2015

Surface to Air: Malaysia Airlines Flight MH17 and Loss Recovery by States for Civilian Aircraft Shootdowns

Kimberly R. Gosling

Jacob A. Ayres

Follow this and additional works at: https://scholar.smu.edu/jalc

Recommended Citation


https://scholar.smu.edu/jalc/vol80/iss3/3

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit http://digitalrepository.smu.edu.
SURFACE TO AIR: MALAYSIA AIRLINES FLIGHT MH17 AND LOSS RECOVERY BY STATES FOR CIVILIAN AIRCRAFT SHOOTDOWNS

KIMBERLY R. GOSLING*
JACOB A. AYRES**

I. INTRODUCTION

ON JULY 17, 2014, Malaysia Airlines Flight MH17, bound for Kuala Lumpur from Amsterdam, crashed outside of Donetsk, Ukraine.¹ Tragically, all 298 passengers and crew aboard the plane died.² The distribution of the wreckage indicated that the airplane had broken up in flight.³

The location of the crash over eastern Ukraine, the site of an ongoing armed conflict between the Ukrainian military and pro-Russian Crimean separatists, immediately led many in the media and international community to suspect that the plane had been shot down by a missile.⁴ The growing consensus that a missile

---

² Id.
⁴ See Raziye Akkoc & Andrew Marszal, Malaysia Airlines Plane Crashes on Ukraine-Russia Border: July 22 as it Happened, TELEGRAPH (July 22, 2014, 11:59AM BST), http://www.telegraph.co.uk/news/worldnews/europe/ukraine/10974050/Ma-
strike downed the plane led to a flurry of finger-pointing between Russia and Ukraine, already in an armed and heated territorial dispute over eastern Ukraine and the Crimean peninsula. Meanwhile, the Dutch Safety Board (DSB) attempted to conduct a thorough accident investigation despite significantly impeded access to the crash site. The preliminary report reflected the political sensitivity of the situation by carefully attributing the crash to "high-energy objects that penetrated the aircraft from the outside." The final report, however, came to a clear conclusion: The airplane was shot down by a surface-to-air missile (SAM) fired from a Buk missile system. While the Dutch authorities have declined to attribute blame to any state or individual, they have linked the crash to "the armed conflict in the eastern part of Ukraine," which had "expanded into the airspace" shortly before the crash.

As accusations were traded in the political arena, commentators quickly began to speculate about the legal ramifications of the crash. The commentary identified a number of potentially


5 See id.; see also infra Section II.C.


7 PRELIMINARY REPORT, supra note 6, at 25.

8 MH17 CRASH REPORT, supra note 3, at 9.

9 Id. at 7, 15.

10 Id. at 253.

culpable or liable parties: Malaysia Airlines and Malaysia (the majority shareholder in the effectively state-owned Malaysia Airlines), Ukraine, Russia, and the Netherlands. Some victims’ families have already filed or announced their intent to file lawsuits in various fora, including a case against Ukraine filed in late 2014 in the European Court of Human Rights and a lawsuit filed against Malaysia Airlines and Igor Girkin, a former rebel leader in the Ukrainian conflict, filed in July 2015 in federal court in Chicago.

The tragedy of Malaysia Airlines Flight MH17 illuminates the unique legal issues that arise in the wake of the shootdown of a...
civilian aircraft. In particular, the legal clamor surrounding Flight MH17 shows how complicated legal redress can become when multiple state actors are involved. This article, using the MH17 disaster as a starting point, will analyze potential paths to recovery available to states after such shootdowns. As missile technology continues to advance, more states may find themselves seeking to recoup losses after the shootdown of one of their civilian aircraft.\(^5\)

Part II of this article will begin with a discussion of the factual background of the crash, including the flight path, the investigation history, and the subsequent political fallout. Part III will examine the various international venues available to states for shutdown-related recovery, addressing their history and procedural requirements, the substantive legal bases for recovery, and the relative merits of each venue. These venues include the International Civil Aviation Organization (ICAO) Council, the International Court of Justice (ICJ), the Permanent Court of Arbitration (PCA), the European Court of Justice (ECJ), and the European Court of Human Rights (ECHR), as well as domestic civil courts (which the article will discuss briefly). Part IV will conclude with a brief synopsis of the best pathways for state recovery after civilian aircraft shootdowns.

This article focuses specifically on recovery by states and is not meant to be exhaustive.\(^6\) Recovery by airlines and the families of victims will not be discussed in detail, although those issues certainly warrant future scholarship.\(^7\) Criminal proceedings, which several media outlets have examined, also will not be addressed at length.\(^8\)

II. FACTUAL BACKGROUND

A. FLIGHT PLAN AND CRASH DETAILS

Unlike the disappearance of Malaysia Airlines Flight MH370, the details of MH17's flight and crash are fairly well docu-

---


\(^6\) The article will also not discuss the Montreal Convention as a basis for recovery, although it certainly provides a reliable route of recovery.

\(^7\) The article will, however, discuss state recovery on behalf of victims and airlines. See infra Section III.

\(^8\) See, e.g., Hamilton, *supra* note 11; Whiting, *supra* note 11.
mented—the only mystery is the exact circumstances of the missile strike.

Flight MH17, a Boeing 777-200ER, departed Schiphol Airport in Amsterdam at 10:31 UTC, destined for Kuala Lumpur, Malaysia. There were 283 passengers and fifteen crew members on board the flight, including nationals of eleven countries. All air traffic controllers (ATCs) involved had approved MH17’s filed flight plan, including the ATCs of Ukraine and the Netherlands. The flight plan stated that MH17 was to fly at 33,000 feet above Ukraine until waypoint PEKIT in the airspace of eastern Ukraine. At waypoint PEKIT, the plane was scheduled to fly at 35,000 feet over the remainder of eastern Ukraine.

At 12:53 UTC, Ukraine’s Dnipropetrovsk Flight Information Region (Dnipro Control) made contact with MH17 when the airplane entered Dnipro Control’s airspace. Dnipro Control asked if MH17 was able to climb to 35,000 feet in accordance with the flight plan, but MH17 responded that it was unable to climb and requested to maintain altitude at 33,000 feet. At 13:19 UTC Dnipro Control cleared MH17 to fly to waypoint RND in Russian airspace and then continue its flight path. The Flight Data Recorder and the Digital Cockpit Voice Recorder both stopped recording at 13:20:03 UTC, at which point MH17 was in the air above Hrabove in eastern Ukraine, fifty kilometers from the Russian border. The wreckage of the plane fell

---

19 MH 17 Crash Report, supra note 3, at 23.
21 MH 17 Crash Report, supra note 3, at 212.
22 Id.
23 Id.
24 Id. at 24–25.
25 Id. at 25.
26 Id. at 26.
27 Id. at 26, 47.
outside of Hrabove, with the widespread distribution of the wreckage indicating "an in-flight break-up."

Many wondered why Flight MH17 was flying over a war zone to begin with. During the period of armed conflict in eastern Ukraine, however, "no state or international organi[z]ation other than Ukraine issued a specific safety warning about the eastern part of Ukraine." Furthermore, at the time of the crash, Ukraine's ATC authority had not closed the airspace over eastern Ukraine, instead restricting flights to altitudes above 32,000 feet. Indeed, during its path over eastern Ukraine, MH17 was at all times in airspace that Ukraine had approved for flight. MH17 was flying at 33,000 feet when it crashed—just above the restrictions imposed by the Ukrainian ATC. Three other commercial flights were also in the area at the time of the crash.

B. Investigation History

In the wake of the crash, Ukraine delegated responsibility for the accident investigation to Dutch authorities, by consent, pursuant to ICAO Annex 13. The Dutch began several parallel

---

28 Id. at 53.
30 MH17 CRASH REPORT, supra note 3, at 179. Notably, while the U.S. Federal Aviation Administration (FAA) issued restrictions on flights over Crimea and the surrounding waters, the restrictions did not include the airspace in which MH17 was shot down. Id.; see Prohibition Against Certain Flights in the Simferopol (UKFV) Flight Information Region (FIR), 79 Fed. Reg. 22,862 (Apr. 25, 2014) (to be codified at 14 C.F.R. pt. 91). As the Dutch Safety Board later pointed out, "The [FAA] warning pertaining to the remainder of Ukraine [including the airspace in which MH17 was shot down] 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." MH17 CRASH REPORT, supra note 3, at 179.
31 MH 17 CRASH REPORT, supra note 3, at 195–96.
32 Id. at 36.
33 Id.
34 Id. at 41.
35 Id. at 14; Convention on International Civil Aviation Annex 13, 5.1, July 2001, http://www.cad.gov.rs/docs/udesi/anl3_cons.pdf [http://perma.cc/7UKN-VQ28] ("The State of Occurrence [of the accident] shall institute an investigation into the circumstances of the accident and be responsible for the conduct of the investigation, but it may delegate the whole or any part of the conducting of such investigation to another State by mutual arrangement and consent."). Presumably, the Netherlands wished to take ownership of the investigation due to the fact that the vast majority of victims were Dutch nationals. See Andrew Parker & Roman Olearchyk, Netherlands to Lead MH17 Investigation, Fin.
investigations, including a civil investigation to determine the
cause of the crash, conducted by the DSB, and a sprawling
criminal investigation coordinated by the public prosecutor of
the Netherlands—purportedly the largest criminal investigation
in Dutch history.

The DSB’s civil investigation proceeded cautiously. In its pre-
liminary report, the DSB concluded that the crash was caused by
“high-energy objects” penetrating the fuselage of the plane mid-
flight. This careful wording gave credence to the belief of
many national officials and commentators that MH17 was
downed by a SAM. In an interview, the Dutch prosecutor in
charge of the criminal investigation, Fred Westerbeke, stated in
a similarly conservative fashion that, although a SAM was the
most likely cause, the investigation did not rule out the possi-

The final report, issued on October 22, 2015, identified the
cause of the crash in no uncertain terms:

The in-flight disintegration of the aeroplane near the Ukrainian/
Russian border was the result of the detonation of a warhead.
The detonation occurred above the left hand side of the cockpit.
The weapon used was a 9N314M-model warhead carried on the
9M38-series of missiles, as installed on the Buk surface-to-air mis-

The DSB “considered, analy[zed and excluded” all other possi-
ble causes of the crash.

In contrast to the cautious preliminary report, the final report
indicts the international civil aviation community for failing to

---

36 MH17 CRASH REPORT, supra note 3, at 14, 18–19. Although the DSB led the
investigation, it received support from investigators from numerous other states.
Id. at 15–16.

37 Id. at 18; Anthony Deutsch, Angry Families of MH17 Crash Victims Seek U.N.
05/us-ukraine-crisis-mh-idUSKCNOJJ1OK20141205 [http://perma.cc/4MMV-
C756].

38 PRELIMINARY REPORT, supra note 6, at 30.

39 See infra Section II.C.

40 Ranier Leurs, MH17-Chefermittler Westerbeke: “Wissen die Russen womöglich
mehr?” [MH17 Chief Inspector Westerbeke: “Did the Russians Know More?”],
SPIEGEL (Oct. 10, 2014) (Ger.), http://www.spiegel.de/panorama/justiz/mh17-
ermittler-westerbeke-ueber-den-absturz-in-der-ukraine-a-999193.html [http://per-
ma.cc/P2DF-EZ2P].

41 MH17 CRASH REPORT, supra note 3, at 9.

42 Id.
assess and respond to the risks associated with flying over the conflict zone in eastern Ukraine. The report notes that "[d]uring the period in which the conflict in the eastern part of Ukraine expanded into the airspace, neither Ukraine nor other states or international organizations issued any specific security warnings to civil aviation about the airspace above the eastern part of Ukraine." Furthermore, only "[a] single operator decided to stop flying over Ukraine because of growing unrest in the country[,] . . . in March 2014 . . . before the armed conflict broke out." "[N]o other operators changed their flight routes for safety reasons related to the conflict in the eastern part of Ukraine after this." The report urgently recommends that international organizations, states, and operators take steps to improve their risk assessment and management of airspace over conflict zones.

C. POLITICAL Fallout

Shortly after news of the crash broke, Russia and Ukraine began a war of words and propaganda that mirrored the actual war between the two countries, with each country pointing the finger of blame at the other. Ukraine’s director of information security, Vitaly Nayda, said that it was “absolutely” a Russian operative that shot down MH17. Russian president Vladimir Putin bluntly blamed Ukraine, stating that “the government over whose territory it occurred is responsible for this terrible tragedy.” Likewise, Russia’s state-sponsored media has consistently accused Ukraine. The crossfire of propaganda reached an al-

43 Id. at 259–63.
44 Id. at 259.
45 Id. at 260.
46 Id.
47 Id. at 7–8, 263–66.
most farcical level when several Russian media outlets ran a satellite photograph of what appeared to be a Ukrainian air force jet firing a missile at MH17. The media outside of Russia quickly deemed the photo a "crudely edited" hoax.

Aside from the sniping between Russia and Ukraine, the MH17 disaster generated consternation in the international community at large. Navi Pillay, the UN High Commissioner for Human Rights, said that the shooting of MH17, "given the prevailing circumstances, may amount to a war crime." Former U.S. Secretary of State Hillary Clinton assigned responsibility to Putin, himself. U.S. Representative Eliot Engel, member of the House Foreign Affairs Committee, called the shootdown "an act of terror" and said he had no doubt that Russia was implicated, based on its support of the Crimean separatists. Similarly, Australian Prime Minister Tony Abbott announced that he was considering whether to classify the shootdown as "an act of overseas terrorism." Various world leaders also issued statements urging

---


53 See id.


57 Hamish Fitzsimmons, MH17: Families of Victims of the Malaysia Airlines Crash Likely to Access Australian Government Terrorism Compensation, ABC (July 24, 2014), http://www.abc.net.au/news/2014-07-24/mh17-families-likely-to-access-compensation/5622408 [http://perma.cc/C3QU-W5BV]. Whether Abbott made this designation was important, in that victims and families of victims of overseas terrorism are eligible to access government compensation funds through the Australian Victim of Terrorism Overseas Payment Act. Id.; see also infra Section III.F. Abbott also famously threatened to metaphorically "shirtfront" Putin—a reference to an Australian Rules football technique for taking down an opponent—by
Russia and Ukraine to cooperate enough to allow an investigation of the crash site.\(^\text{58}\)

Despite the best efforts of Russia and its media, a broad consensus emerged that Russian-backed Crimean separatists shot down MH17 with a Buk SAM array.\(^\text{59}\) The DSB’s final report shared this consensus view about the cause of the crash, although it did not say who was at fault.\(^\text{60}\)

Commenting on Flight MH17, Professor Barry Kellman, an expert on international law and arms control, has noted the danger of the proliferation of SAMs:

SAMs represent a readily available way for any deviant group to inflict terror indiscriminately on the global aviation community

. . . . Altogether, the licit market for anti-aircraft missiles is estimated to be nearly $35 billion for 2011–2021; the size of the illicit market is incalculable.

---

58 See Akkoc & Marszal, supra note 4 (discussing Hillary Clinton, China’s Foreign Minister Wang Yi, and the United Nations’ call for cooperation of Ukrainian and separatist forces to allow for a thorough investigation of the crash).

59 See, e.g., Kellman, supra note 15; Spencer Ackerman & Shaun Walker, MH17: US Intelligence Says Russia “Created Conditions” for Plane Disaster, GUARDIAN (July 22, 2014), http://www.theguardian.com/world/2014/jul/22/mh17-us-intelligence-russia-separatists-report [http://perma.cc/XS3M-VN8K] (stating that U.S. officials believed Russian-backed separatists caused the crash by mistakenly targeting the plane); Brian Fung, This is the Surface-to-Air Missile that Ukraine Says Shot Down MH17, WASH. POST (July 17, 2014), http://www.washingtonpost.com/blogs/th switching/wp/2014/07/17/this-is-the-surface-to-air-missile-that-ukraine-says-shot-down-mh17/ [http://perma.cc/6H8N-7FHV] (stating that U.S. officials confirmed that the crash was caused by a SAM); Leurs, supra note 40; Charlotte McDonald-Gibson, MH17 Crash Report: Clues Mounting into Cause, But Answers Are Few, INDEPENDENT (Sept. 9, 2014), http://www.independent.co.uk/news/world/europe/mh17-crash-report-clues-mounting-into-cause-but-answers-are-few-9722152 .html [http://perma.cc/UQ3T-SG9H] (reporting that Ukraine and “several eye witnesses” believed a SAM caused the crash, while the Malaysian Prime Minster had a “strong suspicion” that a SAM was the cause). A Buk SAM “is a medium-range mobile missile platform that can engage targets flying at altitudes well above MH17’s last reported figures—by some estimates, as much as 72,000 feet.” Fung, supra.

60 MH17 Crash Report, supra note 3, at 9.
If SAMs and other advanced missile capacities proliferate to non-State actors the way that [man-portable air defense systems (MANPADs)] have proliferated, then civilian aviation could be imperiled.\textsuperscript{61}

Given the proliferation of missiles capable of shooting down aircraft, this likely will not be the last shootdown of a civilian aircraft, nor will Malaysia be the last country to face such a disaster. Thus, understanding how to recover losses caused by such incidents will be crucial for any state confronted by a similar event.

III. LEGAL ANALYSIS OF VENUES FOR CIVIL RECOVERY BY STATES

A variety of international venues exist in which a state may seek to recover losses related to the shootdown of a civilian aircraft, whether on its own behalf or on behalf of its citizens and domestic entities. Such losses may include business losses to a domestic airline, compensation to passengers’ families, loss of the airplane, and reputational harm caused by the incident. Each of the following venues provides its own unique set of procedural and substantive advantages and disadvantages that are important to evaluate when considering options for recovery.

Before examining each venue, it should be noted that the case law in many of these venues is sparse. Thus, the rule or treaty providing the basis for recovery is not always entirely clear.\textsuperscript{62} Nor are the precise types of losses that a state may recover in each venue particularly well-defined.\textsuperscript{63} But most of these international venues appear to have taken a relaxed approach to both issues; as long as the plaintiff sufficiently alleges a violation of an applicable treaty, the right to monetary relief for a wide variety of losses is often presumed.\textsuperscript{64} The following discussion recognizes the lack of concrete guidance in these areas, relying on precedent to the extent possible and drawing conclusions in the absence of precedent as needed.

A. INTERNATIONAL CIVIL AVIATION ORGANIZATION COUNCIL

1. History and Procedure

The Convention on International Civil Aviation (Chicago Convention) provides for a method of dispute resolution

\textsuperscript{61} Kellman, supra note 15.
\textsuperscript{62} See infra Section III.B.1.
\textsuperscript{63} See infra Section III.B.3.
\textsuperscript{64} See, e.g., infra Section III.B.3.
through the International Civil Aviation Organization Council (ICAO Council).\textsuperscript{65} Article 84 of the Chicago Convention provides that the ICAO Council shall resolve disputes between contracting states arising under the Convention upon request of one of the states.\textsuperscript{66}

A dispute between contracting states can be brought before the ICAO Council and appealed either to the International Court of Justice or to an ad hoc arbitral tribunal.\textsuperscript{67} If the ICAO Council finds that an “airline of a contracting State” has violated the Convention, each contracting state must bar the operation of the airline in its airspace.\textsuperscript{68} If a state has violated the Convention, ICAO “shall suspend the [state’s] voting power in the Assembly and in the Council.”\textsuperscript{69} Notably, however, nothing in the Chicago Convention expressly provides for civil recovery.

2. Basis for Recovery

Article 3 \textit{bis} of the Chicago Convention,\textsuperscript{70} enacted in the wake of the infamous Korean Airlines shootdown, provides a substantive basis for pursuing relief. On September 1, 1983, Soviet military aircraft shot down Korean Airlines Flight 007, en route from New York to Seoul, killing all 269 people on board.\textsuperscript{71} The Soviet Union denied any liability, despite swift condemnation from the international community.\textsuperscript{72} The ICAO passed a resolution two weeks later condemning the shootdown, and on May 10 of the following year, adopted Article 3 \textit{bis}.\textsuperscript{73}

\begin{footnotesize}
\textsuperscript{66} Id. The Council is “a permanent body responsible to the Assembly . . . composed of thirty-six contracting States elected by the Assembly.” Id. art. 50(a).
\textsuperscript{67} Id. art. 84.
\textsuperscript{68} Id. art. 87.
\textsuperscript{69} Id. art 88.
\textsuperscript{70} Protocol Relating to an Amendment to the Convention on International Civil Aviation, May 10, 1984, 23 I.L.M. 705–07 [hereinafter Article 3 \textit{bis}].
\textsuperscript{73} International Civil Aviation Organization (ICAO) Consideration, 22 I.L.M. 1149, 1150 (1983); Article 3 \textit{bis}, supra note 70. Article 3 \textit{bis} was ratified much later, on October 1, 1998. ICAO, \textit{Assembly Resolutions in Force (as of 3 October 2001)}, at I-6 to -9, ICAO Doc. 9790 (1st ed. 2002).
\end{footnotesize}
Article 3 *bis* begins by “recogniz[ing] that every State must refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of aircraft must not be endangered.”\(^74\) Article 3 *bis* further requires that

*[e]ach contracting State shall establish all necessary provisions in its national laws or regulations to make . . . compliance [with procedures for requiring unauthorized aircraft to land without using armed intervention] mandatory. . . . [and] make any violation of such applicable laws or regulations punishable by severe penalties.*\(^75\)

3. **Merits of the ICAO Council as a Venue**

The ICAO Council’s value as a venue for civil recovery for state victims of civilian aircraft shootdowns lies primarily in its position as the gateway to the ICJ. Article 3 *bis* requires only that the signatory states outlaw attacks on civilian aircraft, and the Convention allows only internal sanctions—neither of which provides any basis for civil damage awards. Moreover, the ICAO Council has shown reluctance to take much punitive action.\(^76\) Despite these deficiencies, bringing an aviation dispute before the ICAO Council is the first step toward the ICJ, which has greater power to allocate relief.\(^77\)

**B. INTERNATIONAL COURT OF JUSTICE**

1. **History and Procedure**

The ICJ is the primary international court of the United Nations (UN)\(^78\) and can settle legal disputes between UN member states according to international law.\(^79\)

Only UN member states are eligible to bring disputes before the ICJ.\(^80\) Furthermore, the ICJ can obtain jurisdiction over a dispute through only three mechanisms: (1) a stipulation or

\(^74\) Article 3 *bis* (a), *supra* note 70.
\(^75\) Article 3 *bis* (c), *supra* note 70.
\(^77\) See *infra* Section III.B.
\(^79\) Id.
agreement to the ICJ's jurisdiction; (2) a jurisdictional clause, such as those in treaties; and (3) a mutual declaration by states that certain categories of disputes will be submitted to the ICJ. In the case of civilian aircraft shootdowns, most states would be eligible to submit disputes to the ICJ by virtue of being UN members and signatories to the Chicago Convention, which expressly allows appeals to be taken directly to the ICJ.

2. Basis for Recovery

As with the ICAO Council, Article 3 bis is the chief substantive basis for pursuing relief before the ICJ for civilian aircraft shootdowns. Despite the fact that the Chicago Convention does not provide for civil recovery, there is precedent for the idea that the ICJ can award monetary damages for violation of the Convention.

On July 3, 1988, the U.S.S. Vincennes shot down Iran Air Flight 655, killing all 248 passengers on board, as the flight was en route from Bandar Abbas, Iran, to Dubai, UAE. The tracking systems on the Vincennes malfunctioned, leading the crew to believe that Flight 655 was a military aircraft. Iran brought a complaint before the ICAO Council against the United States seeking damages for the violation of various articles of the Chicago Convention, including Article 3 bis. The ICAO Council declined to issue an award and instead adopted a resolution condemning the incident. Iran appealed the decision to the ICJ, but the United States settled the dispute by making ex gratia payments before the ICJ could render a decision. The United States determined that it was not liable under the Chicago Convention because its use of force was mistaken, but not unlawful. Despite this determination, the United States decided to make payments to the families of the victims for humanitarian reasons.

81 Id.
82 Chicago Convention, supra note 65, art. 84.
83 See, e.g., Iran v. U.S., supra note 76.
84 Foont, supra note 71, at 711.
85 Id.
86 Iran v. U.S., supra note 76, at 86–104.
87 Id. at 104–05.
88 Foont, supra note 71, at 712.
89 Id.
90 Id.
Precedent also exists outside the aviation context for state civil recovery in the ICJ. But this precedent is limited as the ICJ has awarded damages to states only twice. In the first of those two cases, Corfu Channel, the ICJ ordered Albania to pay £843,947 to the United Kingdom as compensation for damage to two British Royal Navy ships caused by mines in Albanian waters. More than sixty years later, the ICJ ordered the Democratic Republic of the Congo to pay $95,000 to Guinea as compensation for violations of the human rights of a Guinean national.

3. Merits of the ICJ as a Venue

The Iran Air dispute is instructive with respect to the relative merits of the ICJ as a forum in which states may recover for civilian aircraft shootdowns. Despite the lack of explicit authorization for civil awards, the fact that the ICJ entertained Iran’s complaint for damages shows that a damage award for violations of the Chicago Convention is possible.

Furthermore, the ICAO Council and ICJ proceedings provide a method of applying pressure on the responsible state. Although the United States maintained that it bore no responsibility under the Chicago Convention, its payment to the families of the Iran Air victims functioned as a de facto settlement payment. Thus, the pressure of an international lawsuit may allow for civil recovery by state victims of shootdowns, even if the ICJ’s power to dole out damage awards for violations of the Chicago Convention is still relatively untested. Furthermore, the Corfu Channel and Diallo cases suggest that the ICJ has inherent power to award damages, supporting the argument that the ICJ can award damages for violations of the Chicago Convention.

Additionally, the ICJ has confirmed that a state can bring actions on behalf of both individuals and corporations. The Diallo decision confirms that states can bring actions on behalf of individual citizens who have suffered human rights violations;

---

94 See Foont, supra note 71, at 712.
95 See Akande, supra note 91.
this principle would almost certainly apply in the shootdown context.\footnote{Diallo, 2012 I.C.J. Rep. at 335.} Furthermore, the ICJ’s longstanding decision in \textit{Barcelona Traction} allows a state to bring a suit on behalf of a corporation, provided that the corporation is incorporated in the state bringing suit.\footnote{Barcelona Traction, 1970 I.C.J. at 43 (holding that Canada, not Belgium, had standing to bring a claim in ICJ for harm to utility company incorporated in Canada).} Accordingly, a state can bring an action on behalf of an airline victim of a shootdown, provided that it is a domestic airline. This provides another advantage to proceeding in the ICJ.

The ICJ also impliedly allows for recovery for a wide variety of losses. In \textit{Iran v. U.S.}, Iran asked for reparations for a long list of harms, including the loss of the passengers, the loss of the aircraft, the loss of the crew, injury to the legal interests of Iran, and the disruption to Iran Air services.\footnote{Iran v. U.S., supra note 76, at 224–25.} Although the ICJ never ruled on the propriety of those requests, it allowed the action to proceed without expressing any disapproval.\footnote{See Aerial Incident of 3 July 1988 (Islamic Republic of Iran v. United States of America)—Written Proceedings, ICJ, http://www.icj-cij.org/docket/?p1=3&p2=3&k=9c&case=79&code=irus&p3=1 [http://perma.cc/YNY7-XMMM] (last visited Nov. 10, 2015).} This seemingly loose approach to the types of losses that can be recovered in the ICJ provides another incentive to pursue recovery in this forum.

\section{C. Permanent Court of Arbitration}

\subsection{1. History and Procedure}

Dating back even earlier than the ICJ, the PCA was founded in 1899 at the first Hague Peace Conference.\footnote{1899 Convention for the Pacific Settlement of International Disputes, art. 20, http://www.pca-cpa.org/1899ENG605c.pdf?fil_id=192 [http://perma.cc/X6T8-CRDD].} The PCA’s objective was to “facilitat[e] an immediate recourse to arbitration for international differences” that could not be settled by diplomacy.\footnote{Id.} To date, 117 states have signed the PCA’s Conventions of 1899 or 1907.\footnote{Member States, Permanent Ct. Arbitration, http://www.pca-cpa.org/showpage86f3.html?page_id=1038 [http://perma.cc/MR6L-WNJ9] (last visited Nov. 10, 2015).}
The PCA has authority to hear disputes premised on violations of international treaties, among other things.\textsuperscript{104} A dispute between states may be submitted to the PCA only by signatory parties, and all parties must consent to the PCA resolving the dispute.\textsuperscript{105} Proceedings before the PCA are private, unless the court proposes, and the parties agree, to make them public.\textsuperscript{106}

The PCA’s Conventions authorize the Court to resolve disputes by giving “Awards,” which impliedly encompass monetary damages.\textsuperscript{107} In fact, the PCA recently awarded an eye-opening $50,020,867,798 to shareholders of the former Yukos Oil Company, to be paid by Russia for its role in forcing Yukos into bankruptcy.\textsuperscript{108} Furthermore, the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention) allows arbitration victors to enforce their award in any state that has signed it.\textsuperscript{109}

2. Merits of the PCA as a Venue

As a venue for recovery related to civilian aircraft shootdowns, the PCA’s merits vary greatly depending on the defendant because both parties must consent to resolve a dispute in this


\textsuperscript{105} 1907 Convention for the Pacific Settlement of International Disputes, art. 45, http://www.pca-cpa.org/1907ENG0635.pdf?fil_id=193 [http://perma.cc/VYM6-MDQD] [hereinafter 1907 Convention] (“When the Contracting Powers wish to have recourse to the Permanent Court for the settlement of a difference which has arisen between them, the Arbitrators called upon to form the Tribunal with jurisdiction to decide this difference must be chosen from the general list of Members of the Court.”).

\textsuperscript{106} Id. art. 66.

\textsuperscript{107} Id. art. 81.


venue. If the allegedly responsible state refuses to consent, the PCA is foreclosed entirely.

Furthermore, the PCA has the power to resolve disputes relating to violations of international treaties and would be comfortable resolving disputes arising under the Chicago Convention. Therefore, the PCA would provide an appropriate venue for a state pursuing shootdown-related damages based on a breach of Article 3 bis.

The PCA’s willingness to grant large awards, as in Yukos, is also encouraging for prospective plaintiffs as it suggests that the PCA does not take a conservative approach to damage awards. Furthermore, an award from the PCA, coupled with the enforcement power of the New York Convention, would allow a plaintiff state to recover from the defendant state’s assets held in other countries. The privacy of the proceedings also provides additional security for a plaintiff that prefers to avoid publicity.

Finally, as appropriate for an arbitral venue, a state may represent a variety of interests before the PCA. PCA precedent indicates that a state may bring claims on its own behalf, as well as on behalf of individual citizens and domestic businesses. Thus, a state seeking to recover losses associated with a shootdown could bring claims based on harms not only to its own interests, but also to any citizen victims or domestic airline involved. The PCA’s rules also take a flexible approach to the applicable law, thus suggesting the potential for recovery for a wide variety of losses in this forum.

110 See 1907 Convention, supra note 105, art. 47–48.
111 Id.
112 See About Us, supra note 104.
113 See Yukos, Case No. AA 227, at 564.
D. European Court of Justice

1. History and Procedure

The ECJ dates back to 1951, when the Treaty of Paris established the European Union’s (EU) predecessor, the European Coal and Steel Community.118 Headquartered in Luxembourg, the ECJ has jurisdiction to hear disputes arising out of alleged breaches of EU law.119 Furthermore, the ECJ can hear only “direct actions”: claims by “individuals, companies, or organizations” against EU officials or staff for violations of EU law.120 Thus, the ECJ has jurisdiction only over claims against defendants employed by the EU’s twenty-eight member states.121

2. Substantive Basis for Recovery

States may bring claims for civilian aircraft shootdowns in the ECJ pursuant to provisions in the Treaty on the Functioning of the European Union (TFEU).122 Article 340 of the TFEU provides that, “[i]n the case of non-contractual liability, the Union shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties.”123 The TFEU provides that the ECJ has jurisdiction to hear disputes based on Article 340.124

ERHK] (mandating application of the law designated by the parties, or alternatively, “general” rules of international law).


120 Id.

121 Id.


123 Id.

124 Id. art. 268.
3. Merits of the ECJ as a Venue

As a venue for aviation disputes, the ECJ is largely untested. The only notable aviation-related dispute currently before the ECJ relates to the applicability of EU emissions and carbon trading laws to the aviation industry. However, the provisions of Article 340 could also apply to the damage caused by shoot-downs. Using Flight MH17 as an example, if a European Commission official working to implement the Single European Sky initiative acted negligently in failing to warn Eurocontrol to divert air traffic over Ukraine, a state could bring suit in the ECJ for that negligence.

The main hurdle for shootdown-related recovery in the ECJ is the fact that a plaintiff cannot bring a claim there unless it can identify an EU official or employee with some degree of responsibility. This complicates matters in the aviation context due to the EU’s limited involvement in the area. Although the EU has some role in coordinating air traffic control, it generally entrusts those duties to individual states and the independent organization, Eurocontrol. Aside from issues related to air traffic control, it is difficult to imagine an EU official or employee contributing to a civilian aircraft shootdown. Thus, as a practical matter, states may have limited use for the ECJ as a venue for recovery.

Furthermore, because individuals have direct access to the ECJ, it is unclear whether a state would be able to bring claims on behalf of anyone other than itself. This may further limit the suitability of the ECJ as a venue for recovery by states.

---


127 See *Court of Justice of the European Union*, supra note 119.

128 See *Who We Are*, EUROCONTROL, https://www.eurocontrol.int/articles/who-we-are (last visited Nov. 10, 2015).

129 See TFEU, supra note 122, art. 263 (providing an individual right of action for “any natural or legal person” to challenge EU acts or regulations that affect them).
E. EUROPEAN COURT OF HUMAN RIGHTS

1. History and Procedure

The ECHR was established in 1959 under the provisions of the 1950 European Convention on Human Rights (European Convention).130 The purpose of the European Convention, modeled on the Universal Declaration of Human Rights, was to "take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration."131 To date, forty-seven countries have assented to the European Convention and thus subjected themselves to the jurisdiction of the ECHR.132

The ECHR can hear two varieties of disputes: individual cases and inter-state cases.133 In individual cases, "[t]he Court may receive applications from any person, nongovernmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention."134 In inter-state cases, "[a]ny High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party."135 In both types of disputes, the plaintiff must exhaust all domestic remedies before bringing a case before the ECHR.136

2. Substantive Basis for Recovery

Article 2 of the European Convention provides the substantive ground for damage recovery in a civilian aircraft shootdown scenario.137 Article 2 states that signatories have a "right to life," explained as follows: "Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction

---

131 European Convention, supra note 130, at Preamble.
133 European Convention, supra note 130, art. 33–34.
134 Id. art. 34.
135 Id. art. 33.
136 Id. art. 35.
137 Id. art. 2.
of a crime for which this penalty is provided by law." The ECHR has ruled that the right to life under Article 2 can be violated in three ways: "(a) when the homicide is committed by State agents; (b) when the State has failed to protect the victim by taking adequate measures within its power; and, lastly, (c) when, in breach of the criminal law, there has been no effective investigation into the victim’s death."  

3. Merits of the ECHR as a Venue

The ECHR has relatively limited precedent with respect to inter-state cases. In its fifty-five year history, the ECHR received only seventeen inter-state applications for relief, and it adjudicated only three of those on the merits. Nevertheless, given Article 2’s rather expansive definition of violations of the right to life, states may have multiple avenues for shootdown-related recovery before the ECHR.

Using MH17 as an example, the Netherlands could potentially bring a claim against Ukraine under the second right to life prong for failing to close Ukraine’s airspace. Similarly, the Netherlands could also bring a claim against Ukraine for failing to secure the crash site to conduct a timely investigation. These methods of proving an Article 2 violation avoid the difficult question of direct responsibility, which would be required under the first right to life prong. For example, even if the widespread belief that Russian-backed separatists downed MH17 were true, that would not necessarily fit the definition of “state agents” under the first prong of the right to life because the separatists are an irregular militia not officially affiliated with Russia.

Moreover, proceeding under the second and third prongs avoids the question of whether the shootdown qualifies as a homicide under the first prong, a question that the U.S. intelli-

---

138 Id.
141 Indeed, an individual plaintiff has already brought suit on that very theory. A German woman, known only as Olga L., has brought suit in the ECHR for a violation of Article 2 on behalf of her daughter, who died aboard MH17. Hudson, supra note 13.
142 See supra Section II.A.
gence community has raised in positing that the shootdown was accidental.\textsuperscript{143}

Recent ECHR precedent also confirmed that states can recover on behalf of individual human rights victims in certain situations. In \textit{Cyprus v. Turkey}, the ECHR held that a state can recover for human rights violations against its nationals as long as individual victims can be identified, as opposed to seeking recovery for generalized human rights violations.\textsuperscript{144} This ruling confirms that a plaintiff in an inter-state case may be able to recover for its national victims of a shootdown incident.

Nevertheless, procedural barriers suggest that the ECHR may ultimately have limited utility as a venue for recovery for civilian aircraft shootdowns. First, inter-state applications are limited to signatory nations of the European Convention. This can present a problem for non-European nations that fly regularly in Europe. Indeed, it bars Malaysia from initiating an inter-state action in the ECHR for the downing of MH17. Second, the exhaustion requirement creates another hurdle to accessing the ECHR. Requiring a state plaintiff to get a final domestic judgment before pursuing the ECHR adds to the time and expense of recovering losses in an international forum.

\textbf{F. Domestic Civil Courts}

Domestic civil courts provide a more than viable option for state plaintiffs to recover damages for civilian aircraft shootdowns. While an examination of the nuances of various domestic fora is beyond the scope of this article, a few general observations are warranted. In terms of standing and jurisdiction, a state plaintiff likely would have little trouble bringing a claim in its own national courts. But obtaining jurisdiction over international parties could be difficult. Furthermore, not all domestic civil courts are created equally. For example, Dutch courts “limit liability with offsets including life insurance or inheritances triggered by a death.”\textsuperscript{145} The overall reliability and

\textsuperscript{143} See Ackerman & Walker, \textit{supra} note 59 (“US intelligence officials accused Moscow of ‘creating the conditions’ [for the MH17 shootdown] . . . . [b]ut . . . . [t]he assessment of the US intelligence community is that the separatists shot the plane down by accident.”).


\textsuperscript{145} Harris, \textit{supra} note 11.
functionality of domestic courts, such as those of nations embroiled in civil wars, should also be taken into account.

IV. CONCLUSION

The MH17 disaster has brought into focus the international issues that inherently surround civilian aircraft shootdowns. As discussed above, a wide variety of international venues, in addition to domestic fora, are available for claims arising out of the loss of civilian aircraft. The ICAO Council and the ICJ provide a well-worn international path for handling aviation disputes, including shootdowns. As a result, those venues are probably best-suited for handling civilian aircraft shootdowns. The PCA likely is the next best choice because it has a greater history of higher awards, provided that the parties can agree to its jurisdiction. The ECHR is a slightly unconventional option, given the lack of inter-state precedent and its inexperience with aviation disputes. Its broad protection for the right to life, however, is somewhat encouraging for state plaintiffs. The ECJ is a less ideal forum due to the improbability of an EU employee or entity bearing responsibility for the incident. Finally, the domestic option depends entirely on the status of the court system in question and varies accordingly.

Flight MH17 provided yet another example of the complexities that can arise out of an international aviation disaster. Given the proliferation of SAMs, the increasing rate of air travel, and the sheer amount of aircraft in flight every day, the prospect of dealing with similar incidents and their legal ramifications in the future is real. As domestic and cross-border ground conflicts continue to boil over into the airspace, states must understand the attributes of the available venues for recovery in the event they become caught in the crossfire.