set out in detail the involvement of Russia in the downing of Flight MH17 and the related violations of the Convention. As set out in its application, subsequent memorials and today, my Government is convinced that Russia is responsible for the downing of Flight MH17. Without Russia, Flight MH17 would not have been downed.
36. My Government is grateful that its application has been taken up by the Court expeditiously and with due diligence.
37. And today, an important step is taken in the proceedings before this Court. We stand ready for the continuation of the proceedings and the start of the merits phase. We urge the Court to continue its diligent approach to our application. This is extremely important for the next of kin that already have experienced tremendous grief and suffering.
38. I thank you for your attention.