

Provisional version

Committee on Legal Affairs and Human Rights

The crash of Polish Air Force Tu-154 transporting the Polish Delegation on 10 April 2010 on the Russian Federation's Territory

Report*

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A. Draft resolution

1. On 10 April 2010, a Tupolev Tu-154M aircraft was carrying the Polish State delegation, led by President Lech Kaczyński, from Warsaw to Smolensk, in the Russian Federation, to attend a ceremony marking the 70th anniversary of the Katyń Massacre. The plane crashed at Smolensk Severny Airdrome, killing all 96 persons on board (4 flight crew members, four cabin crew members and 88 passengers). The fatalities included President Lech Kaczyński, his wife Maria and many dignitaries and high-ranking Polish officials, including military chiefs of staff (army, air force, and navy) and the President of the National Bank of Poland.

2. The Assembly notes that investigations were commenced immediately after the crash in order to determine the factors that led to this tragic event. Whilst Poland would have been entitled to lead the investigation, the Polish Government agreed with its Russian counterpart that the air safety investigation into the causes of the crash was carried out by the Russian Inter-State Aviation Committee (as the competent authority in the State where the crash took place), with the participation of Polish experts. Both States agreed that the main technical investigation be conducted according to the International Standards and Recommended Practices (SARPs) specified in Annex 13 of the Convention on International Civil Aviation (Chicago Convention), which normally apply to civil aviation, despite the fact that the Polish Air Force TU-154 was registered as a State aircraft and the fateful flight served State purposes.

3. The report of the investigation team of the Russian Inter-State Aviation Committee published on 12 January 2011, concluded that "[t]he immediate cause of the accident was the failure of the crew to take a timely decision to proceed to an alternate airdrome although they were numerous times timely informed on the actual weather conditions at Smolensk Severny Airdrome that were significantly lower than the established airdrome minima; descent without visual contact with ground references to an altitude much lower than minimum descent altitude for go around (100 m) in order to establish visual flight as well as no reaction to the numerous TAWS warnings [Terrain Awareness and Warning System] which led to controlled flight into terrain, aircraft destruction and death of the crew and passengers."

4. The Polish authorities' comments on the draft of the Russian Inter-State Aviation Committee report were not taken into account in the final version of the report. The Polish Committee for Investigation of National Aviation Accidents subsequently issued its own report, on 29 July 2011. This report stipulates that "[t]he immediate cause of the accident was the descent below the minimum descent altitude at an excessive rate of descent in weather conditions which prevented visual contact with the ground, as well as a delayed execution of the go-around procedure. Those circumstances led to an impact on a terrain obstacle resulting

* Draft resolution adopted unanimously by the committee on 25 June 2018.

¹ Appointed on 6 September 2016, as successor for MM. Michael McNamara (Ireland, SOC) and Robert Neill (United Kingdom, European Conservatives Group); reference no. 4103 dated 26.1.2015; last extended until the end of June 2018. The preparation of this report was delayed by the changes of rapporteurs and (ultimately unsuccessful) attempts to obtain the cooperation of the competent Russian authorities.

in separation of a part of the left wing with aileron and consequently to the loss of aircraft control and eventual ground impact.”

5. Whilst both reports agree on the basic nature of the tragedy as an accident, the Russian report places all responsibility on the aircraft's crew members; the Polish investigators concluded that Russian air traffic control also played a part in the accident by passing incorrect information to the crew regarding the aircraft's position, and that deficiencies of Smolensk airport contributed to the crash. The Polish side has also put into doubt the independence and neutrality of the Russian Inter-State Aviation Committee.

6. On 11 April 2018, the Committee for Re-Investigation of the Crash of TU-154M in Smolensk, Russia, appointed by the Polish Government, published a new, preliminary report in which it concluded that the aircraft was “destroyed in the air as a result of several explosions”.

7. Now, over eight years after the accident, the Russian Federation still maintains possession of the plane wreckage, the black boxes with original flight data recordings and other evidentiary material. Whilst copies of flight data recordings and some material evidence have been transmitted to the Polish authorities, Poland has strongly insisted for years that the wreckage and all original materials be returned. In both countries, criminal investigations relating to the crash are still open.

8. The Assembly recalls that under Appendix 13 of the Chicago Convention, the State of occurrence is required to return the wreckage and other evidentiary material to the State of registration of the aircraft as soon as the technical air safety investigation is completed, which was the case in January 2011. The continuing refusal of the Russian authorities to return the wreckage and other evidence constitutes an abuse of rights and has fuelled speculation on the Polish side that Russia has something to hide.

9. The Assembly therefore calls on the Russian Federation

9.1. to hand over the wreckage of the Polish Air Force Tu-154 to the competent Polish authorities without further delay, in close cooperation with Polish experts, and in a manner that avoids any further deterioration of potential evidence ;

9.2. meanwhile, to adequately protect the wreckage in a manner agreed with Polish experts; and

9.3. to refrain from carrying out any more activities at the site of the crash that could be seen as desecrating this location, which has a powerful emotional significance for many Poles.

10. The Assembly further calls on the law enforcement authorities of both States to fully cooperate in establishing any possible criminal responsibilities related to the crash, including by swiftly making any evidence available on the request of the other State.

11. Finally, the Assembly solemnly recalls the purpose of the fateful flight: transporting the most senior representatives of the Polish State to a memorial ceremony at Katyń, the site of the massacre of thousands of Polish patriots by Stalin's secret police in the spring of 1940. Whilst the Soviet Union had long refused to accept its responsibility for this crime, it finally recognized the facts in 1990. The process of reconciliation between Poles and Russians, which must continue on the basis of historical truth, should not be put at risk by any abusive or provocative behaviour relating to the tragic events in Smolensk.

B. Draft explanatory report

1. Introduction

1. More than eight years ago, on 10 April 2010, a Tupolev Tu-154M aircraft was carrying the Polish State delegation, led by President Lech Kaczyński, from Warsaw to Smolensk, in the Russian Federation, to attend a ceremony marking the 70th anniversary of the Katyń Massacre. The plane crashed at Smolensk Severny Airdrome, killing all 96 persons on board (4 flight crew members, four cabin crew members and 88 passengers). The fatalities included President Lech Kaczyński, his wife Maria and many dignitaries and high-ranking Polish officials, including military chiefs of staff (army, air force, and navy), numerous parliamentarians and the President of the National Bank of Poland.

2. A number of investigations were commenced immediately after the crash in order to determine the factors that led to this tragic event. By common agreement between Poland and Russia, the safety investigation was to be carried out following the standards of Appendix 13 of the Convention on International Civil Aviation (Chicago Convention), despite the fact that the plane was a State aircraft on an official mission. The Russian Federation therefore had the primary responsibility for the safety investigation. Poland set up its own committee to investigate the crash, and prosecutors commenced criminal investigations in both countries.

3. The report of the investigation team of the Russian Inter-State Aviation Committee (Air Accident Aviation Commission) published on 12 January 2011, concluded that *“[t]he immediate cause of the accident was the failure of the crew to take a timely decision to proceed to an alternate airdrome although they were numerous times timely informed on the actual weather conditions at Smolensk Severny Airdrome that were significantly lower than the established airdrome minima; descent without visual contact with ground references to an altitude much lower than minimum descent altitude for go around (100 m) in order to establish visual flight as well as no reaction to the numerous TAWS warnings [Terrain Awareness and Warning System] which led to controlled flight into terrain, aircraft destruction and death of the crew and passengers. According to the conclusion made by the pilot-experts and aviation psychologists, the presence of the Commander-in-Chief of the Polish Air Forces in the cockpit until collision exposed psychological pressure on the PIC’s [Pilot-in-Command] decision to continue descent in conditions of unjustified risk with the dominating aim of landing at any means”*.²

4. In the final report of the Polish Committee for Investigation of National Aviation Accidents, issued on 29 July 2011, it is stipulated that *“[t]he immediate cause of the accident was the descent below the minimum descent altitude at an excessive rate of descent in weather conditions which prevented visual contact with the ground, as well as a delayed execution of the go-around procedure. Those circumstances led to an impact on a terrain obstacle resulting in separation of a part of the left wing with aileron and consequently to the loss of aircraft control and eventual ground impact.”*³

5. On 11 April 2018, the Committee for Re-Investigation of the Crash of TU-154M in Smolensk, Russia at the Ministry of Defense of the Republic of Poland⁴ concluded that the aircraft was “destroyed in the air as a result of several explosions”.

6. Now, over eight years after the accident, the Russian Federation still maintains possession of the plane wreckage, the black boxes with original flight data recordings and other material evidence. This is the principal concern expressed by the signatories of the motion on the basis of which the Committee on Legal

² [Commonwealth of Independent States \(CIS\)](https://mak-iac.org/upload/iblock/f2a/finalreport_eng.pdf), the Interstate Aviation Committee (IAC) ([Russian](#): Межгосударственный авиационный комитет (МАК)) report, quotation taken from English translation of report written in Russian, available at: https://mak-iac.org/upload/iblock/f2a/finalreport_eng.pdf. See conclusions at pages 171 to 184. The IAC was established in December 1991 pursuant to the Intergovernmental Agreement on Civil Aviation and Airspace Utilisation (ICAO Registration No. 3720). This regional organisation, provided legal status as an organ of the Russian Federation by Presidential decree, acts on behalf of the Russian Federation for matters in the fields of airworthiness, aircraft accident investigation and prevention, aerodromes and environment.

³ Safety Investigation Committee of State Aviation (SICSA), [Final Report from the examination of the aviation accident No. 192/2010/11 involving the Tu-154M airplane, tail number 101, which occurred on April 10th, 2010 in the area of the SMOLENSK NORTH airfield](#), at p.318. See also page 236 in which ‘factors’ of ‘key importance in determining the reasons for the accident’ are enumerated.

⁴ According to the Technical Report dated 11 April 2018, this Committee is a part of the Committee for the Investigation of National Aviation Accidents (Available at: <http://www.smolenskrashnews.com/reports/polish/Ministry-of-Defense-2018-Technical-Report-Announcement.pdf> (summary announcement and technical report)

Affairs and Human Rights has asked me to prepare a report.⁵ That said, copies of flight data recordings and some material evidence have been transmitted to the Polish authorities already. Also, neither the Russian nor the Polish criminal investigations have yet, to the best of my knowledge, been formally concluded.

2. Focus of the Rapporteurs' mandate and fact-finding activities carried out

7. My predecessors as rapporteurs and I focused on the legal context of the investigations into the crash carried out by the competent authorities and in particular the right of Poland to the return of the wreckage. The rapporteur mandate underlying this report⁶ did not allow for carrying out our own investigation into the causes of and responsibility for this terrible disaster, let alone taking position on this issue – a task which would have been impossible in any case, given the technical complexity of such an investigation.

8. The successive rapporteurs were duly authorized by the committee to carry out certain fact-finding activities, including addressing the competent authorities, including:

- requesting from both the Polish and Russian authorities – explanations as to why the wreckage of the aircraft, as well as the original flight data recordings and other material evidence relating to the crash has not been returned to Poland and as to why the criminal investigations have still not been concluded ;
- holding an exchange of views with two legal experts ; and
- carrying out information visits to Warsaw and Moscow.

9. Regarding the request for explanations, the then Prosecutor General of the Republic of Poland, Mr Andrzej Seremet, replied to my predecessor as rapporteur, Mr Robert Neill, by a letter dated 22 October 2015. By contrast, the Russian side did not provide any explanations, despite a reminder sent by Robert Neill's successor, Michael McNamara. The Permanent Representative of the Russian Federation with the Council of Europe merely expressed, in a letter dated 19 February 2016, his "*regrets on temporary suspension of interaction between the Russian parliamentary delegation and the PACE, which does not permit to use the Assembly's channels of cooperation*".⁷

10. At its meeting on 7 March 2016, the Committee held a hearing with the participation of two aviation law experts, namely

Mr Timothy Brymer, Attorney, Specialist in Aviation and Aerospace Law, Murray, Morin & Herman P.A., London, United Kingdom, and
Mr Pablo Mendes de Leon, Head of Department, Executive Chair of the Department of Air and Space Law, Leiden University, the Netherlands.⁸

11. But the information visits authorised by the Committee could not take place. The Russian authorities did not cooperate in the organisation of a visit to Moscow for the same reason why they did not respond to the written request for information. In view of this refusal, I did not consider it appropriate to travel to Warsaw only. This would have created the wrong impression that the report was unbalanced because of a reliance on partial information from only one side. I also did not and do not wish to be drawn into the highly politicised struggle between representatives of the current and previous governments regarding the causes and manner of investigation of this tragedy⁹. As my mandate would in any case not allow me to take position on any such allegations, I have preferred not to carry out such a visit.

3. The choice of the juridical regime covering the investigations

12. According to the experts who testified before the Committee on 7 March 2016, the choice of juridical regime covering the investigations was complex and has given rise to different interpretations. One

⁵ [Doc. 13628](http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=21283&lang=en) of 7 October 2014, last paragraph, at <http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=21283&lang=en>.

⁶ Document 13628 dated 7 October 2014.

⁷ The correspondence included in the information document published on 29 April 2016 (AS/Jur/Inf (2016) 07)

⁸ The minutes of this hearing are included in the information document of 29 April 2016 (note 7).

⁹ See for example *Polskie Radio dla Zagranicy*, "Report showing evidence of explosion on Smolensk plane coming 'soon': official", 7 April 2018; "Smolensk air crash report 'falsified', prosecutors notified: Polish defence minister", 22 November 2017, both available at: <http://www.thenews.pl>

possibility might have been the 1993 Polish-Russian Agreement,¹⁰ regulating military flights in the two States concerned and which would have provided for the possibility of joint investigations. Nevertheless, as the 1993 Agreement did not regulate in detail the procedure to be followed in a situation of a 'joint' air safety investigation, it was agreed by both sides that the conduct of the investigation would be carried out in accordance with the principles laid down in Appendix 13 of the Convention on International Civil Aviation (the Chicago Convention, of 7 December 1944), in force since 1947 and ratified by both Poland, in 1945, and the Russian Federation (Soviet Union), in 1970.¹¹ More specifically, the experience encountered during on-site work in the first few days after the accident prompted the Russian authorities – despite the fact that the Tu154 was a military aircraft – to propose conducting the air safety investigation according to Annex 13 of the Chicago Convention, a proposal which the Polish government accepted.¹²

13. One point of potential controversy arising from the decision to proceed under Annex 13 of the Chicago Convention was that Article 3 of the Chicago Convention stipulates that *"this Convention shall be applicable only to civil aircraft and shall not be applicable to State aircraft"*.¹³ Although there is no strict definition of a State or civil flight, a legal study conducted by the International Civil Aviation Organization (ICAO) Secretariat in 1994 identified criteria to distinguish between the two. It noted that the Chicago Convention utilises a functional approach to distinguish between State and civilian flights in which they examine the totality of the circumstances, particularly *"taking into account a number of factors, which should include [...] the ownership of the aircraft (Is it privately or publicly owned?), [...] the passengers or personnel carried (Are they State officials or members of the public at large? Is the flight open for use by members of the public?), aircraft registration and nationality markings (Is it registered in a civil or State aircraft registry?), [...] the nature of the crew (Are the crew members civilians or employed by military, customs, or police services?), the operator (Is the operator a military, customs, or police agency?) [...]"*.¹⁴

14. Nevertheless, despite the fact that, in accordance with the above definition, this was a State aircraft transporting high-level government officials, including the President of Poland, operated by military staff and registered as a military aircraft, both States agreed that the main technical investigation be conducted according to the International Standards and Recommended Practices (SARPs), specified in Annex 13 of the Chicago Convention, which normally apply to civil aviation.¹⁵

15. This choice, agreed to by its predecessors, was not compelling, given the official nature of the plane and the flight in question, and it has been strongly criticized by the current Polish government, as having unnecessarily given Russia the dominant role in investigating the crash. The Polish Government of the day had every right to insist that the investigation should be led by the competent Polish authorities. But I cannot see how this choice can now be reversed – the procedure under Annex 13 of the Chicago Convention was chosen by common agreement of the governments in place at the time, and they were, and must remain, the basis of the investigation procedure followed.

4. Relevant aspects of Annex 13 of the Chicago Convention

16. From the detailed list of International Standards and Recommended Practices (SARP)s, set out in Annex 13 of the Chicago Convention, the following air safety investigation principles merit specific mention:

- (1) It is up to the State of Occurrence (i.e. Russia in the case at hand) to institute an investigation into the circumstances of the accident and be responsible for the conduct of the investigation (Standard 5.1).

¹⁰ Agreement between Ministry of Defense of the Republic of Poland and Ministry of Defense of the Russian Federation on terms of bilateral cooperation on military aircraft operations of the Republic of Poland and Russian Federation in the airspace of both States, signed in Moscow on 14 December 1993. <http://bit.ly/1ldxdC9> (unpublished Polish version; also available in Russian).

¹¹ Available at: <http://www.icao.int/publications/pages/doc7300.aspx>. List of Parties to the Convention: http://www.icao.int/secretariat/legal/list_of_parties/chicago_en.pdf.

¹² Confirmed by the then Prime Minister, Donald Tusk, at a press conference on 28.04.2010: <https://www.premier.gov.pl/en/news/news/the-government-and-civil-service-have-passed-this-difficult-test.html>. See also letter, addressed to the Polish Senate from the Polish Ministry of Foreign Affairs, dated 27 January 2015 (in Polish, on file with the Secretariat).

¹³ International Civil Aviation Organization (ICAO) Doc. 7300, available at http://www.icao.int/publications/Documents/7300_orig.pdf.

¹⁴ LC/29-WP/2-1 of 3/3/1994, 29th Session of the ICAO Legal Committee, Montreal, 4–5 July 1994.

¹⁵ For good overview, see Piotr Kasprzyk. "Legal Ramifications of the Investigations of the 2010 Polish President's Aircraft Accident" in Vol.36 *Air and Space Law* (2011), pp. 201–216. As indicated by Kasprzyk, the binding character and precise legal status of SARPs are subject to various interpretations and opinions.

- (2) The accident investigation authority shall have independence in the conduct of the investigation and have unrestricted authority over its conduct (Standard 5.4);
- (3) Any judicial or administrative proceedings to apportion blame or liability should be separate from any investigation conducted under the provisions of Annex 13 (Standard 5.4.1);
- (4) It is also for the State of Occurrence to ensure coordination between the investigator-in-charge and the judicial authorities regarding any criminal investigations (Standard 5.10).
- (5) The State of Registry (i.e. Poland in the case at hand) shall be entitled to appoint an accredited representative to participate in the investigation, as well as one or more advisers to assist the accredited representative in the investigation (Standards 5.18 and 5.19).
- (6) These persons have substantial participation rights spelt out in Standard 5.25, in particular to visit the scene of the crime, examine the wreckage, obtain witness information and suggest areas of questioning, have full access to all relevant evidence as soon as possible, receive copies of all pertinent documents, participate in read-outs of recorded media, participate in off-scene investigative activities such as component examinations, technical briefings, tests and simulations, participate in investigation progress meetings and make submissions in respect of the various elements of the investigation.
- (7) The State conducting the investigation shall send a copy of the draft Final Report to all States that participated in the investigation (including the State of Registry), inviting their significant and substantiated comments on the report as soon as possible. If the State conducting the investigation receives comments (within 60 days), it shall either amend the draft Final Report to include the substance of the comments received or, if desired by the State that provided comments, append the comments to the Final Report. Comments to be appended to the final report shall deal with those aspects upon which no agreement could be reached (Standard 6.3 and Note 2).
- (8) The sole objective of an investigation of an accident or incident shall be the prevention of accidents and incidents. Its purpose is not to apportion blame or liability (Standard 3.1);
- (9) If in the course of an investigation it becomes known, or it is suspected, that an act of unlawful interference was involved, the investigator in charge shall immediately initiate action to ensure that the aviation security authorities of the State(s) concerned are so informed". (Standard 5.11)
- (10) Exceptions to the protection (i.e. confidentiality) of safety information should only be granted when "there is evidence that the occurrence was caused by an act considered, in accordance with the law, to be conduct with intent to cause damage, or conduct with knowledge that damage would probably result, equivalent to reckless conduct, gross negligence or wilful misconduct;" when "an appropriate authority considers that circumstances reasonably indicate" that this may have been the case; or when an appropriate authority determines that the release of the safety information is necessary for the proper administration of justice and that its release outweighs the adverse impact such release may have on the future availability of safety information (Attachment E to Appendix 13, paras. 4 a), b) and c)).
- (11) The State conducting the investigation of an accident or incident should not make specified records collected in the course of the safety investigation available for other purposes unless the appropriate authority for the administration of justice in that State determines that the disclosure of such records outweighs the adverse domestic and international impact such action may have on that or any future investigations (Standard 5.12).¹⁶
- (12) The State of Occurrence shall release custody of the aircraft, its contents or any parts thereof as soon as they are no longer required in the investigation to any person or persons duly designated by the State of Registry or the State of the Operator, as applicable (Standard 3.4).

17. I am not in a position to comment exhaustively on the question whether Russia as State of Occurrence has complied with all the above Standards as listed in Annex 13, as the Russian authorities did not cooperate with the Assembly's rapporteurs in any way. The following can however be inferred from the reply received from the Polish side: clearly, Polish experts were allowed to participate in the investigation by the

¹⁶ See Kasprzyk, above note 14, especially at pp.207-209 and 212-214. For the complete list of SARPs, enumerated in Annex 13 to the Chicago Convention, see: [Aircraft Accident and Incident Investigation, ICAO, 10th edition, July 2010.](#)

Russian Inter-State Aviation Committee, they were granted access to the wreckage, allowed to participate in the read-outs of the flight recorders etc.:

“Nevertheless it should be underlined here that Polish prosecutors and experts were granted unlimited access to the remains of the fuselage and were given the opportunity to take part in all necessary examinations during their numerous visits on the site of the crash. In the course of these visits, visual inspections of the wreckage were carried out, including taking samples for examination and making copies of the records from the flight data recorders. The above-mentioned exercises were performed on numerous occasions, according to the needs of the Polish investigation.” (extract from the reply of the Prosecutor General of the Republic of Poland to Mr Robert Neill¹⁷).

18. But the “Remarks of the Republic of Poland on the draft Final Report by IAC on the investigation into the accident involving aircraft Tu-154M tail number 101”, which the Polish Government requested to be taken into account or attached to the Russian IAC’s draft final report also includes a lengthy list of materials and information requested from the Russian IAC but not received.¹⁸

19. Thus, as pointed out in a letter by the Polish Ministry of Foreign Affairs¹⁹, *“Poland and Russia did not attain consensus as to the content of the document prepared by the Russian side.”* The Russian Inter-State Aviation Committee (IAC)’s final report published on the IAC’s website²⁰ does not reflect the dissenting views of the Polish experts, nor does it present any such dissenting views as an attachment, as foreseen in Standard 6.3 following the above-mentioned request made by the Polish side.²¹

20. The special circumstances and ramifications of this crash and as well as the differences of opinion and practical problems of cooperation noted in the above-mentioned “Remarks of the Republic of Poland” may well have been the reason why the Polish Committee for Investigation of National Aviation Accidents (SICSA) published a separate report²². The status of this report is unclear: while Annex 13 of the Chicago Convention clearly attributes the competence and the responsibility for carrying out the safety investigation to the State of Occurrence, i.e. Russia, it neither expressly foresees nor excludes that the State of Registration also carries out such an investigation.²³

21. As already indicated above, the final reports of both the Russian Inter-State Aviation Committee (IAC) and of the Polish Committee for Investigation of National Aviation Accidents (SICSA) were issued back in 2011, whilst the criminal investigations in both countries have apparently still not been finalised. The juxtaposition of the two national safety investigation reports and two (still on-going) national criminal investigations raises three concerns.

22. The first relates to the causes of the crash itself, such as the fact that the 2011 Polish report concluded that Russian air traffic control also played a part in the accident by passing incorrect information to the crew regarding the aircraft’s position and that there existed deficiencies with respect to Smolensk airport which contributed to the crash.²⁴ The new report published by the Polish Government in April 2018 (above paragraph 8) makes even stronger allegations. But as explained above (paragraph 6), my mandate as Rapporteur does not include investigating the causes of the crash or taking position in this respect.

23. The second concern relates to the conflicting purposes of the safety investigation on the one hand and the criminal investigations on the other. As explained by our experts, the sole purpose of the safety investigation is to identify the causes of an accident in order to draw lessons to improve future air traffic safety – not to apportion blame. Criminal investigations, to the contrary, aim at establishing the personal responsibility of individuals involved in an accident – sometimes in response to popular demand in such cases that “justice must be done” when so many people have perished. Appendix 13 clearly gives priority to

¹⁷ See AS/Jur/Inf(2016) 07 page 14

¹⁸ See Remarks of the Republic of Poland on the draft Final Report by IAC on the investigation into the accident involving aircraft Tu-154M tail number 101, pages 5-28; available at: <http://orka.sejm.gov.pl/ZespolSmolenskMedia.nsf/EventsByLink/ZSMK-9HBN83/%24File/Remarks-on-the-MAK-Report.pdf>.

¹⁹ See note 12

²⁰ available at: https://mak-iac.org/upload/iblock/f2a/finalreport_eng.pdf (as accessed on 11/05/2018)

²¹ See “Remarks of the Republic of Poland”, note 18 above.

²² See note 3, above.

²³ See P. Kasprzyk, note 14 above, page 211, also with references to the legal basis for the establishment of the SICSA investigation in Polish law.

²⁴ Translation, from Polish, of the last part of paragraph 5 of letter sent to Polish Senate from Polish Ministry of Foreign Affairs, see note 12, above. See, for more details, the “Remarks of the Republic of Poland on the draft Final Report by IAC”, note 18 above, and the report of the Polish Safety Investigation Committee of State Aviation (SICSA) itself, note 3 above.

the aim of improving air traffic safety (see Standards 3.1. and 5.12, above para. 16). In order not to deter holders of relevant information from sharing it with investigators, also in future cases, information collected in the safety investigation may only be used for penal purposes if there are reasons to believe that intentional misconduct, recklessness or gross negligence were involved (see Attachment E, 4, above para. 16). But the “General Principles” laid down in Attachment E also state that it is not the purpose of protecting safety information to interfere with the proper administration of justice in States, and that national laws should ensure that a balance is struck between the need for the protection of safety information in order to improve aviation safety, and the need for the proper administration of justice (Attachment E, General Principles 2.2 and 2.3). The need to strike such a delicate balance does not allow for the kind of blame game, which the Russian and Polish authorities have entered into. For our experts, this is “*yet another sad example of the general conflict which commonly exists between the aim to establish cause and the demand to hold individuals accountable*”.²⁵

24. The third concern relates to the release, from Russian custody, of the wreckage of the aircraft. Article 3.4 of Annex 13 of the Chicago Convention (above, para. 16) stipulates that the wreckage and other materials shall be returned when they are no longer needed for the purposes of the “investigation”. The extent to which this provision has been complied with is at the origin of the main ‘concerns’ expressed by the signatories of the motion on the basis of which our Committee has been asked to prepare a report.²⁶ This will be the subject of the final chapter of this report.

5. Russia’s duty to return the wreckage to Poland

25. The duty of Russia (as country of occurrence) to Poland (country of registration of the aircraft) to return the wreckage depends on the relationship between the safety investigation under Annex 13 of the Chicago Convention, which was completed in 2011, and the still ongoing criminal investigations in Poland and Russia.

26. According to the additional answers received from the two aviation law experts²⁷, the investigation conducted pursuant to Annex 13 of the Chicago Convention is defined as a safety investigation, designed to lead to a full understanding of the causes of the accident with a view to making recommendations aimed at improving future air safety. The safety investigation is entirely separate and distinct from the criminal investigation. Whilst the safety investigation is regulated under Annex 13, the criminal investigation is generally subject to national law, and on some occasions international law (in particular, when international legal cooperation is required subject to relevant conventions, or when there is an international duty to prosecute, e.g. under the Rome Statute of the International Criminal Court).

27. I can only agree with our aviation law experts that the term “investigation” in Standard 3.4 of Annex 13 after the completion of which the wreckage shall be returned to the country of registry refers to the safety investigation carried out pursuant to Appendix 13. As this investigation was completed upon publication of the final report by the Russian Interstate Aviation Committee on 12 January 2011, it follows that under Appendix 13, upon which the two States agreed to base the proceedings, Russia must return the wreckage to Poland.

28. The only remaining question is whether Russian national law (in the present case, criminal procedure law) can be invoked to justify that Russia holds on to the wreckage and other material (in particular the original flight recorders) as “evidence” in the still on-going criminal procedure. Despite the failure of Russia to provide an answer to my predecessor’s questions in this regard, I take it for granted that Russian law does foresee the securing of relevant evidence materials for as long as a criminal investigation is still open, and that a criminal investigation regarding the crash of Polish Air Force Tu-154 is indeed still on-going.²⁸

29. The question is thus whether national law prevails over Appendix 13 of the Chicago Convention. Article 26 of the Chicago Convention provides that a State in which an accident to an aircraft occurs within the terms of the Article,

“will institute an inquiry into the circumstances of the accident in accordance, in so far as its laws permit, with the procedure which may be recommended by the International Civil Aviation Organization.”

²⁵ See answers to additional questions, AS/Jur/Inf (2016) 07 page 9.

²⁶ See note 5 above.

²⁷ See AS/Jur/Inf (2016) 07, page 9

²⁸ See Polskie Radia dla Zagranicy, “Polish FM says Russia uninterested in dialogue”, 7 November 2017, with a reference to a statement by Polish Foreign Minister Waszczykowski to this effect.

30. Article 26 thus gives precedence to national laws over the procedure recommended by the ICAO (i.e. the SARP's laid down in Appendix 13). But it should be recalled that the two States agreed to apply Annex 13 to this case, but not the Convention itself. In the absence of a specific agreement to apply (also) the Convention itself, the normal rules governing the application of the Convention remain valid; and according to these rules, the Chicago Convention does not apply to State aircraft on an official mission (paragraph 13 above). By consequence, the Standards laid down in Annex 13 (include the duty to return the wreckage and other materials after the end of the safety investigation) must be respected in their entirety and without restrictions based on the national law of the two States.²⁹

31. If one were to assume - contrary to the conclusion reached above - that national law prevails over Annex 13 despite the non-applicability of Article 26, Russia's duty to return the wreckage to Poland can be based on the general legal principle that rights may not be abused. Keeping the wreckage for more than seven years after the completion of the safety investigation is clearly abusive. The duration of the criminal investigation in Russia is excessive. After more than eight years since the crash occurred, it would be an abuse of rights for Russia to continue relying on the fact that a criminal case is still open in order to refuse the return of the wreckage. It is true that in some cases, criminal investigations into air disasters have lasted even longer than eight years; and the Polish criminal investigations into the Smolensk crash are also still on-going. But the Russian authorities have had full and immediate access to all the physical evidence for all this time - contrary to the Polish prosecutors, whose investigations are complicated by the fact that they are obliged to pass through cumbersome Mutual Legal Assistance procedures³⁰. Finally, any evidence, which may still be required for purposes of the on-going criminal procedure can be secured in other ways than by physically holding onto the wreckage itself, in particular by using formal judicial evidence preservation procedures. I therefore consider that the threshold after which refusing to return the wreckage ostensibly because of the still-open criminal case becomes abusive has long been passed.

32. In the same way, the disrespectful treatment of the wreckage, which was cut into pieces to facilitate transport, and of the bodies of the victims, with body parts mixed up and misplaced, as reported in the Polish media³¹, is unacceptable and must be stopped.

6. Conclusion

33. This report, in view of the limitations of my mandate and of available resources and of the Russian side's failure to cooperate, can only deal with a small number of the questions raised by this crash, namely the legal issues surrounding the application of Annex 13 of the Chicago Convention on International Civil Aviation, and in particular its Standard 3.4 requiring the return of the wreckage by the State of Occurrence to the State of Registry as soon as the safety investigation under Annex 13 is completed. We have seen that the ongoing criminal investigations in Russia do not justify withholding the wreckage any longer from its rightful owners – ultimately the Polish people. The draft resolution therefore calls on Russia to return the wreckage and other materials belonging to the Polish State without further delay. Holding back on returning these emblematic objects to Poland without a legal justification is akin to an abuse of rights which is perceived by many as a provocation.

34. Last but not least, we should not lose sight of the historical context of this disaster. The crash of the Polish Air Force Tupolov on 10 April 2010, when it attempted to land at the military airfield in Smolensk (Russia), has wiped out 96 lives, including those of Polish President Lech Kaczynski, his wife, and dozens of Poland's top political and military leaders. These high representatives of the Polish State were on their way to an event marking the 70th anniversary of the Katyn massacre – an emblematic crime committed by Stalin's secret police, the NKWD, in the spring of 1940. The massacre, which the Soviet Union long blamed on Nazi Germany, wiped out thousands of Polish military officers and other Polish patriots. It took the Soviet Union until 1990, under President Gorbachev's "Glasnost" policy, to recognize the historical truth – which must remain the basis of true reconciliation between the Russian and Polish people. This historical context must be borne in mind when assessing the impact of the tragedy at Smolensk, which came as a stunning blow to the Polish nation. This historical context, and the respect owed to the victims both of the Smolensk air crash and of the Katyn massacre should forbid any kind of abusive, provocative behaviour, from either side, in the process of determining the causes of this catastrophe.

²⁹ See Kasprzyk, note 14, at page 209.

³⁰ Following the European Convention on Mutual Assistance in Criminal Matters, of 1959, in force since 1962 and ratified by Poland in 1994 and the Russian Federation in 1996, respectively (available at: <http://conventions.coe.int/Treaty/en/Treaties/Html/030.htm>)

³¹ See for example Polskje Radio Dla Zagranicy (PRDZ), 30 October 2017, « Construction site at scene of Polish presidential plane crash: report; PRDZ 8 August 2017, "New claims of body mix-ups after Polish presidential plane crash".