

Letter of 27 October 2014 from the Minister of Security and Justice, the Minister of Foreign Affairs and the Minister of Defence to the House of Representatives answering questions relating to the MH17 air disaster

Attached to this letter are the government's answers to the questions put to it by the Permanent Committee on Foreign Affairs at its meeting of 15 October on the disaster involving Malaysia Airlines flight MH17. These answers will serve as input for the government's upcoming follow-up meeting with the Committee.

The questions are listed in the order they were asked. The answers also address the House's additional request (reference 2014Z18546/2014D37766) that the government respond to reports in the German media. And, in keeping with the undertaking he gave, the Minister of Security and Justice addresses your request to enquire about the logbooks kept by the Ukrainian State Emergency Service (SES).

In this letter we also inform the House about the progress being made in identifying the victims and we examine the health risks to which personnel involved in the repatriation mission may have been exposed.

Question 1:

Can you give an undertaking to make additional efforts to find ways of gaining access to the crash site, possibly via the UN?

Answer 1:

From the outset the government has sought by all possible means to gain access to the crash site. As you know the crash site is not under the control of the Ukrainian government. The security situation is in a constant state of flux due to fighting between Ukrainian government troops and pro-Russian separatists and the presence of Russian military personnel massed along Ukraine's eastern border.

The Netherlands has consistently called, in all relevant bilateral contacts and international fora, (including the UN, the OSCE and the EU), for access to the crash site to be made possible. UN Security Council resolution 2166, which was adopted on 21 July 2014, demands that the armed groups in control of the crash site provide access to it.

Unfortunately, the ceasefire which came into force on 5 September has not yet improved the security situation to the extent that the repatriation mission can return to the crash site. The

interim mission is therefore concentrating on finding alternative ways of collecting as many personal belongings as possible, while standing ready to return to the crash site to resume the repatriation mission should the security situation permit. The OSCE Special Monitoring Mission (OSCE-SMM) is playing an important role through its contacts with relevant local actors that can support the interim mission in its pursuit of alternative ways of recovering as much material as possible. The OSCE-SMM also has the task of monitoring the ceasefire.

The government does not consider it opportune to start discussing a possible additional UN mission to the crash site alongside the OSCE-SMM that is already active there. Moreover, the likelihood of reaching agreement in the UN Security Council on such a mission is minimal.

Question 2:

How would the government describe what has occurred? The word missile is not mentioned in the Dutch Safety Board's report,¹ but the incident is generally referred to as the 'downing' of flight MH17.

Answer 2:

The government cannot prejudge the outcome of the independent, international investigation into the circumstances of the crash by the Dutch Safety Board or the criminal investigation by the Public Prosecution. The Dutch Safety Board's preliminary report mentions impacts from a large number of high-energy objects. As we stated in our letter of 24 July informing the House of the latest developments, there seems to be mounting evidence that the aircraft was brought down by a missile. We cannot say this with certainty at present. We must first await the final reports.

German media reports also refer to a missile hitting the aircraft, a conclusion apparently based on available satellite images. It is important to investigate carefully whether this is indeed what happened. Gathering incontrovertible evidence is a protracted process. It is tempting to speculate about the facts behind the crash, but this is something which the Dutch government in particular cannot do. The Netherlands is leading the international investigation into the circumstances of the crash and the criminal investigation and cannot draw any conclusions without compromising the independence of those investigations. The conclusions reported in *Der Spiegel* are therefore entirely the responsibility of that publication. Scenarios based on

¹ Preliminary Report on the Crash involving Malaysia Airlines Boeing 777-200 flight MH17, Dutch Safety Board, The Hague, September 2014.

intelligence and public sources, including the Dutch Safety Board's report, cannot and should not be equated with evidence gathered by forensic experts that stands up to scrutiny in court.

The Public Prosecution Service indicated previously that it would be investigating four possible scenarios: an accident, a terrorist attack from inside the aircraft, an attack from the ground and an attack from the air. The Public Prosecution Service has since indicated, partly in light of the Dutch Safety Board's preliminary report, that two of the four scenarios (an accident and a terrorist attack) seem unlikely. From now on its investigation will therefore focus primarily on the scenarios involving an attack from the ground or the air.

Question 3:

Do you agree that the evaluation should be independent?

Answer 3:

Yes, the evaluation will be performed independently by the Research and Documentation Centre (WODC). More information will be given in the next letter detailing the latest MH17-related developments, as requested at the meeting of the Permanent Committee of 15 October. The evaluation will focus on the period in which the interministerial crisis structure was in place (i.e. until it was scaled down to become the MH17 project organisation). At present the various ministries involved are conducting their own internal evaluations that will serve as input for the independent, interministerial evaluation.

Question 4:

Where are the pieces of wreckage that have been recovered? How is the wreckage at the site being protected and where is it being kept? Are negotiations with the OSCE being conducted on these points?

Answer 4:

At present no large pieces of wreckage have been recovered. Some metal fragments (e.g. small aircraft parts) have been taken from the crash site because they were mixed with victims' remains and personal belongings. The forensic investigation also found metal fragments in the pilots' bodies. Following the identification process in Hilversum, these fragments have now been passed on to the relevant experts. One of the questions being examined is whether the metal fragments could also have come from outside the aircraft.

Large pieces of wreckage have not been recovered until now because the mission's priority is – and will continue to be – the repatriation of remains and personal belongings.

Access to the crash site is essential if the wreckage is to be recovered. This will depend on gaining the cooperation of the separatists who control the area. The interim mission is exploring possible avenues in this regard via the OSCE. A provisional plan has been drawn up which envisages the Dutch Safety Board commissioning private contractors, assisted by the Ministry of Defence, to recover wreckage and then transport it to the Netherlands. This would be in keeping with existing agreements and in consultation with the parties involved. It cannot be ruled out that this recovery operation will also lead to the discovery at the crash site of victims' remains and personal belongings, revealed by receding vegetation. For security reasons, the collection of any remains will as far as possible be combined with the wreckage recovery operation. One or two Dutch forensic experts will be present while this work is carried out. The recovery of any remains will be supervised by the National Forensic Investigation Team and will proceed in accordance with its guidelines and protocols.

Question 5:

Non-disclosure. Is it possible to rule out one of the countries disclosing details of the investigation into the circumstances into the crash or the criminal investigation?

Answer 5:

The Dutch Safety Board is leading the international investigation into the circumstances of the crash of flight MH17 and will decide what is ultimately made public. The investigation is being conducted in accordance with the Convention on International Civil Aviation. Therefore, only the Dutch Safety Board's final report is decisive. None of the countries can veto the final conclusions, which are for the Dutch Safety Board to determine.

In the criminal investigation, the countries involved in the Joint Investigation Team (JIT) have entered into a partnership with the aim of uncovering the truth. They have agreed to work together and to exercise restraint with regard to the disclosure of information about the investigation. The government has no reason whatsoever to believe that the authorities in any of the countries affected is failing to honour these commitments. There is a great willingness to work together.

Question 6:

Are the SES's logbooks in your possession?

Answer 6:

All the information documented by the SES about the initial search of the crash site has been passed on to us via the OSCE. It describes what was done in the days immediately after the crash: how and where the search was conducted, how many people took part, and what kind of – and how many – tools they used. The reports also include the maps that we have already passed on to the House, as does the report published via RTL Nieuws, the Dutch television news broadcaster. As previously explained, these reports and maps indicate the area searched, but victims' remains, personal belongings and pieces of wreckage that were found are not marked on the maps.

Your request to enquire after the logbooks of Ukraine's State Emergency Service (SES) has therefore been met, in keeping with the undertaking given by the Minister of Security and Justice at the Permanent Committee's meeting on the MH17 disaster of 15 October.

Question 7:

The maps we have obtained show that part of the site was not searched by the SES either. Will you or the SES still be going there?

Answer 7:

Because of the security situation it was not possible to search the entire site immediately after the crash. This situation has not changed. On Monday 13 October, because of the poor security situation, the SES was also only able to recover personal belongings and luggage at part of the crash site. The SES takes the view that, given the security situation, it did everything that could be done on 13 October. The search and recovery activities will be resumed as soon as it becomes possible to do so.

Question 8:

Do the investigators possess satellite data for the period from 10 minutes before to 10 minutes after the crash?

Answer 8:

It is desirable that the Public Prosecution Service obtain additional material from the USA for the purpose of the criminal investigation. This is a lengthy process because passing on intelligence information to the criminal justice authorities involves legal complications arising from US legislation. The Public Prosecution Service has every confidence that it will obtain the relevant material in a timely manner.

The government will not at present be making any further disclosures of what specific and detailed information it possesses. In accordance with usual practice, all sources that could help establish the facts in a criminal investigation are being utilised. The Public Prosecution Service must be allowed to assess and determine in confidence what information is usable as evidence. Moreover, the Netherlands is leading the international investigation into the circumstances of the crash. This makes the need to act with due care all the more pressing. Publishing details of intelligence sources now would only further fuel speculation and would be inappropriate in light of the Netherlands' leading role in the criminal investigation. The same concerns apply to the publication of information from the Dutch Safety Board's investigation into the circumstances of the crash. It is up to the Dutch Safety Board and the Public Prosecution Service to draw conclusions in due course. This is a process which demands time and care (see also the answer to question 2).

However, the Public Prosecution Service will, in the period ahead, depart from its usual practice in ongoing investigations by giving information at various stages in the process about how it is progressing, in so far as this is not detrimental to the investigation. This approach is being adopted because of the great importance of this international investigation and the next of kin's need for information.

Question 9:

There were indications of hazards affecting safety in the airspace over Ukraine. Who received the Notice to Airmen (NOTAM) in the Netherlands? Which countries took action? Who had access to this information?

Answer 9:

As the Dutch Safety Board's report indicates, at the time of the crash a NOTAM was in force forbidding access to a section of the airspace in the east of Ukraine below 9.7km (flight level 320) due to hostilities between armed groups and Ukrainian armed forces.

Flight MH17 flew in that section of Ukraine airspace at an altitude of 10km (flight level 330), where no restrictions applied and above the airspace closed to passing international commercial flights according to the most recent NOTAM.

This notice was issued by Ukrainian air traffic control and was also available via a freely accessible Eurocontrol website. Airlines therefore used this information in the preparation of their flight plans.

Possible improvements to the way the NOTAM system is used are currently being examined.

Question 10:

Could information about airspace safety also be provided by other sources so that information provision is not dependent on individual countries?

Answer 10:

Information about the safety of airspace over a particular country is given by that country by means of Notices to Airmen (NOTAMs). Other countries can also give information about that country's airspace by issuing NOTAMs to their airlines.

The Federal Aviation Administration, for instance, does this for US airlines. In Europe, NOTAMs concerning European countries and neighbouring areas are gathered by Eurocontrol. This information can be consulted by anyone via a website. Airlines use this information in the preparation of their flight plans.

In addition, a study is under way, headed by the International Civil Aviation Organization, to identify options for revising the policy on flying over conflict zones. It will specifically examine the question of which sources can be used, how and by whom. It will also consider how the NOTAM system can be better used to disseminate information about risks affecting airspace over conflict zones in a way that eliminates the dependency the House refers to. In addition, a pilot project will be started on a new centralised system that can disseminate risk information about conflict zones quickly and effectively.

The work programme with the proposed improvements will be submitted to the ICAO Council for decision at its session from 27 October to 14 November.

Question 11:

Is all available intelligence information (especially from abroad) in the possession of the Dutch Safety Board?

Answer 11:

In the interests of its investigation, the Dutch Safety Board is unable to give details about the status and content of the information available to the investigation.

Question 12:

As regards the criminal investigation, could the case still be brought before the International Criminal Court?

Answer 12:

This would not be a logical option. Under the principle established by the Rome Statute of the International Criminal Court (ICC), the ICC is complementary to national criminal jurisdictions. This means that a case can be brought before the Court only if the countries concerned are themselves not able or willing to prosecute and try a case. With regard to the crash of flight MH17, at least 12 countries can exercise jurisdiction. Jurisdiction can be exercised on the basis of the scene of the crime, the nationality of a possible suspect, the nationality of the victims and the registration of the aircraft. It is unlikely that none of these countries would be able or willing to prosecute and try the case.

In addition, there are various conditions governing the exercise of jurisdiction by the ICC. One condition is that, at a minimum, the State on the territory of which the crime was committed (or, if the crime was committed on board an aircraft, the State of registration of that aircraft), or the State of which the person accused of the crime is a national, must be a party to the Rome Statute or has accepted the jurisdiction of the Court for a specific crime. Neither Ukraine, on whose territory the crash took place, nor Malaysia, the State of registration of the aircraft, has ratified the Rome Statute. Ukraine has accepted the jurisdiction of the ICC, but only for crimes committed between November 2013 and February 2014. The nationality of the perpetrators is as yet unknown. This condition does not apply in the case of referral by the UN Security Council acting under Chapter VII of the Charter of the United Nations, but that is not relevant in the case at hand.

Question 13:

Can passengers themselves search for information about the safety of airspace?

Answer 13:

The government shares the House's view that it is very important for passengers to be properly informed about flying over conflict zones.

Under the Montreal Convention, airlines must inform passengers of the places of departure and destination. However, there is no obligation to actively inform passengers of the flight route or areas that are avoided.

At present the ICAO Task Force is examining how the gathering and sharing of information about conflict zones can be improved. The Netherlands has actively raised this issue in the Task Force's discussions. This has resulted in an initiative by the aviation industry to identify

international best practices on the provision to passengers of information about flight routes. The government is following this initiative closely and will inform the House of the outcome.

At national level, the Dutch Safety Board is investigating airspace responsibilities and aims to produce its final report in July 2015.

Question 14:

Are there arrangements in place about flying over certain areas?

Answer 14:

Every country has sovereignty over the airspace above its territory. This means that countries are also responsible for the safety of their airspace and may close it if they consider it necessary to do so. If national authorities make a country's airspace available, it is ultimately up to an airline to decide whether to use it.

Prior to a flight, an airline submits a flight plan indicating the envisaged route and time of the flight. As far as Europe is concerned, Eurocontrol checks the flight route and airspace availability to ascertain whether a flight plan is feasible. If it is, Eurocontrol accepts the flight plan and the airline can carry out the flight using the route requested. If a flight plan envisages a route crossing closed airspace, it is rejected by Eurocontrol. In that case the airline must submit a new flight plan setting out an alternative route that is compatible with airspace availability.

Question 15:

Damages for the next of kin: can the Minister of Security and Justice play a role vis-à-vis the next of kin in disputes about damages with airlines and insurance companies?

Answer 15:

The Minister of Security and Justice will do his best to support the next of kin where possible via Victim Support Netherlands (*Slachtofferhulp Nederland*). However, it should be remembered that damages are a matter to be resolved between private parties, where in principle the minister has no part to play. Rules of law apply between the parties and they have recourse to an independent court.

The next of kin themselves are also examining their options, with the help of Victim Support Netherlands, as regards whom to engage to represent them legally.

Question 16:

Is an interim mission possible as long as we are unable to return to the area?

Answer 16:

The interim mission has been operating since the government's decision on 6 August to halt the repatriation mission because of the poor security situation. It has a presence in Kyiv and Kharkiv. The interim mission is maintaining contact with the central authorities in Kyiv, the local population, the local authorities in and around the crash area and the OSCE-SMM. It is also responsible for the management and, should it prove necessary, the proper storage (during the winter) of the equipment located in Kharkiv.

Via the OSCE, the mission is also talking with the local SES, which played an important role earlier in recovering victims' remains and collecting personal belongings and luggage.

It is now late October. Throughout November, snow will be increasingly likely. This means that even if the security situation were to allow us to resume the repatriation mission, it would probably not be possible to consider doing so before spring. Nevertheless, the Ministry of Defence and other partners remain ready to resume the mission until winter really sets in.

If this proves impossible, the Ministry of Defence, together with the National Police and supported by the Ministry of Foreign Affairs, will ensure a winter presence in Kharkiv. The purpose of this mission will be to fulfil a number of tasks currently performed by the interim mission (liaising with the population, authorities and the OSCE) and also to make sure that the repatriation mission can be quickly resumed once circumstances permit.

Question 17:

Can the government publish an interim report on both investigations after six months?

Answer 17:

The investigation into the circumstances of the crash involving flight MH17 is an independent investigation being conducted by the Dutch Safety Board. The Board published a report on 9 September setting out its initial findings and aims to produce a final report in July 2015.

The criminal investigation is very complex and wide-ranging. As a consequence it is not possible to give an undertaking that findings can be published in six months' time. While a criminal investigation is ongoing, information about its substance and its findings is generally not made public because of the risk that this would compromise the investigation. In this specific case the Public Prosecution Service has decided, in view of the investigation's great importance and the next of kin's need for information, to give updates at various stages in the process about how the investigation is progressing.

Question 18:

To what extent is the Netherlands able to fulfil its international role as the country bearing ultimate responsibility for all investigations?

Answer 18:

The Dutch Safety Board is leading the international investigation into the circumstances of the crash of flight MH17. The investigation is being conducted in accordance with the Convention on International Civil Aviation.

The Netherlands suffered by far the most casualties. This is why the Netherlands took the lead and was given responsibility for coordinating criminal-law cooperation between the countries affected. This means that the Public Prosecution Service is responsible for the day-to-day management of the international Joint Investigation Team (JIT).

In view of the excellent record, established independence and wealth of expertise possessed by both the Public Prosecution Service and the Dutch Safety Board, the Netherlands is able to bear the responsibility of both investigations. In order to be able to fulfil this role it is especially important not to speculate or draw premature conclusions about the outcome of the investigations.

Question 19:

What is the government's role in the investigation into the circumstances of the crash?

Answer 19:

The Dutch Safety Board is conducting an independent investigation. The government has no role in it because it did not commission it. The investigation is being conducted in accordance with the Convention on International Civil Aviation of 1944 and Annex 13 thereto. The Dutch Safety Board has been in charge of the investigation since responsibility for it was transferred to the Board by Ukraine on 23 July 2014.

Question 20:

Will the National Remembrance Ceremony allow scope for God and faith?

Answer 20:

The ceremony will not incorporate any expressly religious elements because of the great diversity in the backgrounds of the victims and next of kin.

However, at the informal gathering after the ceremony, which will also be attended by Their Majesties the King and Queen, pastoral care will be available for those who wish it. Pastoral care will be provided in the context of the faiths having widest adherence among the victims and next of kin. A room for quiet contemplation and prayer will also be provided for this part of the programme.

In addition to the answers provided above, we also wish to inform you of progress to date in the identification process and possible health risks for personnel involved in the repatriation mission.

Identification process

Since 17 July 2014 the National Forensic Investigation Team has been working to identify the 298 victims of the MH17 air disaster. A total of 284 victims have so far been identified using dental records, fingerprints or DNA. The work to identify the remaining victims is now entering an increasingly difficult phase. This is because the remains that have not yet been identified do not exhibit, to a sufficient extent, the indicators (including DNA) needed to enable identification.

There are still 14 victims who cannot be identified on the basis of currently available DNA profiles and other information. In the case of nine victims, no DNA pointing to them has yet been found on the remains recovered, while in five cases DNA has been found but it is not certain whether this provides a basis for identification. The next of kin have been informed.

It is possible that remains which have not yielded viable DNA profiles may still provide information which will enable the identification of these nine victims. At present it is not possible to say when or if such information may come to light. It is also possible, however, that the remains of these victims were not recovered from the crash site.

Health risks faced by repatriation mission personnel

The Ministry of Defence and all partner organisations involved in the mission constantly monitor the risks that their personnel may face to check whether adequate measures are being taken and whether additional measures are needed. Because of the real risk of exposure to hazardous substances, steps were immediately taken to limit risks to health, like issuing personnel with face masks and gloves and giving strict guidance on the handling of hazardous substances. The Ministry of Defence's centre of expertise for working conditions and health (CEAG) was asked to assess the situation and investigated possible health risks to personnel

who took part in the operation to recover and identify MH17 victims. It found no significant safety risks.