

Report

Findings of the JIT MH17
investigation into the crew
members of the Buk TELAR and
those responsible in the chain of
command

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JIT MH17

Joint Investigation Team

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1 Introduction

On 17 July 2014 Malaysia Airlines flight MH17 crashed in eastern Ukraine, as a result of which all 298 passengers and crew were killed. The victims were nationals of the Netherlands, Malaysia, Australia, Indonesia, the United Kingdom, Belgium, Germany, the Philippines, Canada, New Zealand, Vietnam, Israel, Italy, Romania, the United States and South Africa. The countries that lost nationals in the crash joined together to conduct a joint investigation. This led to the establishment of the Joint Investigation Team (JIT), an international body made up of investigators from the Netherlands, Australia, Malaysia, Belgium and Ukraine.

Over the course of the investigation, the JIT published findings – firstly in 2016 and 2018, in regard to the circumstances of the crash; and secondly in 2019, in regard to the three Russians and one Ukrainian suspected of being responsible for the downing of flight MH17. In July 2014, these four suspects were military commanders of the so-called Donetsk People's Republic (DPR). On 19 June 2019 the Dutch Public Prosecution Service decided to prosecute these four individuals for the downing of flight MH17.

Dutch criminal proceedings against these four DPR fighters began on 9 March 2020. On that first day of the trial, the Public Prosecution Service explained why it had decided to prosecute these four commanders and no other members of the DPR. That assessment has not changed. On 17 November 2022, The Hague District Court found three of the four defendants – Igor Girkin, Sergei Dubinskiy and Leonid Kharchenko – guilty of causing flight MH17 to crash, resulting in the deaths of all 298 occupants, and of the murder of those occupants.¹ The court sentenced those three defendants to life imprisonment. The fourth defendant, Oleg Pulatov, was acquitted.² No appeal has been lodged against this judgment.

Besides examining the degree of responsibility borne by members of the DPR for the downing of flight MH17, the JIT also investigated the crew of the Buk TELAR (the missile launch vehicle used to hit MH17) and those responsible for supplying this weapon system. This investigation has been ongoing, and has now reached its limits: all investigative options have now been exhausted. The investigation will therefore be suspended. The investigation resulted in various findings, but they do not at this time provide any basis for new prosecutions. In the interests of the next of kin and the general public, the JIT and the Dutch Public Prosecution Service will make these findings public. In doing so, they are complying with national and international obligations to keep the next

¹ Judgments of The Hague District Court, 17 November 2022, ECLI:NL:RBDHA:2022:12216/12217/12218.

² Judgment of The Hague District Court, 17 November 2022 ECLI:NL:RBDHA:2022:12219.

of kin³ and the general public⁴ informed. In addition, the JIT is aware that state responsibility proceedings are under way, and that this information could be relevant in that connection.

This report does not explain every detail of the investigation conducted by the JIT. There are various interests preventing such a step, such as the security and privacy of relevant individuals, potential further investigation and any prosecution that might occur in the future. However, the JIT is disclosing findings that could provide more insight into the factual circumstances in which flight MH17 was shot down, and the potential level of responsibility that various parties may bear for the crash.

No names are mentioned in this report unless they have previously been publicly disclosed in this context (for example in relation to the criminal proceedings, a previous witness appeal by the JIT or public-domain publications by third parties), or they concern individuals known to the public whose identities can be deduced from the context of the findings. In each case, the JIT has weighed up the rights of the next of kin and the general public to information and the interests of the individuals concerned. Everyone referred to in this report – regardless of whether or not they are mentioned by name – is innocent until the court finds, by final and unappealable judgment, that the reverse has been proven. Lastly, where most of the people mentioned are concerned (apart from Girkin, Dubinskiy, Kharchenko and Pulatov), it has not been possible for the JIT to get their side of the story. This is because these individuals could not be traced, or are located in the Russian Federation and the Russian authorities have provided no effective cooperation in respect of the investigation. In some cases, contact with the JIT would also expose an individual to security

³ In accordance with article 51aa, paragraph 1 of the Code of Criminal Procedure; article 51ac, paragraphs 1 and 2 (d, e and f) of the Code of Criminal Procedure; Victims' Rights Instructions, Chapter 4, Public Prosecution Service; Directive 2012/29/EU of 25 October 2012, consideration (26) ('When providing information, sufficient detail should be given to ensure that victims are treated in a respectful manner and to enable them to make informed decisions about their participation in proceedings. (...) This is equally relevant for information to enable a victim to decide whether to request a review of a decision not to prosecute') and (27) ('In exceptional cases, for example due to the high number of victims involved in a case, it should be possible to provide information through the press, through an official website of the competent authority or through a similar communication channel'; Article 2 of the European Convention on Human Rights (ECHR) (see e.g. ECtHR 29 January 2019, 36925/07 (*Güzelyurtlu and Others v. Cyprus and Turkey*), §219: '(...) the investigation must be accessible to the victim's family to the extent necessary to safeguard their legitimate interests'); Office of the United Nations High Commissioner for Human Rights, 'Promotion and Protection of Human Rights: Study on the right to the truth', E/CN.4/2006/91, paragraph 38 ('the material scope of the right to the truth has also expanded to include other elements. These may be summarized as the entitlement to seek and obtain information on: the causes leading to the person's victimization (...) and the identity of perpetrators');

⁴ ECtHR 11 July 2014, 28761 (*Al Nashiri v. Poland*), § 495: 'Furthermore, where allegations of serious human rights violations are involved in the investigation, the right to the truth regarding the relevant circumstances of the case does not belong solely to the victim of the crime and his or her family but also to other victims of similar violations and the general public, who have the right to know what has happened'); Office of the United Nations High Commissioner for Human Rights, Promotion and Protection of Human Rights: Study on the right to the truth E/CN.4/2006/91, paragraph 58 ('The right to the truth also has a societal dimension: society has the right to know the truth about past events concerning the perpetration of heinous crimes, as well as the circumstances and the reasons for which aberrant crimes came to be committed, so that such events do not reoccur in the future.')

risks. In one or two cases, a relevant individual has already commented publicly on the findings of the JIT investigation. If so, that response is included in the report.

Below (in Chapter 2) the report will first reflect on the facts which were established by The Hague District Court by final and unappealable judgment on the basis of the JIT investigation, and which provide the point of departure for the present report. It will next discuss the findings that arose from the JIT's detailed investigation into the precise origin of the Buk TELAR used to down MH17 (Chapter 3), the Buk TELAR's crew and their superior officers (Chapter 4), the individuals responsible for supplying the Buk TELAR (Chapter 5) and other individuals involved in the Buk TELAR's deployment (Chapter 6). Lastly the report will set out why the JIT and the Dutch Public Prosecution Service see no more grounds for further investigation or prosecution (Chapter 7).

Although the investigation has now been suspended, the case file will not be permanently closed. Any new information will be assessed by the JIT, and altered circumstances may prompt the resumption of the investigation.

2 Judgment of The Hague District Court

In its judgment⁵ of 17 November 2022, the court established various facts on the basis of the JIT's investigation and the criminal proceedings. These facts are important for the interpretation of the JIT's additional findings.

2.1 Involvement of Russian authorities in DPR armed conflict

The district court first established that, from mid-May 2014, the Russian authorities had such far-reaching involvement in the DPR conflict in eastern Ukraine that the Russian Federation exercised overall control over the DPR.

The court referred in this regard to the fact that several DPR leaders had close ties and maintained contacts with individuals in the Russian intelligence services, the Russian Presidential Executive Office and advisers from the Kremlin. What is more, various DPR leaders were themselves Russian and had a Russian military background. The court further established that in the course of their contacts with senior figures in the Russian Federation the DPR leaders frequently requested assistance, including military equipment, and that such assistance was provided. According to the court there are 'ample indications' that the Russian Federation adopted a coordinating role and issued instructions to the DPR. Lastly, the court referred to evidence of mutually coordinated military actions by the DPR and Russian Federation. In this connection the court cited reports by various organisations about Russian military personnel regularly crossing the border, and cross-border attacks and intercepted telephone conversations by DPR members, including Dubinskiy and Pulatov, about Russian shelling.

See the following considerations given in the judgment:

The background of members of the DPR

Several of the leaders of the DPR at the time were Russian nationals, and a number of them also had a background in the Russian armed forces. For example, the accused Girkin, at the time Minister of Defence of the DPR, is a Russian national, served in the Russian intelligence agency (FSB) and took part in the wars in Chechnya, Transnistria and Bosnia. His deputy in the DPR and 'head of intelligence' in the DPR, the accused Dubinskiy, is also a Russian national, has a background in the Russian military intelligence agency (GRU) and took part in the wars in Afghanistan, North Ossetia and Chechnya. It is not always clear, however, in what capacity the leaders within the DPR were involved in the DPR. Although several of them indicate that they were retired (reservists) in the Russian Federation and came to Ukraine independently and voluntarily, it is not clear whether this is actually the case or whether they were sent there by the authorities of the Russian Federation. Based on intercepted

⁵ The judgments in the cases against the four defendants are cited as a single judgment in this report because the same facts are established in them. For easy reference, this report consistently refers to the judgment in the case against Igor Girkin (ECLI:NL:RBDHA:2022:14037).

conversations, at least some of them appear to have had a close connection with the Russian Federation. For example, there was communication between the leaders of the DPR and Surkov, who was then the closest adviser to the Russian President Vladimir Putin, regarding appointments to several ministerial posts within the DPR. In an intercepted conversation recorded on 16 May 2014, Borodai said that the government (of the DPR) was about to be announced, that Moscow had surprised him, and that he would be appointed Prime Minister, much to the disappointment of another individual who had arrived in eastern Ukraine from Moscow. Borodai was indeed appointed Prime Minister of the DPR shortly after this intercepted conversation took place. On 15 May 2014, a conversation was intercepted between Borodai and the Chairman of the Supreme Council of the DPR regarding the appointment of a named individual to the post of Minister of the Interior; during that conversation, it was said that the candidate in question "suits Moscow" and that the "Moscow Generals" agreed. In another conversation later that day in which the same Chairman of the Supreme Council took part, he also said that the list of government posts for "the hero city" should not be made longer and that one named individual would certainly not sit on the Security Council because he had not been approved by Moscow. Furthermore, the person who at that time was Minister of Culture of the DPR stated in a witness interview that the Deputy Prime Ministers of the DPR came from Moscow and had significant influence over the functioning of the DPR.

Around the period to which the charges relate, several of the leaders of the DPR maintained ties with individuals from Russian intelligence agencies, the President's office, and Kremlin advisers. Intercepted conversations regularly contain references to contacting "Moscow". One example is a conversation between Dubinskiy and Bezler on 4 July 2014, in which Dubinskiy says that Girkin has been in touch with Moscow, and that Moscow does not want Sloviansk to be surrendered. The court also refers to a conversation that Girkin had on 10 July 2014 in which he told Dubinskiy that he was constantly on the telephone trying to get in touch with Moscow to report on the situation. Contact was maintained with various high-ranking individuals in the Russian Federation, sometimes using special communication channels ("the Glass") and secure telephones supplied by the Russian Federation. For example, Borodai, the leader of the DPR, was in almost daily contact with Surkov between 20 June 2014 and August 2014. In an interview on 16 June 2014, Borodai referred to Surkov as "our man in the Kremlin".

It is the opinion of the court that these references to "Moscow" and "the hero city" cannot be interpreted in any way other than as references to the seat of government, and are therefore understood to refer to the authorities of the Russian Federation.

Support In their communications with senior figures within the Russian Federation, the leaders of the DPR regularly requested support such as the manpower, military equipment and requisite training. This support was indeed provided.

Statements made by representatives and reports by organisations such as NATO, the UN Security Council, the US State Department, the OSCE, and Human Rights Watch all mention the supplies and arms provided to the separatists from the Russian Federation. There are also references to convoys of military weapons which were said to have been brought across the border. This is consistent with what can be heard in intercepted conversations. For example, in one conversation intercepted on 12 June 2014, Dubinskiy says that it has become clear that Russia will provide support, including heavy weapons; in another conversation on 20 June 2014, Kharchenko tells Dubinskiy that the second convoy that came across the border is not what they were expecting; and on 15 July 2014, Girkin

mentions expecting a shipment – a big thing that will be very good for “us” and which will need to be received at the border. Although intercepted conversations do not always reveal whether the weapons and supplies mentioned came from private providers or from the Russian government, the Minister of Culture of the DPR stated that Borodai forwarded requests for weapons from the Council of Ministers of the DPR to the GRU. Following approval by the GRU, the weapons were brought into Ukraine via the “Black Zero” (by which the court understands: illegal border crossing). The court also notes that NATO repeatedly called on the Russian Federation to stop providing support and weapons to the Ukrainian separatists.

Witness statements also mention funding for the DPR provided by the Russian Federation. For example, the person who at that time was Minister of Labour and Welfare of the DPR stated that the person who arranged the funding received it with the cooperation of the Russian President’s office and that the Russian Federation had been funding the DPR since at least the summer of 2014. Support coming from the Russian Federation is also mentioned in intercepted conversations. For example, in a conversation on 13 July 2014, one fighter for the DPR complained about the situation with kit and salaries, to which the response was that “they” are going to Rostov today for a shipment. The intercepted conversations do not generally mention the source of funding within the Russian Federation directly, other than to state that this was often routed via Rostov. The court concludes that this is a reference to the Russian city of Rostov.

Several witness statements mention military training programmes for DPR fighters which took place in the Russian Federation. This often involved training in Rostov (again, the Russian city). Intercepted conversations also include references to training programmes and a training camp. In one conversation that was intercepted on 2 July 2014, separatists talked about their urgent need for manpower and when the “men from the camp” will arrive, and on 3 July 2014, a fighter from the DPR said that the guys went “across the river” to train. Again, it is not always clear whether this training was provided privately or organised by or on behalf of the Russian authorities. However, one conversation by the person who at that time was Minister of Defence of the DPR, with which the DPR was cooperating, makes a clear reference to the role of the Russian GRU in this. In that conversation on 15 July 2014, the Minister was told about a training programme that was being provided for ten persons, to which the Minister replied that this should be done through the GRU. Some of the witness statements also reveal the involvement of Russian bodies in training programmes. For example, witness M58, who will be discussed later, stated that he was taken to the FSB and then to a camp in Rostov, Russia, where he received training. After that he was taken to the Donbas region.

Coordination and instructions

Of particular relevance to the question of whether there was overall control – regardless of the background of the members of the DPR and the Russian Federation’s support for the DPR – is whether the Russian Federation assumed a coordinating role and issued instructions to the DPR. It is the opinion of the court that the case file contains abundant evidence for this. As indicated previously, many intercepted conversations include reports to “Moscow” or people working for “Moscow” regarding the situation on the ground, such as setbacks and successes. A number of intercepted conversations also attest to planning on the part of the authorities of the Russian Federation. For example, in a conversation intercepted on 3 July 2014, Surkov informed Borodai that Antyufeev (court: who became Deputy Prime Minister for State Security of the DPR shortly thereafter) was on his way to Borodai and that “they” will be leaving for the south on Saturday so that they will be ready for combat. Later, on 11 July 2014, Surkov told Borodai that he had spoken to those in charge of “this whole military story”

and that they had indicated that they were making preparations and they were going to accelerate everything. Additionally, on 10 July 2014, a leader of the DPR called to say that he had received an order in Moscow to form the first Cossack Regiment of Novorossiia.

Intercepted conversations also mention Moscow's role in specific operations. In a conversation regarding Sloviansk intercepted on 4 July 2014, a DPR commander says there has been communication with Moscow, but that Moscow does not want Sloviansk to be surrendered. The DPR's Minister of Defence, the accused Girkin, stated in an interview given in July 2014 that this order was not followed because no concrete support was forthcoming. In a telephone conversation on 18 July 2014, two members of the DPR discussed the encirclement of a Ukrainian brigade. One of the two interlocutors stated that he had been in contact with Moscow and that Moscow had indicated that the lives of the soldiers should be spared. In a similar vein, a series of telephone calls between Borodai and a Russian number made on 21 July 2014 is noteworthy. Borodai wanted to speak to the boss, but the boss was not available. Increasingly insistently, Borodai asked if the boss could call him back because he needed advice and instructions on how to handle certain aspects of the MH17 disaster, such as the refrigerated trucks and the black box. Borodai would also like to receive talking points for a press conference. Borodai noted at that point that he assumed that "our neighbours" would want to say something about this matter. It is the court's opinion that the fact that Borodai talked about "our neighbours" and asked about "the boss", even though he himself was the highest-ranking person within the DPR, confirms that the boss he was referring to was a representative of the authorities of the Russian Federation.

Direct participation of the Russian Federation

Reports and communications from various organisations mention shelling and artillery fire on Ukrainian territory, which is said to have been carried out from the Russian Federation. From the first half of July 2014 onwards, Russian soldiers would regularly move across the border and cross-border attacks would take place. One investigation by the International Partnership for Human Rights indicates that there was artillery fire on a Ukrainian encampment close to the border with the Russian Federation in early July 2014, and in an official notice issued on 16 November 2016 the Netherlands Military Intelligence and Security Service also states that, between 11 July 2014 and 17 July 2014, rocket artillery units located in Ukrainian territory close to the Russian border fired on unknown targets in Ukraine. According to the report, the vehicle tracks and traces of firing found showed that artillery installations entered Ukraine from Russian territory. Witnesses have also provided statements regarding Russian equipment manned by Russian military personnel, which crossed the border, fired shells and then returned. Intercepted conversations also confirm that such strikes took place. For example, in a conversation between two members of the DPR intercepted on 12 July 2014, the interlocutors mention that Russia had finally begun to open fire on the Ukrainian armed forces. In another conversation intercepted on 16 July 2014, two members of the DPR - namely the accused Dubinskiy and Pulatov - discuss the problems they were having because they were under fire. Pulatov indicated that Russia could let loose, to which Dubinskiy replied that he has indicated positions on the map that will be sent to Moscow. In a conversation on 17 July 2014, accused Dubinskiy said that Russia intended to fire on their positions from its side. These conversations are just a few examples of a number of similar intercepted conversations in the case file. All of this indicates not only some form of parallel direct involvement but also, and more importantly, coordinated military activities by the DPR and the Russian Federation.

To date, the Russian authorities have denied any involvement in the conflict in eastern Ukraine during

the period in question. However, with respect to the foregoing, the court finds that the case file certainly shows that funding, men, training, weapons and goods were all provided to the DPR by the Russian Federation. In addition, as of mid-May 2014 at the latest, the Russian Federation had a decisive influence on appointments to several senior positions within the DPR, including those of Prime Minister and Minister of Defence. This gave the Russian authorities considerable influence over the leadership of the DPR. The fact that the Russian Federation did indeed exercise influence is apparent from the fact that the Russian authorities were involved, at times directly, in coordinating and carrying out military activities even prior to the crash of flight MH17.

In view of the above, the court concludes that the Russian Federation exercised overall control over the DPR from mid-May 2014, at least until the crash of flight MH17. This means that the armed conflict, which was non-international in geographic terms, was internationalised and was therefore an international armed conflict.

The court therefore finds that on 17 July 2014, an international armed conflict between Ukraine and the DPR was taking place on Ukrainian territory, and that the DPR was under the overall control of the Russian Federation.⁶

⁶ Judgment of The Hague District Court, 17 November 2022, ECLI:NL:RBDHA:2022:14037, 4.4.3.1.3.

2.2 Russian origin of the Buk TELAR

The court also established that the Buk TELAR that was used to shoot down flight MH17 came from the Russian Federation. The weapon was transported by DPR fighters in the night of 16-17 July 2014, and after MH17 had been shot down it was quickly taken back to the Russian Federation. On the morning of 18 July 2014 the Buk TELAR was handed over and taken to the Russian Federation at the Ukrainian-Russian border near the village of Severniy.

See for example the following considerations by the court:

Then around nine o'clock in the morning, a single Buk M is delivered to Donetsk by Bibliothekar, on a trailer. The Buk comes from the Russian Federation and, on Dubinskiy's orders, travels directly to Pulatov in the corridor, where it will solve the problems of bombardment by high-flying Sushkas. Kharchenko receives the instruction from Dubinskiy to escort the Buk, to position it in the vicinity of Pervomaiske and to guard it there with his men.

(...)

During the night and early morning of 18 July 2014, there is much telephone traffic about the removal of the Buk TELAR. The calls take place between the persons responsible for the removal, men of the DPR and the LPR, who are in contact with each other, and also with the two crew members present, but also at the level of the Ministers of Defence of the DPR and the LPR. In that process, a misunderstanding arises about the escorting of the Buk TELAR from the border between the DPR and the LPR, up to the agreed end point: the border with the Russian Federation at Severniy. Girkin becomes very angry at Dubinskiy, and instructs him to sort it out. Dubinskiy attempts to get this done via Kharchenko. However, the misunderstanding is not solved overnight, as the telephones prove unreachable. In the early morning it becomes clear that, under the escort of Bibliothekar, the Buk TELAR has been taken to the Russian border and has arrived there. Only when that becomes clear are Dubinskiy and Girkin at ease.

(...)

The court concludes from the foregoing that in the night of 16 to 17 July 2014, DPR fighters delivered a Buk TELAR from the Russian Federation. The need for anti-aircraft artillery of this kind had long been felt, and following heavy fighting on 16 July 2014, whereby the DPR suffered heavy losses without being able to effectively defend itself, the system was more than welcome. The Buk TELAR that was delivered in the night and early morning was therefore sent on, immediately following its receipt in the morning of 17 July 2014, to the front line on the corridor between Snizhne and the border with the Russian Federation to the south of Snizhne, and in the afternoon of 17 July 2014 was deployed in the area occupied by the DPR near Pervomaiskyi in their fight against the Ukrainian army. As a consequence of that deployment, not a Sushka, but flight MH17 was downed and the 298 occupants of that flight were killed. After it became clear that this disaster had been caused by the deployment of the Buk TELAR, the said weapon was rapidly returned to the Russian Federation, in the expectation of preventing an international outcry.⁷

⁷ Judgment of The Hague District Court, 17 November 2022, ECLI:NL:RBDHA:2022:12217, 6.2.4.4

2.3 Buk TELAR with crew

The district court established not only that the Buk TELAR had come from the Russian Federation, but also that it was accompanied by a full crew. As early as 8 June 2014, Girkin reported to the self-proclaimed prime minister of Crimea, Sergei Aksyonov, that the DPR needed air defence weapons with a greater range than MANPADS, as well as trained crews to operate them. On 16 July 2014, when the situation was becoming dire for the DPR, the requested weapon was provided: a Buk TELAR with crew. Pulatov called the telephone number of one of the crew members when the weapon was being transported to Ukraine and when it was being returned to Russia. Immediately after MH17 had been shot down, one crew member initially remained behind at the launch location, but ultimately the crew travelled back to the Russian Federation, together with the trailer-mounted Buk TELAR.

This is shown by the following facts as established by The Hague District Court:

The intercepted conversations and visual material, viewed also in the context of the aforementioned evidence, lead the court to conclude that after a period of ceasefire, fighting between the separatists and the Ukrainian army resumed in late June - early July 2014, and that the separatists were suffering from the bombing and shelling by the Ukrainian army. On 8 June 2014, by which time he had been active in eastern Ukraine, operating from Sloviansk, for about eight weeks, Girkin already reports this fact in a conversation with Aksenov, the Prime Minister of the Republic of Crimea who requested Girkin to become actively involved in the conflict in eastern Ukraine. Girkin mentions to Aksenov the need for military support from the Russian side, in order to achieve success in the conflict against Ukraine. This includes air defence weapons, including systems with a longer range than Manpads. Girkin wants the desired military equipment to be supplied accompanied by trained crew, because the DPR has no time for training. Aksenov is working on the request, and assistance and coordination from Russia appear to be forthcoming.

(...)

It is also clear from the intercepted conversations that the fighting is arduous; enemy positions cannot be broken through, and the Ukrainians are carrying out air strikes with Sushkas, and continuous artillery fire by the Ukrainians has led to many deaths and injuries on the side of the DPR. (...) The DPR fighters can do nothing against the Sushkas: although two Sushkas are downed by them that day with their Manpads, for the most part the Sushkas fly too high to strike them with the means available to the DPR. Especially because the Strela is also broken. The Strela is due to be removed for repair in the coming night (the night of 16-17 July 2014), Pulatov reports to Dubinskiy. For that reason, Pulatov has no need for tanks, but for decent anti-aircraft defence, he informs Dubinskiy. Dubinskiy then expresses the wish to DPR fighter Sanych to receive a Buk, which he could then send to the corridor that morning, otherwise the prospects do not look good. Dubinskiy tells Pulatov that if he receives delivery of a Buk M that night, then it will be sent directly to Pulatov and that the said Buk M is their only hope. In light of the difficult course of the conflict, caused by heavy artillery fire and air strikes, and Dubinskiy's and Pulatov's complaints about the situation, the wish to have a Buk M must be seen as an expression of the desire to have access to a larger and more powerful weapon in order to be able to defend themselves against the constant Ukrainian (air) attacks. A Buk M would be very suitable for that purpose.

(...)

While the Buk TELAR is en route from the Furshet to Pervomaiskyi, Pulatov makes three unsuccessful attempts to call a telephone number ending in -6335. In the court's opinion, it is sufficiently established that this is the number of a crew member of the Buk TELAR. This follows from the fact that at the moment Pulatov calls this number, the called telephone communicates with a transmission mast on Gagarina Street in Snizhne, and at that precise moment, according to intercepted conversations and the aforementioned video footage, a Buk TELAR is driving under its own power along Gagarina Street in Snizhne towards Pervomaiskyi. This fact, in combination with the fact that historical telecom traffic of that evening shows that - after Kharchenko has requested him to contact the crew of the Buk TELAR because a crew member has been left behind at the launch site - Pulatov made four calls to this number within more than ten minutes, convincingly demonstrates in the opinion of the court that this must have been the number on which a crew member of the Buk TELAR could be reached. All the more so since this number was only in use on 17 July 2014.

(...)

As already indicated above, immediately following the crash of MH17, attention was focused on securing the Buk TELAR, but that changes after several hours, and orders are given to remove the Buk TELAR. All these conversations take place after the conversations about which aeroplane was shot down by the Buk TELAR of the DPR fighters. Because he is too busy because of the crash of MH17, at half past eight Girkin instructs Dubinskiy to evacuate the Buk TELAR and to remove it to the border between the DPR and the LPR, where it will be picked up. The court deduces from this that before issuing this instruction, Girkin must have been in contact with the LPR, which is shown to be the case later that evening. Dubinskiy immediately makes a start on carrying out this instruction and notifies Kharchenko that the Buk TELAR must be taken to the region border and that a trailer will be provided for that purpose. When Kharchenko sets to work and wishes to pick up the Buk TELAR at the checkpoint, he hears from his subordinate that the Buk TELAR has already left for Snizhne under its own power. A short time later, it emerges that one of the crew members has been left behind at the checkpoint. Kharchenko instructs his subordinate to take the crew member to the Furshet and asks Pulatov to seek contact on this matter with the other crew members of the Buk TELAR. However, these attempts are unsuccessful.⁸

(...)

Witness S21, call sign 'Leshy', is one of the people whom Kharchenko tasked with the removal. Witness S21 provided a statement about the progress of the first part of the journey. He stated that the Buk TELAR had been driven into Snizhne on a trailer with a white cab and was to be taken from Snizhne to Krasnyj Luch, where escorting would be handed over to others. S21 states that the plan for handing over the escorting of the Buk TELAR then changed and he travelled with the Buk TELAR as far as Debaltseve, after which the crew continued travelling with the trailer itself towards Luhansk. They knew the way from there. This statement is corroborated both by the content of several intercepted

⁸ Judgment of The Hague District Court, 17 November 2022, ECLI:NL:RBDHA:2022:12217, 6.2.2.4.

conversations on S21's phone and by the transmission mast data, in which the route driven by S21 can be traced from Snizhne via Krasnyj Luch to Debaltseve. Although S21 did not comment on the further route towards the border with the Russian Federation, he did state that the crew wanted to follow the familiar route. The court considers that the route from Debaltseve via Luhansk corresponds to the route very likely to have been taken the day before on the outward journey. The following evidence confirms that this route was followed on the return journey. In a conversation between Bibliothekar and Dubinskiy, Bibliothekar said he had removed 'the box' and that it was now there, in that area. A minute later, Dubinskiy called Girkin and told him that Bibliothekar had personally taken it there. The court understands this to mean that the Buk TELAR had been taken across the border into the Russian Federation. Bibliothekar's telephone pinged several transmission masts on the route between Debaltseve and Luhansk that night, placing the telephone – and thus also the Buk TELAR – in Luhansk at 04:51, after which the telephone continued moving eastwards. The court has established that the Buk TELAR that was in Pervomaiskyi that night, at that time, was travelling in that direction through Luhansk and thus can be seen in this video. This Buk TELAR was captured in various kinds of visual material on the morning of 17 July 2014 as it made its way to Pervomaiskyi. A simple comparison of the number of missiles on the Buk TELAR shows that one missile was missing that night, after the disaster, a missile that had still been present that morning, before the disaster.⁹

2.4 Responsibility for deployment of Buk TELAR and launch of Buk missile

In its judgment the district court also referred to the broader responsibility for the deployment of the Buk TELAR and the downing of flight MH17.

In this regard the court established that the use of a Buk TELAR requires a well-trained crew and proper preparation, and that the launch of a Buk missile must follow a specific procedure. This means that a Buk missile cannot be fired by accident or on a whim. Furthermore, according to the district court, the downing of an aircraft flying at high altitude will inevitably result in the death of everyone onboard. According to the court, the crew had no justification whatsoever for shooting down aeroplanes or other aircraft in eastern Ukraine. Since the deployment of the Buk TELAR in this case was not intended to be a deterrent but was intended to actually shoot down aircraft, with all the consequences that would entail, the district court concluded that the crew of the Buk TELAR and anyone who contributed to the deployment of this weapon had deliberately (and with premeditation) caused an aircraft to crash and the deaths of everyone onboard.

In this connection the court held that the actions of the crew when firing the Buk missile at MH17 could not be established, nor could the identity of the individual who gave the order to fire. Furthermore, it could not be established whether the missile was deliberately fired at a civil aircraft, or whether it was launched in the belief that MH17 was a military aircraft. The court considers it completely implausible that a deliberate decision was made to shoot down a civil aircraft, and it is plausible that MH17 was shot down by mistake.

See the district court's following considerations in the judgment:

⁹ Judgment of The Hague District Court, 17 November 2022, ECLI:NL:RBDHA:2022:14037, 6.2.2.4

Why was MH17 downed: intent, unlawfulness and premeditation

The court notes - along with the prosecution and counsel for defendant Pulatov - that the actions of the crew of the Buk TELAR when launching the Buk missile at MH17 cannot be established on the basis of the case file. The case file also fails to identify who gave the instruction to launch a missile, and why that order was given.

The court has found that the Buk missile was fired from a farm field near Pervomaiskyi and that that area was under the control of the DPR at the time. The Buk TELAR was deployed in the DPR's fight against the Ukrainian armed forces, to bring down Ukrainian military aircraft. Indeed, DPR forces were suffering greatly from air strikes by Ukrainian military aircraft.

In what is known as the target acquisition process that precedes the firing of a weapon such as a Buk TELAR, a target is identified in order to achieve a certain effect. The target is then checked, and a decision is made whether or not to fire a missile. These steps and decisions are not only related to the technical functioning of a weapon system such as a Buk TELAR, but are also prescribed for participating in hostilities, according to international humanitarian law (the law of war) Consideration must also be given to whether the deployment of the weapon will or can result in damage to unintended objects or victims. This may lead to the decision to abandon or abort deployment of the weapon, for example, if it is recognised that the target is in fact a civil aircraft.

The case file contains no information about what occurred in the Buk TELAR just before the Buk missile was fired. Therefore, the court cannot determine whether a civil aircraft was deliberately shot at or whether the missile was fired in the assumption that MH17 was a military aircraft. However, the court can determine the following.

A Buk weapon system is primarily intended to be used to shoot down (enemy) aircraft. The death of enemy occupants may also be an intended purpose of shooting down the aircraft, but it need not be. Due to the enormous destructive power of the weapon and its effects, which effects the court itself observed during its inspection of the reconstruction, and the weapon's great altitude range, the likelihood of those on board the aircraft surviving the attack is nil, and anyone deploying a specialised, expensive weapon such as a Buk TELAR is aware of this. Operating a Buk TELAR requires a well-trained crew. Furthermore, the weapon cannot be casually deployed. Deployment demands the necessary preparation, including designation of and transport to a location where the weapon can be used. Making the system ready and the actual firing of a missile follow a set procedure, described previously. It is precisely this extensive preparation, consisting of many steps, that leads to the conclusion that the opportunity existed to think about and consider the intended act. The court finds it plausible that that opportunity was indeed used.

This means that the firing of a Buk missile is neither accidental nor does it happen on a whim. Instead, it is very deliberate and well-considered, according to a set method of operation (prescribed by technical requirements) Therefore, in the court's opinion, it can be said that there was intent and a certain deliberation concerning the firing of the missile at the target in question, and that the nature of the weapon and the purpose of its use mean that it is clear what the consequences of the intended firing would be, namely, the destruction and crashing of the aircraft and, in all probability, the death of all those on board.

Bringing down this aeroplane, which was flying at an altitude of ten kilometres, in this way, in the opinion of the court, automatically would lead to the death of all those on board. Legally speaking, this means that the intention of the crew of the Buk TELAR was to take the lives of those on board of this aircraft and that this was done with premeditation. There is no evidence of any indication to the contrary to which more weight should be given. Also, the intention of the crew was to cause this aircraft to crash by firing a Buk missile, although this was likely to endanger the lives of the occupants of said aircraft, as a result of which 298 people died. The crew was in no way justified in shooting down aircraft, meaning the unlawfulness of that action is a given.

Since the deployment of a Buk TELAR in this context was aimed at downing one or more aircraft with all that this entails, it must be assumed that the aforementioned intent and premeditation were present not only on the part of those who fired the missile, but also on the part of anyone who contributed to making the deployment of this weapon possible. As previously considered, there is no indication that those who played a role in enabling the deployment of this weapon assumed that the weapon would not actually be deployed. That they contributed to that deployment with the intention that it would bring down a military aircraft and not a civil aircraft does not change this, as will be explained below.

Mistake scenario

Before the court addresses the question of whether these charges can be proven with regard to the accused, the court will consider whether the possibility or even likelihood that it was thought that the aircraft that was shot down was a military aircraft, and that there was no intention to strike a civil aircraft (error in objecto/persona), is of any significance in assessing intent in this criminal case. First and foremost, the court considers it completely implausible that a civil aircraft was deliberately downed. Not only because it is impossible to see what purpose that would have served, but also because neither the case file nor the trial provide any indication of this. On the contrary, the statement of M58, who was present in the field, and the telephone reactions following the downing of MH17 rather show that those involved initially thought that they had succeeded in shooting down a Ukrainian military aircraft. A mistake being made is something the court does find plausible, especially in a situation where only a Buk TELAR operating independently is being used and no other aircraft are flying nearby with which the target can be compared. Therefore, the court will proceed on the assumption that it was believed a military aircraft was being downed.

In a situation where the wrong target is mistakenly impacted in the execution of a crime, case law of the Netherlands Supreme Court, among others, holds the physical perpetrator of the crime responsible without prejudice. The reasoning here is that in the crime of murder, the intent is to kill another person with premeditation, and if it turns out afterwards that not the intended person, but another person was killed, the definition of the offence is still met, namely that another person was intentionally killed. In the court's view, this also applies to intentionally and unlawfully causing an aircraft to crash. If in retrospect it turns out that a different type of aircraft than the intended type was shot down, the definition of the offence is still met. The fact of the matter is that, in the absence of combatant privilege, killing a soldier warrants punishment as much as killing a civilian, and shooting down a military aircraft warrants punishment as much as shooting down a civil aircraft. Further, if the intention was to shoot down an aeroplane that should not have been shot down and an aeroplane was shot down that should not have been shot down, then, at the very least, the substantial likelihood of killing people who also should not have been killed was accepted. In the eyes of the law, there is no difference between the two aircraft, nor the status of those on board. Therefore, the mistake does not negate the intent or premeditation.

(...)

In the court's opinion, it is incorrect to impose the requirement of conditional intent or a different degree of culpability in the case of a remote participant - unlike in the case of a physical perpetrator - when determining whether a mistake made by the physical perpetrator can be imputed to this remote participant. After all, it is equally true that these remote participants knowingly played a role in a crime. The fact that the execution of that crime mistakenly involved the wrong victim should not absolve the participant of responsibility any more than the physical perpetrator. In concrete terms, those who have played a criminally culpable role in the deployment of a Buk TELAR with the purpose of shooting down a military aircraft (a similarly proscribed act) are therefore responsible for the consequences of that unlawful deployment for that reason alone, even if the crew of the Buk TELAR mistakenly shot down a civil aircraft instead of a military aircraft in the execution of that crime.

(...)

Contributing to this is the fact that the evidence shows that this particular Buk TELAR was deployed in the fight that the DPR was waging against the Ukrainian military authorities, and indeed, this Buk TELAR was used to fire a missile from an area held by the separatists in combat to establish a corridor that was of great importance to those separatists (and their battle). Indeed, the corridor connected the part of the Donbas that the separatists already controlled to the Russian Federation, providing a direct and short supply route for equipment to the occupied Donbas area. In light of the DPR's objective of achieving greater independence from Ukraine, by force if necessary, whereby control and authority had already been taken (in part of) the Donbas, the Buk TELAR was an essential weapon to achieve that goal, given Ukraine's military air superiority in the conflict on the days around 17 July 2014, specifically in the area around Snizhne. Thus, all actions related to obtaining and deploying the said Buk TELAR contributed towards the realisation of the DPR's goal. As a result, it can be stated that the Buk TELAR, regardless of who concretely had authority and command over its deployment and regardless of the specific instructions given to its crew, was for the use and benefit of the DPR.¹⁰

In the course of the investigation conducted over the past eight-and-a-half years, the JIT has been unable to find sufficient information regarding these three points (deliberate attack versus mistake; the crew's actions when launching the missile; order to fire). This report will describe the findings of the JIT's investigation into the Buk TELAR, its crew, their superior officers and those responsible for supplying and deploying the Buk TELAR.

2.5 Denial and obstruction by the Russian Federation

Contrary to the established facts, the Russian authorities have to date denied any involvement in the conflict in eastern Ukraine in 2014. They also deny any involvement in the downing of flight MH17. In its judgment the district court established that on multiple occasions the Russian authorities presented falsified evidence in support of this denial:

¹⁰ Judgment of The Hague District Court, 17 November 2022, ECLI:NL:RBDHA:2022:14037, 6.2.5.3.

The authorities of the Russian Federation, to which Almaz-Antey is affiliated, have - as the court has found above - wrongly denied any involvement in the conflict in eastern Ukraine. In addition, they have denied any involvement in the MH17 disaster. In the context of that denial, the authorities of the Russian Federation have repeatedly presented evidence that sought to show that the Ukrainian authorities, rather than the authorities of the Russian Federation, were responsible for the MH17 disaster. On several occasions, however, this so-called evidence was found to have been falsified or there were evident traces of manipulation.¹¹

This stance by the Russian authorities has also had an adverse effect on the investigation into the crew, their superior officers and those responsible for supplying the Buk TELAR to the DPR. It has not been possible to conduct any investigative activities in the Russian Federation, and questions about Russian involvement posed in the context of a request for legal assistance remain unanswered.

2.6 Conclusion

In summary, the district court established that:

- the Russian authorities had far-reaching involvement in the DPR conflict from mid May 2014;
- the Buk TELAR used to down flight MH17 came from the Russian Federation accompanied by a crew;
- anyone who contributed to the deployment of the Buk TELAR bears responsibility for the downing of flight MH17;
- the specific actions of the crew when firing the Buk missile, and the identity of the individual who gave the order to fire, are not known.
- it is completely implausible that a deliberate decision was made to shoot down a civil aircraft, and it is likely that MH17 was hit by mistake;
- contrary to the established facts, the Russian authorities have to date denied any involvement in the conflict in eastern Ukraine and on multiple occasions have presented falsified evidence.

These facts, as established by the district court, are relevant to the interpretation of the investigation findings discussed below.

¹¹ Judgment of The Hague District Court, 17 November 2022, ECLI:NL:RBDHA:2022:14037, 6.3.2.5.

3 Origin of the Buk TELAR

The district court established, on the basis of various evidence gathered by the JIT, that the Buk TELAR used to shoot down MH17 had come from the Russian Federation. The JIT conducted a detailed investigation into the unit to which this Buk TELAR belonged.

3.1 Identification of the Buk TELAR

During the criminal proceedings the Public Prosecution Service extensively discussed the investigation into the unit to which the Buk TELAR belonged.¹² The identification of the Buk TELAR took place in several steps.

First, the video footage and photos taken of the Buk TELAR in Ukraine on 17 and 18 July 2014 were investigated. The court designated this material as authentic images of the Buk TELAR used to down MH17, and included those images in the evidence. These images can therefore also be used to identify the Buk TELAR. The visual material from Donetsk, Makeevka, Torez and Luhansk is of such a high quality that a total of 15 specific features of the TELAR are recognisable. On the basis of both the combination and location of these 15 features, it is possible to identify the Buk TELAR.

To determine the origin of the TELAR, the JIT went in search of other visual material of a TELAR with exactly the same combination of features. In the process, investigators located visual material of a Russian military Buk convoy that had moved from Kursk in the Russian Federation in a southerly direction along the Russian-Ukrainian border from 23 to 25 June 2014. The last images of the convoy, which comprised a complete Buk system¹³ including six TELARs, were captured in Millerovo, in the Russian Federation. The visual material consists of 21 video files and nine social media posts containing one or more images. The convoy includes a Buk TELAR with a tactical vehicle number on the left-hand side beginning with 3, followed by a small white stripe and ending in 2. This vehicle is referred to hereafter as '3X2'. This Russian Buk TELAR '3X2' had 14 of the 15 specific features of the Buk TELAR used to down flight MH17. The 17-18 July 2014 images of the Buk TELAR used to down MH17 do not show a vehicle number on the left-hand side, only a diagonal stripe and a small white stripe. Investigation has revealed that when a vehicle is to be deployed in an operation, it is common practice to sand away or paint over the tactical vehicle number so that it cannot be identified. In both its form and location, the 15th specific feature of this Buk TELAR – the remnants of a tactical vehicle number on the left-hand side in the form of a diagonal stripe and a small white stripe – precisely matches the '2' and the abovementioned 'small white stripe' of the vehicle number of the Russian Buk TELAR '3X2'. Thus, the Buk TELAR which was used to shoot down MH17 and which is visible on the images captured in Ukraine on 17 and

¹² Explanatory notes on the investigation into the main scenario (hearing of 8-10 June 2020) and the public prosecutor's closing speech (hearing of 20-22 December 2021).

¹³ See section 4.2 for explanation of further information concerning the Buk system.

18 July 2014 matches all 15 specific features of the Buk TELAR '3X2' visible on the images filmed in the Russian Federation between 23 and 25 July 2014.

The third and final step was to investigate the uniqueness of this match in respect of the 15 specific features. To do so, investigators searched for Buk TELARs other than '3X2' with the same combination of specific features. First, they assembled a data set of around 1.3 million images of possible Ukrainian and Russian Buk systems. An automated search tool developed by the Netherlands Forensic Institute was used to search within these images. This automated search resulted in 463,584 images that potentially showed all or part of a TELAR. Each of these images was then examined by eye for the presence of a Buk TELAR. This manual search resulted in 2,481 images showing one or more Ukrainian and Russian Buk TELARS (or parts thereof). Each of these 2,481 images was examined to determine whether the aforementioned 15 specific features were present. The outcome of this examination was that no Buk TELARs with the same combination of features as the TELAR in the Ukrainian visual material from 17 and 18 July 2014 and the '3X2' in the Russian visual material from 23 to 25 July 2014 were found in these images.

3.2 Military unit

Investigators next tried to determine which unit this Russian Buk-TELAR '3X2' belonged to. To this end, they looked at the images from 23 to 25 June 2014 and social media posts. It was an eye-catching convoy which attracted considerable attention. Over the course of its journey, the convoy was captured in various photos and videos, which were later found online.

One video of the convoy, filmed on 24 June 2014, showed five number plates belonging to the Russian 53rd Anti-Aircraft Missile Brigade (AAMB). The 53rd AAMB works with Buk systems and its base is located in Marshala Zhukova, near Kursk. The brigade is sometimes also identified by its military postcode 32406. This convoy's route was reconstructed using geolocation of the images filmed between 23 and 25 June 2014. This showed that the convoy of 23 to 25 June 2014 had travelled from Kursk in a southerly direction along the Russian-Ukrainian border. The convoy was last visually documented in the Russian town of Millerovo in the Rostov region.

In addition to visual material, a large number of social media posts regarding this convoy were found online. These messages were posted by military personnel of the 53rd AAMB and their relatives, among others. The content of these messages show that the convoy in question was from the 53rd AAMB from Kursk and was travelling to the Rostov region.

On the basis of these findings, the JIT concluded that the Buk TELAR that downed flight MH17 had come from the 53rd AAMB from Kursk in the Russian Federation.

4 Crew of the Buk TELAR and commanders

In its judgment, the court not only noted that the Buk TELAR that shot down MH17 was from the Russian Federation, but also that it came to Ukraine with a crew. It also noted that, after the downing of MH17, the Buk TELAR returned with its crew to the Russian Federation. The JIT assumes that the crew and the Buk TELAR belonged to the same military unit.

The court also established that it was unknown who had given the relevant orders to the crew, what they entailed and why the crew fired a Buk missile at MH17 at that particular moment. The court agreed with the JIT's conclusion that the crew used the Ukrainian phone number ending in - 6335.

In order to find the answer to the question of *why* flight MH17 was shot down and who can be held responsible, an investigation was conducted into the identities of the crew members and their superiors. After all, they should be able to answer that question. The following section first discusses the scope of the investigation. Then it highlights the findings of the investigation into the composition and organisation of the 53rd AAMB, the military command structure, the deployment of the 53rd AAMB at the Russian-Ukrainian border, the methods used to identify the Buk TELAR and the possible crew members of the Buk TELAR and their immediate commanders.

4.1 Scope of the investigation

A complicating factor in this investigation was the absence of any telecommunications with the crew. The phone number ending in -6335 was active in Ukraine only on 17 July 2014. This number was not tapped, and its user was not in contact with any numbers that *were* being tapped; only one call was made on 17 July 2014 involving this number. The content of this one call is unknown. So there are no conversations involving the crew that could shed light on their identities or the circumstances under which they fired the Buk missile. Nor are there any conversations in which the crew's identities or the reasons for firing the missile are discussed. Unlike the investigation into the DPR fighters responsible, in which intercepted phone conversations formed the bulk of the evidence, there was no relevant telecom data in the investigation into the crew, their assignment and their immediate commanders.

Other investigation methods and various sources were used – where necessary with authorisation from the examining magistrate – in order to acquire information from and about military personnel of the 53rd AAMB. For instance, the JIT gained access to the contents of a number of inboxes, two of which belong to officers of the 53rd Brigade. These inboxes contained transport orders and other documents that proved relevant to the investigation into the 53rd AAMB's activities in the summer of 2014. Specifically, the material concerned a number of long deployments in the Russian region bordering the Donbas in eastern Ukraine. The route taken by Buk TELAR '3X2' to that border region was instrumental in the investigation into the crew members and their commanders. That route could possibly be used to identify the individuals involved, as was done in the investigation into the DPR fighters. The same is true for the route taken by Buk TELAR '3X2' after

the downing of flight MH17, after it crossed the Russian border. The investigation into these routes is described in this report.

An extensive investigation of public sources also took place. This included the securing of satellite images. In addition, satellite images were made available by the Netherlands Defence Intelligence and Security Service (MIVD) and the European Space Agency (ESA). The range of military and other radar systems positioned in the Russian Federation was also investigated.

The JIT also issued several calls for witnesses, both online and in video messages and letters. Many witnesses were interviewed as part of the investigation into the crew, including members of the 53rd AAMB. In so far as they yielded relevant information, those interviews are discussed in this report.

In addition, the social media accounts of members and former members of the 53rd AAMB were monitored and travel movements were traced. This social media investigation verified the above-mentioned orders, among other things. On the basis of the investigation results, several military personnel were identified and it was established that several members of the 53rd AAMB, who were not mentioned by name in the orders, were deployed in the border region at the time of the downing of MH17.

In order to be able to interpret the findings, an investigation was conducted into the composition and organisation of the 53rd AAMB and the Russian military command structure.

4.2 Composition and organisation of the 53rd AAMB

The 53rd AAMB, which is part of the Russian army, is responsible for operational air defence in a particular area. In 2014 the 53rd AAMB consisted of a staff and communications company, a technical support company and three operational battalions. The full brigade comprises over 700 active personnel (conscripts, contract soldiers and officers).

The battalions carry out the air defence tasks. Each battalion has a full Buk system consisting of 11 Buk vehicles: a command vehicle (CP), a radar vehicle (TAR), three launch vehicles without radar (TELL) and six launch vehicles with radar (TELAR). Secured documents from March 2015 showed that each battalion had 123 positions for conscripts, contract soldiers and officers. A battalion is commanded by a battalion commander and his deputy and has its own battalion staff.

Each battalion is divided into three companies (referred to as batteries). Each company has two TELARs and one TELL and is commanded by two officers. The command vehicles (CP) and the radar vehicle (TAR) serve all three companies. The court's judgment proceeds from the assumption that one (autonomous) Buk TELAR was deployed.

As a rule, the crew of a Buk TELAR consists of four personnel: a commander, a first and second operator and a driver. The commander is in charge of the vehicle and communicates with the battalion or brigade command. He is the only person on board who is authorised to launch a missile. For this purpose he has a 'commander's key', which is needed to carry out a launch. The commander is an officer who has completed a five-year training programme in which he has

learned how to command all types of Buk vehicle. An operator is responsible for reading out the systems and adjusting them where necessary. His tasks can also be carried out by the commander. An operator is usually a contract soldier or a conscript. Operator training takes two months and focuses on a specific type of Buk vehicle. Drivers are also often contract soldiers or conscripts. In addition to driving the vehicle, they must also be able to maintain and repair it. The investigation did not yield any information about driver training.

4.3 Military command structure

In 2014, the commander of the 53rd AAMB was Colonel Sergei Muchkaev. Under Russian military law, the commander is the sole person responsible for the conduct of military operations, and he can be expected to know the current status of his unit.¹⁴ The 53rd AAMB is responsible for air defence in the area under the responsibility of the 20th Guards Army in the Western Military District of the Russian armed forces. If a unit of the 53rd AAMB carries out operational tasks outside its own district, responsibility for those tasks lies with the leadership of the district in question. In the case of the deployment of Buk TELAR '3X2' in 2014, that means the leadership of the Southern Military District. The commander of this district is under the command of the Chief of the General Staff of the Russian armed forces and the Russian Minister of Defence, Sergei Shoigu. The Chief of the General Staff and the Minister of Defence, for their part, are subordinate to the President of the Russian Federation, Vladimir Putin. As commander-in-chief of the Russian armed forces, President Putin has ultimate military authority.¹⁵

Formal authority does not automatically lead to actual control over the deployment of the Buk TELAR. Chapter 5 discusses the investigation into the Russian decision to provide a Buk TELAR and crew to the DPR.

4.4 Deployment of the 53rd AAMB

It follows from the images and social media posts discussed earlier that the convoy with Buk TELAR '3x2' was a convoy of the second battalion of the 53rd AAMB, which drove from its military home base near Kursk to Millerovo between 23 and 25 June 2014.

Various documents were secured from the available in-boxes, including transport orders and related documents, addressed to Russian military personnel who in 2014 were working for regional military traffic units (the 47th and 56th VAI), but also documents that can be linked to the personnel and materiel department of the 53rd AAMB.

In the summer of 2014, the 47th and 56th VAI were involved in escorting various 53rd AAMB transports, including the convoy that travelled from 23 to 25 June 2014. It is clear from the available documents that the final destination of this convoy was Nizhnemityakin, a village

¹⁴ Articles 75 and 76 of the Presidential law of November 2007, No. 1495 (adjusted on 21-02-2019), established as general military legislation of the armed forces of the Russian Federation.

¹⁵ <http://en.kremlin.ru/structure/president/authority/commander> (last consulted on 5 December 2022)

southwest of Millerovo. Nizhnemityakin is around 15 kilometres from the Ukrainian border and around 40 kilometres from the Ukrainian border crossing at Severniy. This is where the Buk TELAR and its crew were handed over by a DPR fighter with call sign Bibliothekar on the morning of 18 July 2014. Near that location, that same Bibliothekar collected the Buk TELAR and crew in the early morning of 17 July 2014, after it had been brought over the border from the Russian Federation.

4.4.1 Movement of Buk TELAR '3X2' and other Buk vehicles to the border region

On the basis of the above-mentioned Russian military orders and other sources, an investigation was conducted into this movement of Buk TELAR '3X2' from the brigade base in Kursk to the border region. The whereabouts of Buk TELAR '3x2' in the period from 25 June 2014 until the moment it crossed the Russian-Ukrainian border in the early morning of 17 July 2014 were investigated as well. An investigation was also carried out to find out what could have happened to this TELAR after it returned to the Russian Federation via the Ukrainian-Russian border crossing at Severniy on the morning of 18 July 2014. In addition the team investigated which members of personnel of the 53rd AAMB went to the border region in that period. All of this was done on the basis of the notion that having a solid grasp of the Buk TELAR's movements could shed light on the crew.

The JIT confirmed the authenticity of these orders and documents on the basis of their provenance and validated the contents by comparing them with other sources. These orders and documents concern, among other things, various deployments of the 53rd AAMB in the summer of 2014. The orders relate to the transport of materiel and personnel from the military home base in Marshala Zhukova (near Kursk) to the border region with Ukraine on three occasions: from 23 June 2014, from 15 July 2014 and from 19 July 2014. These documents also contain information about the return of personnel and materiel from Volchenskiy, south of Millerovo, and Glubokiyy to the home base in late September and early October 2014.

Buk TELAR '3X2' was part of the convoy of 23 June 2014. The orders show that on 23 June 2014, personnel and materiel of the 53rd AAMB, escorted by the 47th and 56th VAI, left the military base in Kursk and drove for two days to the final destination of Nizhnemityakin in the Rostov region.

The route described in the orders matches the route that can be deduced from the available images of this convoy. Those images show 11 combat vehicles which together form a Buk battalion: a command vehicle (CP), a radar vehicle (TAR), three launch vehicles without radar (TELL) and six launch vehicles with radar (TELAR). These Buk vehicles were transported by road on Kamaz tractor-trailer combinations, the visible number plates of which matched the registration numbers listed in the orders.

Vehicle numbers can be seen in the images on nine of the eleven Buk vehicles. One of them is Buk TELAR '3X2'. The other eight identifiable Buk vehicles each have a vehicle number beginning with '2'. The first digit of a vehicle number denotes the battalion to which the vehicle belongs. This means that Buk TELAR '3X2' was from the 3rd battalion, whereas the other Buk vehicles in this convoy were from the 2nd battalion. The second digit of the vehicle number denotes one of the three companies (or batteries) of the battalion in question, and the third digit (which for a TELAR is always a 1 or a 2) denotes one of the two TELARs of the company (or battery) in question. The vehicle numbers of the six Buk TELARs of the 2nd battalion are therefore 211, 212, 221, 222, 231 and 232. The first convoy, from 23 to 25 June 2014, indeed included five TELARs with vehicle

numbers 211, 212, 221, 231 and 232, but no TELAR with vehicle number 222. The sixth TELAR in this convoy is the '3X2', and it appeared to be in the convoy in place of the TELAR with vehicle number 222.

The orders contain no information about the objective of the deployment of Buk TELAR '3X2' and other materiel near the Ukrainian border. It is known, however, that as early as February 2014 Putin gave the order 'to conduct a sudden comprehensive check of the combat readiness of the troops/forces from Western Military District and Central Military District and some military branches' and that in March 2014 Minister of Defence Shoigu announced 'surprise exercises'. On 1 June 2014, the Russian Ministry of Defence also announced that from that day onwards more than 300 exercises would be conducted throughout the summer. Shoigu then reported on 19 June 2014, at a private meeting with several members of the Duma, that the armed forces were ready to fulfil any task given by 'the country leadership and supreme commander'. A document from the commander of the 53rd AAMB of November 2017 discusses the history of the brigade. For the year 2014 it mentions 'strategic exercises in unknown territory'.

In 2018, in a request for legal assistance, the Public Prosecution Service asked the Russian Federation where the Buk TELAR with vehicle number '3X2' was in the period between 23 June and 23 July 2014. This question remained unanswered. According to the Russian authorities there was no evidence pointing to the presence of any Russian Buk TELAR in eastern Ukraine, and therefore there was no reason to answer the question about the whereabouts of the TELAR bearing the number '3X2' between 23 June and 23 July 2014.

According to the orders, on 15 July 2014 a convoy consisting of 48 passenger and transport vehicles left for the same border region. These orders do not mention Buk vehicles. These orders and other documents do show, however, that from 15 July 2014 a total of 193 military personnel of the 53rd AAMB were deployed to a place south of Millerovo, presumably Volchenskiy.

In order to verify the orders, the investigation also looked at the orders relating to the convoy of 19 July 2014. These orders concern the transport of, among other things, 10 Buk vehicles to the border region. It follows from other documents and secured images that these were vehicles from the 1st battalion. A satellite photo of the home base of the 53rd AAMB of 18 July 2014 shows loaded tractor-trailer combinations lined up. Images from 19 and 20 July 2014 show 11 Kamaz tractor-trailer combinations, carrying 10 Buk vehicles and one armoured vehicle. The route that these vehicles took matches the route described in the orders. The vehicles described in the orders also match the images.

As mentioned above, the 53rd AAMB consists of three battalions. It follows from the combination of the orders and the secured images that the 1st and 2nd battalions were deployed in the summer of 2014. Nothing specific was found that would point to the movement of any other vehicles of the 3rd battalion to the border except '3X2'.¹⁶ The conclusion that the 3rd battalion was not independently deployed follows from the investigation of public sources. In the summer of 2014, Russian students underwent training with the 53rd AAMB. The photos they posted on VK show

¹⁶ It should be noted that the convoy of 19 July 2014 included two covered Buk TARs. As the vehicle numbers of these TARs are not visible, it is not known to which battalion they belong.

vehicles of the 3rd battalion. Their posts mentioned that the photos were taken at the home base of the 53rd AAMB in the period from 22 June to 25 July 2014.

4.4.2 Withdrawal of Buk vehicles of the 1st and 2nd battalions

A memorandum was found with the orders, with information about the withdrawal of personnel and materiel of the 53rd AAMB, including the Buk vehicles. The memorandum is dated 23 September 2014 and signed by the acting commander of the 53rd AAMB. It refers to 'combat directive 399' of the command centre of the Western Military District. According to this directive of the Western Military District, the staff and the 1st and 2nd battalions of the 53rd AAMB were to be withdrawn to the brigade base near Kursk between 26 September and 1 October 2014. As regards the Buk vehicles, the order says that one command vehicle, one radar vehicle, two TELLs and four TELARs of the 1st battalion were to be removed and one command vehicle, one radar vehicle, three TELLs and five TELARs of the 2nd battalion.

The memorandum contains no information about the removal of the sixth TELAR of the 2nd battalion, which was transported to the deployment area in the convoy from 23 to 25 June 2014. Nor does it contain any information about the second radar vehicle and the fifth TELAR, which according to previous orders were transported to the deployment area in the convoy of 19 July 2014. According to the memorandum, all the Buk vehicles were to be transported by rail, and not – as on the way to the deployment area – by road. To this end they were ordered to rendezvous on 27 September 2014 at the 'field positions of the 1st battalion', two kilometres southeast of Volchenskiy. The memorandum also says that the 9M38 Buk missiles of the 1st and 2nd battalion would be dismantled on 24 and 25 September 2014.

The Buk vehicles that were to be removed were to rendezvous on 27 September 2014 near Volchenskiy. The JIT asked ESA about the availability of satellite images of the vicinity of Volchenskiy and the route from Volchenskiy to Kursk in the period from 27 September to 2 October 2014, as mentioned in the memorandum. There are no images of this route with sufficiently high resolution available for the period in question, with the exception of a satellite image of 29 September 2014. That image shows around 100 military vehicles lined up in rows near a railway line near Likovsky, around six kilometres southeast of Volchenskiy. No Buk TELARs can be identified in that satellite image.

A comparison of satellite pictures of the home base of the 53rd AAMB from 27 July and 2 October 2014 shows a substantial increase in the number of vehicles present on 2 October compared with 27 July 2014.

4.4.3 Possible removal of TELAR '3X2' from 18 July 2014

On the basis of the investigation it is plausible that the deployed Buk vehicles of the 1st and 2nd battalions returned to the home base of the 53rd AAMB in Kursk in late September 2014. However that does not necessarily mean that the Buk TELAR with which MH17 was shot down also returned to base at that time. It could also have been removed separately and at a different time. As mentioned earlier, the memorandum about the withdrawal of the 1st and 2nd battalions shows that one of the Buk TELARs of the 2nd battalion did not return to base.

As noted above, the transport of the Buk TELAR to the deployment area was instrumental to the investigation into the crew and their commanders; the same applies to its removal after the

downing of flight MH17. The JIT therefore investigated what happened after 18 July 2014 to the Buk TELAR that shot down MH17. It took into account the possibility that this weapon was brought back to the home base in Kursk shortly after the downing of MH17. It investigated the various ways in which this removal could have been carried out: by road, rail or air.

Due to the possibility that the removal took place by road, the JIT asked ESA about the availability of satellite images of the route between Severniy and Kursk from 18 July 2014 onwards. ESA's response was that it only had satellite images of Kursk air base. These images will be discussed later. For now it suffices to say that no Buk TELAR can be seen on them.

The Netherlands Defence Intelligence and Security Service (MIVD) provided a satellite photo from 20 July 2014 at 08:41, which shows a military site near Millerovo. A covered object can be seen on a low-loader. No other covered vehicles or low-loaders are visible on this satellite image. The external characteristics and dimensions of this covered object match those of covered vehicles on low-loaders that are visible in the satellite image of the home base of the 53rd AAMB of 18 July 2014 that was discussed previously. In addition, on 20 July 2014 a photo was posted on VK showing a covered military vehicle on a low-loader with a Kamaz truck. It is not known where or when this photo was taken. The outlines of the covered vehicle match those of a covered Buk TELAR in a video of 20 July 2014 showing the convoy delivering Buk vehicles of the 1st battalion. The registration number of the Kamaz truck on the VK photo does not appear in the video of the convoy of the 1st battalion, nor is it on the list of registration numbers in the transport orders for this convoy. A Kamaz truck with the same registration number as the one in the VK photo does appear in visual material from 23 June 2014 of the convoy of the 2nd battalion which delivered Buk TELAR '3X2'. On that occasion this truck was transporting an uncovered Buk TELAR; the photo from 20 July 2014 was therefore not taken during this previous convoy. The JIT has not been able to find any further information about this VK photo and satellite photo of a covered vehicle on a low-loader.

Witnesses were interviewed about the possible removal of the TELAR that downed MH17. One of them was S31. Witness S31 stated that, shortly after the downing of MH17, he spoke with a DPR fighter who was involved in the local air defence in Snizhne: Vladimir Tsemakh. This witness heard from Tsemakh that after the downing he had looked after a depressed crew member of the Buk and given him liquor. According to Tsemakh this crew member was later picked up by a vehicle, and left for Russia. The Buk was loaded on to a truck and taken away in the direction of Rostov. Tsemakh was interviewed about this by the JIT, and he disputed witness S31's version of events.

There is a marshalling yard a few hundred metres south of the location where the aforementioned covered vehicle was sitting on a low-loader on 20 July 2014. A railway line runs past the military base of the 53rd AAMB in Marshala Zhukhova, with a branch that leads to the military site. The JIT investigated whether Buk TELAR '3X2' returned to base by rail in the period after the downing, but found no evidence for this.

Lastly, the JIT considered the possibility that the Buk TELAR that downed MH17 was removed by plane. It is clear from telecom data that this Buk TELAR must have crossed the Ukrainian-Russian border on 18 July 2014 at around 06:00. According to the MIVD, on 18 July 2014 at 04:21 there were two Ilyushin Il-76 transport aircraft, which are capable of transporting a Buk TELAR, at the nearest air base, at Rostov-on-Don. On 19 July 2014 at 16:10 only one of those two aircraft was

still at this air base. That means that the other aircraft left the air base in the meantime. According to satellite images from ESA and Google Earth and information from the MIVD, on 18 July 2014 at 06:08, 10:27, 11:44, around midday and at 14:31 there was an Ilyushin Il-76 at a military air base in the vicinity of the home base of the 53rd AAMB at Kursk. The aircraft appears to be in the same spot at each time. ESA did not observe any similar aircraft at this air base in the period from 2010 to 2014 (inclusive). Assuming the Buk TELAR returned to the Russian Federation on 18 July 2014 at around 06:00, it could certainly not have been delivered to the air base at Kursk at 06:08. The flight distance from this air base to the air base at Rostov-on-Don is estimated at 600 kilometres. To date, the JIT has not been able to find any further information about the possible removal of the Buk TELAR by air.

After the video recorded in Luhansk in the early morning of 18 July 2014, the investigation found no further visual material that recognisably showed the Buk TELAR that downed MH17.

4.4.4 Summary

Starting on 23 June 2014, Buk TELAR '3X2' travelled for two days in a convoy of the 2nd battalion of the 53rd AAMB to the region bordering the Donbas. Six Buk TELARs were transported in that convoy, one of which has been identified as the Buk TELAR that downed MH17: TELAR '3X2'. The JIT investigated what happened to Buk TELAR '3X2' after the downing of flight MH17.

It is clear from telecom data that it returned to the Russian Federation via the Severniy border crossing at around 06:00 on 18 July 2014. According to witness S31 the TELAR was transported to Rostov by truck. The JIT tried to trace its subsequent movements in the Russian Federation, investigating whether it was transported by road, rail or air.

No evidence was found of transport by rail. The JIT did, however, secure a satellite photo of 20 July 2014 of the Millerovo area, showing one covered vehicle on a low-loader, the shape and dimensions of which match the covered vehicles observed on 18 July 2014 in a satellite image of the home base of the 53rd AAMB. On 20 July 2014, an image was posted on social media of one covered Buk TELAR on a Kamaz truck. That same truck was part of the convoy of the 2nd battalion that departed on 23 June 2014 and which included TELAR '3X2'. It could not be established whether the covered vehicle in the satellite image was the same vehicle as the covered TELAR in the VK photo, nor whether it was TELAR '3X2'.

An investigation into the possibility of removal by air yielded the following results. When TELAR '3X2' crossed the Russian border on the morning of 18 July 2014, there were two Il-76s at the nearest military air base at Rostov-on-Don, which are capable of transporting a TELAR. The next day only one of these Il-76s was observed at this air base. It could not be established where the other Il-76 went. On 18 July 2014, at several points in time from 06:08 onwards, an Il-76 was observed at the military air base at Kursk. This Il-76 appeared to be in the same spot every time. ESA had not observed this before in satellite images of this location in the period from 2010 to 2014 (inclusive). The Il-76 that was present at this air base at 06:08 can in any case not have been an Il-76 from the air base at Rostov-on-Don that had transported Buk TELAR '3x2' to Kursk, as TELAR '3X2' crossed the border at Severniy at around 06:00 and can therefore not have been taken to Kursk by plane at 06:08.

The Russian authorities have refused to answer the question of where Buk TELAR '3X2' was in the period from 23 June to 23 July 2014. The memo concerning the withdrawal of the Buk vehicles of the 1st and 2nd battalions from 27 September 2014 onwards shows that one of the Buk TELARs of the 2nd battalion did not return to base. Whether this was TELAR '3X2' has so far not been established.

4.5 The Buk TELAR's target identification systems

As part of the investigation into the question of why MH17 was downed, the JIT looked at the target identification options available to the crew of a Buk TELAR. Targets can be identified by linking up with an external radar system or by using either the TELAR's own radar, a military identification system that uses a transponder (Identification Friend or Foe (IFF) system) or the TELAR's camera. The Buk TELAR's IFF system can only identify military allies (friendly aircraft). Enemy aircraft and civilian aircraft are not recognised as 'friends', and the system thus designates them as 'foes'. In addition, on a cloudy day like the afternoon of 17 July 2014, the TELAR's camera cannot be used. In such cases, the crew can use the TELAR's own radar to identify or further identify a target. The radar can be used to establish the target's speed, altitude, heading and manoeuvrability. If several objects are detected and compared, the (relative) size of the target can also be established. Using the radar makes the Buk TELAR vulnerable, as it allows the TELAR to be detected too. For that reason, in enemy territory the TELAR's own radar is generally used as little as possible. Besides the TELAR's own radar, external radar data can also be used. The investigation showed that several (military) radar systems in the Russian Federation covered the airspace where MH17 was flying. Investigative activities also showed that from May 2014 onwards current Russian radar information was being shared with the 'people's army' in eastern Ukraine. The investigation could not establish whether this was also done on 17 July 2014 and whether that radar information – or other information relating to the target – reached the crew of Buk TELAR '3X2'.

The investigation therefore did not provide clarity as to what target information the crew of Buk TELAR '3X2' had on 17 July 2014 when they fired the Buk missile. Nor did the investigation provide clarity regarding any possible assignment the crew was sent to Ukraine to carry out. At the very least, this information would be known to the crew and their commanders.

4.6 Crew members and commanders of the 53rd AAMB

The orders concerning the convoy that left the home base of the 53rd AAMB on 23 June 2014, which included Buk TELAR '3X2', do not contain any information about (the identities of) possible crew members who travelled with '3X2' between 23 and 25 June 2014. Orders and other documents have been secured, however, that show that from 15 July 2014 at least 193 military personnel of the 53rd AAMB were deployed to a place south of Millerovo, presumably Volchenskiy. That is the region to which the 2nd battalion travelled earlier. Given the contents of these orders and documents, these military personnel must have arrived in the border region before Buk TELAR '3X2' and its crew crossed the Russian-Ukrainian border in the early morning of 17 July 2014. They too were therefore included in the investigation into the crew.

These documents mention the 193 military personnel by name. On the basis of an investigation of other available documents and public sources, including social media, several of these military personnel can be linked to the 1st battalion and a small number to the 2nd and 3rd battalions.

4.6.1 Brigade commander Muchkaev

These deployed military personnel include several staff members, including the aforementioned commander of the brigade, Muchkaev.

In the criminal trial against Pulatov the court ordered that Muchkaev be interviewed as a witness. In response to a request by the examining magistrate, the Russian authorities indicated on 3 December 2021 that this interview could not take place, because they said the questions to be put to Muchkaev concerned 'military matters, to which a duty of confidentiality applies in accordance with Russian law' and an interview could 'compromise the state secrets of the Russian Federation'. It was possible in the course of the investigation, however, to interview Muchkaev's grandfather, who lived in Latvia until his death. He stated that he had heard from his daughter that his grandson Muchkaev was not involved in the downing of MH17. An investigation into the MH17 disaster was said to have been conducted in the Russian Federation and that investigation was said to have exonerated his grandson. The grandfather also stated that he had not seen his grandson for years and that they seldom spoke. According to him he never spoke about MH17 with his grandson.

Although it is plausible, in view of his role and responsibility, that Muchkaev was aware of the deployment of a Buk TELAR of his brigade on Ukrainian territory, the investigation found no specific evidence of this. There is no telecom data from which this could be deduced. Nor was it possible to confirm Muchkaev's presence in the border region at the time of the downing of flight MH17.

4.6.2 Wider circle of possible crew members

All military personnel of the 53rd AAMB for whom there were indications that they may have been in the border region when the Buk TELAR was deployed were investigated further. This includes both military personnel who travelled with the convoy of 23 June 2014 to that border region and military personnel who left the base in Kursk on 15 July 2014. Thirty-five officers among them could be expected, in view of their ranks and positions, to be capable of operating a Buk TELAR. However, these findings do not rule out the possibility that there were more officers present in the border region with the same skills. It was established that seven other military personnel for whom there were indications that they were in the border region worked as an operator in a Buk TELAR or as the driver of a Buk vehicle. This also does not rule out the possibility that there were other operators or drivers present.

A number of members of the 53rd AAMB were tracked down and interviewed as part of the investigation. The investigation team obtained a large number of chat messages. The participants in these chats include former members of the Russian 53rd Anti-Aircraft Missile Brigade (AAMB). In one of these chats a former member of the 53rd AAMB said, in response to questions about other people who were on deployment with him near the border with Ukraine in the summer of 2014, that everyone had to sign a confidentiality declaration. He denied having been in Ukraine during that deployment.

In another chat, individual A discussed their chat contact with another former member of the 53rd AAMB. The investigation team has been in contact with this former member of the 53rd AAMB and interviewed him as witness G8010. During this chat, individual A says that G8010 wrote to A that he had been in Ukraine three times and that in the summer of 2014 the 2nd battery of the 2nd battalion was based near Yelan in Rostov province.¹⁷ The 3rd battery was based around five kilometres from Patronovka and the 1st battery possibly near Voikova, Duby or Mityakinskaya. Individual A sent part of his/her chat conversations with G8010 along. In one of the chats, G8010 says he has no information about the 'Volvo' or other moments related to 'the case'. It can be deduced from the context that 'the case' refers to the MH17 investigation. Various media previously reported on the delivery of the Buk TELAR on a trailer pulled by a white Volvo truck.

Witness G8010 confirmed to the investigation team that he was part of the 53rd AAMB in the summer of 2014. He told the investigation team that he was part of the convoy that left the base in Kursk on 23 June 2014. According to G8010, the final destination of this convoy was not revealed to contract soldiers or conscripts, but they ended up based in woods that were surrounded by agricultural fields. There were no houses or villages in the vicinity. G8010 spoke about his duties, but stated that he knew nothing about the specific mission. According to him such information was not shared by the officers. This interview ended abruptly, because the connection was lost due to a technical problem. After that point, the investigation team was no longer able to contact G8010.

In addition, the investigation team received information from another soldier of the 53rd AAMB: witness S45. By means of covert investigative activities, the investigation team established that S45 said that he was in Ukraine for six months, deep in the forests of the Donbas. According to S45 the 53rd AAMB's presence in Ukraine was a secret because there was no official armed conflict between Russia and Ukraine. For that reason it was also forbidden to be in contact with Ukrainians. The locations where S45 was based were always remote and scattered along the border. It was established that S45 stated that 'the incident with the Boeing' took place while he was in Ukraine. He was aware of rumours that his unit was responsible for it, but he did not believe that MH17 was downed by a Buk. The people who work with these systems know exactly how a Buk-M1 works and he thought a mistake would be unlikely. According to S45, people pointed to his unit in relation to the Boeing because they were the closest to the crash site. The distance was sufficient to be able to down an aircraft, in part because there was radar and a command post present. S45 said he knew nothing about the downing of the Boeing; he saw only a field, trees and combat materiel. While he was in Ukraine, several combat vehicles were brought from Russia to Ukraine and his unit also downed planes and a helicopter, but he said that he personally had not seen any shooting.

During police interviews, S45 told a different version of events. In those interviews he stated that in the summer of 2014 he had taken part in a deployment from the base in Kursk. He changed location during this deployment. He said the deployment had lasted several weeks and he did not know anymore exactly where he had been. The journey took at least 24 hours and rumour had it that Rostov was their destination. The base consisted of tents and a shower. There were no towns in the vicinity; there were fields everywhere and narrow wooded areas between the fields. When

¹⁷ 'Battery' means the same as 'company' here. A battalion consists of three companies. Each company has two Buk TELARs and one Buk-TELL.

MH17 was downed, S45 was deployed in a field, but he did not see a launch. By his own account S45 was not in Ukraine. He did not even see any combat aircraft or helicopters being downed during the field exercises. The combat vehicles of his battery¹⁸ were not moved. Officers would sometimes leave, but not for long. In the police interview, S45 was unable to confirm the information that had been received from him during covert investigative activities. Nor was he able to answer the question of who the crew members were. He said he might have known, but he was unable to remember a lot of names. He stated that he was very scared and that he could no longer take any risks.

4.6.3 Members of the 3rd battalion under the command of an officer

Through witness S28, the investigation team came into contact with another member of the 53rd AAMB: M1. Witness S28 stated that he made contact with military personnel of the 53rd AAMB via the social media platform VKontakte (VK), using the name 'Anastasia'. S28 was in contact via online chats with one of them, M1, for about a month. At the time, M1 no longer worked for the 53rd AAMB. Investigation has shown that in the summer of 2014 the chat contacts mentioned by S28 were indeed conscripts in the 2nd battalion of the 53rd AAMB and that they were part of the convoy from 23 to 25 June 2014 that also included Buk TELAR '3X2'. Witness S28 made screenshots of parts of the chats and provided them to the JIT. His computer was seized by the Russian authorities.

In the chats provided by S28, M1 wrote that he served together with another soldier, referred to here as M2, in the 2nd battalion and that together with M2 he drove past Millerovo and Kamensk and spent three months in the woods near Kuybyshevo. On the way towards Rostov, three contract soldiers travelled with them who went in a different direction after Millerovo. These contract soldiers were under the command of an officer, whose name and rank were mentioned by M1. When asked where those contract soldiers went, M1 answered that that was a big secret and that he could say nothing about it or he would get his head chopped off. He said he could give a clue though, and then quoted a song in which a soldier is ordered to go west. When S28 (still under the name 'Anastasia') responded by asking whether he meant blue-yellow and then sent a picture of the Ukrainian flag, M1 responded that 'Anastasia' was not only beautiful but also clever.

According to S28, M1 told him that he had left Kursk with his colleagues around 23 June 2014. Contract soldiers and one Buk vehicle also travelled with them. After Kuybyshevo they split up and spread out to move to the border. The Buk were divided among several locations. M1 also told S28 about a large exercise area between Millerovo and Kamensk-Shakhtinskiy. He said the materiel would be parked there until it was due to go to the Ukrainian border. M1 and his colleagues stayed there for several days, after which they were sent into the woods on the border with Ukraine. It was a considerable distance from populated areas, but close to Kuybyshevo. S28 also stated that M1 told him that two Buk systems had to be sent back to barracks after only two weeks because they had technical problems and could not be repaired in the field.

Witness M1 confirmed to the investigation team that in 2014 he was a soldier in the 53rd AAMB and that he had been using the account with which S28 chatted for 10 years. However, M1 denied

¹⁸ 'Battery' means the same as 'company' here. A battalion consists of three companies. Each company has two Buk TELARs and one Buk-TELL.

having chatted with 'Anastasia', claimed that the chats were fake and refused to answer further questions.

An investigation into the officer whose name and rank M1 mentioned (to S28) and who he said was in command of the Buk crew led to his identification. On 17 July 2014 this officer was a member of the personal staff of brigade commander Muchkaev. It could not be established whether this officer was in the border region on 17 July 2014. In photos on social media after 17 July 2014 this officer is wearing two decorations: one for the development of and combat operations with a Buk system and the other for extraordinary service with the Russian security service FSB. Given his staff position in the 53rd AAMB, this officer would not, as a rule, be eligible for a medal for combat action with a Buk unless he had actually taken part in that action. FSB decorations are not usually awarded to military personnel, and they are awarded on fixed dates. Since this officer entered service, this decoration has been awarded only once: on 21 July 2014, i.e. four days after the downing of flight MH17.

According to M1's chat messages that were provided by S28, this officer was in command of crew members of the 3rd battalion.

4.6.4 Officers of the 2nd battalion

Information obtained from witness S42 points in a different direction. This witness stated that they had heard from someone in the Russian army that four people serving in the 53rd AAMB were involved in the downing of the Boeing. These four people together formed the crew of the Buk. After the downing of MH17, the crew returned to the 53rd AAMB's camp in Kamensk-Shaktinskiy. S42 was able to name two of the four crew members. The examining magistrate established that investigation of various sources had confirmed that S42 had been in a position to obtain the information that they provided.

The investigation also revealed that the names given by S42 matched those of two officers of the 53rd AAMB. On the basis of investigation of social media it was established that one of these officers was actually deployed to the border region in the summer of 2014. Both officers were members of the 2nd company of the 2nd battalion.

An information report by the SBU identifies one of the officers named by S42 as the person with whom Tsemakh had been drinking after MH17 was shot down. According to the aforementioned witness S31, he heard from Tsemakh that after the downing he had looked after a depressed crew member of the Buk and given him liquor. Tsemakh disputes the claim he was in contact with one or more crew members and denies any involvement in the downing of MH17. The investigation yielded insufficient indication of criminal involvement on his part.

So far the investigation has found no further confirmation of the information that S42 and S28 received from third parties concerning possible involvement of the three officers named by them in the downing of MH17. Witness S45 was unable or unwilling to name any crew members. Calls for witnesses issued by the JIT in 2018 and 2019 and a media and letter campaign in 2021, aimed personally at the residents of Kursk and members of the 53rd AAMB, yielded no new information about the identities of the crew members. Nor did investigation of public and non-public sources lead to further confirmation of the statements of S42 or S28.

4.6.5 Request for legal assistance sent to the Russian Federation

Lastly, in a request for legal assistance in 2018 the Public Prosecution Service asked the Russian Federation to identify the crew members of the Buk TELAR with vehicle number '3X2' in the period from 23 June to 23 July 2014. The Russian authorities were unwilling to answer this question either, as according to them there was no evidence for the presence of any Russian Buk TELAR in eastern Ukraine.

4.6.6 Tweet about crew

The JIT took note of messages posted on Twitter on 17 July and 25 September 2022 which included photos and the names of four members of the 2nd battalion who allegedly shot down MH17.¹⁹ The investigation acquired the information that formed the basis for these posts. It included a personnel list (with which the investigation team was familiar) of the 53rd AAMB from 2015 and passport details of members of the 53rd AAMB. On the basis of this information and the results of its own investigation, the JIT concluded that nothing could be found that pointed to involvement on the part of these four persons in the downing of MH17.

4.6.7 Summary

In summary, in the course of the investigation 42 military personnel of the 53rd AAMB were identified who were deployed in the border region at the time of the downing of flight MH17 and who, in view of their ranks and positions, could be expected to be capable of operating or driving a Buk TELAR. The investigation yielded concrete indications of involvement on the part of three specific officers in the downing of flight MH17. Two of them are mentioned as crew coming from the 2nd battalion, a third person as accompanist of crew coming from the 3rd battalion.

The crew cannot be identified unequivocally and beyond doubt on the basis of the current investigation results. Furthermore, the results do not rule out the possibility that military personnel other than the three named officers were part of the crew.

¹⁹ See the Twitter account @daniel_romein.

5 Delivery of the Buk TELAR

In its judgment the court held that as of the second half of May 2014 the Russian authorities were deeply involved in the DPR's conflict, during which the Buk TELAR was deployed and flight MH17 was shot down. In that connection the court referred to the close ties between DPR leaders and individuals in the Russian Presidential Executive Office, advisers to the Kremlin, and the Russian intelligence services. Staff of these Russian government bodies also turned up in the JIT's investigation into who was responsible for supplying the Buk TELAR to the DPR. This chapter describes the findings of that investigation. The provision of the Buk TELAR is a separate matter from its actual deployment (as established by the court) by Girkin, Dubinskiy and Kharchenko. The findings of the investigation into other parties who may bear joint responsibility for that deployment is discussed in the next chapter.

The main source of information for the investigation into the delivery of the Buk TELAR is telecom data, including intercepted phone conversations that were previously included in the case file. In its judgment the court explained how it came to the conclusion that these intercepted conversations were authentic.²⁰ The same arguments apply to the intercepted conversations that were not included in the case file and are first mentioned in this report.

For ease of reading, the investigation findings will be discussed in chronological order: from the arrival of the Russians Girkin and Borodai in eastern Ukraine in the spring of 2014 to discussions inside the Russian Federation about arms deliveries to the DPR and the transportation of the Buk TELAR to the Russian-Ukrainian border in late June 2014.

5.1 April-May 2014: relationship between Aksyonov and DPR leaders

On 7 April 2014 an armed group occupied the offices of the regional government in the city of Donetsk in eastern Ukraine, proclaiming the establishment of the Donetsk People's Republic (DPR). Five days later, on 12 April, a group occupied the city of Slavyansk. That same day Girkin crossed over [into Ukraine] from Crimea. From that point on he was in command of the DPR fighters, first as 'commander of the Donbas People's Militia' and later as 'Minister of Defence' and 'commander-in-chief of the so-called Donetsk People's Republic'. Not long after that, Borodai followed him from Crimea to eastern Ukraine, where he assumed the role of 'prime minister' of the DPR.

Before arriving in eastern Ukraine, the two men, Girkin and Borodai, were involved in the annexation of Crimea by the Russian Federation. By their own admission, there were there as advisers of the Russian Sergei Aksyonov.²¹ As of late February 2014, he was the self-styled premier of Crimea. According to the president of the Russian Federation, Vladimir Putin, Russia made the decision to annex Crimea in the night of 22 February and the early hours of 23 February 2014. Putin was personally involved in operational decisions related to Russia units. For example,

²⁰ Judgment of The Hague District Court, 17 November 2022, ECLI:NL:RBDHA:2022:12217, 5.6.

²¹ <https://ria.ru/20190619/1555717877> (last accessed on 8 December 2022).

he ordered Minister of Defence Sergei Shoigu to deploy an intelligence division and elite troops. On 18 March Putin concluded an 'agreement' with Aksyonov (and two other leaders) on the 'accession' of the 'Republic of Crimea' to the Russian Federation. Within three days this agreement was ratified by Russia and the annexation was enshrined in law. On 14 April Aksyonov was appointed by Putin as leader of Crimea.

In the months following their arrival in eastern Ukraine, Borodai and Girkin remained in contact with Aksyonov. For example, on 13 April 2014, the day of his arrival in Slavyansk, Girkin received a call from Borodai in Moscow at 15:09:07. Borodai passed the phone to Konstantin Malofeev, a Russian oligarch who was also involved in the annexation of the Crimea. Girkin said that they had managed to repel a Ukrainian attack. Malofeev then asked if he had already reported this to Aksyonov. When Girkin said that he had not been able to reach him yet, Malofeev replied that he had a meeting with Aksyonov in Moscow the next day and that Girkin needed to contact him before then.

5.2 June 2014: Separatists request Russian air-defence systems

In June 2014 there was heavy fighting between the Ukrainian army and troops of the DPR and LPR. During this fighting both the DPR and LPR requested heavier weaponry, including better anti-aircraft systems. The investigation carried out shows that from the second half of July 2014 several Buk-TELARs have been delivered to the separatists, including the Buk-TELAR that shot down flight MH17.²²

One witness stated that in May and June 2014 meetings were held in the Russian cities of Rostov and Kamensk-Shakhtinsky at which Plotnitskiy (at that time the 'Minister of Defence' of the LPR) and an as-yet unidentified GRU general were present. At a meeting in June, Plotnitskiy said that the portable air-defence systems (PZRKs) were no longer effective because aircraft were flying at higher altitude and heavier materiel was needed to shoot them down. After this discussion, the GRU general said that he would personally explain the situation to the Russian Minister of Defence, Sergei Shoigu, shortly. The GRU general also said that they could already supply light weapons, and were indeed doing so, but that heavier weapons could only be supplied once the separatists had captured weapons of that kind too. That way, Russia would be able to deny having supplied any weapons.

In early June, the DPR made a similar request for heavier anti-aircraft systems. At that time Slavyansk, where Girkin had his headquarters, was under fire. On 8 June (at 11:30:47) Girkin called Aksyonov's deputy. Girkin said that the Ukrainian 'enemy' was numerically superior and that they needed Russian support. He said they needed 'decent anti-aircraft systems manned by trained personnel' and asked the deputy to pass this request on to Aksyonov, the first in command ('Pervyi'):

²² For example, it can be deduced from intercepted conversations that a Buk-TELAR was delivered to the LPR in the night of 13 to 14 July, that this system was leaking oil and caught fire and an attempt was made to remove this vehicle.

- (...)
- B: *[Inaudible]* Sergey brought me [...], told me you wanted to get hold of me to share some information.
- C: Now I wouldn't call that "sharing information"... In fact, this information is widely - known, and it reads that, err... that if no large-scale support arrives in the nearest time, the, err... they will smother/strangle (...). What we need is truly large-scale support, what [...] is already not sufficient. Err... Giving [...] by dribs and drabs - as they do it now - can't make any difference anymore. We are outnumbered by the enemy. Me, I've been *around* long enough and I can still hold ground here some time, but if they keep it at this pace and launch an offensive against other towns and cities where people are unprepared and have no combat experience, they're going to crush them flat in no time.
- And then they will crush flat me, of course. If the issue of Russian support - air cover, or at least artillery support - is not dealt with, then we will not be able to hold ground here in the East, no way. ... First, back when this support was needed in large numbers, as much as possible, they didn't provide it; and what they are giving now is what we needed a month back.
- B: Uh-huh.
- C: Now all we get is only enough to barely get by, nothing more. We will not be able to turn the tide in any significant way, and they will be squeezing us on all fronts.
- B: I see.
- C: Hello?
- B: Yes, yes, I'm following you, I'm following.
- C: We need anti-tank artillery, we need tanks, we need decent anti-aircraft defense - because we can't last on MANPADS alone any more - all manned with trained personnel, of course, seeing as we have, and will have, no time to train them. That's it... For example, four tanks are simply sitting on positions short of Semionovka and firing on (...) positions from a distance safe for the rear. They've kept it this way for three days now. But I have no single anti-tank canon to counter them. Just now they were pounding the center of the city/town with howitzers, fired 30 rounds, some exploded nearby, just 150 meters short of my headquarters. But I cannot reach them because they're too far, in terms of range. That's it. And that's the case everywhere. The entire Ukrainian army... [...]
- B: Yes, yes, I get that. Yes, yes.
- C: Now that's the message to get across. Sooner or later they will have to make a decision anyway, but by then a considerable part of the militia will be destroyed and the front line will be pushed away to somewhere behind Donetsk, to the east.
- C: Now that's the story.
- B: OK...
- C: I'd ask you to get this across to Pervyi.
- B: Yes, I get that. OK. Will do.
- (...)

5.3 First half of June 2014: Russian discussions about supplying the DPR with weapons

A little more than 15 minutes later (on 8 June at 11:46:33), Aksyonov himself called Girkin back. Aksyonov said that he was aware of the situation and that he had informed others. He was

awaiting a response and had another meeting that evening to discuss the required support. He told Girkin that he would be in touch after the meeting. Aksyonov also said that a 'joint coordination centre' had been set up for this situation, and that the necessary documents were already being drawn up:

(...)

- D: Hey there, Igorioha. Good job, you're in your usual self, as I see. Now, in a nutshell, here's the story: on Tuesday I went to, err... to where I was supposed to go in the light of this situation... If it weren't for all those visits yesterday and today which, err, prevented [...] from *coordinating action / briefing in relation to the picture*... At 22 or so tonight I'll get in touch with... well, with those who are, err... who have already made this decision. Just now...
- C: Uh-huh.
- D: ...just now I got a visit from those who had *worked* here - you surely know all of them in the line of this situation...
- C: Well, yes, yes.
- D: Now all of them have already *received the entire picture*. I mean, all who sort of been to both buildings back then, err... Well you remember...
- C: I see what you mean.
- D: Yes, everyone has received the *picture*. I mean, we... I will need you to [...] over the same *channel/line* at 22-22:30 today, me and you will need to talk over the same *chonnell/line*. I will then *coordinate/brief* you openly, and... There's already a person and a joint coordination center in place that are dealing with this situation... I mean those who *are/have been* coordinating this *picture* - I just don't want to *give* surnames openly over the phone.
- C: I understand. OK, I'll be available at that time. But, in general, do you understand what the situation is like and that [...*inaudible*]?
- D: I do understand what the situation is like, Igor. Listen up, that's right what I told them on Tuesday, that if we don't take certain steps... I mean, I was, err, where I was sort of supposed to be in the light of this situation, and the message I brought along was that if no concrete steps are taken, then we're going to sort of lose all these *commodity markets* which we're sort of speaking about in terms of this *picture*.
- C: OK then, they just [...*inaudible*]...
- D: That's what I was saying: we're about to lose these *commodity markets*. Well, me and you, we understand what that means.
- C: Yes, yes.
- D: And I sort of made it clear for [...], and right in my presence the guy rang up another pal who is responsible for the conduct of [...], then I had a talk with him about it one's again on Wednesday, and then with Kostia on Thursday, and today I'm still waiting - it's just because all of them are gone for two days, were in different places, and that's why, err, that's why they asked to sort of [...] for these two days because of this *picture*. Anyway, the documents necessary for the support are already being prepared... I will also be [...] about *all this stuff* tonight, I will be *coordinating/briefing* Kostia, err, Kostia's man, err, in relation to all this cookery. And at 22-22:30 today I will *coordinate/brief you on* all points of contact necessary for the entry.
- C: OK, I'll be waiting for you call.
- (...)

On 19 June 2019 the JIT released this conversation as part of an appeal for witnesses. In response, Aksyonov told RIA Novosti that he 'supported and would always support' the separatists and that other than that he had not 'dusted off any missiles or readied them for launch'.²³

In summary: in this conversation of 8 June 2014 Aksyonov informed Girkin that the previous Tuesday (i.e. 3 June) he had already gone where he needed to go given the situation, that on that Tuesday he said that 'concrete steps' urgently had to be taken and that the documents for the requested support had already been drawn up, but that he still had to wait because 'they' were in different places and would be away for two days.

Another phone conversation involving one of Aksyonov's aides showed that on Tuesday 3 June 2014 Aksyonov was in Sochi for a brief visit. According to news releases from the Kremlin, Putin was also in Sochi that day, and in the days that followed, the president travelled on to Astrakhan (4 June) and then to France (5-6 June), for the joint D-Day commemoration with various world leaders.²⁴

In another phone conversation involving the same aide, on 7 June 2014 (18:11:23), this individual explained the Russian decision-making process with regard to military support. The aide said he got 'a beating' because he had said that they were thinking too slowly. He went on to say that the decision to provide support had been postponed by a week, because there was only one person who could make that decision: not a general or the Minister of Defence, but the person who was directly accountable to the people and who was currently at a summit in France:

(...)

- A: There is such ... there is such a situation: I got a beating today because err ... I said 'you are thinking too slowly'. I say: "Kozitsyn took 1 out of 3 border posts there, and people need to be armed so that they can keep this post. Well, this is the border, everything is open".
- B: Uh-huh.
- A: I got such a beating, you won't believe it. It turns out, you know.... you ... let me tell you briefly so that you understand.
- B: Okay.
- A: It turns out there, that the information I gave you ... I spoke with err... three people, remember, the last one? In the Council of Ministers?
- B: Yes, yes, yes.
- A: Those people flew to Moscow, received ... asked for a pause for a week, so that ... this is Pervyi/Number One who makes a personal decision. The Number One.
- B: Uh-huh, I get it.
- A: They beat the fuck out of me today. They said that there is no general, no minister, no sh ... defense minister. This is all about... this is about... Well, how to say? As they said, wait... Number One is the person who answers to the people personally, you know? He makes a decision. And since there is now this summit in France ...

²³ <https://ria.ru/20190619/1555717877.html?in=t> ((last accessed on 8 December 2022).

²⁴ See www.kremlin.ru/events/president/news/45821, www.kremlin.ru/events/president/news/45825, www.kremlin.ru/events/president/news/45832, www.kremlin.ru/events/president/news/45827 (last accessed on 23 June 2021).

B: Uh-huh, uh-huh.

A: He ... he has to give the go-ahead for all of this. Can you imagine what the level is?
(...)

'Sh...defense minister' would seem to be a reference to Shoigu, the Russian Minister of Defence. A day later, on 8 June at 21:24:18 (i.e. after Aksyonov's conversation with Girkin about the deferred decision on the request for military support), Aksyonov's aide had a similar conversation in which he said that his superiors had flown up and back to deliver their report, but that they still needed an additional week because there was only one person who could make that decision, and he was in France:

(...)

A: You know, there is still such a problem that our err ... bosses, they absolutely do not see any connection at all. They just got on the plane, then left, then reported, then back. It takes a lot of time.

B: Well yes, it is ...

A: They told me that the decision was positive. Well, they asked for another week, so that ... because the First is in err ... well, France. He's the only one, he's the only one who makes the decision, nobody else.

(...)

A: I ... I hinted there: let's hurry up, because really such a chance cannot be lost, because the border is still under control, we need to help there. They beat the fuck out of me, they yelled at me: you don't understand, that ... you ... you just don't ... Don't you understand that only the First gives instructions? Before he gets it, it's time. Who the hell are you? As I understand it, there is only one person responsible, only Number One, you know? That's all. It is done as he says.

B: I see. Nobody decides anything except him, damn.

(...)

5.4 14-30 June 2014: Russian meeting to discuss the provision of anti-aircraft systems

Investigators gained some degree of insight into the Russian decision-making process regarding the delivery of heavier anti-aircraft systems to the separatists. The investigation yielded specific information pointing to the following scenario.

In June 2014 Aksyonov and the deputy head of the GRU, Alexei Dyumin, requested a political decision on providing the 'People's Army' in Donbas with a heavier anti-aircraft system, such as an S-200 or Buk system. This happened at a meeting at the Presidential Executive Office in Moscow.

The Presidential Executive Office is a Russian state agency that supports the president and which is responsible for drafting and implementing legislation. In 2014 the Presidential Executive Office played an active role in the conflict in eastern Ukraine. This is apparent from a number of sources, including emails from that period from Vladislav Surkov, who was at that time a member of the Executive Office and a key adviser to Putin, and Aleksei Chesnakov, a former member of the

Executive office and in 2014 the director of a political consultancy that worked with this body.²⁵ Surkov is also known as the architect of the Minsk agreements of September 2014 and February 2015.²⁶ In a 2016 photo taken at the Ukraine talks in Berlin, Surkov can be seen sitting between President Putin and German chancellor Angela Merkel.²⁷

So it was at this meeting in June 2014 at the Presidential Executive Office that Aksyonov and Dyumin requested a political decision on the delivery of a heavier anti-aircraft system, such as an S-200 or a Buk system, to the 'People's Army' in Donbas. This request was supported by Malofeev and Surkov. Representatives of the FSB, the GRU and the defence ministry are also present during the meeting.

This meeting resulted in a written resolution to submit the request to supply heavier anti-aircraft systems to the 'People's Army' to Minister of Defence Shoigu and President Putin. Surkov and Aksyonov were the driving force behind this request. It is unknown if the request explicitly referred to a Buk.

One of the arguments underlying the request for heavier anti-aircraft systems was that the separatists had previously shot down a large military transport aircraft, an Ilyushin-76, with IGLAs (MANPADS) and that the Ukrainian armed forces were now prepared for this eventuality and had started flying at higher altitudes. This meant that there was now a need for air defences with a greater range. It is important to note in this regard that the Ukrainian armed forces were also using such a system, meaning that it could appear as if the DPR had captured it from them. The defence ministry was reluctant to provide anti-aircraft systems to the separatists because this could entail risks to its own (Russian) aircraft. Nevertheless, in the end the request was granted.

According to the investigation the meeting at the Presidential Executive Office took place some time in June 2014. Other sources show that the aforementioned Ilyushin-76 was shot down with a MANPADS on 14 June 2014. All 49 Ukrainian military personnel on board were killed.²⁸ It can therefore be concluded that the meeting must have taken place sometime between 14 and 30 June 2014.

5.5 Surkov's position

According to the aforementioned investigation findings, in June 2014 Surkov and Aksyonov were working to help get heavier anti-aircraft systems to the separatists in eastern Ukraine. The request to that effect was submitted to Minister Shoigu and President Putin. The request was granted.

²⁵ https://static.rusi.org/201907_op_surkov_leaks_web_final.pdf (last accessed on 5 December 2022); <https://cpkr.ru/content/about-us> (last accessed on 5 December 2022).

²⁶ Mikhail Zygar, *All the Kremlin's Men* (2016), p. 291.

²⁷ <https://www.theguardian.com/world/2016/oct/26/kremlin-puppet-masters-leaked-emails-vladislav-surkov-east-ukraine> (last accessed on 5 December 2022).

²⁸ See also the Ukrainian judgment of 15 March 2021, which can be consulted at <https://reyestr.court.gov.ua/Review/95638731>.

Surkov was Putin's adviser and worked at the Presidential Executive Office. According to Russia specialist Anna Matveeva, Surkov was given control of Donbas affairs in July 2014, taking over from Aksyonov, Malofeev and others.²⁹ According to Girkin, Surkov had 'tactical command' and 'managed' the situation in Ukraine in his capacity as adviser to Vladimir Vladimirovich [Putin].³⁰ In an interview on 28 November 2014, Borodai said that Surkov was the most senior Russian official to deal with this issue and that Surkov, as the president's aide, regularly reported to Putin about it directly.³¹ In a phone conversation that took place on 25 June 2014 (11:30:38) with the aforementioned Chesnakov,³² Borodai said that the 'head of the government administration' had called him twice that day. Borodai's telephone data shows that he had been phoned twice that morning by the number used by Surkov. The other party to the conversation with Borodai – Chesnakov – was at that time the independent adviser to the Presidential Executive Office and closely involved in the conflict in eastern Ukraine.³³ Borodai's telephone data shows that as far back as 11 June 2014 (22:52), Borodai was in contact with Surkov's number almost every day, and sometimes multiple times a day, with the exception of the periods that Borodai was in Moscow. During an interview in June 2021, Surkov said that his own contribution to the situation in eastern Ukraine was 'significant', and in fact 'many times more significant (...) than many people could imagine. Both for the Russian state and for Ukraine.'³⁴

In Surkov's inbox an email was found from 13 May 2014, in which Malofeev proposed several candidates for positions in the DPR government. A number of them had been screened by Malofeev and his associates ('us'). The JIT compared the content of these emails with other emails and confirmed their authenticity. For example, during this period, participants in various intercepted phone conversations spoke about lists of names for the DPR's 'government' and 'security council'. The then 'Minister of Culture' of the DPR told the JIT that Russia exercised full control over DPR affairs. According to this DPR minister the 'deputy prime ministers' of the DPR received their instructions from Moscow. At the Kremlin in late 2017 Surkov awarded decorations to Russian mercenaries from the Wagner Group, a paramilitary organisation, for downing a Ukrainian helicopter and two Ukrainian combat aircraft on 12 and 16 July 2014. This emerged from statements given by two members of the Wagner Group as part of a covert operation by the SBU, the Ukrainian security service. The same two individuals also provided documents, showing their nomination for the decorations. In intercepted phone conversations Surkov coordinated various matters with Borodai, such as the encirclement of Slavyansk, the establishment of an additional security service, payments, and the intransigent attitude of DPR commander Igor Bezler. When Borodai sought to coordinate with Moscow about the delivery of refrigerated rail containers containing the bodies of the victims and the black boxes from MH17, his first point of contact was Surkov. If Borodai was unable to reach him, he would call Chesnakov again to ask him to have 'the boss' (i.e. Surkov) call him back as soon as possible.

²⁹ A. Matveeva, *Through Times of Trouble: Conflict in Southeastern Ukraine explained from within* (2019), p. 277.

³⁰ <https://www.youtube.com/watch?v=a0mIzX5TssA> (last accessed on 5 December 2022).

³¹ <https://www.youtube.com/watch?v=ug0w6PH2Hyc> (last accessed on 5 December 2022).

³² See section 5.4.

³³ <https://chesnakov.ru/about/> (last accessed on 5 December 2022); <http://cokr.ru/about> (last accessed on 5 December 2022).

³⁴ <https://youtu.be/gYuqBK83I3o> (last accessed on 14 June 2021).

5.6 14-30 June 2014: Russian talks about arms deliveries

The aforementioned meeting at the Presidential Executive Office in which the participants discussed the provision of heavier anti-aircraft systems must, as previously noted, have taken place between 14 and 30 June 2014. The Buk TELAR used to shoot down MH17 was part of a convoy that departed from Kursk on 23 June 2014 and arrived at the Russian-Ukrainian border on 25 June.

The investigation into the Russian decision-making process in the period between 14 and 30 June 2014 revealed that in the night of 12 to 13 June 2014, Borodai travelled from Snizhne in eastern Ukraine to the Russian city of Rostov, and that he was in Moscow from 14 to 19 June. In a telephone conversation on 14 June 2014 (15:08:19), Borodai said that he was near Staraya Square in Moscow, where the Presidential Executive Office is located.

During this visit in June 2014 there was no telephone contact with Surkov, Chesnakov and other Russian users of the same consecutive series of encrypted-phone numbers, which Borodai ordinarily called with great regularity. On the second day of his visit to Moscow, Borodai spoke on the phone with a separatist (15 June 2014, 16:41:34) telling him that he would be back soon, with 'gifts' ('So I will come with gifts'). On 17 June (16:55:18) Borodai spoke on the phone with another separatist and told him: 'Moreover, I met some of our mutual friends. (...) We had a good talk.' Borodai (B) said the same thing on 18 June (20:52:32) to a certain 'Luna' (A) whose telephone was transmitting to telephone masts in Snizhne at that moment. Borodai told Luna that he was waiting and that he hoped to see him again soon. He would bring 'the salary' and said that there were many 'parcels and gifts' for everyone. According to Borodai the trip had been a success:

- (...)
- B: Look. I'll bring you the salary. It's just that it will be partially in dollars, partially in rubles. (...) Or do you need it in dollars?
- A: No, no, better in our, native (...). I need to pay (...) out to people. (...)
- B: (...) I get it. I understood. Okay, I hope to see you very soon.(...) I'm just waiting, so to speak.
- A: (...) The main thing is that big brothers ...(...) so that our big brothers don't forget about us. (...) I will call you back tomorrow, err ... if there are any parcels.
- B: Err ... I actually sit on it - on this parcel, as they say. (...) There will be parcels. I have a huge amount of parcels and gifts for everyone here, damn it.
- A: (...) It was nice to hear you. (...) The trip was effective. That's important.
- B: Yes, yes. Quite effective.
- (...)

Borodai's stay in Moscow was confirmed by the OSCE in reports of 18 and 19 June 2014.³⁵

During the same period another separatist, Aleksei Fominov, was in Moscow. On 18 June Fominov called from Moscow to an unknown fellow fighter, who indicated that they needed uniforms. Fominov responded that he would be back the following day and would bring uniforms with him.

³⁵ OCSE report of 18 June 2014, <https://www.osce.org/ukraine-smm/119945> (last accessed on 5 December 2022).

Fominov also asked if they had any 'heavy stuff'. When that proved not to be the case, Fominov said that he had just set off and would try to get the 'green light' for that (18 June 2014, 12:47:00). In the evening (18 June 2014, 22:09:40) Fominov reported that he had just been to his fifth meeting and that he wasn't getting anywhere with the 'hardware issue'. Another meeting was scheduled to the next day (i.e. 19 June), 'a big one':

- (...)
- A: (...) Have just been at the fifth meeting! Just stepped outside. A fellow dropped in to have a word. It was the fifth bloody meeting and it looks like ... {sighing} The fucking hardware issue gets nowhere. I'm tired as fuck. To make matters worse, they clash with each other (...). Basically, there is a proposal... There will be a meeting tomorrow.
- B: I see.
- A: A big one.
- (...)

The next morning Fominov reported that the people in Moscow had a lot of questions for him, 'in particular, the people who are above everyone' (19 June 2014, 10:44:34). In a call later that day (17:27:42) Fominov (A) said that he was on his way to the man who was sending 'stuff'. A fellow fighter (B) told him how difficult the situation on the front was and said that they need anything they could get:

- (...)
- A: I'm on my way to see the man who promised us [...] so many times. The one who's sending [stuff] to Igor. (...) When I get there, I'll try to explain it. [That] if they don't come up with anything by the end of today—{unintelligible}, whatever it takes them—then they and {unintelligible} people can say goodbye to the factory. I'm right on my way to see them. See? It seems like they don't get it.
- B: Do your best. We need everything we can get. (...) [When you see] the comrades from the other side, spread a map in front of them and show them what length of the frontline is being held by us and by him. (...) There're as many as 46 tanks, 6 fucking SAUs and 31 motherfucking BTRs near us already.
- A: (...) Fuck, fuck, fuck... But just you wait, I was just talking to, um... I'm in the meeting with all those people who make decisions on {unintelligible} (...).
- (...)

Later that evening (19 June 2014, 23:05:31), Fominov (B) called the DPR commander Bezler (A) and asked if there was still heavy fighting going on. Bezler said that this was the case.³⁶ Fominov

³⁶ During the first hearing in the criminal trial (9 March 2020), the Public Prosecution Service spoke about an intercepted telephone conversation that Bezler took part in on 17 July 2014, in which the other party to the call announced that a 'bird' would be coming his way. In that connection the Public Prosecution Service remarked that an extensive investigation had been conducted into both this conversation and Bezler as an individual. That investigation was not able to confirm that this conversation had actually contributed to the downing of flight MH17. Moreover, the investigation showed that there was so little time between this conversation and the launch of the Buk missile that it was doubtful that the conversation could have contributed to the downing of the aircraft.

asked him to hold their position for another two or three days because 'some very good decisions' had been made:

- (...)
- A: (...) Will you be able to hold the ground?
- B: I don't know. We have to. (...)
- A: Some very good decisions have been made about everyone/everything. (...) I mean, some really good decisions. Well, at least a day or two or three?
- B: We'll do our best.
- (...)

In summary: Borodai and Fominov were both in Moscow until 19 June and spoke on the phone about meetings and discussions that had occurred about (apparent) military support, with an ultimately positive result. On 19 June 2014, at a private meeting with several members of the Duma, Shoigu reported that the armed forces were ready to carry out any task issued by 'the country leadership and supreme commander'. According to the Kremlin, a meeting of the Russian Security Council was held on the evening of 19 June 2014 on 'the situation in southeastern Ukraine'.³⁷

It is unclear exactly what sort of material the 'parcels and gifts' and 'hardware' referred to by Borodai and Fominov consisted of, but it can be inferred from other intercepted conversations that deliveries of heavier military equipment, including tanks, started shortly after their visit to Moscow. It is unknown if the topic of heavier anti-aircraft systems, such as a Buk, came up.

One witness did state that large amounts of military equipment arrived after the arrival of a GRU general on 20 or 21 June 2014. This equipment crossed the Russian border into Ukraine at Orekhovka (near Severniy). The GRU general, who was referred to as 'Andrei Ivanovich' and was identified by the JIT as Oleg Ivanovich Ivannikov, was there as an adviser to Plotnitskiy, but also chaired the meetings conducted with LPR commanders. Ivannikov also commanded the private military force Wagner, which entered Ukraine at the same time as him.

A few days later, on 23 June 2014, a Buk convoy departed for the Ukrainian border. The convoy included the Buk TELAR that was transported across the border in the night of 16 to 17 July 2014 and was used to shoot down MH17. It has yet to be determined whether it had been decided to deliver this Buk TELAR to the DPR prior to the convoy's departure, or whether this decision was only made later, after the deployment of the 53rd AAMB to the border.

5.7 Putin's position

In the aforementioned intercepted conversations from early June 2014, participants stated that the decision to provide more far-reaching military support to the DPR and LPR lay with Putin. In addition, specific information was found that a request to provide separatists with heavier anti-aircraft systems had been submitted to Putin. Other sources as well point to the Russian

³⁷ <https://en.kremlin.ru/events/president/news/45943> (last accessed on 23 November 2020).

president's personal involvement in the conflict in eastern Ukraine, mainly in a behind-the-scenes capacity.

For example, although on 24 June 2014 Putin publicly asked the Russian Federation Council to rescind the resolution that gave him the authority to conduct a military intervention in Ukraine,³⁸ it remained clear to the DPR that the Russian president was still involved in the conflict. In a conversation that took place the following day, 25 June 2014 (23:20:46), a fellow fighter asked Borodai if it was true that 'Uncle Vova' was refusing to help: he had seen that in the news. Borodai replied that this was not true, and that these were just normal 'diplomatic manoeuvres'. Borodai then said to the other party: 'You're here for a reason, and I'm here for a reason.' 'Vova' is a diminutive of 'Vladimir', Putin's first name.

In addition, there are indications that Putin wished to be briefed in detail about the course of the conflict and the military results achieved by the DPR and LPR. For example, intercepted phone conversations show that on 25 June 2014 Borodai was questioned from Moscow about the downing of a Ukrainian helicopter, which he was unaware of at the time. First, Borodai received a call about this (on 25 June 2014, 07:49:17) by a member of the Russian Federation Council. Borodai said that he knew nothing about the downing of a helicopter, though he did say that 'the air poses a big problem for us, since, naturally, we've got no aviation of our own'. The member of the Federation Council thanked Borodai and said that he now had a general idea of what he wanted to talk about in his speech. According to the Kremlin website, on 26 June 2014, a day after this conversation between Borodai and a member of the Federation Council, Putin had a meeting with the Security Council (which the speaker of the Federation Council is a permanent member of) devoted to the situation in Ukraine.³⁹ In the early afternoon, after the telephone conversation with the member of the Federation Council, Borodai was called again (25 June 2014, 12:38:53), this time by Viktor Medvedchuk, a Russian-born former Ukrainian politician and representative of the DPR and LPR in peace talks. Medvedchuk told Borodai:

'Sasha, they're asking – for the, um, report to V.V./VV report – what our account [of events] is in relation to the helicopter.'

Borodai responded by saying that he did not know and asked if the matter could wait. Medvedchuk wanted to have the information for 'V.V.' as soon as possible. In a later conversation it became clear who was being referred to by 'V.V.'. That same evening, at 21:59:22, Medvedchuk and Borodai talked about the ongoing talks with Ukraine. Medvedchuk then said he needed to go to Moscow for a meeting with 'the leader'. According to him, 'the chief himself', namely 'V.V.', picked Rostov as the location for the meeting. The next day Medvedchuk met with this 'V.V.' This can only be Russian president Vladimir Vladimirovich Putin, who – as is customary in Russia – is also referred to in other conversations by his first name and patronymic or his initials. By his own account, Medvedchuk needed to report to this 'V.V.' in June 2014 about an air defence-related incident: the downing of a Ukrainian helicopter.

³⁸ www.en.kremlin.ru/events/president/news/46057 (last accessed on 16 September 2019).

³⁹ <https://en.kremlin.ru/events/president/news/46082> (last accessed 23 November 2020).

In conversations on 27 June 2014 (23:29:20 and 23:38:00), Medvedchuk told Borodai that he had just been called by 'our president', who had indicated that Girkin and Pavel Gubarev (the self-proclaimed governor of the DPR) had been saying that they did not intend to honour the ceasefire. According to Borodai, Girkin had said that he was respecting the ceasefire but would not allow himself to be provoked. Medvedchuk said that Girkin would have to publicly support the ceasefire, and Borodai promised that Girkin would do so. In addition, Medvedchuk spoke to Borodai about an upcoming prisoner exchange. He then said that Borodai would get their 'lists' and that Borodai would have to try to give them 'counter lists'. In that connection Medvedchuk specifically asked about a Ukrainian 'female pilot' by the name of 'Nadezhda Savchenko'. Public sources indicate that this woman had been taken prisoner by the DPR a short time before. Apparently 'the OSCE' would have to be contacted the next day about her and the 'lists'. According to Medvedchuk, this was 'at the president's request'.

Medvedchuk was later mentioned by Putin himself in a conversation with the so-called prime minister of the LPR, Igor Plotnitskiy, on 15 November 2017 (20:42:49). In this conversation Putin (B3) was personally informed by Plotnitskiy (A) about the 'military component' and asked him about Medvedchuk's 'initiative' for a prisoner exchange:

- A: Hello?
- B1: Igor Venediktovich?
- A: Yes.
- B1: Hello. You are speaking to Moscow, on the special phone line⁴⁰. Vladimir Vladimirovich⁴¹ would like to talk to you. (...)
- A: Thank you. Ok.
- B1: Did I understand it correctly? Am I connected with the telephone of mr. Plotnitskiy?
- A: That is correct. Yes.
- B1: One moment, I'll connect you.
- A: That's fine.
- B2: Hello?
- A: Hello
- B2: Igor Venediktovich, hello. You are speaking with Mamakin [phonetic transcription], the secretary to Vladimir Vladimirovich. One moment please and I'll connect you.
- A: Yes, please, that's fine.
- B3: Hello?
- A: Yes, good evening.
- B3: Igor Venediktovich, good day.
- A: Yes.
- B3: Good afternoon, hello.
- A: Yes, hello, Mr President.
- B3: How are you doing?
- A: Thank you, Vladimir Vladimirovich. I'm fine.
- B3: So things are going okay then. And what are your thoughts on this... 'military component'?

⁴⁰ Special telephone line, the so-called 'spetscommutator' is the Kremlin telephone line.

⁴¹ Vladimir Vladimirovich Putin, president of the Russian Federation.

- A: I think the 'military component' is at a pretty good level on our side. Though there are certain weak points... [interruption – sentence not completed]
- B3: Have things intensified?
- A: At times it's heavier, but that's due to the occasional movement of various military units, or to shifting out units with fresh troops, but there hasn't been anything too intense yet, thank God.
- B3: And what about the socioeconomic situation?
- A: We have a fairly good handle on the socioeconomic situation, and we are levelling up in all kinds of ways. But obviously living conditions leave something to be desired, and we have questions about and suggestions for improving living conditions, but we haven't always been able to resolve these issues.
- B3: Well, I've already said it to Aleksandr Vladimirovich, and maybe we can... I can ask colleagues who are helpful to you in various areas to draw up a supplemental report with regard to the situation there. And then we can meet to discuss this, all right?
- A: Thank you, Vladimir Vladimirovich. Maybe it would be possible to discuss this face to face?
- B3: That's what I said. That we can discuss this later on in a face-to-face meeting.
- A: Thank you, Vladimir Vladimirovich.
- B3: Igor Venediktovich, I also wanted to address Medvedchuk's initiative regarding a prisoner exchange. You've probably heard about that.
- A: Yes of course. Yes of course Vladimir Vladimirovich.
- B3: What's your opinion about it?
- A: I'm completely in favour, since Ukraine has been blocking the normal prisoner exchange for a year. Our inhabitants form an overwhelming majority there. Here the ratio is around 1 to 10. And they of course suffer within the four walls. That's not only a matter of speech, they truly suffer. I have seen how they are being held. It is incomparable to how their people are being held in our territory. So this initiative is a relief for us, if we can get our people out of their territory.
- B3: Igor Venediktovich, in that case we still need to work out a few additional details. I'll ask my people to assist you where necessary in both word and deed.
- A: Thank you!
- B3: Thank you very much. That's it and I wish you the best.
- A: Thank you. Bye.
- B3: Bye.

This conversation from 2017 is in keeping with the aforementioned findings of late June 2014, which showed that Putin was personally involved in the conflict in eastern Ukraine. It is also in keeping with a witness statement to the effect that the same individual, Plotnitskiy, carried an encrypted phone containing direct numbers for President Putin, Shoigu and Surkov. As the JIT repeatedly discovered, not everyone was equally disciplined when it came to security of communications.

5.8 Summary

In an intercepted conversation in early June 2014, Aksyonov, the Russian leader of Crimea, spoke about a 'joint coordination centre' for Russian military support for the conflict in eastern Ukraine. In addition, it is clear from various intercepted conversations that during this period that decisions

were being made at presidential level about such military support. According to an aide of Aksyonov's, it was not the defence minister but the president himself who made these decisions. Other intercepted conversations also show that Putin was personally involved in the conflict in eastern Ukraine.

On 8 June 2014 Girkin asked Aksyonov for broader military support, including 'decent anti-aircraft systems manned by trained personnel'. According to Aksyonov the necessary documents had already been drawn up at that time.

At some point in the second half of June, Aksyonov and Dyumin, the deputy head of the GRU, submitted a request for heavier anti-aircraft systems at a meeting at the Russian Presidential Executive Office. This request was supported by Malofeev, an oligarch, and Surkov, a member of the Presidential Executive Office and adviser to Putin. This meeting was also attended by representatives of the FSB and the Ministry of Defence. The meeting resulted in the submission of the request for heavier anti-aircraft systems to Minister of Defence Shoigu and President Putin. This request was granted.

During this same period, from 14 to 19 June 2014, Borodai was in Moscow, on the same city square where the Presidential Executive Office is located. By his own account, Borodai was there, arranging 'parcels and gifts' for his fellow DPR fighters. Besides Borodai there was also another separatist in Moscow who took part in phone conversations about meetings and discussions regarding military support. It is unknown if heavier anti-aircraft systems, such as Buks, were mentioned in these discussions. Intercepted phone conversations show that shortly after their visit to Moscow, other heavier military materiel was delivered to the DPR, including artillery.

A short time later, on 23 June 2014, the Buk TELAR '3X2' departed for the Russian-Ukrainian border from its home base in Kursk, as part of the second Buk battalion of the 53rd AAMB.

6 Other parties involved in the deployment of the Buk TELAR

As well as investigating the Buk TELAR's crew, their direct superiors and those responsible for supplying the Buk TELAR, the JIT also investigated the parties responsible for the deployment, on 17 July 2014, of that Buk TELAR, which was used to shoot down flight MH17. Girkin, Dubinskiy and Kharchenko have already been convicted of deploying this weapon by the district court. The investigation was broader, however, and also encompassed other individuals who may have been jointly responsible for the Buk TELAR's deployment on 17 July 2014.

Once again, telecom data was the key source of evidence in this regard, and use was made of intercepted phone conversations previously included in the prosecution file and authenticated by the district court. The same arguments regarding the recordings' authenticity apply to the intercepted phone conversations that had not yet been included in the file and which are discussed for the first time in this report.

In the interests of clarity the investigation findings will be discussed in chronological order, from the arrival of the Buk TELAR at the Russian-Ukrainian border until shortly after the downing of flight MH17 on 17 July 2014.

6.1 Late June to early July 2014: Russia exerts more influence over DPR

As the Buk TELAR convoy travelled from Kursk to the border between 23 and 25 June 2014, the conflict in eastern Ukraine had come to a temporary halt. On 20 June, Ukraine announced a week-long ceasefire. When the ceasefire expired, fighting resumed on the DPR's northwestern and southern fronts. In July this fighting intensified further.

In this period the Russian Federation began exerting more influence over the DPR. Changes were made to the military structure in eastern Ukraine. This is made clear, for example, by an intercepted conversation between two DPR commanders from 1 July 2014 (22:08:05)

(...)

B: As the Commandant of Makeyevka, I'd very much like to know that. I want to know what we're moving towards.

A: We're moving towards unity of command. What happens next is a bunch of men with a mandate from Shoigu will arrive and kick the local warlords the fuck out of the units

B: - Uh-huh.

A: ...and then people from Moscow will take charge. (...)

B: (...) I need to know one thing: who shall I fucking report to when it happens?

A: You will report to the Minister of Defense. (...) Minister of Defense of the DPR. (...) our Minister of Defense is Strelkov, and our Commander-in-Chief-like any other President or Prime Minister - is Borodai. (...) Strelkov can give you orders, of course - and he'll certainly do so, as the war minister. No one else can give you orders. Well, Borodai, as the Prime Minister, can give your orders directly. In that case, you will have to comply.

(...)

In an intercepted conversation on 4 July 2014 (22:07:21) Dubinskiy confirmed these planned changes to the DPR's structure. In that conversation he explained that Alexander Borodai was in Moscow to discuss this situation. In another conversation that day, Dubinskiy said that once Borodai returned they would have more information 'on the commanders, on the political structure.'

Borodai was indeed in Moscow during the first week of July 2014. On 6 July 2014, by his own account, he was in the vicinity of the Kremlin in Moscow, where he was dealing with 'other matters on a larger scale'. The individuals Borodai spoke to there can be deduced from various intercepted phone calls from the previous week. In a conversation on 30 June 2014 (20:25:28), for example, Borodai can be heard in the background saying that their funds are running out and that sooner or later he will have to go to Moscow for a few days. He indicates that he has a meeting scheduled: 'With our [inaudible] portrait; with Vladimir Vladimirovich.' This is President Putin's first name and patronymic. The words 'our portrait' seem to refer to Putin's portrait, which hangs in every Russian government building. Three days later, on 3 July 2014 (20:28:19), Borodai called Vladislav Surkov. In this conversation, Borodai says that he has been summoned unexpectedly and will hopefully be able to present a report in person. In intercepted conversations the next day, Dubinskiy says that Borodai is in Moscow in connection with changes to the political and military leadership within the DPR.

Borodai's visit fits within a recurring pattern of trips to the Russian Federation by him and other DPR leaders. During this visit, Borodai had no phone contact with Surkov, Chesnakov or other Russian users of a series of consecutive encrypted phone numbers,⁴² while at other times Borodai was in regular phone contact with them.

During this trip, Borodai designated Girkin as the day-to-day leader of the DPR in his absence. For example, in phone conversations on 6 July 2014 (14:55:54 and 21:05:15) Borodai referred someone to Girkin to resolve a certain problem, since he himself was not 'in the region'. However, Girkin's resolution of such problems did not always run smoothly. The next day, on 7 July 2014 (10:31:19), another DPR fighter complained to Borodai that Girkin had ordered him to release a prisoner. Borodai explains that his and Girkin's hands are tied. The decision to release this man was not Girkin's. 'Unfortunately [this came] from Moscow.' Borodai then says that he and Girkin are 'one and the same': they have the same leader.

While Borodai was in Moscow, a number of Russian generals arrived in eastern Ukraine. One of them was known to the separatists as Delfin and was identified by the JIT.⁴³ From a conversation

⁴² This is a series of Russian phone numbers with the same initial nine digits (792653185XX). Only the last two digits are different.

⁴³ During the first hearing of the criminal proceedings (9 March 2020) the Public Prosecution Service discussed the possible involvement of Delfin and another Russian officer with the call sign Orion. The Public Prosecution Service explained that in 2016 the JIT suspected, on the basis of several intercepted phone conversations, that these individuals had played a role in the downing of flight MH17, but that further investigation had revealed no evidence of

on 9 July 2014 it emerged that Delfin had been appointed head of the general staff of the so-called South East Army, which was based in Krasnodon, Ukraine. It appears that the aim was that this body would serve as the joint staff for the 'armed forces' of the DPR and LPR, and the activities of both groups would be coordinated from within it. In addition, it seems that a joint 'Army of Novorossiia' was to be formed under the leadership of a Russian general named Travkin. This individual was also identified by the JIT. Until 2010 he was a major general in the Russian military intelligence service (GRU). In a conversation on 10 July at 10:20:01, the previously mentioned Fominov indicated that in Moscow he was instructed to form the first 'Cossack Regiment of Novorossiia'. He had received the approval of the 'commander' (here he is probably referring to Travkin). In another conversation (on 17 July 2014 at 12:29:51) Travkin is referred to as 'commander-in-chief'. Another commander who arrived in eastern Ukraine in early July 2014 and worked in the newly established general staff was Elbrus. This individual was identified by the JIT. According to Alexander Khodakovskiy, DPR commander of the Vostok Battalion, Elbrus was from 'Vympel' a special unit of the FSB.

In December 2014 Girkin spoke about his relationship with the general staff in July 2014.

'I was in regular contact with the staff, which became operational in mid-July, consisted of several retired generals and colonels, and was intended to serve as an umbrella organisation that would unify the Republics' various commanders. Still, my contacts with the staff were of no use to me, as I received no instructions from them. What I did was inform the general staff every day about the situation in the areas at the front where the units under my command were fighting.'⁴⁴

And regarding the question of whether this general staff had any influence or useful purpose, Girkin responded as follows:

'I don't know. What I can say is that I think the situation was terrible for them. These people were used to a constant flow of normal supplies, facilities, understanding, but they had none of that, and the way I see it, they just got lost in the situation. That situation required people with leadership skills, and these people were just staff functionaries who weren't capable of leading anyone, compelling them, subjecting them to authority.'⁴⁵

Borodai's telecom data shows that on the night of 9 to 10 July 2014, he was back in eastern Ukraine. Various phone conversations revealed that after his return certain changes were indeed made to the DPR command structure. On 10 July 2014 at 01:00:48, for example, Borodai said that he had returned with around 10 'apparent' civilians in his wake, who were accompanied by a security escort. In the same conversation, Borodai also said that there would be changes to their 'government', as new members had arrived. They would quickly alleviate the miserable situation there (in eastern Ukraine). After arriving in Donetsk, Borodai urgently wanted to speak with Girkin.

relevant involvement in the downing of the aircraft. This situation has not changed since 9 March 2020. Further study of the findings of the investigation has only cast more doubt on previous indications.

<https://theins.ru/politika/83281> (last accessed on 5 December 2022).

⁴⁵ <https://theins.ru/politika/83281> (last accessed on 5 December 2022)

On 10 July 2014, Girkin and Borodai gave a joint press conference in which Borodai introduced Girkin as 'commander of the armed forces of the DPR, Minister of Defence of the DPR and head of the Security Council of the Donetsk People's Republic.' Borodai also said he was happy that he and Girkin were part of this new constellation. In response to a question about what he had done in Moscow, and whom he had spoken to there, Borodai gave the following answer:

'Personally I feel I achieved sufficient success in the consultations. As for who I spoke to – of course, I won't say, because that falls under military secrets. But nevertheless, I believe the consultations were successful, and I'm counting on the support of the Russian Federation in the very short term. The Russian people are already giving us enormous support, with both volunteers and humanitarian aid, and I think this support will only increase.'⁴⁶

Next, Borodai said that he could not discuss the precise details of this support, but he noted that 'the consultations led to good results'. During the press conference Girkin explained the establishment of the general staff as follows:

'In short, at the moment a general staff is being set up for the armed forces of the DPR and the LPR. The headquarters of the general staff has already been determined. The formation of this organisation is practically complete. The joint administration of Novorossia will be established soon. That is all I can say at this time.'⁴⁷

6.2 6 to 14 July 2014: planning DPR offensive

During the press conference Girkin also described where the front line was located on 10 July 2014: running alongside Shakhtarsk, Torez and Snizhne. According to Girkin, the heaviest fighting on the southern front line was concentrated near Saur-Mogila and Stepanovka, where prolonged artillery fire from both sides was ongoing.

In early July 2014 the DPR began preparing an offensive to the south of Snizhne. Following a meeting of the staff led by Girkin, on 6 and 7 July 2014 Pulatov conducted reconnaissance activities from south of Snizhne to the Russian border.⁴⁸ During the press conference Girkin said that the heaviest fighting was concentrated in this area.

On 10 July Girkin was frequently on the phone with 'Moscow'. In a conversation at 14:18:37, for example, an assistant of Girkin can be heard telling Dubinskiy that Girkin is currently on the phone with Moscow and that it is important. Later that day, at 17:22:16, Girkin himself tells Dubinskiy that he is constantly on the phone, trying to get hold of Moscow. By his own account he wants to report on the situation. Borodai subsequently phones the commander of Snizhne. He tells him he will be coming by with Girkin tomorrow and assures the commander he will receive military equipment, arms and money. Borodai says he has it all.

⁴⁶ https://www.youtube.com/watch?v=1-Z_dJRhfB8 (last accessed on 5 December 2022).

⁴⁷ https://www.youtube.com/watch?v=1-Z_dJRhfB8 (last accessed on 5 December 2022).

⁴⁸ Judgment of The Hague District Court, 17 November 2022, ECLI:NL:RBDHA:2022:12217.

Later that evening a briefing took place between Girkin and all the commanders. Borodai was present, and Dubinskiy was also urged to come to the meeting. At 23:37:32 Dubinskiy asked a subordinate to urgently fetch a map of Snizhne and the area to the south and southeast of the city. According to Dubinskiy these were 'operation instructions'.

6.3 14 to 16 July 2014: start of DPR offensive

From 14 July there was heavy fighting between Ukrainian troops and the DPR in the area south of Snizhne. On 14 July Dmitrovka was bombarded by the Ukrainian air force. In the night of 14 to 15 July the separatists attacked checkpoints near Stepanovka, and the next day this village was captured. Preparations were also made to attack Marinovka. In the evening of the 14th, for example, Girkin called the commander of Snizhne and told him that Marinovka would have to be taken the next morning and that the commander's troops would have to support this effort. Ultimately, Marinovka was not attacked until the day after, on the morning of 16 July 2014. The previous night (15 to 16 July) a meeting took place. The attendees included Girkin, Borodai, the commander of Snizhne and the commander of the Oplot Battalion. The fact that something was afoot was made clear by subsequent intercepted phone conversations. Borodai, for example, called a subordinate to ensure the availability of sufficient ambulances to extract casualties, and doctors to treat them. In the early hours of the morning (02:22:34) the Oplot Battalion commander told Girkin's assistant that the offensive would begin in a few hours.

In the early morning of 16 July 2014 Marinovka, a village four kilometres from the Russian border, was attacked by the DPR. The attack was launched from newly captured Stepanovka and Saur-Moglia, the hill that had been captured earlier. The troops commanded by Kharchenko and Pulatov played a key role in this attack.⁴⁹ Girkin and Borodai were also at the front that day. A video filmed on the morning of 16 July shows Girkin and Borodai being interviewed in the vicinity of Marinovka. In the interview Girkin talks about dead and wounded fighters on the DPR side. In addition, an intercepted phone conversation with the Oplot Battalion commander on the same day (08:17:08) shows Girkin and Borodai received a detailed briefing on the battalion's progress in the fighting. Girkin then tells the commander that Marinovka has been captured and that they are now trying to advance further. Later, in the afternoon (15:45:30) Borodai confirms that Girkin's troops have made territorial gains that day: '(...) Stepanovka and – what's its name – Maryinka are currently occupied by Strelkov's units'.⁵⁰ The investigation showed that Borodai meant Marinovka when he referred to 'Maryinka', and that he got this place name wrong on other occasions too.

⁴⁹ Judgment of The Hague District Court, 17 November 2022, ECLI:NL:RBDHA:2022:12217, consideration 6.2.4.4

⁵⁰ See also intercepted conversation (09:25:29) in which Borodai tells Zakharchenko: '*Run around and wave your hats, eh? Well that's not a good idea, naturally. Stay put for now, we'll figure out something... other than running around and waving your hats. (...) So the bottom-line is, three out of four tanks you had in Maryinka are now out of action.*'

6.4 Burlaka's position

During an intercepted phone conversation on 16 July 2014 at 08:17:08, the Oplot Battalion commander told Borodai and Girkin that a helicopter had just flown overhead. It was flying on a zig-zagging course to the east, in the direction of Luhansk. Next Borodai called a person known as 'Vladimir Ivanovich' and asked him whether it was possible that 'our helicopters' were carrying out an attack on 'Maryinka'. 'Vladimir Ivanovich' reacted to this comment as he always did when Borodai called him: he asked Borodai to switch on the phone's encryption mode. The phone's scrambler was then switched on, making it impossible to listen in to the rest of the conversation.

The person whom Borodai addressed as Vladimir Ivanovich was identified by the investigation team as Andrei Burlaka, an FSB general who was first deputy to the head of the FSB Border Service. The investigative collective Bellingcat had previously reached the same conclusion,⁵¹ following a JIT witness appeal in November 2019 in which information about 'Vladimir Ivanovich' was released.⁵² From June to mid-August 2014, Borodai was in almost daily contact with Burlaka. Borodai described him to others as 'the commander of this operation' and 'the one who makes all the decisions'. Burlaka used an encrypted phone whose number was from the same series as those used by Borodai, Surkov and Chesnakov.⁵³

The investigation revealed that on several occasions Burlaka gave Borodai instructions and directly intervened from the Russian Federation with regard to internal DPR matters. Burlaka's actions on 1 July 2014 are an example of this. Recorded conversations on that date show that a conflict arose that day between Borodai and Bezler, prompted by the storming of the interior ministry building in Donetsk by troops under Bezler's command. Borodai called Burlaka and Surkov in connection with this conflict. Since the discussion took place on encrypted phone lines, the substance of their discussions is not known, but Borodai told others that he was instructed by Burlaka to ensure, by force of arms, that Bezler did not seize the interior ministry building. He was also instructed to 'destroy' him. The conflict was ultimately resolved after Burlaka spoke to one of Bezler's subordinates.

Burlaka appears to have had some say over not only Borodai's position, but Girkin's as well. On 11 July 2014 at 20:15:41, for example, a DPR fighter told Burlaka that Girkin had placed his group under the command of another separatist and asked Burlaka whether he should obey Girkin's instructions. Burlaka answered in the affirmative. In another case, Burlaka interfered with Girkin's equipment supplies. On 31 July 2014 at 00:56:38, Girkin was told that a convoy of 'seven boxes' had been supplied, but that Burlaka had instructed that two of them must be supplied to another party. Affronted, Girkin responded that Burlaka should be giving such instructions to Girkin himself and not issuing commands to his people directly.

⁵¹ <https://www.bellingcat.com/news/2020/04/28/Burlaka/> (last accessed on 5 December 2022).

⁵² <https://www.politie.nl/en/information/witness-appeal-crash-mh17-nov-19.html> (last accessed on 5 December 2022).

⁵³ This is a series of Russian phone numbers with the same initial nine digits (792653185XX). Only the last two digits are different.

Furthermore, telecom data shows that in the course of 16 July 2014 various separatist leaders and leaders of the Krasnodon general staff held meetings with Burlaka, a 'higher-ranking boss' 'who flew over from Moscow'. These meetings took place at a location on the Russian side of the Russian-Ukrainian border. The investigation produced no information about what was discussed at these meetings.

6.5 Borodai's position

As the so-called prime minister of the DPR, Borodai was in close contact with Burlaka and Surkov during this period. The contacts between Burlaka and Surkov concerned developments in the theatre of operations, the delivery of military equipment, and administrative matters, such as the establishment of an extra security service and the intransigent attitude of DPR commander Bezler. Surkov also concerned himself with the composition of Borodai's government. In an intercepted conversation on 25 June 2014 (23:20:46) about Putin ('Uncle Vova'), Borodai said that he was in eastern Ukraine for a reason. Borodai was thus a key link in the chain between the DPR and Moscow. Various intercepted phone conversations show that Borodai was receiving instructions from Burlaka. In one conversation, on 3 July 2014 at 13:26:36, a Russian fighter described Borodai's position as follows:

'Nah, look, he says things he's told to say, do you know what I mean? (...) He says things that are dictated from Moscow. He's an appointee, you see?'

In intercepted conversations Borodai is sometimes described as commander-in-chief. For example, in a phone conversation on 4 August 2014 (23:53:53), a little over two weeks after the downing of MH17, Dubinskiy reported that he had been promoted to major general three days earlier on the orders of 'Commander-in-Chief' Borodai, who in turn was confirming the order of 'VVP'. 'VVP' is a common abbreviation of Vladimir Vladimirovich Putin. Girkin is also described as commander-in-chief of the DPR. Girkin gave himself this title in the witness statement he gave to the Russian authorities on 6 February 2015. During a joint press conference on 10 July 2014, Borodai presented Girkin as 'commander of the armed forces of the DPR, Minister of Defence of the DPR and head of the Security Council of the Donetsk People's Republic'. It is not always clear how such titles relate to one another within the DPR.

In intercepted phone conversations, Borodai does not come across as the commander-in-chief. When it comes to the DPR's actual military operations, and particularly the planning and execution of the offensive to the south of Snizhne, nothing was found indicating that Borodai was the person in command on the ground. Phone intercepts do show that he was kept informed about military results, but not that he directed combat activities himself, as Girkin did. Borodai did not appear to know the name of Marinovka, where the DPR, under Girkin's command, launched its southern offensive ('(...) Stepanovka and – what's its name – Maryinka are currently occupied by Strelkov's units'). In addition, during the offensive of 16 July 2014 (08:17:08) Borodai passed the phone to Girkin when the Oplot Battalion commander reported on the resistance his troops were encountering. Girkin responded that the commander should press on. When the same commander phoned Borodai over an hour later (09:25:29) to report that several of his tanks had been disabled and asked what the plan was, or whether new orders were coming, Borodai responded that they would think of something, and then handed the phone to Girkin.

6.6 16 to 17 July 2014: deployment of the Buk TELAR

After the capture of Marinovka, the DPR offensive ground to a halt. The DPR could not break through the Ukrainian positions and had to contend with Ukrainian air strikes and constant artillery fire, which resulted in many dead and wounded on the DPR side. As the district court established in its judgment, in the night of 16 to 17 July 2014 Pulatov reported to Dubinskiy that he needed not tanks, but decent anti-aircraft defence. After this, Dubinskiy spoke to a comrade and expressed his desire to obtain a Buk that he could send to the front that morning, because otherwise the prospects did not look good. Dubinskiy told Pulatov that if they did manage to get hold of a 'Buk M', it would immediately be sent to Pulatov, and that this Buk was their only hope.⁵⁴

On the morning of 17 July 2014 Girkin received a report that they had suffered a total defeat on a plateau. At 08:27:03 Girkin passed this report from the front on to Borodai and asked him whether he had a fully charged phone he could use to report over an encrypted line. When Borodai answered that he did indeed have a fully charged phone available, Girkin asked him to send it to him, and said he would wait to receive it. Half an hour later (at 08:59:28), one of the phones used by Borodai called Burlaka's number. This conversation could not be intercepted because it took place over an encrypted line, but the conversation lasted 296 seconds.

At around 09.00 that morning, a Buk TELAR was delivered in Donetsk. At that time, Dubinskiy was with Girkin at DPR headquarters in Donetsk. Kharchenko joined them, and Dubinskiy instructed him to escort the Buk TELAR further, position it in the vicinity of Pervomaiske, and have his men guard it there.

That morning, Borodai's phone was transmitting to the same phone mast as those of Girkin, Dubinskiy and Kharchenko: the mast at Schorsa Street in Donetsk. The DPR headquarters building is located within range of this phone mast. Furthermore, it appears that Borodai did indeed visit Girkin to bring him a fully charged encrypted phone, as discussed in the earlier phone call at 08:27:03. At 08:58:02 one of Girkin's subordinates was summoned to Girkin's office. In an intercepted conversation at 09:33:12 the same subordinate informed another separatist that Borodai was with him at that time. This indicates that Girkin and Borodai were that morning at the same location as that where Dubinskiy was instructed to deploy the Buk TELAR that had been received.

According to the district court, it is impossible to satisfactorily establish, however plausible it may be, that at this moment (or at any other time prior to the downing of flight MH17) Girkin was aware of the availability of a Buk TELAR.⁵⁵ The same must apply here to Borodai.

In the same period that Dubinskiy was at headquarters arranging orders for Bibliothekar, Pulatov and later Kharchenko to ensure that the Buk TELAR reached its intended destination,⁵⁶ Borodai was in phone contact with Burlaka. They had two conversations: one at 09:24:11 lasting 95 seconds, and another at 09:35:06, lasting 322 seconds. On the same day, 17 July 2014, Borodai had phone

⁵⁴ Judgment of The Hague District Court, 17 November 2022, ECLI:NL:RBDHA:2022:12217, 6.2.4.4

⁵⁵ Judgment of The Hague District Court, 17 November 2022, ECLI:NL:RBDHA:2022:12217, 6.2.5.3

⁵⁶ Judgment of The Hague District Court, 17 November 2022, ECLI:NL:RBDHA:2022:12217, 6.2.4.4

contact with Burlaka on more than 20 occasions. The substance of these conversations is not known because they were conducted using encrypted phones. It is therefore not clear whether these conversations involved the further deployment of the Buk TELAR.

Recorded phone conversations conducted by Borodai on 17 July 2014 concerned matters other than the deployment of the Buk TELAR. For example, at 13:11:06 he spoke with Medvedchuk about a planned meeting via video link with the OSCE, which neither of them would be participating in. In this call, Borodai and Medvedchuk jokingly note that they have both received the same 'directive' not to attend the meeting. Less than half an hour later (at 13:36:50), Borodai is called by a DPR fighter who complains that things are taking too long, that they have more than enough manpower, and that some of the weapons have been taken. He 'doesn't get it at all', and wonders what is going on. Borodai responds that he must follow Girkin's orders.

6.7 17 July 2014: after the downing of flight MH17

After the downing of flight MH17, no phone conversations conducted by Borodai or Burlaka concerning the deployment or removal of a Buk or the downing of the aircraft were intercepted either. However, Borodai's intercepted conversations include discussions of the impact and aftermath of the disaster. On 17 July 2014 at 23:43:37, Borodai (A) called the commander of the Oplot Battalion (B). This conversation shows that Borodai has just been at the crash site and is currently en route to DPR headquarters in Donetsk.

- (...)
- A: Where are you? Where are you now?
- B: I'm waiting for the minister. I'll bring him with me and come to you.
- A: To me? Where? There? I've already left there.
- B: In that case, first I'll take the minister there, and after that I'll come to you. (...) Because the Minister of Health damn well needs to be present at the Boeing crash location.
- A: You need to come to me, but first I need to swing by the esbushka.⁵⁷
- (...)

During this conversation shortly before midnight on 17 July 2014, Borodai's phone was transmitting to phone masts in Makeeva, near Donetsk. From 00:03:27 on 18 July 2014, his phone was transmitting to a mast on Schorsa Street in Donetsk, near DPR headquarters. At 00:10:19 Borodai (A) received a phone call from Chesnakov (B), who worked with Surkov. In this call, Borodai informs Chesnakov that he has just returned from the crash site. Chesnakov asks him about communications on the establishment of an investigation headquarters and contacts with international organisations and the victims' next of kin :

- (...)
- B: Sorry to call so late. I was told you were up.
- A: Yes, of course I'm up. I've just come back. From the beautiful places.

⁵⁷ 'Esbushka' of 'eSBeUshka' is the nickname of the SBU building that was occupied by the DPR and was being used as the DPR's headquarters.

- B: I've got two questions to ask. Number one: they say it works out very well there in terms of information; I mean you say right things.
- A: Well, we can find more...
- B: Yeah.
- A: ... on top of everything else.
- B: Yeah. Look, there's a request. Is it possible to spread the information immediately about the decision for you to establish a headquarters for the investigation...
- A: OK.
- B: ... so that you engage with all international organizations, and relatives of those killed, and others.
- A: Yes. Yes.
(...)

Shortly thereafter, in a phone call at 00:32:32, Dubinskiy told a comrade that Borodai was currently with Girkin. It is not clear what Borodai and Girkin discussed at that time. Around this time, Dubinskiy's phone was transmitting to phone masts in the same vicinity as the DPR's headquarters. Between 00:18:56 and 02:03:16 Borodai's phone was no longer active. His whereabouts in this time period are therefore unknown. From 02:03:16 his phone was transmitting to a mast at a different location. The DPR's headquarters building is located outside the range of this mast.

No indication was found that Borodai was involved in the removal of the Buk TELAR that shot down MH17. Girkin initially instructed Dubinskiy to remove the Buk TELAR at 20:30:52 on 17 July 2014. Dubinskiy passed on this instruction to Kharchenko. At 23:32:34 Kharchenko told Dubinskiy that the Buk convoy had left Snizhne. At this point Borodai was not yet at DPR headquarters. It was only later that night, starting at 01:47:32, that Girkin and Dubinskiy got involved again in the removal of the Buk TELAR. During the ongoing removal operation, Borodai's phone was no longer active or was at a different location to Girkin and Dubinskiy.

The next and last-known conversations conducted by Borodai about MH17 took place on 21 July 2014. At that time, the affected countries and several international organisations were trying to gain access to the disaster area in order to repatriate the victims' remains and conduct an investigation. On the morning of 21 July 2014 Borodai called Surkov eight times but was unable to reach him. Next Borodai (A) called Chesnakov (B) at 12:45:43 and said that he wished to speak to 'the boss' about the departure of the refrigerated rail container ('reefer') containing victims' remains, the transfer of the black boxes, and points of contact for his upcoming press conference:

- (...)
- A: (...) three Dutch experts arrived today, and I hope that twelve more Malaysian experts will arrive any time soon. (...) And then there're some Red Cross representatives. All of them are eager to get work done, so we'll take all of them to the scene and to the reefer, but after that they all want us to send that reefer en route to Kharkov. (...)...and it is my understanding that [our] colleagues, if you will, also support it—am I right? I mean, [we] support [the decision] to send that reefer to Kharkov, but not until an official handover ceremony has taken place and a corresponding document has been signed—(...)...saying that we have handed over so-and-so many bodies of the victims and so-and-so many other things. (...) Is this the correct standpoint?

- B: To me, it is.
- A: Well, I'd like to have a consultation—(...)...and to discuss it directly with the boss. (...) And as soon as possible. But I absolutely can't get him on the phone, I get cut off all the time. Maybe he can try? (...) Now, about the [black] boxes that I have in my possession: I will hand them over to no one else but ICAO representatives, do I get it right? (...) And those will have to come here to get them.
- B: Uh-huh.
- But to be honest, I'd like a consultation to clear this out completely. (...) May I ask [that he] calls me back at the earliest opportunity, because I've got to be at another press conference any time soon. (...) [I need] to know my talking points (...) For I assume our neighbors will be saying something [on the matter].
- (...)

After this, Borodai tried calling Surkov twice, again without success. At 17:32:10, Borodai told Chesnakov that he urgently needed to speak to 'the boss', because he really needed to know to whom he should hand over the black boxes and the victims' remains.

Later in the evening of 21 July 2014, at around 23:00, Borodai gave a press conference at which he announced that the train containing victims' bodies would be travelling to Kharkiv and handed over the black boxes from flight MH17 to Malaysian investigators.⁵⁸

6.8 Summary

From 6 July 2014, over a week after the arrival of the Buk TELAR '3X2' at the Russian-Ukrainian border, changes were made to the DPR's military and political structure. Russian generals travelled to Ukraine to form a joint general staff that would coordinate the military operations of the DPR and LPR. Their degree of actual influence in July 2014 remains unclear. Girkin said that he received no instructions from this general staff. There are however indications that Borodai received instructions from the FSB general Burlaka. As of June 2014 he and Borodai were in daily contact. Burlaka also gave instructions directly to Girkin's subordinates, a situation which Girkin accepted. Burlaka's instructions to Borodai and to Girkin's subordinates related to internal conflicts and dynamics between DPR commanders, and to the provision of equipment. The investigation uncovered no concrete instructions from Russian generals or other Russian officials concerning the deployment of the Buk TELAR.

The Buk TELAR was deployed as part of the armed conflict taking place to the south of Snizhne. The planning and execution of this DPR offensive was the responsibility of Girkin, Dubinskiy, Pulatov and Kharchenko (among others). Borodai was also present, and was kept informed about the military results in the course of the fighting. There are no indications that Borodai himself directed any combat activities. He was not familiar with the place name Marinovka, where on 16 July 2014 Girkin was leading the DPR offensive. When asked operational questions he passed the

⁵⁸ See e.g. *The Guardian's* liveblog of 21 July 2014: <https://amp.theguardian.com/world/2014/jul/21/mh17-disaster-ukraine-obama-live-updates> (last accessed on 5 December 2022).

telephone to Girkin. And when a DPR fighter asked him on the afternoon of 17 July 2014 what was going on, Borodai replied that he must follow Girkin's orders.

When the offensive stalled and the DPR fighters came under fire, a Buk system was requested and received. Once the Buk TELAR had arrived in Donetsk, Dubinskiy arranged its deployment. At that time, Borodai and Girkin were in the same DPR headquarters building. As the district court held in Girkin's case, it is not possible to establish whether Borodai was aware at that time of the Buk TELAR's availability. While Dubinskiy was making phone calls from headquarters about the deployment of the Buk TELAR, Borodai spoke to Burlaka on the phone twice. Over the course of the entire day (17 July) Borodai had more than 20 phone conversations with Burlaka. Since those calls took place on encrypted phones, the substance of these conversations is not known. There are no intercepted phone conversations involving Borodai or Burlaka about the downing of flight MH17 or about the request for, or the supply and removal of, the Buk TELAR. Nor is there any evidence that Borodai was in the vicinity of Girkin and Dubinskiy when they were dealing with the removal of the Buk. There are however intercepted conversations which show that he concerned himself with the impact and aftermath of the downing of flight MH17. On 17 July 2014, for example, he was present at the crash site, and he tried to contact Surkov about the transfer of victims' remains and the aircraft's black boxes.

7 Options with regard to investigation and prosecution

The JIT investigation regarding the crew of the Buk TELAR used to down flight MH17, their superior officers, the parties responsible for supplying the weapon system and other parties involved in the weapon's deployment on 17 July 2014 has now reached its limits. As things now stand, the JIT and the Dutch Public Prosecution Service have reached the following conclusions.

7.1 Investigative options

All the available telecom data of relevant individuals has now been analysed. The JIT has investigated this case as thoroughly as it reasonably can without the cooperation of the Russian authorities. In this connection, the investigation team has had to take account of the major security risks facing its sources.

Any new evidence in the investigation must be sought in the Russian Federation. In order to obtain new evidence the JIT would have to rely on the cooperation of the Russian authorities or Russian (insider) witnesses. Under the current Russian regime the latter are not able to speak freely, and would expose themselves to major security risks if they were to talk to the JIT. To this day, the Russian authorities continue to deny – contrary to the established facts – any involvement in the conflict in eastern Ukraine on and around 17 July 2014. Since that date, the Russian Federation has on multiple occasions presented – and provided to the JIT – falsified evidence exonerating itself. At other times, the Russian authorities have refused to provide information. For example, they refused to answer questions posed by the Public Prosecution Service in 2018 about the whereabouts of the Buk TELAR '3X2' in the period from 23 June to 23 July 2014 and the identity of its crew members. They also refused to allow the 2021 request of the examining magistrate to examine the commander of the 53rd AAMB. Since the start of the JIT investigation the Russian authorities have publicly cast doubt on its findings. They did the same with the district court's judgment of 17 November 2022.⁵⁹ Relations with the Russian Federation have deteriorated further since the Russian invasion of Ukraine on 24 February 2022. There is now no prospect of receiving the kind of open-minded cooperation necessary to continue the investigation.

⁵⁹ <https://www.interfax.ru/russie/873011>, 17 November 2022: (translated from Russian) 'Moscow called the decision of the Hague court in the MH17 case politically motivated. The Russian Foreign Ministry does not consider the verdict of the court in The Hague, which sentenced Russians Igor Girkin and Sergey Dubinskiy and Ukrainian Leonid Kharchenko to life imprisonment in absentia in the criminal "case MH17", impartial. "We deeply regret that the District Court of The Hague has disregarded the principles of impartial justice in favor of the current political situation, thus causing a serious reputational blow to the entire judicial system of the Netherlands," the Ministry said in a statement. (...) According to the Foreign Ministry, "both the course and the results of the proceedings indicate that it was based on a political order to reinforce the version promoted by The Hague and its associates in the Joint Investigation Team about Russia's involvement in the tragedy." (...)'. See also: <https://www.reuters.com/world/europe/russia-says-it-will-examine-dutch-courts-position-mh17-2022-11-17/>; <https://tass.com/pressreview/1538645>.

7.2 Prosecution options

The investigation's findings to date do not provide sufficient grounds for prosecution. There are either formal obstacles to a prosecution, or the necessary lawful and convincing evidence is lacking.

7.2.1 Buk TELAR crew members and their superior officers

The investigation into the crew of the Buk TELAR used to down MH17 produced second-hand information about the possible involvement of three former officers of the 53rd AAMB. This information is ambiguous, and thus far it cannot be confirmed to an adequate extent. Since it has not yet been possible to establish the identity of the Buk TELAR crew members, it is not possible to prove via this line of enquiry why they fired a Buk missile at MH17. It is equally impossible to establish whom they received which orders from. Nor could this information be found by other means. It therefore remains unclear what the crew's superior officers in the Russian military chain of command knew about the downing of flight MH17 on 17 July 2014 or what degree of say they actually had regarding it. These superior officers included the commander of the 53rd AAMB, the Russian Minister of Defence and – as commander-in-chief – the Russian President.

Furthermore, as members of the regular armed forces of the Russian Federation, the crew members and their superior officers may be able to claim combatant immunity. Such immunity applies to violence committed as a combatant, and it continues to apply after the individual concerned has left the armed forces. It is open to question whether a claim of combatant immunity in this case would have any chance of succeeding. After all, to this day the Russian Federation continues to deny that the Russian armed forces were involved in the armed conflict in eastern Ukraine in July 2014, or in the downing of flight MH17. Unlike in the case of the four DPR fighters who were prosecuted previously, limits to Dutch jurisdiction under international law may be a barrier to the prosecution of the crew members and their superior officers.

Whether combatant status can also be claimed by a defence minister and a president in the role of commander-in-chief is a matter of academic debate. The answer may depend in part on the circumstances of the case. In the present case, it may be relevant that, on 17 July 2014, Minister of Defence Sergei Shoigu held the military rank of general, and that President Putin, as commander-in-chief, was personally involved behind the scenes in the conflict in eastern Ukraine.

Even if the Buk TELAR crew and their superior officers were entitled to claim combatant immunity, such a claim would not stand in the way of a war crimes prosecution. Combatants and non-combatants alike can be prosecuted for war crimes. However, without concrete information about the circumstances in which the decision was made to fire the Buk missile at MH17, it is not easy to determine whether the downing of MH17 was a war crime. The district court held that it is completely implausible that a civilian aircraft was deliberately shot down and that it is plausible that MH17 was shot down by mistake. As a consequence there appears to be limited scope for instituting criminal proceedings in respect of a war crime.

7.2.2 Parties responsible for supplying the Buk TELAR

As the district court held, in the circumstances in question it may be assumed that 'anyone who helped facilitate the deployment of this weapon' had both intent and premeditation in respect of unlawfully causing the crash of flight MH17 and the death of everyone on board.⁶⁰

The investigation produced strong indications that a decision on providing the Buk TELAR – or in any event a heavier air defence system with a higher range – to the DPR was taken at presidential level. Although the investigation produced strong indications, the high bar of complete and conclusive evidence is not reached.

Furthermore, whether or not he is entitled to claim combatant immunity, the president of the Russian Federation, as head of state, is in any event immune under international law from prosecution. Under Dutch law, a head of state cannot be prosecuted for any offence whatsoever, even a war crime (article 8d of the Criminal Code and section 16 of the International Crimes Act). This immunity applies for as long as Putin remains head of state.

In addition to Putin, several other individuals have emerged who were involved in making the decision to supply the separatists in eastern Ukraine with the Buk TELAR. These individuals include Sergei Aksyonov, Vladislav Surkov, Alexei Dyumin and Sergei Shoigu.

There are indications that Aksyonov, Surkov and Dyumin supported the DPR's request for a heavier air defence system and (along with other individuals) decided to present the request to Shoigu and Putin. The question is whether, in doing so, they also have a criminal responsibility for the deployment of this weapon. In any event, they had no actual decision-making power about whether to provide a Buk TELAR. That authority lay at a higher level. Therefore, were they sufficiently helpful in facilitating the eventual deployment of the Buk TELAR that their actions constituted criminal aiding and abetting? For such a charge, further and more concrete evidence is needed concerning their own part – and that of others – in the decision-making process related to the possible provision of the Buk TELAR. There is therefore insufficient evidence as yet to hold them criminally liable for the downing of MH17. What is more, Dyumin, as deputy head of Russia's military intelligence service (GRU), may be entitled to claim combatant immunity.

The same goes for Shoigu, as noted above. In addition it is open to question whether Shoigu – alongside Putin – had actual decision-making power when it came to supplying the Buk TELAR. After all, the investigation produced indications that this was ultimately the president's decision, and not – as noted in an intercepted phone conversation – that of a general or defence minister named 'Sh...'. Was he therefore sufficiently helpful in facilitating the eventual deployment of the Buk TELAR that his actions could be described as criminal aiding and abetting? Regarding Shoigu, too, more – and more concrete – evidence is needed concerning his own part in the decision-making process regarding the supply of the Buk TELAR.

Lastly, Alexander Borodai and Aleksei Fominov held consultations with Russian officials in Moscow about the provision of military equipment. Since it could not be clearly determined whether those

⁶⁰ Judgment of The Hague District Court, 17 November 2022, ECLI:NL:RBDHA:2022:12217, 6.3.2.4.

consultations concerned the supply of a Buk system, these individuals cannot be held responsible for its delivery.

7.2.3 Parties jointly responsible for deployment of Buk TELAR

Finally, the investigation included other individuals who could – in addition to Girkin, Dubinskiy and Kharchenko – be held criminally liable for the deployment of the Buk TELAR in eastern Ukraine. The investigation did not uncover any concrete instructions given by Russian generals or other Russian officials regarding the deployment of the Buk TELAR.

There were however indications of a direct, de facto chain of command between FSB general Andrei Burlaka and DPR fighters Borodai and Girkin. Within this chain of command, Burlaka gave orders to Borodai and to subordinates of Girkin, orders which Girkin in turn accepted. It is not clear whether Burlaka, acting in his command role, was involved in a criminal capacity in the deployment of the Buk TELAR. Since he used a secure line, the contents of his phone conversations are not known. Conversations held by other parties about Burlaka show that his orders to Borodai and to Girkin's subordinates related to internal conflicts and dynamics among DPR commanders, as well as the provision of equipment. Nothing was said about providing a heavier air defence system.

Substantive conversations held by Borodai, the so-called prime minister of the DPR, have been located, however. These show that his role primarily involved administration, logistics and military support. When it came to operational military orders, Borodai would refer people to Girkin. In Moscow Borodai held consultations about providing military equipment, but it is not known whether this included a heavier air defence system.

On the basis of the information obtained, it is not possible to establish that Borodai and Burlaka had advance knowledge of the Buk TELAR's availability. Nor are there any concrete indications – unlike in Girkin's case – that Borodai and Burlaka directed combat activities themselves, requested a heavier air defence system themselves, and later worked to get rid of the Buk TELAR once it had been used.

Therefore, in contrast to the conclusion of the district court in Girkin's case, it is not possible at this time to provide lawful and convincing evidence that Borodai and Burlaka were able to decide on the deployment and use of the Buk TELAR and that they accepted that deployment and use. Nor is it possible to prove that they deliberately aided and abetted the downing of MH17 in another way.

7.3 Conclusion

After working for over eight-and-a-half years, the JIT sees no further scope for investigation. The investigation will therefore be suspended. The investigation produced various findings, but these do not provide any grounds for prosecuting new individuals. Although the investigation is being suspended, the JIT is not closing the case. New information or a change in circumstances may give reason to resume the investigation or institute new criminal proceedings.