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A Call for Legal Accountability in the Wake of the MH17 Tragedy

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A CALL FOR LEGAL ACCOUNTABILITY IN THE WAKE OF THE MH17 TRAGEDY

DR. VERNON NASE*

DR. MARK KIELSGARD**

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I. INTRODUCTION

ON JULY 17, 2014, MALAYSIA AIRLINES FLIGHT MH17 took off from Amsterdam, en route to Kuala Lumpur, on what should have been an uneventful flight.¹ The 298 passen-

¹ Robert Wall, *Final Report on Downing of Malaysia Airlines Flight MH17 Due October*, WALL ST. J. (Aug. 27, 2015, 7:38 AM), <http://www.wsj.com/articles/final-re>

gers and 15 crew on board included 193 Dutch, 43 Malaysian and 27 Australian nationals.²

The flight traversed airspace in the Netherlands, Germany, Poland, and the Ukraine.³ After Flight MH17 made contact with air traffic control in Dnipropetrovsk, Ukraine (Dnipro Control), Dnipro Control requested clearance from Russian Air Control in Rostov-on-Don (RND). Dnipro Control requested that Air Traffic Control (ATC) move over to Russian Air Control.⁴ Russian Air Control granted its request.⁵ Dnipro Control then tried reaching Flight MH17 to advise the pilots.⁶ After a further communication with RND to see if the flight was appearing on their radar, the flight had vanished.⁷ Flight MH17 crashed near the town of Hrabove in eastern Ukraine's Donetsk Oblast province approximately forty kilometers (twenty-five miles) from the Russian border.⁸

The aircraft was "flying in unrestricted airspace, under control of ATC, flying at an altitude cleared by ATC."⁹ It was at an altitude of 1,000 feet above the upper limit of a restricted airspace.¹⁰ The Donbass People's Militia, pro-Russian separatists, held an insurgency on the Ukraine territory where the wreckage fell.¹¹ Insurgents controlled the crash site where armed conflict

port-on-downing-of-malaysia-airlines-flight-mh17-due-october-1440675525 [http://perma.cc/GJ26-LSFC].

² *MH17 Malaysia Plane Crash: What We Know*, BBC (Oct. 14, 2015), <http://www.bbc.com/news/world-europe-28357880> [http://perma.cc/753K-MZVL].

³ *Id.*

⁴ Leonid Bershidsky, *Flight MH17 Crash Report Answers One Question*, BLOOMBERG VIEW (Sept. 9, 2014, 8:18 AM), <http://bloombergvew.com/articles/2014-09-09/flight-mh17-crash-report-answers-one-question> [http://perma.cc/F57T-HM8Q].

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Ukraine: Pro-Russia Rebels Downed Malaysian Plane*, DAILY MAIL (July 17, 2014, 9:57 PM), <http://www.dailymail.co.uk/wires/ap/article-2696170/Ukraine-Pro-Russia-rebels-downed-Malaysian-plane.html> [http://perma.cc/K5T9-ZC6H].

⁹ DUTCH SAFETY BOARD, PRELIMINARY REPORT: CRASH INVOLVING MALAYSIA AIRLINES BOEING 777-200 FLIGHT MH17 (Sept. 9, 2014), <http://www.onderzoeksraad.nl/en/onderzoek/2049/investigation-crash-mh17-17-july-2014/preliminary-report/1562/preliminary-report-points-towards-external-cause-of-mh17-crash> [http://perma.cc/B9Z4-UYHJ] [hereinafter PRELIMINARY REPORT].

¹⁰ *Id.* at 13.

¹¹ *Malaysian Airlines MH17 Reported Crashed Just After Rebel Leader Boasted of Shooting Down Plane: "We Warned Them Not to Fly in Our Skies"*, NAT'L POST (July 14, 2014, 10:13 PM), <http://news.nationalpost.com/news/malaysian-airlines-mh17-reported-crashed-just-after-rebel-leader-boasted-of-shooting-down-plane-we-warned-them-not-to-fly-in-our-skies> [http://perma.cc/ALJ5-6CG6].

was active.¹² The insurgents and the insurgency severely hampered the Dutch Safety Board's initial attempts to recover wreckage from the crash site.¹³ The Malaysian Prime Minister, Najib Razak, and the Malaysian Transport Minister, Liow Tiong Lai, carefully negotiated with the insurgents to ship the bodies of deceased passengers to the Netherlands and hand over of the flight data recorder and the cockpit voice recorder.¹⁴

II. LEGAL ISSUES EXAMINED

This article will explore the following issues to analyze and determine legal responsibility and liability for the tragic chain of events leading to the destruction of Malaysia Airlines, Flight MH17. Part III will examine issues of individual criminal liability, to the extent the facts are known, and apply the law of armed conflict to assess whether it is an internal armed conflict or an internationalized conflict, and the potential criminal liability in either case.¹⁵ This article then considers the probable role of the relevant actors relative to their status as subordinates, superiors, or commanders and discusses the mens rea proof requirements in order to conclude that an international criminal investigation is merited.¹⁶

Part IV considers an aviation-specific perspective on the Flight MH17 incident, beginning with the potential liability for perceived failures in ATC services. This includes an examination of the role of the Ukrainian State Air Traffic Services Enterprise (UkSATSE), and Eurocontrol, in addition to the leadership role of the International Civil Aviation Organization (ICAO).¹⁷ This article compares the systemic response of these bodies to the

¹² *Id.*

¹³ *Malaysia Airlines Flight 17 Crashed*, AIR ACCIDENTS INVESTIGATION BUREAU, http://www.aaib.gov.mn/news_page/view/544 [<http://perma.cc/T8Y4-77KN>] (last visited Nov. 20, 2015).

¹⁴ Lindsay Murdoch, *MH-17: Secret Calls Led to Breakthrough Agreement on Bodies, BlackBoxes*, SYDNEY MORNING HERALD (July 22, 2014, 10:34 AM), <http://www.smh.com.au/world/mh17-secret-calls-led-to-breakthrough-agreement-on-bodies-black-boxes-20140722-zvikv.html> [<http://perma.cc/A6HC-RV3V>]; see also Brian Ries, *MH17 Black Box Intact, Data Successfully Downloaded*, MASHABLE (July 23, 2014), <http://mashable.com/2014/07/23/mh17-cockpit-voice-recorder-black-box/#5ik2sS.cgOqs> [<http://perma.cc/8RMH-ZDFF>].

¹⁵ Theodor Meron et al., *Application of Humanitarian Law in Noninternational Armed Conflicts*, 85 AM. SOC'Y INT'L L. PROC. 83, 83 (1991).

¹⁶ William A. Schabas, *Mens Rea and the International Criminal Tribunal for the Former Yugoslavia*, 37 NEW ENG. L. REV. 1015 (2003).

¹⁷ John Croft, *MH17 Flight Route Approved By Eurocontrol, Safe Per ICAO, IATA*, AVIATION WK. (July 18, 2014), <http://aviationweek.com/commercial-aviation/>

Federal Aviation Administration's (FAA) decisive treatment of the same developing situation in the Ukraine.¹⁸ This article flags the key conclusions of the Interim Accident Report prepared by the Dutch Safety Board before considering prior incidents of attacks on civilian aircraft, the development of State practice in making compensatory payments, and the the 1944 Convention on International Civil Aviation's (Chicago Convention) prohibition on such interference.¹⁹ Finally, this article considers the legal options available to the relatives of deceased passengers on Flight MH17.

Part III argues in favor of eradicating impunity for the crimes involved in the downing of Flight MH17. It asserts there is probable cause to conduct a thorough international criminal investigation into war crimes and calls on the Ukraine to temporarily extend its self-referral to the International Criminal Court to include these crimes.

Part IV argues for greater international communication regarding the control of airspace above insurgencies to prevent this tragic event from ever occurring again. The authors concur with the views expressed by the International Air Transport Association (IATA) in calling for a fail-safe system of airspace closure. On passenger liability issues, the authors strongly favor the responsible State making monetary payments to the relatives of passengers consonant with those made by the United States in the wake of the USS *Vincennes* incident.

III. CRIMINAL LIABILITY

A. THE INSURGENTS

The separatist conflict began in February 2014 when "Russia-friendly Ukrainian president Viktor Yanukovich was ousted by protesters."²⁰ That following April, separatist militia groups

mh17-flight-route-approved-eurocontrol-safe-icao-iata [<http://perma.cc/8LTD-GSV8>].

¹⁸ Binoy Kampmark, *MH17 and Ukraine's Dilemma*, COUNTER PUNCH (July 18, 2014, 9:01 AM), <http://www.counterpunch.org/2014/07/18/mh17-and-ukraines-dilemma/print/> [<http://perma.cc/86CH-YZ92>].

¹⁹ Robert Wall, *Dutch Safety Board Says Investigators Examine Possible Buk Anti-Aircraft Missile Parts*, IPR NEWS WIRE (Aug. 11, 2015), <http://iprnewswire.com/dutch-safety-board-says-investigators-examine-possible-buk-anti-aircraft-missile-parts/> [<http://perma.cc/3H9G-YVHE>].

²⁰ Michael Birnbaum, *Ukraine Pro-Russia Rebels Hold Elections in the East, Fueling Conflict*, WASH. POST (Nov. 2, 2014), <http://wpo.st/Ou5j0> [<http://perma.cc/2Y NJ-TSSC>].

seized control of government buildings in Donetsk, Kharkiv and Sloviansk.²¹ In response, Russia annexed the Ukraine's Crimean peninsula, and separatist protesters seized eastern Ukrainian government buildings and territory.²² The subsequent fighting between insurgents and Ukrainian forces resulted in the deaths of over 4,000 people.²³ After the downing of Flight MH17, the armies of the Donetsk People's Republic and the Lugansk People's Republic merged to form the "United Army of Novorosiya."²⁴ While the insurgents currently control the territory where Flight MH17 debris scattered, it is doubtful that their newly created State could claim sovereignty over this territory.²⁵

The traditional criteria of statehood, under international law, requires a (a) permanent population; (b) defined territory; (c) government; and (d) capacity to enter into relations with other States (Montevideo Criteria).²⁶ Various international organizations apply this criteria when establishing if an entity is a state, such as by the Badinter Arbitration Committee.²⁷ The Montevideo Criteria are not separate elements of a test to be proven independently of each other; each criteria is designed to realize the core principle of effectiveness, i.e. the essence of a state is a government exercising control over a territory and a population and having the independent capacity to enter into relations with other states.²⁸ State practice suggests that the Montevideo Crite-

²¹ *Ukraine Crisis: What Is Happening Where?*, BBC (Apr. 15, 2014), <http://www.bbc.com/news/world-europe-27012612> [<http://perma.cc/M85X-6WK4>].

²² Kathy Lally, *Putin's Remarks Raise Fears of Future Moves Against Ukraine*, WASH. POST (Apr. 17, 2014), <http://wpo.st/516j0> [<http://perma.cc/PCX4-AAUD>].

²³ *Ukraine and Russia after Euromaidan*, G4S RISK CONSULTING (Nov. 2014), <https://gis.g4s.com/files/Ukraine%20and%20Russia%20after%20Euromaidan%20November%202014%20by%20G4S%20Risk%20Consulting.pdf> [<http://perma.cc/2B58-CDLR>].

²⁴ Linda Kinstler, *Putin Just Got Exactly What He Wanted in Eastern Ukraine*, NEW REPUBLIC (Sept. 16, 2014), <http://www.newrepublic.com/Article/119460/east-ern-ukraine-ceasefire-exactly-what-putin-wanted> [<http://perma.cc/E42Q-3EC8>].

²⁵ *See Dutch Say Their Mission to Recover Remains of Downed MH-17 Airliner in East Ukraine is Complete*, UKR. TODAY (May 2, 2015), <http://uatoday.tv/geopolitics/dutch-say-their-mission-to-recover-remains-of-downed-mh17-airliner-in-east-ukraine-is-complete-424966.html> [<http://perma.cc/K6K9-46QQ>].

²⁶ Montevideo Convention on the Rights and Duties of States art. 1, Dec. 26, 1933, 165 L.N.T.S. 19.

²⁷ Alain Pellet, *The Opinions of the Badinter Arbitration Committee—A Second Breath for the Self-Determination of Peoples*, 3 EUROPEAN J. OF INT'L LAW [E.J.I.L.] 179, 182–83 (1992).

²⁸ JAMES CRAWFORD, CREATION OF STATES IN INTERNATIONAL LAW 77 (2d ed. 2006); Thomas D. Grant, *Defining Statehood: The Montevideo Convention and its Discontents*, 27 COLUM. J. TRANSNAT'L L. 403, 410 (1998–1999); Shaina Stahl, *Unpro-*

ria are not exhaustive, immutable, or conclusive factors of statehood.²⁹ In fact, Crawford suggested that the Montevideo Criteria are “no more than a basis for further investigation.”³⁰ However, they do reflect a core principle of internationally effective polity: that a state exists where there is the effective establishment of an organized political community on a territory.³¹ The requirement of an effective government in control of territory and population has also been upheld in the discussion on applications for United Nations (UN) membership made by South Korea, the Republic of Vietnam, Ceylon, Mongolia, and Indonesia.³²

While the insurgents have declared a State to be in existence, it is contentious to assert they have a viable administration.³³ Equally, apart from the Russian Federation, it is questionable that the insurgents have the capacity to enter into viable diplomatic relations.³⁴ James Crawford notes that the “[c]apacity to enter into relations with States at the international level is no longer, if it ever was, an exclusive State prerogative,” and cites *Community Competence to Conclude Certain International Agreements* in support of this view.³⁵ Nevertheless, it also seems that the Donetsk People’s Republic (now United Armed Forces of Novorossiia) belligerent occupation of the area does not affect the continuity of the original State (the Ukraine) in respect of its territory before the insurgency.³⁶ Even where governmental authorities may be “driven into exile or silenced,” the powers of

tected Ground: The Plight of Vanishing Island Nations, 23 N.Y. INT’L L. REV. 1, 17 (2010).

²⁹ IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 70 (7th ed. 2008).

³⁰ JAMES CRAWFORD, *BROWNLIE’S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 128 (8th ed. 2012).

³¹ ROBERT JENNINGS, *THE ACQUISITION OF TERRITORY: IN INTERNATIONAL LAW* 1 (1963); Hans Kelsen, *The Pure Theory of Law and Analytical Jurisprudence*, 55 HARV. L. REV. 44, 64–65 (1941–42).

³² Rosalyn Cohen, *The Concept of Statehood in United Nations Practice*, 109 U. PA. L. REV. 1127, 1135–42 (1961).

³³ See Karina Oganessian, *Donestsk, Luhansk: The “People’s Republics” One Year On*, DEUTSCHE WELT (May 11, 2015), <http://dw.com/p/1FOFY> [<http://perma.cc/E94U-4KEW>]. Acceptance of the pro-Russian separatists seems to have been greater one year after the referendum, if not solidified.

³⁴ CRAWFORD, *CREATION OF STATES*, *supra* note 28, at 417.

³⁵ *Id.* at 61 (citing Opinion 1/94, *Community Competence to Conclude Certain International Agreements*, 1994 E.C.R. I-5276).

³⁶ See Paul Sonne, *With “Novorossiia,” Putin Plays the Name Game With Ukraine*, WALL ST. J. (Sept. 1, 2014), <http://www.wsj.com/Articles/with-novorossiia-putin-plays-the-name-game-with-ukraine-1409588947> [<http://perma.cc/HX96-NFWH>]. A literal translation of “Novorossiia” is “New Russia.” *Id.*

the existing State continue.³⁷ Further, Crawford notes that “there is a presumption that an entity with the formal attributes of a State, which is established by a belligerent occupant, is not independent, and hence, not a State under international law.”³⁸ In this context, the gaze of the international community is fixed on the issues associated with Russian Federation involvement and support for the separatist forces.³⁹

B. THE PUPPET POLLS

On November 2, 2014, the Luhansk and Donetsk regions, the two regions currently controlled by the insurgents, held simultaneous elections where “anyone could vote at any polling place he or she wanted, as well as online.”⁴⁰ However, the people who were running the polls did not have access to any voter registration data, which would seem to be a minimum requirement for those engaging in such an enterprise.⁴¹

The effectiveness of the polls as a unilateral step of succession is doubtful. There is a strong international reluctance to support unilateral secession or separation, and there is no recognition of a unilateral right to secede based merely on a majority vote of the population of a given territory.⁴² Interestingly, the Crimean referendum of March 16, 2014, was not recognized by numerous States on the grounds, *inter alia*, that it violated Ukraine’s constitution, was hastily conducted, and was conducted while Russia controlled Crimea’s land, sea, and air access.⁴³ United Nations General Assembly (UNGA) Resolution 68/262 further affirmed this position.⁴⁴

C. ALLEGED RUSSIAN INVOLVEMENT

Immediately after the Flight MH17 crash, the United States suggested that it had evidence that the jet was shot down by a

³⁷ CRAWFORD, CREATION OF STATES, *supra* note 28, at 73.

³⁸ *Id.* at 156; *see* Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276, Advisory Opinion, 1971 I.C.J. Rep. 78 (June 21).

³⁹ *Putin Reveals Secrets of Russia’s Crimea Takeover Plot*, BBC (Mar. 9, 2015), <http://www.bbc.com/news/world-europe-31796226> [<http://perma.cc/7HDF-MC6U>].

⁴⁰ Birnbaum, *supra* note 20.

⁴¹ *Id.*

⁴² CRAWFORD, CREATION OF STATES, *supra* note 28, at 417.

⁴³ G.A. Res. 68/262 (Mar. 27, 2014); U.N. SCOR, 69th Sess., 7144th mtg. at 6–7, U.N. Doc. S/PV.7144 (Mar. 19, 2014).

⁴⁴ G.A. Res. 68/262, *supra* note 43, at 2.

Russian Buk missile provided by Russia to the separatist forces.⁴⁵ The United States also alleged that the rocket launcher involved in the crash was rapidly withdrawn to Russia.⁴⁶ Russian involvement is the subject of conjecture. Olexsandr Zakharchenko, a separatist, and the Prime Minister of the Donetsk People's Republic (Novorossiia), has openly admitted that "[t]here have been some 3,000–4,000" Russian volunteers fighting with the insurgents.⁴⁷

Additionally, Zakharchenko conceded that many of these individuals come from the Russian military.⁴⁸ He stated, "[m]oreover, I'll be even more sincere to tell you that some active military servicemen are fighting among us too, who have preferred to spend their vacation not on a beach but among us, their brothers fighting for our freedom."⁴⁹ While the Russian Federation has denied its active military involvement in the insurgency, evidence to the contrary has been mounting.⁵⁰ In fact, in August 2014, the North Atlantic Treaty Organization (NATO) released satellite images "which it says show Russian combat forces, armed with heavy weapons, engaged in military operations in Ukraine."⁵¹ NATO claimed that over 1,000 Russian troops were operating in Ukraine with around 20,000 troops stationed near the border.⁵²

⁴⁵ Dominic Rushe, *MH17: Kerry Says All Evidence Points to Separatists and Urges Russia to "Step Up"*, *GUARDIAN* (July 21, 2014), <http://www.theguardian.com/world/2014/jul/20/mh17-kerry-evidence-ukrainian-separatists> [<http://perma.cc/3CAR-9MKX>]; *MH17: Missile System Came From Russia: Kerry*, *NEW STRAITS TIMES ONLINE* (July 20, 2014, 9:51 PM), <http://www.nst.com.my/node/15448> [<http://perma.cc/PCZ5-A6HU>].

⁴⁶ Rushe, *supra* note 45.

⁴⁷ *All Russians Fighting for Donbas Militia Are Volunteers—Self-Proclaimed Donetsk Peoples' Republic PM*, *RUSSIA BEYOND THE HEADLINES* (Aug. 28, 2014, 1:30 AM), http://rbth.com/news/2014/08/28/all_russians_fighting_for_donbas_militia_are_volunteers_-_self-proclaime_39357.html [<http://perma.cc/8BSY-4FQ7>]; *see Donetsk Militants Say They "Will Have Army of 100,000 Men"*, *UNIAN* (Feb. 2, 2015, 3:40 PM), <http://www.unian.info/war/1039283-donetsk-militants-say-they-will-have-army-of-100000.html> [<http://perma.cc/JQ5Z-A25V>].

⁴⁸ *All Russians Fighting for Donbas Militia Are Volunteers—Self-Proclaimed Donetsk Peoples' Republic PM*, *supra* note 47.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Ukraine Crisis: NATO Releases Satellite Images Which It Says Show Russian Troops Operating in Ukraine*, *ABC* (Aug. 29, 2014, 5:40 PM), <http://www.abc.net.au/news/2014-08-29/nato-satellite-images-show-russian-troops-operating-in-ukraine/5704550> [<http://perma.cc/WW8X-USJ3>].

⁵² *Id.*

D. CRIMINAL LIABILITY

The assessment of criminal liability, including command responsibility, of the actors in the Flight MH17 crash must turn upon the findings of a rigorous criminal investigation. Criminal law is highly fact-specific, yet the facts surrounding this crash are in dispute. Credible evidence is essential. Although the Dutch Safety Board has issued a preliminary report, this report did not assess whether criminal activity was present.⁵³ Moreover, the Dutch authorities face the hurdles of conducting their investigation in the fog of war.⁵⁴ In a rigorous criminal investigation, the issues that determine liability would also include whether this was an international armed conflict (IAC) or an internal or non-international armed conflict (NIAC); whether the relative actors are liable horizontally or vertically; and the mens rea standard for subordinates, superiors, and commanders.⁵⁵

The final crash report has confirmed that the aircraft was downed by an external, high energy source.⁵⁶ The Russian Federation contended early on that the source of the explosion was the Ukrainian military forces.⁵⁷ Other facts that have surfaced tend to inculcate the separatist forces that, according to U.S. officials, fired a Buk missile.⁵⁸ U.S. Secretary of State John Kerry observed that imagery collected by U.S. intelligence agencies showed that a missile was launched from eastern Ukraine and was bound to strike the Malaysian civil aircraft.⁵⁹ The launcher

⁵³ Toby Sterling, *Dutch Safety Board Set to Say MH17 Downed by Russian-Made Missile, but Not Point Finger*, REUTERS (Oct. 12, 2015, 12:37 PM), <http://www.reuters.com/article/2015/10/12/us-ukraine-crisis-mh-idUSKCN0S620151012> [<http://perma.cc/XB3V-SKZL>].

⁵⁴ *Id.*

⁵⁵ Jens David Ohlin, *Second-Order Linking Principles: Combining Vertical and Horizontal Modes of Liability*, 25 LEIDEN J. INT'L L. 771, 771 (2012).

⁵⁶ DUTCH SAFETY BOARD, MH17 CRASH 19–20 (Oct. 2015), <http://www.onderzoeksraad.nl/uploads/phase-docs/1006/debcd724fe7breport-mh17-crash.pdf> [hereinafter MH17 CRASH REPORT].

⁵⁷ Tom Parfitt, *Russia Says MH-17 Was Shot Down by Plane Missiles*, TELEGRAPH (Nov. 14, 2014), <http://www.telegraph.co.uk/news/worldnews/europe/ukraine/11232683/Russia-says-MH-17-was-shot-down-by-plane-missiles.html> [<http://perma.cc/BQR4-YAWC>].

⁵⁸ Brian Bennett, *U.S. Officials Believe Attack Against Malaysian Plane Was Mistake*, L.A. TIMES (July 22, 2014), <http://www.latimes.com/world/europe/la-fg-ukraine-intelligence-us-20140722-story.html> [<http://perma.cc/66WM-AM5M>].

⁵⁹ Philip Bump, *Kerry: Ukraine Crash is "A Moment of Truth" for Russia*, WASH. POST (July 20, 2014), <http://www.washingtonpost.com/blogs/post-politics/wp/2014/07/20/kerry-ukraine-crash-is-a-moment-of-truth-for-russia/> [<http://perma.cc/UV56-2UXR>].

design for these anti-aircraft weapons “used a rudimentary radar system that gives an incomplete picture of what is flying above, officials said.”⁶⁰ These systems are designed to link with other radar that could enhance the targeting system and would allow distinction between military and civilian aircraft.⁶¹ The separatists, however, did not have those secondary radar images available and may have mistaken the Malaysian airliner for a Ukrainian military plane.⁶² This view is bolstered by the contention that the separatist forces had recently shot down a Ukrainian AN-26 military transport plane in the same vicinity.⁶³ Shortly after Flight MH17 went down, a Russian social networking page published a post asserting that rebels had shot down a plane outside Torez, near the location of the wreckage of Flight MH17.⁶⁴ The post, which was later deleted, appeared to incorrectly identify the aircraft as an AN-26 military transport plane, lending credence to the theory that the rebels mistakenly downed the Malaysian airliner.⁶⁵

Moreover, one senior United States official opined that an “ill-trained crew” may have fired the missile and noted that, “it does appear to be a mistake.”⁶⁶ It was emphasized in the preliminary report that the aircraft was flying approximately 1,000 feet above the no-fly zone, open to commercial air traffic, and that there were four other commercial jets flying in the same area at the same time.⁶⁷

Though the Russian Federation has denied supplying the separatists with Buk missiles,⁶⁸ Kerry, citing an “enormous amount of evidence,” accused Russia of providing Buk missiles and req-

⁶⁰ Bennett, *supra* note 58.

⁶¹ *Id.*

⁶² *Id.*

⁶³ See Alec Luhn, *Three Pro-Russia Rebel Leaders at the Centre of Suspicions Over Downed MH17*, GUARDIAN (July 20, 2014), <http://www.theguardian.com/world/2014/jul/20/three-pro-russia-rebel-leaders-suspects-over-downed-mh17> [<http://perma.cc/HJP8-QJGM>].

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ Bennett, *supra* note 58.

⁶⁷ PRELIMINARY REPORT, *supra* note 9, at 14.

⁶⁸ Mark Trevelyan, *Ukraine Says Rebels Strengthened by Tanks, Missiles from Russia*, REUTERS (Feb. 12, 2015), <http://uk.reuters.com/Article/2015/02/12/uk-ukraine-crisis-military-idUKKBN0LG1CJ20150212> [<http://perma.cc/RC3T-H6WE>].

uisite training to pro-Russian rebels.⁶⁹ Moreover, American intelligence analysts had confirmed the authenticity of recorded conversations between rebel leaders about the shooting down of what they thought was a Ukrainian military transport plane shortly after Flight MH17 lost contact.⁷⁰ Other evidence includes the existence of a Russian military installation near the city of Rostov, which serves as a source of Russian support to separatists and has been described as “a hub of training and weapons that has expanded dramatically over the past month” prior to the downing of Flight MH17.⁷¹ Additionally, the U.S. Embassy in Kyiv, Ukraine reported that Russia was moving heavy weaponry into eastern Ukraine.⁷²

Though admittedly conflicted, Ukrainian officials and news sites have produced evidence alleging that at least one Buk was present in a town near the crash site.⁷³ Given the sophistication of the weaponry and the training needed to bring down a plane at the height at which Flight MH17 was flying, Kerry asserted that, it is “pretty clear that this is a system that was transferred from Russia in the hands of separatists.”⁷⁴

Germany’s foreign intelligence service have also concluded that pro-Russian rebels were responsible for the crash.⁷⁵ Yet,

⁶⁹ Interview with Bob Schieffer of CBS’s *Face the Nation*, U.S. DEP’T OF STATE (July 20, 2014), <http://www.state.gov/secretary/remarks/2014/07/229509.htm> [<http://perma.cc/7D2G-L62M>].

⁷⁰ *United States Assessment of the Downing of Flight MH-17 and its Aftermath*, EMBASSY OF THE U.S. AT KYIV, UKR. (2014), <http://ukraine.usembassy.gov/state-ments/asmt-07192014.html> [<http://perma.cc/9V6P-BMEH>].

⁷¹ Greg Miller, *U.S. Discloses Intelligence on Downing of Malaysian Jet*, WASH. POST (July 22, 2014), http://www.washingtonpost.com/world/national-security/us-discloses-intelligence-on-downing-of-malaysian-jet/2014/07/22/b178fe58-11e1-11e4-98ee-daea85133bc9_story.html [<http://perma.cc/2TCD-HC4V>].

⁷² *United States Assessment of the Downing of Flight MH-17 and its Aftermath*, *supra* note 70 (the weaponry delivered included “150 vehicles including tanks, armored personnel carriers, artillery, and multiple rocket launchers”).

⁷³ James Nye et al., *Tucked in the Corner of a Leafy Square, is this the Russian Missile Launcher That Blasted Flight MH17 Out of the Sky?*, MAILONLINE (July 18, 2014), <http://www.dailymail.co.uk/news/Article-2696847/They-shouldnt-f-g-flying-There-war-going-Ukraine-intelligence-officials-release-phone-calls-claim-PROVES-Russia-shot-Flight-MH17.html> [<http://perma.cc/4YZ4-3CTR>].

⁷⁴ Interview with Candy Crowley of CNN’s *State of the Union*, U.S. DEP’T OF STATE (July 20, 2014), <http://www.state.gov/secretary/remarks/2014/07/229508.htm> [<http://perma.cc/LJL5-84D5>].

⁷⁵ Hubert Gude & Fidelius Schmid, *Deadly Ukraine Crash: German Intelligence Claims Pro-Russian Separatists Downed MH17*, SPIEGEL (Oct. 19, 2014), <http://www.spiegel.de/international/europe/german-intelligence-blames-pro-russian-separatists-for-mh17-downing-a-997972.html> [<http://perma.cc/6CHZ-22ZG>].

they claim to have intelligence indicating that the rebels captured a Buk missile system from a Ukrainian military base,⁷⁶ which if true, may tend to exculpate Russian involvement. If the rocket, supplied by the Russian Federation, was fired by separatists under the mistaken belief that Flight MH17 was a Ukrainian military plane, then war crimes may nonetheless have been committed and command responsibility may be applicable. If the Buk missile were captured from Ukrainian forces, individual criminal liability would be less likely. In the case of the former, criminal responsibility may rest with the individual soldiers firing the missiles, the commanders who exercised effective control over the soldiers, and/or the civilian leadership in the Russian Federation.

Drawing upon the Geneva Conventions of 1949 and Optional Protocol II of 1977, the Rome Statute of the International Criminal Court (RS) specifies in Article 8(2)(b)(i) that it is a serious violation of war crimes to “intentionally direct[] attacks against the civilian population as such or against individual civilians not taking part in hostilities”⁷⁷ in an IAC. Alternatively, RS Article 8(2)(e)(i) provides the same definition for NIAC.⁷⁸

E. INTERNAL OR INTERNATIONAL ARMED CONFLICT?

While the RS and customary international law provide penalties for intentionally directing attacks against civilians in both NIAC and IAC, NIACs may attract criminal liability even when those attacks were under orders, or when the attack against *civilians* was the product of mistake.⁷⁹ Thus, defenses and liability are conditioned upon the status of the conflict; if the conflict is an NIAC, then domestic or vertical liability (e.g., extradition)

⁷⁶ *Id.*

⁷⁷ The Rome Statute of the International Criminal Court art. 8(2)(b)(i), July 17, 1998, 2187 U.N.T.S. 90 [hereinafter RS].

⁷⁸ *Id.* art. 8(2)(e)(i) (the court shall have jurisdiction over “[o]ther serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law . . . [including inter alia] (i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities”).

⁷⁹ *Id.* art. 32–33; see also Geneva Convention Relative to the Treatment of Prisoners of War art. 109, Aug. 12, 1949, 75 U.W.T.S. 135 [hereinafter Third Geneva Convention] (a POW status can only be gained in an international armed conflict, where they must be repatriated once hostilities have ceased in accordance with Article 109 of the Third Geneva Convention).

may vest.⁸⁰ If the conflict is an IAC, then the perpetrators (i.e., soldiers firing the Buk missile under orders) may avail themselves to defenses and potentially avoid criminal liability at the cessation of hostilities. Although, command liability may nonetheless attract prosecution as a war crime.⁸¹ The Russian Federation has maintained that this is an NIAC, though this claim is hotly contested.⁸²

1. *Immunity in International Armed Conflicts*

It is established law that the benefit of combatant status carries immunity. "Upon capture, combatants entitled to prisoner-of-war (POW) status may neither be tried for their participation in the hostilities nor for acts that do not violate international humanitarian law. This is a long-standing rule of customary international law."⁸³ Moreover, "[t]his privilege . . . [is] universally recognized."⁸⁴ POWs cannot be tried in domestic courts during an IAC unless their "actions (1) rise to the level of a 'war crime' or 'crime against humanity'; or (2) are unrelated to the state of hostilities (i.e., are common crimes)"⁸⁵ and must be repatriated once hostilities have ceased in accordance with Article 109 of the Third Geneva Convention.⁸⁶

This rule is unique to combatants in an IAC since the attempt to introduce the concept of POWs into NIACs has failed.⁸⁷ Thus, non-state armed groups, which do not fall within the definition of a POW in Article 4 of the Third Geneva Convention, or those

⁸⁰ RS, *supra* note 77, art. 17.

⁸¹ *Id.* art. 33.

⁸² See Sarah Rainsford, *Nadiya Savchenko: Ukraine Resistance Symbol in Russia*, BBC (Mar. 6, 2015), <http://www.bbc.com/news/world-europe-31760381> [<http://perma.cc/6T6X-NHNF>] (noting the fact that the Ukrainian pilot, Nadiya Savchenko, was arrested by Russia and charged as an accessory to murder of two Russian journalists via mortar fire is consistent with Russia's claim that the armed conflict remains internal).

⁸³ CUSTOMARY INT'L HUMANITARIAN L. 384 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005).

⁸⁴ Derek Jinks, *The Declining Significance of POW Status*, 45 HARV. INT'L L.J. 367, 376 n.38 (2004).

⁸⁵ *Id.* at 436–37; see also Third Geneva Convention, *supra* note 79, art. 85.

⁸⁶ Third Geneva Convention, *supra* note 79, art. 109 ("Subject to the provisions of the third paragraph of this Article, Parties to the conflict are bound to send back to their own country, regardless of number or rank, seriously wounded and seriously sick prisoners of war, after having cared for them until they are fit to travel, in accordance with the first paragraph of the following Article.").

⁸⁷ SANDESH SIVAKUMARAN, *THE LAW OF NON-INTERNATIONAL ARMED CONFLICT* 513 (2012).

in NIACs could be tried in accordance with the domestic legal system often “as criminals or traitors, and, increasingly, terrorists.”⁸⁸

2. *The Line Between Non-International Armed Conflicts and International Armed Conflicts*

An NIAC is defined in Article 1(1) of Optional Protocol II as, “dissident armed forces or other organized armed groups which, under responsible command, exercise such control over part of its territory as to enable them to carry out sustained and concerted military operations.”⁸⁹ This definition aptly fits the actions of the Ukrainian separatists as they hold territory against the government forces and are able to carry out sustained military operations.⁹⁰ This would bring the conflict under the RS Article 8 (2)(c)(d)(e), the Optional Protocol II and common Article 3 of the Third Geneva Convention.⁹¹ It would also provide for domestic criminal sanctions for all rebel forces and potential extradition, whether war crimes have been committed or not.⁹² However, an NIAC possessing sufficient international elements could be internationalized and would consequently be governed by the law of IAC.⁹³ This may occur in three situations, (1) where a state recognizes the situation as one of belligerency; (2) where the armed conflict is a war of national liberation; or (3) where an outside state intervenes in the conflict.⁹⁴ Most apropos to the instant case is the third scenario. An outside state may intervene in two ways: by militarily assisting in the hostilities on the side of the armed group or by exerting control over the non-state armed group.⁹⁵

a. The “Assisting in the Hostilities” Limb

There are two considerations in this form of intervention. One utilizes the theory of pairing, which holds that the side

⁸⁸ *Id.* at 514.

⁸⁹ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) art. 1(1)-(2), Dec. 7, 1978, 1125 U.N.T.S. 609 [hereinafter Protocol II].

⁹⁰ *Malaysian Airlines MH17 Reported Crashed*, *supra* note 11.

⁹¹ RS, *supra* note 77, art. 8(2)(c); Protocol II, *supra* note 89, art. 1(1)-(2); Third Geneva Convention, *supra* note 79, art. 3(1).

⁹² See SIVAKUMARAN, *supra* note 87, at 514.

⁹³ *Id.* at 212.

⁹⁴ *Id.*

⁹⁵ DIETER FLECK, THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 582 (2013).

whom the outside state chooses to assist, the government or the armed group, would be determinative of the nature of the armed conflict.⁹⁶ The other approach holds that the armed conflict would nevertheless become international in character, whichever side the outside state assists.⁹⁷

For the first approach, if the outside state intervenes on the side of the government forces, the action would not be transformed into an IAC.⁹⁸ The rationale is that the fighting would remain between a state and a non-state armed group instead of between states.⁹⁹ This approach was applied by the ICJ in *Nicaragua v. United States*, where the court noted:

The conflict between the contras' forces and those of the Government of Nicaragua is an armed conflict which is "not of an international character[.]" The acts of the contras towards the Nicaraguan Government are therefore governed by the law applicable to conflicts of that character; whereas the actions of the United States in and against Nicaragua fall under the legal rules relating to international conflicts.¹⁰⁰

In *Nicaragua*, since the "minimum rules applicable" are identical in both IACs and NIACs, the court commented that it was unnecessary to make such a categorization.¹⁰¹ This was similarly held in *Prosecutor v. Tadic*.¹⁰²

The second approach holds that outside intervention on either side would internationalize the conflict.¹⁰³ Certain International Criminal Tribunals for the Former Yugoslavia (ICTY) cases have gone further to suggest that involvement of outside forces in one battle would also internationalize another separate fight.¹⁰⁴ The logic is that by engaging the government forces, armed groups that would otherwise be fighting those forces

⁹⁶ SIVAKUMARAN, *supra* note 87, at 222-23.

⁹⁷ *Id.* at 223-24.

⁹⁸ *Id.* at 223.

⁹⁹ *Id.*

¹⁰⁰ Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, 94, ¶ 219 (June 27).

¹⁰¹ *Id.*

¹⁰² Prosecutor v. Tadic, Case No. IT-94-I-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 72 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

¹⁰³ SIVAKUMARAN, *supra* note 87, at 223.

¹⁰⁴ See Prosecutor v. Blaškic, Case No. IT-95-14-T, Judgment, Including Declaration of Judge Shahabuddeen, ¶ 94 (Int'l Crim. Trib. for the Former Yugoslavia Mar., 3, 2000).

would be strategically “freed up.”¹⁰⁵ As seen in *Prosecutor v. Blaškić*, “[by] engaging the ABiH in fighting outside the CBOZ, the HV weakened the ability of the ABiH to fight the HVO in central Bosnia. Based on Croatia’s direct intervention in [Bosnia-Herzegovina], the Trial Chamber finds ample proof to characteri[ze] the conflict as international.”¹⁰⁶ It was further held in *Prosecutor v. Kordić and Cerkez*, that the incurring Croatian armed forces, though made up in part by volunteer Croatians, “would not affect the general finding by the Trial Chamber that there were Croatian troops involved in the conflict” since “they were Croatian citizens, militarily involved in the struggle between the Bosnian Croats and the Bosnian Muslims, in which struggle Croatia was also involved.”¹⁰⁷ This approach is not without criticism, as observed by Judge Shahabuddeen in *Blaškić* who stated that, “it is difficult to see why an on-going internal armed conflict should suddenly and necessarily lose that character altogether because of foreign intervention.”¹⁰⁸

There is criticism that both approaches are unsatisfactory and that a better analysis would depend on the relationship between the intervening state and the assisted group.¹⁰⁹ Sandesh Sivakumaran points to the violent situation in Libya in 2011 as an example.¹¹⁰ Although NATO intervened in order to protect civilians on the side of the armed groups against Gaddafi’s forces, he asserted that whether NATO’s intervention internationalized the conflict would depend on its relationship with the rebel group.¹¹¹

In Ukraine, the character and scope of Russian involvement is publicly unknown. It is apparently paired with the separatists.¹¹² This would superficially qualify for internationalizing this conflict under *Nicaragua*, but the full extent of the assistance is un-

¹⁰⁵ See *id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Prosecutor v. Kordić & Cerkez*, Case No. IT-95-14/2, Judgment, ¶ 108 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 26, 2001).

¹⁰⁸ *Blaškić*, Case No. IT-95-14-T at 289 (Declaration of Judge Shahabuddeen).

¹⁰⁹ SIVAKUMARAN, *supra* note 87, at 224.

¹¹⁰ *Id.* at 225.

¹¹¹ *Id.*

¹¹² Terrence McCoy, *Russian Troops Fighting in Ukraine? Naw. They’re Just on “Vacation,”* WASH. POST, Aug. 28, 2014, <https://www.washingtonpost.com/news/morning-mix/wp/2014/08/28/russians-troops-fighting-in-ukraine-naw-just-on-vacation/> [http://perma.cc/KGS9-NJ5S].

proven.¹¹³ Indeed, Russian troops fighting on Ukraine soil are doing so without publicly acknowledged government sanction, though certainly with Russian sympathy.¹¹⁴ Claims have surfaced that they are using vacation time to fight for the separatists or that they are retired military personnel.¹¹⁵ If true, this would mean they are mercenaries, acting alone, and consequently fail to elevate this conflict to IAC status. Of course, Russian provision of massive military equipment and sophisticated weaponry, if proven, would cast doubt on these claims.¹¹⁶

b. The "Exerting Control" Limb

The level of "control" necessary to internationalize a conflict is controversial. In *Nicaragua*, the ICJ held:

The Court has taken the view . . . that United States participation, even if preponderant or decisive, in the financing, organizing, training, supplying and equipping of the *contras*, the selection of its military or paramilitary targets, and the planning of the whole of its operation, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the *contras* in the course of their military or paramilitary operations in Nicaragua Such acts could well be committed by members of the *contras* without the control of the United States. For this conduct to give rise to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.¹¹⁷

In *Tadic*, the ICTY found that the control must be of an *overall character* and comprise more than just financial assistance or military equipment and training.¹¹⁸ The court opined that overall control need not include issuing specific orders or planning for

¹¹³ See *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. Rep. 14, 94, ¶ 219 (June 27).

¹¹⁴ McCoy, *supra* note 112.

¹¹⁵ See *id.* (East Ukrainian pro-Russian separatist leader Alexander Zakharchenko stated in an interview, "[a]mong us are fighting serving [Russian] soldiers, who would rather take their vacation not on a beach but with us, among brothers, who are fighting for their freedom."); see also SIVAKUMARAN, *supra* note 87, at 222–25.

¹¹⁶ See McCoy, *supra* note 112.

¹¹⁷ *Nicar. v. U.S.*, 1986 I.C.J. ¶ 115 (emphasis added).

¹¹⁸ *Prosecutor v. Tadic*, Case No. IT-94-I-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 137 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).

each operation or target, but rather, “[t]he control required . . . may be deemed to exist when a State . . . has a role in organi[zing], coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group.”¹¹⁹

The court cautioned that, “in [Nicaragua], the controlling State is not the territorial State where the armed clashes occur or where at any rate the armed units perform their acts, more extensive and compelling evidence is required to show that the State is genuinely in control.”¹²⁰ However, the court also observed, “[w]here the controlling State in question is an adjacent State with territorial ambitions on the State where the conflict is taking place, and the controlling State is attempting to achieve its territorial enlargement through the armed forces which it controls, it may be easier to establish the threshold.”¹²¹

This somewhat suggests a lower measure of control, removed from the day-to-day actions and instead, concentrating on overall policy and objectives. In Ukraine, where this standard for state responsibility would be compelling for internationalization as the Ukrainian territory is adjacent to national Russian territory, the stated goal of the separatists is to annex the territory of Ukraine into Russia, and the apparent policy considerations of the Russian authorities is annexation (as evidenced by its annexation of Crimea).¹²² This is further fueled by the alleged provision of military arms and training, and the presence of Russian officers and troops fighting in Ukraine.¹²³ However, the evidence of Russian organization is scant and the presence of high-ranking Russian officers is vitiated by Russian participants allegedly acting alone without orders from the Russian govern-

¹¹⁹ *Id.*

¹²⁰ *Id.* ¶ 138.

¹²¹ *Id.* ¶ 140.

¹²² G.A. Res. 68/262, *supra* note 43, at 2; Press Release, General Assembly, General Assembly Adopts Resolution Calling Upon States Not to Recognize Changes in Status of Crimea Region, U.N. Press Release GA/11493 (Mar. 27, 2014) (noting the resolution was supported by 100 U.N. member states, which affirmed the U.N.’s recognition of Crimea as part of Ukraine; states voting against include Armenia, Belarus, Bolivia, Cuba, North Korea, Nicaragua, Russia, Sudan, Syria, Venezuela and Zimbabwe); see also Guy Chazan, *Separatists Urge Russia to Annex Donetsk in Wake of Referendum*, FIN. TIMES, May 12, 2014, 4:30 PM, <http://www.ft.com/cms/s/0/75b30b62-d9a0-11e3-b3e3-00144feabdc0.html#axzz3qwo7bKWI> [<http://perma.cc/VW2X-VFNR>] (noting that the resolution was adopted in response to the Russian annexation of Crimea).

¹²³ *Donetsk Militants Say They “Will Have Army of 100,000 Men”*, *supra* note 47.

ment.¹²⁴ Unless further evidence can be accumulated it is unlikely that this could be internationalized under this test.

More importantly, the “overall control” test was rejected by the ICJ as unpersuasive and unjustifiably expanding state responsibility in the 2007 case *Bosnia and Herzegovina v. Serbia and Montenegro*.¹²⁵ The Court found that “[i]t must next be noted that the ‘overall control’ test has the major drawback of broadening the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility.”¹²⁶ However, this decision was subtly crafted for determining state responsibility only—not individual criminal liability.¹²⁷ The court distinguished its finding by observing “that the ICTY was not called upon in the *Tadic* case, nor is it in general called upon, to rule on questions of State responsibility, since its jurisdiction is criminal and extends over persons only.”¹²⁸ Thus, an individual commander may technically assert *de facto* effective control over troops under his authority, even if there is no state responsibility attributed to his state of origin and no superior liability attaches to its civilian authorities.

F. SUBORDINATE LIABILITY

Presuming an IAC, personal liability for the soldiers firing the weapon would only vest if it could be proven that they knew and intended to fire at a commercial jet.¹²⁹ For example, if it could be established that the perpetrators had a secondary radar system in use that identified MH17 as a commercial airliner, then such liability would vest.¹³⁰ Yet, this seems unlikely in light of the social media reports indicating a mistake and that the guidance system was reportedly inadequate to properly identify the target as civilian.¹³¹ Thus, they could rely on mistake or even following orders as a defense. As a customary practice in criminal law, the

¹²⁴ *Id.*

¹²⁵ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Montenegro*), 1996 I.C.J. 210, ¶ 404 (July 11).

¹²⁶ *Id.* ¶ 406.

¹²⁷ *See id.* ¶ 403.

¹²⁸ *Id.*

¹²⁹ RS, *supra* note 77, art. 8(2)(b)(i).

¹³⁰ *See id.* art. (8)(2)(b)(i), 30 (concluding that under these circumstances the perpetrators could plausibly rely on a defense that they did not know how to interpret the images on the secondary radar and therefore still lacked the necessary intent to commit this war crime, but it may prove to be a weak defense).

¹³¹ Bennett, *supra* note 58; Luhn, *supra* note 63.

defense of mistake, if honestly held, would serve to vitiate guilt.¹³² The following orders defense could also be viable: RS Article 33(1) provides that a subordinate would be relieved of guilt if they were under a legal obligation to obey orders, they did not know the orders were unlawful, and the orders were not manifestly unlawful.¹³³ The limited evidence available suggests that all three limbs of this test may be satisfied in the attack on Flight MH17.

Alternatively, there are allegations that members of the rebel forces justified the action by claiming (after the fact) that Flight MH17 was carrying spies. Rebel leader Kozitsyn also responded, “[t]hey shouldn’t be flying. There is a war going on . . .” and “[w]e warned you not to fly in our skies.”¹³⁴ These statements may imply the insurgents were targeting all aircraft in the area, military or civilian, rendering the mistake unconvincing, or it may simply be a retrospective justification for shooting. These statements also seem to ignore the fact that Flight MH17 was flying above the restricted airspace.¹³⁵

If this were an NIAC, then individual liability would attach as an ordinary crime under Ukrainian law as a joint criminal enterprise.¹³⁶ Though mistaken, the perpetrators would still be held accountable regardless of the identity of the victims.¹³⁷ Individual liability may also suffice for extradition purposes, if the Ukrainian authorities consented,¹³⁸ under a passive nationality

¹³² International Committee of the Red Cross, *Preparatory Commission for the International Criminal Court Working Group on Elements of Crimes*, PCNICC/1999/WGEC/INF.2/Add.4 (Dec. 15, 1999), reprinted in KNUT DÖRMANN, *ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT* 493, 495–96 (2003) (explaining *ignorantia facti excusat*, a well-established principle in numerous jurisdictions).

¹³³ RS, *supra* note 77, art. 33 (“The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless: (a) The person was under a legal obligation to obey orders of the Government or the superior in question; (b) The person did not know that the order was unlawful; and (c) The order was not manifestly unlawful.”).

¹³⁴ Luhn, *supra* note 63.

¹³⁵ MH17 CRASH REPORT, *supra* note 56, at 37.

¹³⁶ William A. Schabas, *Punishment of Non-State Actors in Non-International Armed Conflict*, 26 FORDHAM INT’L L.J. 907, 918 (2003).

¹³⁷ Criminal Code of Ukraine, art. 37(1-3), <http://www.wipo.int/wipolex/en/details.jsp?id=6087> [<http://perma.cc/5DHL-DJQU>].

¹³⁸ Interested states that have extradition agreements with Ukraine include The Netherlands, United Kingdom, Germany, and Belgium. See European Convention on Extradition, Dec. 13, 1957, C.E.T.S. No. 024, <http://www.coe.int/en/>

jurisdictional basis. Indeed, the Russian Federation is currently holding a Ukrainian military pilot, Lieutenant Nadia Savchenko, on this jurisdictional ground.¹³⁹

G. SUPERIOR LIABILITY

As indicated above, superior liability for Russian authorities is difficult to establish as it requires a determination of control sufficient to internationalize the conflict.¹⁴⁰ As discussed, making this determination and amassing the necessary evidence to support it may be pragmatically impossible.¹⁴¹ If this were an NIAC, then superior responsibility would not vest, as it could not be shown that Russian superiors, as opposed to commanders in the field, exerted effective control over the actions of the separatists.¹⁴² Despite the different effective control standard for state responsibility and individual criminal liability, this issue is anticipated by claims that Russian soldiers in Ukraine are acting independently.

RS Article 28(b)(i) further requires that “the superior either knew, or consciously disregarded information which clearly indicated that the subordinates were committing or about to commit such crimes.”¹⁴³ This implies a slightly higher *mens rea* burden of proof for superior responsibility than for command responsibility, as seen below, and creates a difficult burden of proof for any subsequent prosecution to meet. Satisfying this burden would be unlikely.

H. COMMAND RESPONSIBILITY

From the limited evidence available, three suspects for command responsibility emerge. The first, Igor Girkin, also known as Strelkov,¹⁴⁴ claimed responsibility on a popular Russian social-

web/conventions/full-list/-/conventions/rms/0900001680064587 [http://perma.cc/CE5X-53HJ] (status as of Oct. 20, 2015). Canada also has an extradition agreement. *See Treaty Between Canada and Ukraine on Mutual Assistance in Criminal Matters* art. 7, Can.-Ukr., Sept. 23, 1996, C.T.S. 1999 No. 7, www.treaty-accord.gc.ca/text-texte.aspx?id=101647 [http://perma.cc/8MPB-8MTW].

¹³⁹ Rainsford, *supra* note 82.

¹⁴⁰ *See supra* text accompanying notes 111, 118–29.

¹⁴¹ *See supra* text accompanying notes 125–26.

¹⁴² RS, *supra* note 77, art. 28(b)(ii).

¹⁴³ *Id.* art. 28(b)(i).

¹⁴⁴ Strelkov roughly translates into “rifleman.” It was confirmed that he may have participated in the atrocities committed in Bosnia. *See Ukraine Crisis: Key Players in Eastern Unrest*, BBC, (Aug. 28, 2014), www.bbc.com/news/world-latin-america-27211501 [http://perma.cc/9LHK-PU39]; Gianluca Mezzofiore, *Igor*

networking site for downing what he thought was a Ukrainian military transport plane shortly before reports identified the target as a commercial jet.¹⁴⁵ Strelkov, an alleged Russian intelligence agent and (retired) Colonel in the Russian armed forces was allegedly leading the military forces of the Donetsk People's Republic.¹⁴⁶ A second suspect is Igor Bezler, a notorious loose cannon who purportedly rules the town of Horlivka with an iron fist.¹⁴⁷ The third suspect is Nikolai Kozitsyn; Kozitsyn commands a group of Cossack fighters, "the traditional military caste that once protected the borders of the Russian empire."¹⁴⁸

RS Article 28(a) describes command liability:

A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

- i. That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
- ii. That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.¹⁴⁹

Strelkov: Key MH17 Crash Suspect Linked to Massacre of 3,000 Bosnian Muslims in 1992, INT'L BUS. TIMES (July 25, 2014), <http://www.ibtimes.co.uk/igor-strelkov-key-mh17-crash-suspect-linked-massacre-3000-bosnian-muslims-1992-1458304> [<http://perma.cc/3QDL-FQGQ>]. Strelkov is currently sanctioned by the EU. See *EU Names 15 New Targets for Sanctions*, MAIL ONLINE (Apr. 29, 2014), <http://www.dailymail.co.uk/wires/ap/Article-2615657/EU-names-15-new-targets-sanctions.html> [<http://perma.cc/2U2A-7EVZ>].

¹⁴⁵ Paul Roderick Gregory, *Smoking Guns: Russian Separatists Shot Down Malaysian Flight MH17; Putin Must be Held Responsible*, FORBES (July 18, 2014, 12:22 AM), <http://www.forbes.com/sites/paulroderickgregory/2014/07/18/smoking-guns-russian-separatists-shot-down-malaysian-plane/> [<http://perma.cc/SV9D-AQ3W>].

¹⁴⁶ Jeff Stone, *Who Is Igor Strelkov? Russians Love Reenactor Turned Rebel Commander Who Delivered Bizarre, Racist Press Conference*, INT'L BUS. TIMES (July 28, 2014), <http://www.ibtimes.com/who-igor-strelkov-russians-love-reenactor-turned-rebel-commander-who-delivered-bizarre-1641050> [<http://perma.cc/CF28-QE9U>].

¹⁴⁷ Luhn, *supra* note 63.

¹⁴⁸ *Id.*

¹⁴⁹ RS, *supra* note 77, art. 28(a).

In applying command responsibility to the downing of Flight MH17 three issues arise: (1) whether command responsibility is applicable to NIACs; (2) what is meant by “effective control” for individual command responsibility; and (3) what is the necessary mens rea for liability to vest.

1. *Application in Non-International Armed Conflict*

The international community has repeatedly called on leaders of armed groups in NIACs to ensure accountability of their members.¹⁵⁰ The Report of the International Commission of Inquiry into the Conflict in Libya in 2011 urged the non-state armed groups to “conduct exhaustive, impartial and public investigations into all alleged violations of international human rights law and international humanitarian law.”¹⁵¹ Similarly, military groups in the 2006 Sudan conflict were called upon to “prevent future violations by investigating the cases brought to their attention and holding the perpetrators responsible.”¹⁵²

Command responsibility is implicit in the definition of an NIAC, as armed groups require some form of organization, which “implies responsible command and that responsible command in turn imply command responsibility.”¹⁵³ International rules on command responsibility are also applicable to NIACs:

In short, wherever customary international law recognizes that a war crime can be committed by a member of an organi[z]ed military force, it also recognizes that a commander can be penally sanctioned if he knew or had reason to know that his subordinate was about to commit a prohibited act or had done so and the commander failed to take the necessary and reasonable measures to prevent such an act or to punish the subordinate. Customary international law recognizes that some war crimes can be committed by a member of an organi[z]ed military force in the

¹⁵⁰ Geoffrey S. Corn, *Regulating Hostilities in Non-International Armed Conflicts: Thoughts on Bridging the Divide Between the Tadic Aspiration and Conflict Realities*, 91 INT’L L. STUD. 281, 297 (2015).

¹⁵¹ Human Rights Council Report of the International Commission of Inquiry to Investigate All Alleged Violations of International Human Rights Law in the Libyan Arab Jamahiriya, at 9, U.N. Doc. A/HRC/17/44 (June 1, 2011).

¹⁵² Gáspár Biró, *Situation of Human Rights in the Sudan: Report of the Special Rapporteur, Mr. Gáspár Biró, Submitted in Accordance with Commission on Human Rights Resolution 1995/77*, 24, U.N. Doc. E/CN.4/1996/62 (Feb. 20, 1996).

¹⁵³ Prosecutor v. Hadzihasanovic, Alagic and Kubura, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, ¶ 17 (Int’l Crim. Trib. for the Former Yugoslavia July 16, 2003).

course of an internal armed conflict; it therefore also recognizes that there can be command responsibility in respect of such crimes.¹⁵⁴

Accordingly, under customary international law, command responsibility would accrue in the Flight MH17 case whether the unrest in Ukraine was ultimately determined to be an NIAC or, under treaty law, to be an IAC.

2. *Effective Command and Control*

The linchpin of command responsibility is whether the accused exercises *de facto* control of the troops committing the crime such that the accused is able to prevent or punish crimes.¹⁵⁵ This principle was laid out in *Prosecutor v. Delalic, Mucic, Delic, Landzo* which held that “[t]he concept of effective control over a subordinate—in the sense of a material ability to prevent or punish criminal conduct, however that control is exercised—is the threshold to be reached.”¹⁵⁶ In *Prosecutor v. Blaškic*, the Appeals Chamber found the accused could not be held liable for all the troops under his command because “the Appellant did not enjoy or exercise effective command and control over all the units nominally subordinated to him . . . [and therefore, could not] be held accountable for failing to punish members of units over which he did not exercise effective control.”¹⁵⁷

Delalic, in which the court addressed the crimes committed in the Celebici prison-camp, is relevant here.¹⁵⁸ Though dealing with superior liability, *Delalic* nonetheless sheds light on effective control applicable to command responsibility.¹⁵⁹ *Delalic*, a high-ranking civilian official, was tried for crimes committed at the prison camp, which was under the direct command of another.¹⁶⁰ *Delalic*’s function was to transport weapons, supply material, military equipment, food, communications equipment, and provide for railroad access, transportation of refugees, the linking up of electricity grids and to coordinate between civilian

¹⁵⁴ *Id.* ¶ 18.

¹⁵⁵ Ilias Bantekas, *The Contemporary Law of Superior Responsibility*, 93 AM. J. INT’L L. 573, 574 (1999).

¹⁵⁶ *Prosecutor v. Delalic, Mucic, Delic, and Landzo*, Case No. IT-96-21-A, Appeal Judgment, ¶ 256 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001).

¹⁵⁷ *Prosecutor v. Blaškic*, Case No. IT-95-14-A, Judgment, ¶ 612 (Int’l Crim. Trib. for the Former Yugoslavia July 29, 2004).

¹⁵⁸ *Delalic*, Case No. IT-96-21-A, ¶ 1.

¹⁵⁹ *See id.* ¶ 196.

¹⁶⁰ *Id.* ¶¶ 2, 224, 313.

and military personnel.¹⁶¹ The court found that Delalic was “a well-placed influential individual, clearly involved in the local effort to contribute to the defen[s]e of the Bosnian State. [However], [t]his effort and the recognition which accompanied it did not create a relationship of superior and subordinate between him and those who interacted with him.”¹⁶²

Applying this case to the crash of Flight MH17, any of the three suspects mentioned above—Strelkov, Bezler or Kozitsyn—would be liable only if they were in a position of authority over the troops firing the rocket, able to issue orders to the same, and capable of meting out punishment for infractions.¹⁶³ Mere assistance or providing logistical support would be insufficient.¹⁶⁴ The nexus of command between Bezler and the relevant troops is not publicly known.¹⁶⁵ The same may be said of Kozitsyn, as the evidence leaked to the press concerning his dismissal of the event as a plane “carrying spies” does not necessarily establish command authority or control over the relevant troops.¹⁶⁶

However, Strelkov allegedly took credit for downing what he apparently thought was a Ukrainian aircraft, which turned out to be Flight MH17.¹⁶⁷ This admission implies command authority, but is not dispositive. Moreover, because Strelkov’s function presumably consisted of supplying weapons and training, and if the Buk missile originated from Russia, it is likely that Strelkov’s command sphere included the troops who fired the weapon at Flight MH17 and were trained by him.¹⁶⁸ It may also be deduced that Strelkov or the troops who reported to Strelkov, as he was informed of the action shortly after the fact, ordered the attack.¹⁶⁹ This suggests command authority. However, difficulties persist. Questions remain as to the exact nature and limitations

¹⁶¹ *Id.* ¶ 355.

¹⁶² Prosecutor v. Delalic, Mucic, Delic, and Landzo, Case No. IT-96-21-T, Trial Judgment, ¶ 658 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998).

¹⁶³ See *Delalic*, Case No. IT-96-21-A.

¹⁶⁴ See *id.*; *Delalic*, Case No. IT-96-21-T.

¹⁶⁵ Shaun Walker, *An Audience with Ukraine Rebel Chief Igor Bezler, the Demon of Donetsk*, GUARDIAN (July 29, 2014, 6:59 EDT), <http://www.theguardian.com/world/2014/jul/29/-sp-ukraine-rebel-igor-bezler-interview-demon> [<http://perma.cc/M5SG-6W5Q>].

¹⁶⁶ See Luhn, *supra* note 63.

¹⁶⁷ See *supra* Section III.H.

¹⁶⁸ *MH17 Crash: “Old Buk Missile Used”—Russian Firm*, BBC (June 2, 2015), <http://www.bbc.com/news/world-europe-32972406> [<http://perma.cc/Q6TU-9BFG>].

¹⁶⁹ Luhn, *supra* note 63.

of Strelkov's command, whether he had issued orders to down all aircraft in the vicinity, his knowledge of the limits of the no-fly zone and the routine presence of commercial aircraft above the no-fly zone, and his authority to mete out punishment to troops.¹⁷⁰ Without further evidence of his culpability, making a criminal case against Strelkov, by using the command responsibility paradigm, would rely on conjecture.

3. *Mens Rea*—"Should Have Known that the Forces were Committing or About to Commit Such Crimes"

Assuming that sufficient evidence of Strelkov's effective control could be produced, the prosecution would turn on *mens rea*. Even if Strelkov did not know that the target was a commercial jet, he may still have satisfied the mental element of the crime under the "should have known" formula.¹⁷¹ Under RS Article 28(a)(i) and (ii), a commander may satisfy this requirement if he "either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and . . . failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission."¹⁷² Thus, the prosecution would have to satisfy two prongs: that Strelkov should have known that his troops were about to commit a war crime and, that armed with that knowledge, he failed to take steps to prevent it.

The "should have known" formula is not substantively different from the "had reason to know" standard in the ICTY statute, which in turn stems from Additional Protocol I and the *Hostage* case.¹⁷³ This legal position goes back to the 1948 judgment by the International Military Tribunal for the Far East (IMTFE) in Tokyo.¹⁷⁴ Authority for this approach can also be found in Article 86(2) of the Protocol Additional relating to the protection of

¹⁷⁰ *See id.*

¹⁷¹ RS, *supra* note 77, art. 28(a).

¹⁷² *Id.*

¹⁷³ Kai Ambos, *Superior Responsibility*, in THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT 866 (Antonio Cassese et al., eds., 2002).

¹⁷⁴ 2 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 3769 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005) (providing "[t]hey had knowledge that such crimes were being committed, and having such knowledge they failed to take such steps as were within their power to prevent the commission of such crimes in the future, or they are at fault in having failed to acquire such knowledge").

victims in international armed conflicts.¹⁷⁵ The French version of the highlighted portion of the Protocol is given priority, which reads, "information enabling them to conclude."¹⁷⁶ Thus, the level of knowledge required need only be constructive on the part of the commander.

In the *Blaškić* case, the court found that "recklessness which may be likened to serious criminal negligence" may suffice.¹⁷⁷ This is "negligence . . . so serious that it is tantamount to malicious intent."¹⁷⁸ Scholar Kai Ambos concluded that:

A superior who simply ignores information which clearly indicates the likelihood of criminal conduct on the part of his subordinates is seriously negligent in failing to perform his duty to prevent or suppress such conduct by failing to make reasonable effort to obtain the necessary information that will enable him to take appropriate action.¹⁷⁹

In *Delalic*, the ICTY concluded that while there is not a strict liability standard, a commander may be criminally liable if he had knowledge "that his subordinates were about to commit or had committed crimes."¹⁸⁰ However, this case cautioned that "uncertainty arises in relation to situations where the superior lacks such information by virtue of his failure to properly supervise his subordinates."¹⁸¹

As a commander arguably in effective control of the troops firing on Flight MH17, Strelkov should have known that the Buk missile system used by the separatist army lacked the necessary safety mechanism of a secondary guidance system necessary to distinguish commercial jets from viable military targets. In order

¹⁷⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 ("The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.").

¹⁷⁶ J. de Preux, *Article 86—Failure to Act*, in COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 1005, 1013 (Yves Sandoz et al. eds. 1987).

¹⁷⁷ *Prosecutor v. Blaškić*, Case No. IT-95-14-T, ¶ 152 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000).

¹⁷⁸ *See de Preux*, *supra* note 176, at 1012.

¹⁷⁹ Ambos, *supra* note 173, at 866.

¹⁸⁰ *Prosecutor v. Delalic, Mucic, Delic, Landzo*, Case No. IT-96-21-T, Trial Judgment, ¶ 383 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998).

¹⁸¹ *Id.* ¶ 387.

to prove this, a prosecutor would need to show that Strelkov had sufficient information to enable him to conclude the Buk missile system could distinguish civilian planes from military targets.¹⁸² Such information could come in the form of media accounts.¹⁸³ The argument that a commander never read reports submitted by his subordinates is no defense.¹⁸⁴ Nor is temporary absence from the command headquarters.¹⁸⁵ If Strelkov was tasked with the duty of equipping and training troops in the use of the Buk missile, he should have been aware of its targeting limits, the no-fly zone, and the routine commercial traffic flying in airspace above the zone. Moreover, evidence from social media reports, referenced above, suggests that the separatists had a “shoot first and ask questions later” policy.¹⁸⁶ While Delalic was serving a purely ministerial or logistical function and found to have no culpability, Strelkov, and perhaps others, was in command, took credit for the kill, and trained the troops in the use of the Buk missile. Moreover, troops reported to him after the action because, presumably, the troops were answerable to him.¹⁸⁷ The nature of Strelkov’s self-proclaimed command responsibilities as such, and his multiple failures to exercise reasonable care given the situation on the ground, made this disaster highly probable.¹⁸⁸ Thus, the relatively low mens rea burden of proving criminal negligence (rather than specific intent) would be manageable for a prosecutor even under the “fog of war.” In the language of the *Delalic* case, the information available to Strelkov “should have put him on notice of the fact that an unlawful act was being, or about to be,

¹⁸² Christopher N. Crowe, *Command Responsibility in the Former Yugoslavia: The Chances For Successful Prosecution*, 29 U. RICH. L. REV. 191, 225 (1994).

¹⁸³ *Id.* at 226.

¹⁸⁴ United States v. Wilhelm List, Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No.10, Vol. XI/2 1230, 1271 (Feb. 19, 1948).

¹⁸⁵ *Id.* at 1260.

¹⁸⁶ See *supra* Section III.H.

¹⁸⁷ Prosecutor v. Delalic, Mucic, Delic, Landzo, Case No. IT-96-21-T, Trial Judgment, ¶ 657, 673, 696, 718 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 1998); Sneha Shankar, *MH17 Crash Victims Sue Ukraine’s Donetsk People’s Republic Leader Igor Girkin For \$900M*, INT’L BUS. TIMES (July 16, 2015, 3:11 AM), <http://www.ibtimes.com/mh17-crash-victims-sue-ukraines-donetsk-peoples-republic-leader-igor-girkin-900m-2011019> [<http://perma.cc/EV2X-U9MV>].

¹⁸⁸ Aleksandar Vasovic et al., *Elusive Muscovite with Three Names Takes Control of Ukraine Rebels*, REUTERS (May 15, 2014, 8:42 AM), <http://www.reuters.com/article/2014/05/15/us-ukraine-crisis-commander-insight-idUSBREA4E06E20140515#S0apKMVoRo7i2mJr.97> [<http://perma.cc/TS5J-Y6CY>].

committed by a subordinate.”¹⁸⁹ By failing to take the necessary precautions for the safety of civilians, and given his imputed knowledge of circumstances prevailing at the time, Strelkov failed to exercise due diligence in the fulfilment of his duties.¹⁹⁰

Additionally, while *Delalic* provides that prosecutorial uncertainty may accrue if the leader lacks the relevant knowledge owing to his failure to properly supervise his troops, Strelkov’s knowledge of the relevant circumstances was unrelated to his supervision of his troops.¹⁹¹ He knew or should have known of the safety deficits in the misused, ill-equipped missile system, the no-fly zone limitations, and the heavy commercial air traffic above that zone as well as the destructive capability of the Buk missile (independently of his supervision of the troops), rendering *Delalic* distinguishable from this case.¹⁹²

Under this interpretation, Strelkov failed to take necessary and reasonable measures to prevent the crime. For criminal liability to vest, there must be a causal link between the command failure and the crime.¹⁹³ “The requirement that the crimes of the subordinate be ‘a result’ of the superior’s ‘failure to exercise control properly’ implies a causal relationship between the superior’s failure and the subordinate’s commission of crimes.”¹⁹⁴ Moreover, “[i]t is sufficient that the superior’s failure of supervision increases the risk that the subordinates commit certain crimes.”¹⁹⁵ The causal link in the Flight MH17 event, subject to further investigation, is straightforward. Legal causation can be established via Strelkov’s failure to provide adequate training, safety equipment in the guidance system for the rocket launcher, and an established policy of no firing above the no-fly

¹⁸⁹ Prosecutor v. Delalic, Mucic, Delic, Landzo, Case No. IT-96-21-A, Appeal Judgment, ¶ 233 (Int’l Crim. Trib. for the Former Yugoslavia Feb. 20, 2001).

¹⁹⁰ See Prosecutor v. Blaškic, Case No. IT-95-14-T, ¶ 332 (Int’l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000) (“[I]f a commander has exercised due diligence in the fulfilment of his duties yet lacks knowledge that crimes are about to be or have been committed, such lack of knowledge cannot be held against him. However, taking into account his particular position of command and the circumstances prevailing at the time, such ignorance cannot be a defen[s]e where the absence of knowledge is the result of negligence in the discharge of his duties: this commander had reason to know within the meaning of the Statute.”).

¹⁹¹ See *supra* text accompanying note 181.

¹⁹² Dave Majumdar, *How Can a Civilian Plane Accidentally Be Shot Down?*, TECH. REVIEW (July 18, 2014), <http://www.technologyreview.com/news/529156/how-can-a-civilian-plane-accidentally-be-shot-down/> [http://perma.cc/N3ZW-BY6T].

¹⁹³ RS, *supra* note 77, art. 25(2-4), 28(a).

¹⁹⁴ See Ambos, *supra* note 173, at 860.

¹⁹⁵ *Id.*

zone, inter alia.¹⁹⁶ Thus, even when viewed in the light most favorable to Strelkov, his acts of omission constitute negligence.

Acts of omission are sufficient for command liability. In *Halilovic*, the Trial Chamber found that “command responsibility is responsibility for an omission.”¹⁹⁷ Liability for omissions “arises for a superior from the moment he acquires knowledge or has reasonable grounds to suspect that a crime is being or is about to be committed.”¹⁹⁸ Accordingly, on the information available, Strelkov, and possibly other commanders, could have the requisite mens rea of criminal negligence for command responsibility for their acts of omission by failing to take reasonable measures. It is these failures that were the proximate cause of the destruction of Flight MH17. Naturally, these conclusions come with the caveat that an exhaustive criminal investigation is absolutely necessary to uncover additional exculpatory or inculpatory data.

IV. AVIATION ISSUES AND LIABILITY

A. WHO SHOULD CONDUCT THE INVESTIGATION?

The state of occurrence, under the Chicago Convention, has the right to conduct the air crash investigation.¹⁹⁹ Article 26 vests Ukraine, the state of occurrence, with the responsibility to conduct the investigation.²⁰⁰ It provides that “the state in which the accident occurs will institute an enquiry.”²⁰¹ The fact that the territory is the subject of an insurgency cannot alter this situation, as the insurgents are not in a position to fulfill the criteria for statehood over the disputed area.²⁰²

Ukraine delegated the accident investigations to the Netherlands Accident Investigation authorities.²⁰³ Chapter 5 of Annex 13 to the Chicago Convention permits this course of action.²⁰⁴

¹⁹⁶ See *supra* text accompanying notes 145, 192.

¹⁹⁷ Prosecutor v. Halilovic, Case No. IT-01-48-T, Judgment, ¶ 54 (Int’l Crim. Trib. for the Former Yugoslavia Nov. 16, 2005).

¹⁹⁸ Prosecutor v. Strugar, Case No. IT-01-42-T, Judgment, ¶ 373 (Int’l Crim. Trib. for the Former Yugoslavia Jan. 31, 2005).

¹⁹⁹ Convention on International Civil Aviation art. 26, Dec. 7, 1944, 15 U.N.T.S. 295 [hereinafter Chicago Convention].

²⁰⁰ See *id.*

²⁰¹ *Id.*

²⁰² The alleged sovereignty of the insurgents is examined *supra* Section III.A.

²⁰³ See PRELIMINARY REPORT, *supra* note 9.

²⁰⁴ Convention on International Civil Aviation: Annex 13 Aircraft Accident and Incident Investigation ¶ 5.1 (9th ed. 2001) [hereinafter Annex 13].

Paragraph 5.1 provides that the state of occurrence “may delegate the whole or any part of the . . . investigation to another State by mutual arrangement and consent.”²⁰⁵ Additionally, Paragraph 5.18 of Annex 13 specifies that the “State of Registry, the State of the Operator, the State of Design and the State of Manufacture shall each be entitled to appoint an accredited representative to participate.”²⁰⁶ Malaysia also had a right to be a party to the investigations as flag state of the aircraft under Article 26 of the Chicago Convention.²⁰⁷

Other States, as provided for under Annex 13, may also participate.²⁰⁸ According to the Final Report, the Dutch inquiry was assisted by accredited representatives from Ukraine, Malaysia, the United States, the United Kingdom, Australia, and the Russian Federation.²⁰⁹

B. POTENTIAL LIABILITY FOR PERCEIVED AIR TRAFFIC CONTROL FAILURES

The Ukrainian State Air Traffic Services Enterprise (UkSATSE), is responsible for providing ATC services to aircraft flying through controlled airspace above Ukraine.²¹⁰ Upon the downing of Flight MH17, UkSATSE shut down air routes over the disputed eastern part of the country.²¹¹ In July, prior to the downing of Flight MH17, several military aircraft had been shot down in the vicinity.²¹² These included a Ukrainian AN-26 military transport plane and a Su-25 war plane.²¹³

Distinguished Professor Elmar Giemulla, representing a German dependant of a passenger aboard Flight MH17, has announced her intention to sue Ukraine over its failure to close all

²⁰⁵ *Id.*

²⁰⁶ *Id.* ¶ 5.18.

²⁰⁷ Chicago Convention, *supra* note 199, art. 26.

²⁰⁸ Annex 13, *supra* note 204, ¶ 5.18.

²⁰⁹ See MH17 CRASH REPORT, *supra* note 56, at 7.

²¹⁰ UKRAINIAN STATE AIR TRAFFIC SERVICES ENTERPRISE, uksatse.ua/index.php?lang=EN [<http://perma.cc/E65R-9RBR>].

²¹¹ Croft, *supra* note 17.

²¹² *Several Dead After Military Helicopter is Shot Down in Ukraine*, DEUTSCHE WELLE (June 24, 2014), <http://www.dw.de/several-dead-after-military-helicopter-is-shot-down-in-ukraine/a-17734474> [<http://perma.cc/8U4Z-9CEC>].

²¹³ Victoria Butenko et al., *Ukraine Says Russia Shot Down Military Plane; Moscow Attacks Sanctions*, L.A. TIMES, July 17, 2014, <http://www.latimes.com/world/europe/la-fg-ukraine-russia-plane-sanctions-20140717-story.html> [<http://perma.cc/9WCQ-479C>].

airspace above the Donetsk Oblast province.²¹⁴ At the time of its shooting down, Flight MH17 was flying above the 32,000 foot ceiling, below which airspace was temporarily restricted.²¹⁵ Article 9 (Prohibited Areas) of the Chicago Convention provides that States may restrict or prohibit other States from flying over their territory for reasons of “military necessity or public safety.”²¹⁶ This right is also referenced in Annex 2 of the Chicago Convention at 3.1.10.²¹⁷

Reports suggest Giemulla is seeking \$1.2 million in compensation, and intends to file a lawsuit against Ukraine in the European Court of Human Rights alleging “negligent homicide.”²¹⁸ Giemulla has likely pursued this avenue for compensation because of a perception that Malaysia Airlines can establish, under the Montreal Convention, that it was “not negligent” and, hence, successfully defend liability above the 113,100 Special Drawing Rights (SDR) cap.²¹⁹ He acknowledges Malaysia Airlines “reacted not unreasonably,” while suggesting that “the centre of gravity of wrongs rests with the Ukraine.”²²⁰ U.S. lawyer, Jerry Skinner, representing eight Australian families, is also considering this course of action but will not take action solely against the Ukraine.²²¹ Potential claims against States, at this

²¹⁴ Annika Breidhardt, *Families of German MH17 Victims to Sue Ukraine: Lawyer*, REUTERS (Sept. 21, 2014), <http://www.reuters.com/article/2014/09/21/us-ukraine-crisis-mh17-germany-idUSKBN0HG08520140921> [<http://perma.cc/6QND-K79H>].

²¹⁵ See PRELIMINARY REPORT, *supra* note 9, at 13.

²¹⁶ Chicago Convention, *supra* note 199, art. 9 (providing that “[s]uch prohibited areas shall be of reasonable extent and location so as not to interfere unnecessarily with air navigation”).

²¹⁷ See Convention on International Civil Aviation, Annex 2, ¶ 3.1.10 (providing that “[a]ircraft shall not be flown in a prohibited area, or in a restricted area.”).

²¹⁸ *Australian Families Set to Launch Wide Ranging Lawsuit over MH17 Tragedy*, NEWS.COM.AU (Dec. 4, 2014), <http://www.news.com.au/travel/travel-updates/australian-families-set-to-launch-wide-ranging-lawsuit-over-mh17-tragedy/story-fnizu68q-1227143694292> [<http://perma.cc/9J84-SAF7>]; *German Families to Sue Ukraine over MH17 Deaths*, DEUTSCHE WELLE (Sept. 21, 2014) <http://www.dw.de/german-families-to-sue-ukraine-over-mh17-deaths/a-17938210> [<http://perma.cc/K8SQ-FGTA>].

²¹⁹ See Int’l Civil Aviation Org. [ICAO], Montreal Convention of 1999 Working Paper, ¶ 2.1, ICAO Doc. A38-WP/170 (an SDR of 113,110 is approximately U.S. \$170,000 as of April 2013).

²²⁰ *Australian Families Set to Launch Wide Ranging Lawsuit over MH17 Tragedy*, *supra* note 218.

²²¹ *Id.*

stage, are circumscribed by the difficulties in obtaining definitive evidence that confirms their international wrongfulness.

C. EUROCONTROL

Malaysia Airlines has asserted that Eurocontrol had accepted Flight MH17's route over Ukraine at an altitude of 35,000 feet, but noted that Ukrainian controllers had the flight fly at 33,000 feet instead.²²² Malaysia Airlines has further maintained that the aircraft was in airspace that had been deemed safe by both the ICAO and the IATA.²²³ These comments tend to focus attention on the role of each of these bodies, and arguably, flag possible dysfunction within the overall system.

The European Organisation for the Safety of Air Navigation (Eurocontrol) is an intergovernmental organization established under the Eurocontrol Convention in 1960 to coordinate and plan air traffic control for all of Europe.²²⁴ It currently has forty-one member States.²²⁵ Eurocontrol's self-acknowledged objective is "to deliver a Single European Sky that will help overcome the safety, capacity and performance challenges facing European aviation in the 21st century."²²⁶ One of Eurocontrol's objectives is to "facilitate civil-military coordination and cooperation in European air traffic management."²²⁷ Eurocontrol possesses full legal personality.²²⁸

A Eurocontrol spokesperson emphasized that the decision lay solely with Ukraine to keep Ukrainian airspace above the altitude of 9,753 meters open.²²⁹ The spokesperson characterized Eurocontrol as "playing the role of a network manager."²³⁰ Eurocontrol's position is consistent with the traditional rights of

²²² Croft, *supra* note 17.

²²³ *Id.*

²²⁴ See "Eurocontrol" International Convention Relating to Co-operation for the Safety of Air Navigation, Dec. 13, 1960, 523 U.N.T.S. 117.

²²⁵ See *Who We Are*, EUROCONTROL, <http://www.eurocontrol.int/articles/who-we-are> [<http://perma.cc/2427-6F57>] (last visited Nov. 21, 2015).

²²⁶ See *What We Do*, EUROCONTROL, <http://www.eurocontrol.int/articles/our-role> [<http://perma.cc/N6YQ-UFJ4>] (last visited Nov. 21, 2015).

²²⁷ See *Our Areas of Expertise*, EUROCONTROL, <http://www.eurocontrol.int/articles/our-areas-expertise> [<http://perma.cc/Q3FT-TNH5>] (last visited Nov. 21, 2015).

²²⁸ Pablo Mendes de Leon, *The Relationship Between Eurocontrol and the EC: Living Apart Together*, 4 INT'L ORG. L. REV. 305, 307-08 (2007).

²²⁹ Alexander Mosesov, *Eurocontrol Denies Warning Kiev of Airspace Threats Prior to MH-17 Crash*, SPUTNIK NEWS (Feb. 13, 2015), <http://sputniknews.com/europe/20150213/1018229237.html> [<http://perma.cc/H4ZE-Y6TP>].

²³⁰ *Id.*

States as embodied in Articles 1 (Sovereignty), 6 (Scheduled Air Services) and 28 (Air Navigation Facilities and Standard Systems) of the Chicago Convention.²³¹ However, as Jakob Wurm observes, “Eurocontrol has been vested with certain sovereign rights by its Member States in order to exercise important tasks relating to civil air transportation. In particular, it provides coordination of and control measures for air traffic services on the basis of a jointly administered air traffic system.”²³²

De Leon notes that in 2003, “Eurocontrol and the [European Community] Commission concluded a Memorandum Concerning a Framework for Cooperation.”²³³ According to De Leon, the framework identified “areas of cooperation as priority areas,” which included “safety and security, [and] human resources including Air Traffic Control.”²³⁴ The memorandum declared, “that it does not create rights and obligations under international law.”²³⁵ However, there is a clear and profound interaction between Eurocontrol competence, communication and direction, and the exercise of sovereign rights by Member States of Eurocontrol. In the wake of the Flight MH17 incident, Eurocontrol initiated the steps that activated the European Aviation Crisis Coordination Cell (EACCC), enabling EACCC “to coordinate the response to the impact of the airspace closure.”²³⁶

Norwegian commentator Einar Sorensen has argued for a broader role of Eurocontrol with respect to establishing air safety zones and airspace restrictions.²³⁷ Sorensen argued that “it was too risky to depend on countries’ own assessments of their airspace security, and Eurocontrol should take over the task.”²³⁸

²³¹ Chicago Convention, *supra* note 199, art. 1, 6, 28. Interestingly, “[n]either Eurocontrol nor the EC is a party to the Chicago Convention.” See de Leon, *supra* note 228, at 306.

²³² Jakob Wurm, *Asking National Courts to Correct the Over-flight Charges of Eurocontrol*, in CHALLENGING ACTS OF INTERNATIONAL ORGANIZATIONS BEFORE NATIONAL COURTS 158–59 (August Reinisch ed., 2010).

²³³ De Leon, *supra* note 228, at 312.

²³⁴ *Id.*

²³⁵ *Id.* at 313.

²³⁶ Croft, *supra* note 17.

²³⁷ Emily Woodgate, *Eurocontrol Could Have Saved MH17*, NEWSINENGLISH.NO (July 24, 2014), <http://www.newsinenglish.no/2014/07/24/eurocontrol-could-have-saved-mh17/> [http://perma.cc/FC33-N3Q2].

²³⁸ *Id.*

D. IATA AND INDUSTRY ISSUES

The IATA is a key player in all international aviation issues. IATA carriers comprise most of the world's airlines.²³⁹ While IATA primarily represents the interests of its members, it has played an important role in seeking and contributing to reforms in international civil aviation. Its Intercarrier Agreements in the 1960s and 1970s, in which IATA carriers waived defenses and provided a higher level of recovery than available under the Warsaw Convention, kept the United States within the Warsaw system.²⁴⁰ The IATA Intercarrier Agreements of the mid-1990s paved the way for the introduction of recovery in the first tier of liability for up to 100,000 SDR.²⁴¹

Shortly after the Flight MH17 incident, Tony Tyler, IATA's Director General and CEO, stated that "[g]overnments and air navigation service providers inform airlines about routes that they can fly and with what restrictions. Airlines comply with that guidance."²⁴² IATA, along with the Civil Air Navigation Services Organization (CANSO), the Airports Council International (ACI) and ICAO, then issued a Joint Statement on Risks to Civil Aviation Arising from Conflict Zones.²⁴³ The statement called for ICAO to establish a senior-level task force to address the challenges posed by the Flight MH17 incident, and to establish "fail-safe channels for essential threat information to be made available to civil aviation authorities and industry," as well as "incorporating into international law, through appropriate UN frameworks, measures to govern the design, manufacture and deployment of modern anti-aircraft weaponry."²⁴⁴

²³⁹ See *Current Airline Members*, IATA, <http://www.iata.org/about/pages/index.aspx> [<http://perma.cc/5MDE-FUTM>] (last visited Nov. 21, 2015) ("representing some 260 airlines or 83% of total air traffic").

²⁴⁰ See S. TREATY DOC. NO. 107-14 at vi.

²⁴¹ See Montreal Convention of 1999 Working Paper, *supra* note 219 (providing recovery in its first tier of 113,110 SDR, or approximately U.S. \$170,000 as of April 2013).

²⁴² Karen Walker, *IATA Chief: MH17 was an Attack Against the Air Transport System*, AIR TRANSPORT WORLD (July 22, 2014), <http://atwonline.com/blog/iata-chief-mh17-was-attack-against-air-transport-system> [<http://perma.cc/6K3B-VKQW>].

²⁴³ Press Release, IATA et al., Joint Statement on Risks to Civil Aviation Arising from Conflict Zones (July 29, 2014), <http://www.iata.org/pressroom/pr/Pages/2014-07-29-02.aspx> [<http://perma.cc/A45M-YAHU>].

²⁴⁴ *Id.*

E. THE INTERNATIONAL CIVIL AVIATION ORGANIZATION

Prior to the Flight MH17 incident, ICAO “issued a State Letter advising States and their air operators of a potentially unsafe situation arising from the presence of more than one air traffic service provider in the Simferopol Flight Information Region (FIR).”²⁴⁵ However, ICAO acknowledged after the event that the loss of Flight MH17 occurred outside of the Simferopol FIR.²⁴⁶

A burning issue coming out of the Flight MH17 shoot down was the need to take concerted action in the face of this type of danger. On October 28, 2014, the ICAO passed a council resolution condemning the downing of Flight MH17,²⁴⁷ and issued a Joint Statement on Risks to Civil Aviation from Conflict Zones.²⁴⁸

F. THE ICAO “AFTER THE EVENT” LETTER

A particular ICAO letter, dated July 24, 2014, focuses on the safety and security of civil aircraft operating in airspace affected by conflict.²⁴⁹ The letter emphasizes the need for: “[C]lose coordination between civil and military authorities in the event of armed conflict or the potential for armed conflict; and [the need to] restrict or prohibit uniformly the aircraft of other States from flying over your territory for reasons of military necessity or public safety.”²⁵⁰

The letter reminds States that Article 9 of the Chicago Convention empowers States to restrict or prohibit uniformly the aircraft of other States from flying over its territory.²⁵¹ The ICAO

²⁴⁵ ICAO *Monitoring Loss of Malaysia Airlines Flight MH17*, ICAO (July 17, 2014), <http://www.icao.int/newsroom/pages/icao-monitoring-loss-of-malaysia-airlines-flight-mh17.aspx> [<http://perma.cc/MLU7-NMX4>].

²⁴⁶ *Id.*

²⁴⁷ See Int’l Civil Aviation Org. [ICAO], *Council Resolution on Malaysia Airlines Flight MH17, Destroyed Over Eastern Ukraine On 17 July 2014* (Oct. 28, 2014), <http://www.icao.int/newsroom/newsdoc2014/council%20resolution%20on%20malaysia%20airlines%20flight%20mh17.pdf> [<http://perma.cc/E3MF-33A3>] (noting passage of United Nations Security Council Resolution 2166 on July 21, 2014).

²⁴⁸ Joint Statement on Risks to Civil Aviation Arising from Conflict Zones, *supra* note 243.

²⁴⁹ Letter from Raymond Benjamin, ICAO Secretary General, to State Civil Authorities (July 24, 2014), <http://www.icao.int/Newsroom/NewsDoc2014/059e.pdf> [<http://perma.cc/FS9T-BTL8>].

²⁵⁰ *Id.* at 1.

²⁵¹ *Id.* ¶ 2 (noting that “[s]uch prohibited areas, if needed, shall be of reasonable extent and location so as not to interfere unnecessarily with air navigation. Notices to airmen (NOTAM) or other communications containing the necessary information, advice and measures to be taken should then be issued”).

also uses this letter to stress the point that this is an area of State responsibility: "The responsibility for initiating the coordination process rests with the State whose military forces are engaged in the conflict. The responsibility for instituting special measures to assure the safety and security of international civil aircraft operations remains with the State responsible for providing air traffic services" ²⁵²

G. THE HIGH-LEVEL SAFETY CONFERENCE

A High-level Safety Conference of ICAO Member States (attended by 120 Member States and observers from thirty-five international organizations) took place in February 2015.²⁵³ This conference discussed "emerging safety issues, including the global tracking of aircraft and risks to civil aviation arising from conflict zones."²⁵⁴ In his opening address, Dato' Azharuddin Abdul Rahman, Director General of Civil Aviation of Malaysia, reminded the audience of the role of Article 3 bis from the Chicago Convention, which prohibits the use of weapons against civil aircraft in flight.²⁵⁵

The Report of the Second High-Level Safety Conference 2015 includes an agreement that "[t]he tragic loss of Flight MH17 highlights the necessity to provide accurate and timely information to States and airlines regarding risks to civil aviation arising from conflict zones as a matter of urgency," and the "urgent need to utilize and enhance existing mechanisms for the purpose of sharing critical information related to airspace use restrictions that are associated with conflict zones to ensure robust risk assessments."²⁵⁶

H. COMPARISON WITH FAA RESPONSE

One useful point of comparison between the ICAO and Ukrainian responses is provided by the FAA's response to the insurgency in the Ukraine. The FAA on April 3, 2014, issued a

²⁵² *Id.* ¶ 3.

²⁵³ Int'l Civil Aviation Org. [ICAO], *Second High-level Safety Conference 2015 Report*, at ii-1 (2015), http://www.icao.int/meetings/hlsc2015/documents/reports/10046_en.pdf [<http://perma.cc/8U8W-ZYU7>].

²⁵⁴ *See id.* at vi-1.

²⁵⁵ *See* Second High-level Safety Conference 2015 Opening Address, Dato' Azharuddin Abdul Rahman, Director General of Civil Aviation of Malaysia, <http://www.icao.int/Meetings/HLSC2015/Documents/Statements/Opening%20Remarks%20%E2%80%93%20Malaysia.pdf> [<http://perma.cc/BFX8-6KW8>].

²⁵⁶ *Second High-level Safety Conference 2015 Report*, *supra* note 253, at 3-3.

warning in FDC Notice to Airmen (NOTAM) 4/2816 about the disputed air zone, indicating that “Russia’s claim to the airspace over Ukraine’s Crimea could lead to conflicting air traffic control instructions.”²⁵⁷ Several weeks later, “the FAA issued a tougher warning, telling pilots not to fly over the area.”²⁵⁸ This NOTAM, FDC NOTAM 4/7667 (A0012/14), related to airspace above Crimea, the Black Sea, and the Sea of Azov.²⁵⁹ However, as observed in the final crash report, “[t]he warning pertaining to the remainder of Ukraine was formulated in general terms and did not contain any specific information about the armed conflict and the potential risks it could present to civil aviation.”²⁶⁰ In contrast, the ICAO’s warning was instead directed to governments advising them of the need to warn their airlines.²⁶¹

I. FINAL REPORT CRITIQUE OF ICAO

While acknowledging ICAO’s heavy reliance on State-provided information and that no request for assistance was received from the Ukraine, the Dutch Safety Board still expressed a reservation associated with ICAO’s handling of matters. In particular, ICAO’s letter to Simferopol FIR (Crimea) on April 2, 2014, “stated [the ICAO] would continue to actively coordinate with the parties active in the region with respect to the developments in the realm of flight safety.”²⁶² The Dutch Safety Board suggested that this letter had created expectations that ICAO would take further action if the threat increased.²⁶³ However, ICAO was inactive: “In the Dutch Safety Board’s opinion, it would have been appropriate . . . for ICAO to have requested

²⁵⁷ David Koenig & Scott Mayerowitz, *Flight MH17: Why Airlines Didn’t Avoid Risky Ukraine Airspace*, GLOBAL NEWS (July 18, 2014), <http://globalnews.ca/news/1458755/flight-mh17-disaster-could-force-airlines-into-costly-route-changes/> [<http://perma.cc/62DP-4MTY>]; see also Press Release, FAA, FAA Statement—Expanded Notice to Airmen Released (July 17, 2014), http://www.faa.gov/news/press_releases/news_story.cfm?newsId=16655&cid=TW233 [<http://perma.cc/K5R6-R7T3>] (prohibiting U.S. flight over the Simferopol (UKFV) and Dnepropetrovsk (UKDV) Flight Information Regions (FIR)). The precise words of this advice are “the potential exists for civil aircraft to receive confusing and conflicting ATC instructions while operating in the disputed airspace,” referring to airspace above the Crimean peninsula. FAA, FDC Notice to Airmen (NOTAM) 4/2816 (Apr. 3, 2014), <https://www.nbaa.org/ops/intl/mid/FDC-NOTAM.pdf>.

²⁵⁸ Koenig & Mayerowitz, *supra* note 257.

²⁵⁹ MH17 CRASH REPORT, *supra* note 56, at 179.

²⁶⁰ *Id.*

²⁶¹ Koenig & Mayerowitz, *supra* note 257.

²⁶² MH17 CRASH REPORT, *supra* note 56, at 227.

²⁶³ *Id.*

clarification from Ukraine and/or offered its services, in relation to the statements made by the Ukrainian authorities about the Antonov An-26 being shot down on 14 July.”²⁶⁴

J. THE NETHERLANDS AND THE PRELIMINARY ACCIDENT REPORT

The release of the Preliminary Report regarding the crash represents a significant achievement on the part of the Dutch Safety Board, especially given the problems associated with the crash site's location in a region of disputation held by separatist forces. The evidence considered includes aircraft maintenance data, flight operational data, images available publically and obtained from the National Bureau of Air Accidents Investigation of Ukraine and the Australian Federal Police, satellite imagery, ATC surveillance data obtained from the UksATSE, and ATC surveillance data from the Russian Federation.²⁶⁵ The Preliminary Report concluded that the “pattern of damage . . . was consistent with the damage that would be expected from a large number of high-energy objects that penetrated the aircraft from outside.”²⁶⁶ A key deduction of the Preliminary Report in Part 3 (Summary of Findings) noted it was likely “that this damage resulted in a loss of structural integrity of the aircraft, leading to an in-flight break up.”²⁶⁷

Due to the preliminary nature of this report, care must be exercised in analysing its findings. The Dutch investigatory authorities were careful not to attribute responsibility to a Buk anti-aircraft missile.²⁶⁸ The Dutch Safety Board has suggested “[the] investigation into the cause of the accident is in full progress and focuses on many more sources than only the shrapnel.”²⁶⁹ At the time of the Preliminary Report not all data had

²⁶⁴ *Id.* at 228.

²⁶⁵ See PRELIMINARY REPORT, *supra* note 9.

²⁶⁶ *Id.* at 25.

²⁶⁷ *Id.* at 30.

²⁶⁸ See *id.*

²⁶⁹ See Amanda Macias, *More Proof That a Russian BUK Missile Shot Down Passenger Plane MH17*, BUS. INSIDER (Mar. 19, 2015), <http://www.businessinsider.com/r-fragment-from-mh17-crash-site-supports-missile-theory-dutch-tv-2015-3> [<http://perma.cc/VVL9-Q4JV>]; see also *MH17: Dutch Team to Return to Ukraine Crash Site to Collect More Remains*, ABC (Jan. 23, 2015), <http://www.abc.net.au/news/2015-01-24/dutch-team-to-search-for-more-remains-at-mh17-crash-site/6044064> [<http://perma.cc/MQG4-HGQM>] (noting that the Dutch prosecution service is concurrently conducting a criminal investigation of the incident).

been analyzed and therefore, does not claim to provide a definitive analysis.²⁷⁰

Recently, Dutch journalist Jeroen Akkermans has alleged that an object he took from the crash site bears a discernible Russian marking.²⁷¹ He reports that he has now conveyed this object to Dutch authorities.²⁷² While Akkermans' contention may carry persuasive value in the arena of public opinion, most prudent observers patiently wait on the final report.

K. THE FINAL CRASH REPORT CRITICAL FINDINGS AND RECOMMENDATIONS

After comprehensive analysis, including the conduct of several simulations, the Dutch Safety Board concluded that "the aeroplane was struck by a 9N314M warhead as carried on a 9M38-series missile and launched by a Buk surface-to-air missile system."²⁷³ While acknowledging that the Buk missile could have been launched from a 320 square kilometer area in the east of Ukraine, the final crash report noted the need for further forensic research to determine the exact launch location.²⁷⁴ Pertinently, the Dutch Safety Board also noted that this investigatory work fell "outside the mandate of the Dutch Safety Board, both in terms of Annex 13 [of the Chicago Convention] and the Kingdom Act 'Dutch Safety Board'."²⁷⁵

The Dutch Safety Board in its Final Report emphasized the need for ICAO to take "a stronger, more proactive role" in airspace management in conflict zones.²⁷⁶ It argues for a "stricter redefinition of the responsibility of states for their airspace."²⁷⁷ This would necessitate amendment of the Chicago Convention, including the Standards and Recommended Practices (SARPS) in the Annexes, to require states dealing with armed conflict to publish information outlining "the nature and extent of threats" at an earlier date.²⁷⁸ The Dutch Safety Board also envisaged ICAO issuing a State Letter where a state dealing with an armed

²⁷⁰ See PRELIMINARY REPORT, *supra* note 9, at 4.

²⁷¹ Jeroen Akkermans, *MH17 Crash: My Revealing Fragments from East Ukraine*, BBC (Apr. 16, 2015), <http://www.bbc.com/news/world-europe-32283378> [<http://perma.cc/7SV5-HG3P>].

²⁷² *Id.*

²⁷³ MH17 CRASH REPORT, *supra* note 56, at 137.

²⁷⁴ *Id.* at 144, 147.

²⁷⁵ *Id.* at 147.

²⁷⁶ *Id.* at 264.

²⁷⁷ *Id.*

²⁷⁸ *Id.*

conflict fails to provide such information.²⁷⁹ Further, the Dutch Safety Board recommended a toughening of the regulatory regime by way of converting non-mandatory Recommended Practices into Standards in order to mandate compliance.²⁸⁰ The Dutch Safety Board's Recommendation 6, related to risk assessment, calls upon ICAO to "[a]mend relevant Standards so that risk assessments shall also cover threats to civil aviation in the airspace at cruising level, especially when overflying conflict zones. Risk increasing and uncertain factors need to be included in these risk assessments"²⁸¹ In terms of operator accountability, the Dutch Safety Board has called for greater levels of public accountability for routes chosen.²⁸²

L. THE INTERNATIONAL PROHIBITION ON SHOOTING DOWN CIVIL AIRCRAFT

Past incidents involving the downing of civil aircraft in the post-World War II period include: (i) the Soviet Union shooting down a French Commercial Airliner; (ii) China shooting down a Cathay Pacific flight; (iii) Bulgaria shooting down an El AL airliner; (iv) the Soviet Union shooting down Korean Airlines Flight 902; (v) the Soviet Union shooting down Korean Airlines Flight 007; and (vi) the United States shooting down Iran Air Flight 655.²⁸³

Mistaken aircraft identification is a feature of several of the above incidents. In 1954, a Chinese fighter fired on a Cathay Pacific flight traveling between Bangkok and Hong Kong.²⁸⁴ China argued that its military had mistakenly identified the civil aircraft as a Nationalist Chinese military aircraft sent to attack a Chinese military base at Port Yulin.²⁸⁵ In this case, "the Chinese apologized for the incident and agreed to pay compensation for the resulting losses."²⁸⁶

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Id.* at 265.

²⁸² *Id.* at 266.

²⁸³ Brian E. Foont, *Shooting Down Civilian Aircraft: Is there an International Law?* 72 J. AIR L. & COM. 695, 704–15 (2007); see also Craig A. Morgan, *The Shooting of Korean Air Lines Flight 007: Responses to Unauthorised Aerial Incursions*, in INTERNATIONAL INCIDENTS: THE LAW THAT COUNTS IN WORLD POLITICS 204–212 (W. Michael Reisman & Andrew R. Willard eds., 2014).

²⁸⁴ Foont, *supra* note 283, at 705.

²⁸⁵ *Id.*

²⁸⁶ *Id.*

The second incident involved the shooting down of KAL007 by the Soviet Union over the Sea of Japan when the aircraft strayed into Soviet airspace near military facilities on Sakhalin Island.²⁸⁷ A Soviet military jet shot down the aircraft killing all 269 persons on board.²⁸⁸ The Soviet Union secreted the flight data recorder, and a first accident investigation, without access to the black box, was conducted under the auspices of ICAO.²⁸⁹ At that time, “the Soviet Union refused to accept full responsibility for the downing, ignored U.S. demands for compensation, and went virtually unpunished for the attack.”²⁹⁰ With the demise of the old Soviet Union, a second accident investigation was conducted. The Boris Yeltsin-led Russian Federation provided the black box, which made a more complete investigation possible.²⁹¹ At the time of the second investigation, Yeltzin characterised the KAL007 tragedy as involving “the most horrible catastrophe of the Cold War.”²⁹² Despite this seemingly unequivocal statement, a subsequent Russian inquiry essentially resurrected their prior position on KAL007.²⁹³

M. THE ARTICLE 3 BIS PROHIBITION

The downing of KAL007 was met with widespread international condemnation and some countries implemented sanctions against the Soviet Union.²⁹⁴ The ICAO Council met in September 1983 and passed a resolution deploring the use of armed force against civil aircraft.²⁹⁵ On May 10, 1984, the ICAO

²⁸⁷ *Korean Airlines Flight Shot Down by Soviet Union*, HISTORY, <http://www.history.com/this-day-in-history/korean-airlines-flight-shot-down-by-soviet-union> [<http://perma.cc/HL6N-MNE9>] (last visited Nov. 21, 2015).

²⁸⁸ *Id.*

²⁸⁹ Thom Patterson, *The Downing of Flight 007: 30 Years Later, a Cold War Tragedy Still Seems Surreal*, CNN (Aug. 31, 2013), <http://edition.cnn.com/2013/08/31/us/kal-flight-007-anniversary/> [<http://perma.cc/3ZZG-45P7>].

²⁹⁰ Douglas A. Ewing, *The Downing of Iran Air Flight 655: Highlighting the Need for International Adjudication of Damages*, 13 SUFFOLK TRANSNAT'L L.J. 656, 663 (1990).

²⁹¹ John-Thor Dahlburg, *Yeltsin Tells of Soviet Atrocities: Legacy: Russian Releases Documents on 1983 Downing of KAL Jetliner and the Mass Murder of Polish Officers in WWII. Gorbachev is Blamed for Suppressing Secrets*, L.A. TIMES (Oct. 15, 1992), http://Articles.latimes.com/1992-10-15/news/mn-395_1_polish-officers [<http://perma.cc/XZW7-7GE4>].

²⁹² *Id.*

²⁹³ Masahiko Kido, *The Korean Airlines Incident on September 1, 1983, and Some Measures Following It*, 62 J. AIR L. & COM. 1049, 1056 (1997).

²⁹⁴ Foont, *supra* note 283, at 708.

²⁹⁵ Int'l Civil Aviation Org. [ICAO], *Resolution Adopted by the Extraordinary Session of the Council of the ICAO on September 16, 1983* (1983).

Assembly amended the Chicago Convention by adding a new Article 3 bis, which stated a prohibition on the use of force against civil aircraft.²⁹⁶

ICAO member States were slow to ratify Article 3 bis, and it was not until October 1998 that it entered into force.²⁹⁷ ICAO also developed specific procedures, signals and rules to guide states in implementing interceptions of civil aircraft if deemed necessary.²⁹⁸ These were contained in its "Manual Concerning Interception of Civil Aircraft," and included in amendments to Annexes 2, 6, 10 and 11 of the Chicago Convention.²⁹⁹

N. THE U.S.S. *VINCENNES* INCIDENT³⁰⁰

During the 1988 Iran/Iraq conflict, the U.S.S. *Vincennes* (*Vincennes*) was patrolling the Strait of Hormuz on a mission to protect oil tankers.³⁰¹ Following an attack on the U.S.S. *Stark* by an Iraqi military jet, the *Vincennes* mistook Iran Air flight 655 for a military aircraft, and after attempts to communicate with the aircraft on the wrong frequency, shot the aircraft down, killing all on board.³⁰² The incident was headed for the International Court of Justice before Iran and the United States settled and withdrew the matter.³⁰³ As Paul Dempsey observed, "[n]ot only was the U.S. legal case poor, its moral position was miserable."³⁰⁴ In the wake of this incident, on an ex gratia basis and without acknowledging legal liability, the Reagan Administration made payments of around \$300,000 per family to the dependents of

²⁹⁶ Chicago Convention, *supra* note 199, art. 3 bis.

²⁹⁷ *Id.*

²⁹⁸ Kido, *supra* note 293, at 1067–68.

²⁹⁹ *Id.*

³⁰⁰ Max Fisher, *The Forgotten Story of Iran Air Flight 655*, WASH. POST (Oct. 16, 2013), <http://www.washingtonpost.com/blogs/worldviews/wp/2013/10/16/the-forgotten-story-of-iran-air-flight-655/> [http://perma.cc/NAE6-XVKX].

³⁰¹ George C. Wilson, *Navy Missile Down Iranian Jetliner*, WASH. POST (July 4, 1988), <http://www.washingtonpost.com/wp-srv/inatl/longterm/flight801/stories/july88crash.htm>.

³⁰² See Paul Stephen Dempsey, *Flights of Fancy and Fights of Fury: Arbitration and Adjudication of Commercial and Political Disputes in International Aviation*, 32 GA. J. INT'L & COMP. L. 231, 293 (2004) ("Until minutes before the missile launch, military transmissions from the *Vincennes* warning the incoming aircraft had not been received by Iran Air 655, for they had been broadcasting on military frequencies.").

³⁰³ Shapour Ghasemi, *Shooting Down Iran Air Flight 655 [IR655]*, IRAN CHAMBER SOCIETY (2004), http://www.iranchamber.com/history/Articles/shootingdown_iranair_flight655.php [http://perma.cc/2376-BJXE].

³⁰⁴ Dempsey, *supra* note 302, at 293.

the deceased victims.³⁰⁵ At this time, the United States stated that the following principles applied to such events: "(1) indemnification is not required for injuries or damage incidental to the lawful use of armed force; (2) indemnification is required where the exercise of armed force is unlawful; and (3) states may, nevertheless, pay compensation *ex gratia* without acknowledging, and irrespective of, legal liability."³⁰⁶ While the position adopted by the United States is contentious, it demonstrates a situation where a State makes gratuitous payments to the relatives of deceased passengers.

The Cathay Pacific incident also endorses making payments where a State has erroneously shot down a commercial airliner.³⁰⁷ A further incident, in October 2001, in which a Ukrainian missile shot down a commercial aircraft en route from Tel Aviv to Russia, saw the Ukraine make payments of \$200,000 per family to the families of deceased individuals.³⁰⁸ Consequently, there is state practice suggesting the making of such payments. This surely presents as an option, although it may arguably as yet fall short of representing a customary international law obligation.

O. RELEVANCE OF AVIATION SECURITY CONVENTIONS ON ISSUES OF CRIMINAL RESPONSIBILITY

Where command or State responsibility cannot be established, the legal position becomes problematic. However, aviation security conventions dealing with unlawful interference in civil aviation, namely those secured in Tokyo (1963), The Hague (1970), and Montreal (1971), may potentially come into play.

The Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Convention of 1971)³⁰⁹ is in force in each State most integrally involved in the Flight MH17 incident.³¹⁰ In Article 1(b) of the Montreal Convention

³⁰⁵ *Id.* at 294.

³⁰⁶ Foont, *supra* note 283, at 712.

³⁰⁷ *Id.* at 716.

³⁰⁸ *Id.*

³⁰⁹ Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, T.I.A.S. No. 7570, 974 U.N.T.S. 178 [hereinafter referred to as the Montreal Convention of 1971].

³¹⁰ The Montreal Convention of 1971 is in force in each of the following States: The Ukraine (Jan. 26, 1973), the Russian Federation (Feb. 19, 1973), Malaysia (May 4, 1985), the Netherlands (Aug. 27, 1973) and Australia (July 12, 1973). See Status List, ICAO, Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation Signed at Montreal on 23 September 1971,

of 1971, it states that an individual commits an offense if he or she unlawfully and intentionally destroys an aircraft.³¹¹ The jurisdictional options include the State in whose territory the offense is committed (correctly applied in this instance, the Ukraine) and also the State of registration or “flag State” of the aircraft (in this instance, Malaysia).³¹² Effective implementation of the Convention by an obtuse State may still be problematic. The obligation imposed by the Convention in Article 7 is to “submit without exception whatsoever and without undue delay, the case to its competent authorities for the purpose of prosecution, through proceeding in accordance with the laws of that State.”³¹³ Article 7 is practically worded, but there is still scope for its obstruction by cynical State authorities.

P. MALAYSIA AIRLINES BLAMEWORTHINESS

In this context, there has been considerable international focus on the actual carrier, Malaysia Airlines. In the lead up to the final crash report, and in the wake of the preliminary crash report, the popular media was quick to point the finger of blame in the direction of Malaysia Airlines.³¹⁴ In the context of legal liability, it is pertinent to note the observations of the Dutch Safety Board in the final crash report. First, the report noted that “Malaysia Airlines complied with all standards relevant to ‘air operators’ . . . [including] ICAO standards and national regulations.”³¹⁵ Second, the report also noted that while Malaysia Airlines based its decision to fly over the eastern part of Ukraine “virtually exclusively on aeronautical information [contained in NOTAMs] and did not perform its own additional risk assessment,” it was “not in a unique situation.”³¹⁶ The Board conceded that “there were many operators that were still flying over the conflict area.”³¹⁷ It is the authors’ understanding that only one operator, Qantas, had ceased flying over the Ukraine at the time

http://www.icao.int/secretariat/legal/List%20of%20Parties/Mtl71_EN.pdf (last visited Nov. 21, 2015).

³¹¹ Montreal Convention of 1971, *supra* note 295, art. 1(b).

³¹² *Id.*

³¹³ *Id.* art. 7.

³¹⁴ See, e.g., Tom Batchelor, *MH17 Crash Caused by Pro-Russian Rebels but Malaysia Airlines to Blame Too, Says Report*, EXPRESS (July 15, 2015), <http://www.express.co.uk/news/world/591469/MH17-Malaysia-Airlines-pro-Putin-rebels-blamed-crash>.

³¹⁵ MH17 CRASH REPORT, *supra* note 56, at 227.

³¹⁶ *Id.*

³¹⁷ *Id.*

of the incident.³¹⁸ Coincidentally, both Malaysia Airlines and Qantas are linked in the One World Alliance with code sharing occurring on certain routes.³¹⁹ In the case of MH17, there were “two passengers with a Qantas ticket”³²⁰ indicating the interconnectedness of contemporary air travel and the need to address issues such as those posed by the MH17 incident at a systemic level.

Q. PASSENGER ISSUES

Flight MH17 was international in nature. When it was shot down, it had departed the Netherlands and flown over several countries en route to Kuala Lumpur in Malaysia. Individual tickets inevitably will reveal different destinations, some being Malaysia on round trip tickets, others being Australia or the Netherlands on round trip tickets. On such international flights, the liability of the air carrier to passengers is governed by conventions, either the Warsaw Convention³²¹ or the Montreal Convention (1999).³²² Here, the Montreal Convention (1999) is in force in the Netherlands (from June 28, 2004), Australia (from January 24, 2009) and Malaysia (from February 29, 2008).³²³ Where there is clearly international carriage under Article 1 of the Montreal Convention, and there are a sufficient number of appropriate jurisdictional options under Article 33 of the Convention, there is still the need to satisfy the requirements of Arti-

³¹⁸ There are reports suggesting that Korean Air, Asiana, and China Airlines had also rerouted aircraft but there was no clarification at the time of this writing as to whether the rerouting only related to the Crimea region. See, e.g., *Flight MH17 Took Abandoned Flight Path*, SKY NEWS (July 18, 2014), <http://www.skynews.com.au/news/top-stories/2014/07/18/flight-mh17-took-abandoned-flight-path.html>.

³¹⁹ See *Member Airlines*, ONEWORLD, <https://www.oneworld.com/member-airlines/overview> (last visited Dec. 2, 2015).

³²⁰ MH17 CRASH REPORT, *supra* note 56, at 56, 213.

³²¹ The Convention for the Unification of Certain Rules Relating to International Carriage by Air, opened for signature Oct. 12, 1929, 49 Stat. 3000, 137 L.N.T.S. 11, reprinted in 49 U.S.C. § 40105 (2001), as amended by the Montreal Protocol [hereinafter the Warsaw Convention].

³²² The Convention for the Unification of Certain Rules for International Carriage by Air, May 28, 1999, S. Treaty Doc. No. 106-45, 1999 WL 33292734 (2000) [hereinafter Montreal Convention of 1999].

³²³ See Status List, ICAO, Convention for the Unification of Certain Rules for International Carriage by Air Done at Montreal on 28 May 1999, http://www.icao.int/secretariat/legal/List%20of%20Parties/Mtl99_EN.pdf (last visited Nov. 21, 2015).

cle 17 of the Convention for air carrier liability to be established.

Article 17(1) of the Montreal Convention provides that "[t]he carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking."³²⁴ In the context of the Flight MH17 incident, it is uncontentious that "death" has occurred to individuals who were "passengers," and that death occurred while they were "on board" the aircraft. What is more problematic in a technical sense is whether there was an "accident" under the Convention.

The word "accident" is not defined by the Convention and therefore, courts consistently rely on the language set forth by Justice Sandra Day O'Connor in the U.S. Supreme Court case *Air France v. Saks*.³²⁵ In *Saks*, Justice O'Connor concluded that "liability under Article 17 . . . arises only if a passenger's injury is caused by an unexpected or unusual event or happening that is external to the passenger."³²⁶ According to Ronald Schmid, the objective of Article 17 "is to cover the typical risks in air carriage only."³²⁷ If this conceptualization is accorded its ordinary meaning, then carriers ought not be responsible where a civil aircraft is shot down, either by another aircraft or by a missile. Under this argument, there is also a failure of causation because there is no connection between what caused the damage and the normal operation of the aircraft. However, there is also a body of case law in which hijackings have been accepted by air carriers as falling under the scope of the Convention. For example, in cases such as *Husserl v. Swissair*³²⁸ and *Haddad c. Air France*,³²⁹ acts of hijacking were accepted by the respective courts as falling under the Convention. Moreover, even Justice O'Connor in *Saks* noted that courts have regarded terrorist attacks and hijackings as coming under Article 17.³³⁰ Where Georgette Miller observes

³²⁴ Montreal Convention of 1999, *supra* note 322, art. 17(1).

³²⁵ *Air France v. Saks*, 470 U.S. 392 (1985).

³²⁶ *Id.* at 405.

³²⁷ Elmar Maria Giemulla & Ronald Schmid, *WARSAW CONVENTION 2* (1992).

³²⁸ 351 F. Supp. 702 (S.D.N.Y. 1972).

³²⁹ *Haddad c. Air France* 1979 RFDA 329 (TGI Paris, Apr. 28, 1978).

³³⁰ *Saks*, 470 U.S. at 405 (referring to *Evangelinos v. Trans World Airlines, Inc.*, 550 F.2d 152 (3d Cir. 1977) and *Krystal v. British Overseas Airways Corp.*, 403 F. Supp. 1322 (C.D. Cal. 1975)).

that the carrier “can exonerate himself if he establishes that all the required security measures had been taken.”³³¹

It is most likely that Malaysia Airlines, as a responsible carrier, will not dispute passenger claims made under the Montreal Convention up to its liability limit. However, because the liability cap is set at 113,100 Special Drawing Rights,³³² legal counsel for passengers may seek a higher level of compensation than the liability limit in the first tier of liability. If they do, then the carrier will have to make a decision as to whether to defend and argue for the imposition of the liability limit. It could do this by seeking to establish, under Article 21(1)(a) and (b) of the Montreal Convention, that it was not negligent in causing the damage, or that the damage resulted solely from the negligence or other wrongful act or omission of a third party.³³³

As Malaysian Airlines has acted promptly to provide the United States with \$50,000 in advance payments,³³⁴ it seems most likely that they will not defend actions up to the liability cap, at the very least. It is arguably likely that they will seek to create a negotiated settlement with passengers up to a certain level of compensation (somewhere above the first tier cap but short of multi-million dollar amounts).

One principle that may come into play is the principle of exclusivity. The Montreal Convention represents the sole and exclusive remedy for passengers against the air carrier.³³⁵ This means that if there is no “accident” under Article 17 of the Convention,³³⁶ there is no other remedy available for the passenger against the air carrier. To some extent this may act as a break upon outlandish claims. The other factor that may enter the negotiation matrix is the fact that Eurocontrol cleared the flight path; hence the negligence of the air carrier in this case is by no means a given proposition.

³³¹ GEORGETTE MILLER, *LIABILITY IN INTERNATIONAL AIR TRANSPORT* 111 (1977).

³³² See Montreal Convention of 1999 Working Paper, *supra* note 219 (an SDR of 113,110 is approximately U.S. \$170,000 as of April 2013).

³³³ See Montreal Convention of 1999, *supra* note 322, art. 21(1)(a),(b).

³³⁴ Daisy Melwani, *Malaysian Airlines Fights Back Against ‘Insulting’ Offer Claim*, TRAVEL WEEKLY (Oct. 27, 2014), <http://www.travelweekly.com.au/news/malaysia-airlines-fights-back-against-insulting-of> [<http://perma.cc/8PP7-EYE8>].

³³⁵ Montreal Convention of 1999, *supra* note 322.

³³⁶ *Id.* art. 17(1) (“The carrier is liable for damage sustained in case of death or bodily injury of a passenger upon condition only that the accident which caused the death or injury took place on board the aircraft or in the course of any of the operations of embarking or disembarking.”).

Another potentially pressing matter for the dependents of the passengers is the limitations period under the Convention, which sits at two years.³³⁷ Hence, if claims are not brought within two years, the passenger loses the ability to bring a claim against the air carrier. Article 35 of the Montreal Convention provides that “[t]he right to damages shall be extinguished if an action is not brought within a period of two years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the carriage stopped.”³³⁸ The case law suggests that the courts strictly apply the limitations period, such that compliance with the two-year limitations period under Article 35 is a “condition precedent” for bringing an action.³³⁹ Where the most logical cause of action for relatives of Flight MH17 passengers lies under the Montreal Convention, and against the air carrier, it is imperative that their legal advisers keep their eyes on the clock, which is most definitely running.

V. CONCLUSIONS

A. THE WAR CRIMES INVESTIGATION

On the basis of the foregoing analysis, the authors conclude that there are sufficient grounds to conduct a criminal war crimes investigation. This investigation should be in the nature of a criminal investigation rather than a mere civil enquiry, though it certainly would work in tandem with any investigation carried out by the Dutch and international authorities. A criminal investigation would place greater focus on the participation of the actors, as well as the surrounding circumstances concerning, *inter alia*, specific orders given, quantum of authority exercised, training of relevant troops, role of specific actors, issuance of written and oral orders by and to the relevant actors, and existing policy rules of engagement in the conflict.

The initiation of a criminal investigation is justified on the basis that there is sufficient evidence or probable cause to believe that some potential suspects, especially Strelkov, exercised

³³⁷ *Id.* art. 35.

³³⁸ *Id.*

³³⁹ *See, e.g.,* Narayanan v. British Airways, CV 11-2175-JFW CWX, 2011 WL 10004677 (C.D. Cal. May 6, 2011); Dickson v. Am. Airlines, Inc., 685 F. Supp. 2d 623, 627 (N.D. Tex. 2010) (observing that “the bringing of the action within two years was, by the express language of the Convention, a condition precedent”); Hall v. Heart of England Balloons Ltd., Case No. 8BM10813 (Birmingham Cty. Ct., Nov. 17, 2009); Lemieux v. Halifax Int’l Airport Authority, 2011 NSSC 396.

effective control over the relevant troops, that the acts do in fact constitute war crimes, and that there was subordinate misconduct and/or command responsibility. Moreover, the preliminary findings establish probable cause that the relevant actors satisfy the relatively low negligence *mens rea* requirements for command responsibility, as the missiles were allegedly fired without the necessary fail-safe safety mechanisms (essentially being fired blind into unrestricted airspace where significant commercial air traffic flew). Preliminary findings may also suggest that there was a “shoot first policy” bolstering the *mens rea* requirements for subordinate liability. Additionally, the evidence needed to establish superior liability on the part of Russian authorities appears anecdotal, and in the absence of sufficient evidence (but subject to developing investigation), an investigation would probably proceed under the assumption that this is an NIAC.

The practicalities of conducting a criminal investigation may be daunting because it would take place in a war zone, but this is not particularly unusual in war crime investigations common to international tribunals.³⁴⁰ Theoretically, the arrest, investigation, and trial could vest under a variety of jurisdictional bases including domestic Ukrainian, or could stem horizontally from victim states under theories of nationality jurisdiction, or even, if Ukraine opted, for an *ad hoc* non-party state self-referral to the ICC based on Article 12(3).³⁴¹ This latter method may be the most likely means to bring this issue before an international tribunal, as the Ukraine has already availed itself of this mechanism by referring alleged crimes committed during the civil unrest preceding the departure of the former President of Ukraine.³⁴² The prior self-referral was temporally limited to the

³⁴⁰ Investigations have taken place in war zones including in the former Yugoslavia, the Democratic Republic of Congo, Sudan and others.

³⁴¹ RS, *supra* note 77, art. 12(3) (“If the acceptance of a State which is not a party to this statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question.”).

³⁴² The Ukrainian Parliament Rada officially filed a 12(3) declaration to the ICC passed on February 25, 2014 and lodged with the Court on April 9, 2014 for crimes against humanity and directed at ousted Ukrainian leader Yanukovych Viktor Fedorovych, along with Pshonka Viktor Pavlovych (ex-Prosecutor General of Ukraine), Zakharchenko Vitalii Yuriiovych (ex-Minister of Internal Affairs of Ukraine) and others. Declaration of the Verkhovna Rada of Ukraine, ICC-CPI, OTP, Ukraine, https://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Documents/997/declarationVerkhovnaRadaEng.pdf [http://perma.cc/578L-RAXT].

period from November 21, 2013 to February 22, 2014,³⁴³ ending approximately five months before the downing of Flight MH17. Though this referral is the subject of some controversy,³⁴⁴ particularly since a 2001 Ukrainian Constitutional Court case suggests the illegality of such a referral,³⁴⁵ it may, if extended or replicated, nonetheless provide the best opportunity for a full criminal investigation and potential criminal liability of the perpetrators. Indeed, as the need for a thorough and objective criminal investigation is paramount to a resolution, the authors argue that Ukraine should enlarge its 12(3) declaration to include war crimes and cover the time period during which the Flight MH17 was downed.

B. AVIATION ISSUES

In the past, both China and the United States have made payments to the relatives of deceased passengers where civil aircraft have been shot down. With the U.S.S. *Vincennes*/Iran Air incident, this was done even without conceding legal liability. If Russian citizens were involved in launching a missile that downed Flight MH17, there is a case for Russia making payments to families of passengers. Despite the political winds that blow around this incident, the making of such payments would serve to enhance claims of Russian responsibility within the international community. This step would represent an appropriate, face-saving initiative. While Russia's Cold War history in this respect was deplorable, President Putin has the opportunity to delineate his administration from the heavy handedness of the past.

Another compensation option is if the air carrier, in consultation with its insurers, elects to waive its defenses to the liability cap. Alternatively, it may simply seek to make settlement offers in excess of the liability limit of 113,100 SDR. This would represent a mature response to the complex maze of responsibility and liability created by this extraordinary event.

Although the Convention on Compensation for Damage to Third Parties, Resulting from Acts of Unlawful Interference Involving Aircraft focuses on compensation for damage to third

³⁴³ *Id.*

³⁴⁴ See Kevin Jon Heller, *Thoughts on the Ukraine Ad Hoc Self-Referral*, OPINIO JURIS (Apr. 18, 2014), <http://opiniojuris.org/2014/04/18/thoughts-ukraine-ad-hoc-self-referral/> [<http://perma.cc/HNP9-5PEJ>] (providing an interesting discussion on this issue).

³⁴⁵ *Id.*

parties, not passengers, Article 8 is worthy of examination.³⁴⁶ Chapter III, Article 8 of this Convention provides for the establishment of an International Civil Aviation Compensation Fund.³⁴⁷ Although this convention is not yet in force, in the tragic circumstances of Flight MH17, States may be moved to consider the desirability of creating a standalone fund for victims, including passengers, if issues of attribution cannot be definitively established. However, with only thirteen signatures, two ratifications, and five accessions, the support for this particular Convention and its approach in all contexts may seem somewhat limited.³⁴⁸

C. AIRSPACE CLOSURE

The key regulators, such as ICAO and Eurocontrol, were quick to emphasize that ultimate responsibility for airspace closure lies with individual States, essentially as a product of their sovereignty over air space. At the same time the ICAO letters to States, before and after the Flight MH17 incident, suggest its important leadership role. Equally, Eurocontrol's "single European sky" concept and its activation of the EACCC suggest that its leadership role goes well beyond the mere formulation of aims and objectives.

After the event, the peak industry body, IATA, appropriately called for the establishment of "fail-safe channels for essential threat information to be made available"³⁴⁹ to both State civil aviation authorities and the industry, namely the airlines. The report of the recent Second-High-Level Safety Conference (2015) emphasizes the need to enhance "existing mechanisms." If this means modification of the standards contained in Annexes 11 and 17 of the Chicago Convention, and the two security manuals,³⁵⁰ so as to provide the fail-safe notifications asked for by IATA, such steps would be positive.

³⁴⁶ Convention on Compensation for Damages to Third Parties Resulting from Acts of Unlawful Interference Involving Aircraft art. 8, May 2, 2009, ICAO Doc. 9920.

³⁴⁷ *Id.* art. 8.

³⁴⁸ See Status List, ICAO, Convention on Compensation For Damage Caused by Aircraft to Third Parties Done at Montreal on 2 May 2009, http://www.icao.int/secretariat/legal/List%20of%20Parties/2009_GRC_EN.pdf [<http://perma.cc/6D55-ARS9>] (last visited Nov. 21, 2015).

³⁴⁹ Joint Statement on Risks to Civil Aviation Arising from Conflict Zones, *supra* note 243.

³⁵⁰ Int'l Civil Aviation Org. [ICAO], Manual Concerning Safety Measures Relating to Military Activities Potentially Hazardous to Civil Aircraft Operations,

However, there is a need for a global response that goes beyond "existing mechanisms." In the view of the authors, a proactive approach is required to provide air carriers and passengers with the safety that they require. Arguably, there is a need for a single body to be vested with the role of notifying States and airlines of the need to adjust routes to avoid zones involving ground based insurgency or warfare, as well as to declare prohibited areas of airspace to a much greater height than previously considered necessary. In the authors' view, the key regulators need to decisively address this issue rather than seek to refine a system that has failed. To borrow the words of IATA, only a "fail-safe" system will suffice.

ICAO Doc. 9554-AN/932 (1st ed. 1990), http://www.icao.int/Meetings/anconf12/Document%20Archive/9554_cons_en.pdf; Int'l Civil Aviation Org. [ICAO], Aviation Security Manual, ICAO Doc. 8973-Restricted.