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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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-

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

The flight traversed airspace in the Netherlands, Germany, Poland, and the Ukraine. 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. Russian Air Control granted its request. Dnipro Control then tried reaching Flight MH17 to advise the pilots. After a further communication with RND to see if the flight was appearing on their radar, the flight had vanished. 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.

The aircraft was “flying in unrestricted airspace, under control of ATC, flying at an altitude cleared by ATC.” It was at an altitude of 1,000 feet above the upper limit of a restricted airspace. The Donbass People’s Militia, pro-Russian separatists, held an insurgency on the Ukraine territory where the wreckage fell. Insurgents controlled the crash site where armed conflict
was active. The insurgents and the insurgency severely hampered the Dutch Safety Board’s initial attempts to recover wreckage from the crash site. 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.

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. 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.

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). This article compares the systemic response of these bodies to the

12 Id.
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. 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 1944 Convention on International Civil Aviation's (Chicago Convention) prohibition on such interference. 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 temporally 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 Yanukovych was ousted by protesters." That following April, separatist militia groups

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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 Novorossiya.”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-

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. In fact, Crawford suggested that the Montevideo Criteria are "no more than a basis for further investigation." 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. 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.

While the insurgents have declared a State to be in existence, it is contentious to assert they have a viable administration. Equally, apart from the Russian Federation, it is questionable that the insurgents have the capacity to enter into viable diplomatic relations. James Crawford notes that the "capacity 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. Nevertheless, it also seems that the Donetsk People's Republic (now United Armed Forces of Novorossiya) belligerent occupation of the area does not affect the continuity of the original State (the Ukraine) in respect of its territory before the insurgency. Even where governmental authorities may be "driven into exile or silenced," the powers of

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).
33 See Karina Oganesyan, Donetsk, 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.
the existing State continue.\textsuperscript{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."\textsuperscript{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.\textsuperscript{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."\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{43} United Nations General Assembly (UNGA) Resolution 68/262 further affirmed this position.\textsuperscript{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
Russian Buk missile provided by Russia to the separatist forces. The United States also alleged that the rocket launcher involved in the crash was rapidly withdrawn to Russia. Russian involvement is the subject of conjecture. Olexsandr Zakharchenko, a separatist, and the Prime Minister of the Donetsk People’s Republic (Novorossiya), has openly admitted that “[t]here have been some 3,000–4,000” Russian volunteers fighting with the insurgents.

Additionally, Zakharchenko conceded that many of these individuals come from the Russian military. 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.” While the Russian Federation has denied its active military involvement in the insurgency, evidence to the contrary has been mounting. 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.” NATO claimed that over 1,000 Russian troops were operating in Ukraine with around 20,000 troops stationed near the border.

46 Rushe, supra note 45.
48 All Russians Fighting for Donbas Militia Are Volunteers—Self-Proclaimed Donetsk Peoples’ Republic PM, supra note 47.
49 Id.
50 Id.
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.\(^5\) Moreover, the Dutch authorities face the hurdles of conducting their investigation in the fog of war.\(^5\) 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.\(^5\)

The final crash report has confirmed that the aircraft was downed by an external, high energy source.\(^5\) The Russian Federation contended early on that the source of the explosion was the Ukrainian military forces.\(^5\) Other facts that have surfaced tend to incriminate the separatist forces that, according to U.S. officials, fired a Buk missile.\(^5\) 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.\(^5\) The launcher

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\(^{54}\) Id.


design for these anti-aircraft weapons “used a rudimentary radar system that gives an incomplete picture of what is flying above, officials said.” These systems are designed to link with other radar that could enhance the targeting system and would allow distinction between military and civilian aircraft. The separatists, however, did not have those secondary radar images available and may have mistaken the Malaysian airliner for a Ukrainian military plane. 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. 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. 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.

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.” 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.

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

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60 Bennett, supra note 58.
61 Id.
62 Id.
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.\(^6^9\) 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.\(^7^0\) 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.\(^7^1\) Additionally, the U.S. Embassy in Kyiv, Ukraine reported that Russia was moving heavy weaponry into eastern Ukraine.\(^7^2\)

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.\(^7^3\) 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."\(^7^4\)

Germany's foreign intelligence service have also concluded that pro-Russian rebels were responsible for the crash.\(^7^5\) Yet,


\(^7^2\) 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”).


\(^7^4\) 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].

they claim to have intelligence indicating that the rebels captured a Buk missile system from a Ukrainian military base, 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” in an IAC. Alternatively, RS Article 8(2)(e)(i) provides the same definition for NIAC.

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. 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)

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76 Id.
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.\textsuperscript{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.\textsuperscript{81} The Russian Federation has maintained that this is an NIAC, though this claim is hotly contested.\textsuperscript{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."\textsuperscript{83} Moreover, "[t]his privilege . . . [is] universally recognized."\textsuperscript{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)"\textsuperscript{85} and must be repatriated once hostilities have ceased in accordance with Article 109 of the Third Geneva Convention.\textsuperscript{86}

This rule is unique to combatants in an IAC since the attempt to introduce the concept of POWs into NIACs has failed.\textsuperscript{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

\textsuperscript{80} RS, supra note 77, art. 17.
\textsuperscript{81} Id. art. 33.
\textsuperscript{82} See Sarah Rainsford, Nadiya Savchenko: Ukraine Resistance Symbol in Russia, BBC (Mar. 6, 2015), http://www.bbc.com/news/world-europe-31760981 [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).
\textsuperscript{83} CUSTOMARY INT’L HUMANITARIAN L. 384 (Jean-Marie Henckaerts & Louise Doswald-Beck eds., 2005).
\textsuperscript{85} Id. at 436–37; see also Third Geneva Convention, supra note 79, art. 85.
\textsuperscript{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.").
\textsuperscript{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.
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.
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 con-
flict 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 trans-
formed 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 Nicara-
guia v. United States, where the court noted:

The conflict between the contras’ forces and those of the Gov-
ernment 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 appli-
cable 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 identi-
cal 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 ei-
ther side would internationalize the conflict.103 Certain Interna-
tional 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. 
101 Id.
102 Prosecutor v. Tadic, Case No. IT-94-1-A, Decision on the Defence Motion 
for Interlocutory Appeal on Jurisdiction, ¶ 72 (Int’l Crim. Trib. for the Former 
103 Sivakumaran, supra note 87, at 223.
104 See Prosecutor v. Blaškic, Case No. IT-95-14-T, Judgment, Including Declara-
tion of Judge Shahabuddeen, ¶ 94 (Int’l Crim. Trib. for the Former Yugoslavia 
would be strategically “freed up.” As seen in *Prosecutor v. Blaškic*, “[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 characterize the conflict as international.” It was further held in *Prosecutor v. Kordic 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.” This approach is not without criticism, as observed by Judge Shahabuddeen in *Blaskic* 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.”

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. Sandesh Sivakumaran points to the violent situation in Libya in 2011 as an example. 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.

In Ukraine, the character and scope of Russian involvement is publicly unknown. It is apparently paired with the separatists. This would superficially qualify for internationalizing this conflict under *Nicaragua*, but the full extent of the assistance is un-
Indeed, Russian troops fighting on Ukraine soil are doing so without publicly acknowledged government sanction, though certainly with Russian sympathy. Claims have surfaced that they are using vacation time to fight for the separatists or that they are retired military personnel. 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.

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.

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. The court opined that overall control need not include issuing specific orders or planning for

\[\text{References}\]

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 Sivakumar, supra note 87, at 222–25.
116 See McCoy, supra note 112.
each operation or target, but rather, “[t]he control required . . . may be deemed to exist when a State . . . has a role in organizing, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group.”

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.” 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.”

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). This is further fueled by the alleged provision of military arms and training, and the presence of Russian officers and troops fighting in Ukraine. However, the evidence of Russian organization is scant and the presence of high-ranking Russian officers is vitiates 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/11498 (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. 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. 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." However, this decision was subtly crafted for determining state responsibility only—not individual criminal liability. 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." 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. 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. 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. Thus, they could rely on mistake or even following orders as a defense. As a customary practice in criminal law, the

\[\text{\textsuperscript{124} Id.}\]
\[\text{\textsuperscript{126} Id. ¶ 406.}\]
\[\text{\textsuperscript{127} See id. ¶ 403.}\]
\[\text{\textsuperscript{128} Id.}\]
\[\text{\textsuperscript{129} RS, supra note 77, art. 8(2)(b)(i).}\]
\[\text{\textsuperscript{130} See id. art. (8)(2)(b)(i), 30 (concluding that under these circumstances the perpetrators could plausibly rely on a defense that they did not know how to interpret the images on the secondary radar and therefore still lacked the necessary intent to commit this war crime, but it may prove to be a weak defense).}\]
\[\text{\textsuperscript{131} Bennett, supra note 58; Luhn, supra note 63.}\]
defense of mistake, if honestly held, would serve to vitiate guilt.\textsuperscript{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.\textsuperscript{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."\textsuperscript{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.\textsuperscript{135}

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


\textsuperscript{133} RS, \textit{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.").

\textsuperscript{134} Luhn, \textit{supra} note 63.

\textsuperscript{135} MH17 Crash Report, \textit{supra} note 56, at 37.


\textsuperscript{138} Interested states that have extradition agreements with Ukraine include The Netherlands, United Kingdom, Germany, and Belgium. \textit{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.\textsuperscript{139}

G. \textbf{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.\textsuperscript{140} As discussed, making this determination and amassing the necessary evidence to support it may be pragmatically impossible.\textsuperscript{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.\textsuperscript{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."\textsuperscript{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. \textbf{COMMAND RESPONSIBILITY}

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

\textsuperscript{139} Rainsford, supra note 82.
\textsuperscript{140} See supra text accompanying notes 111, 118–29.
\textsuperscript{141} See supra text accompanying notes 125–26.
\textsuperscript{142} RS, supra note 77, art. 28(b)(ii).
\textsuperscript{143} Id. art. 28(b)(i).
\textsuperscript{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. 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. A second suspect is Igor Bezler, a notorious loose cannon who purportedly rules the town of Horlivka with an iron fist. 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.”

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.


Luhn, supra note 63.

Id.

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. 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.” 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.”

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.” 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 organized 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 organized military force in the

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course of an internal armed conflict; it therefore also recognizes that there can be command responsibility in respect of such crimes.\textsuperscript{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 \textit{de facto} control of the troops committing the crime such that the accused is able to prevent or punish crimes.\textsuperscript{155} This principle was laid out in \textit{Prosecutor v. Delalic, Mucic, Delic, Landzo} which held that \textquoteright\textquoteright [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.\textsuperscript{156} In \textit{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.”\textsuperscript{157}

\textit{Delalic}, in which the court addressed the crimes committed in the Celebici prison-camp, is relevant here.\textsuperscript{158} Though dealing with superior liability, \textit{Delalic} nonetheless sheds light on effective control applicable to command responsibility.\textsuperscript{159} \textit{Delalic}, a high-ranking civilian official, was tried for crimes committed at the prison camp, which was under the direct command of another.\textsuperscript{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

\textsuperscript{154} \textit{Id.} \textsuperscript{18}.


\textsuperscript{158} \textit{Delalic}, Case No. IT-96-21-A, ¶ 1.

\textsuperscript{159} See \textit{id.} ¶ 196.

\textsuperscript{160} \textit{Id.} ¶¶ 2, 224, 313.
and military personnel. The court found that Delalic was "a well-placed influential individual, clearly involved in the local effort to contribute to the defense of the Bosnian State. However, 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." 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. Mere assistance or providing logistical support would be insufficient. The nexus of command between Bezler and the relevant troops is not publicly known. 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. However, Strelkov allegedly took credit for downing what he apparently thought was a Ukrainian aircraft, which turned out to be Flight MH17. 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. 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. This suggests command authority. However, difficulties persist. Questions remain as to the exact nature and limitations

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161 Id. ¶ 355.
163 See Delalic, Case No. IT-96-21-A.
164 See id.; Delalic, Case No. IT-96-21-T.
166 See Luhn, supra note 63.
167 See supra Section III.H.
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. Without further evidence of his culpability, making a criminal case against Strelkov, by using the command responsibility paradigm, would rely on conjecture.

3. 

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. 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.” 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. This legal position goes back to the 1948 judgment by the International Military Tribunal for the Far East (IMTFE) in Tokyo. 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.
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.\textsuperscript{175} The French version of the highlighted portion of the Protocol is given priority, which reads, "information enabling them to conclude."\textsuperscript{176} Thus, the level of knowledge required need only be constructive on the part of the commander.

In the \textit{Blaškic} case, the court found that "recklessness which may be likened to serious criminal negligence" may suffice.\textsuperscript{177} This is "negligence . . . so serious that it is tantamount to malicious intent."\textsuperscript{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.\textsuperscript{179}

In \textit{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."\textsuperscript{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."\textsuperscript{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

\textsuperscript{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.").
\textsuperscript{176} J. de Preux, \textit{Article 86—Failure to Act}, in \textit{COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949} 1005, 1013 (Yues Sandoz et al. eds. 1987).
\textsuperscript{177} Prosecutor v. Blaškic, Case No. IT-95-14-T, ¶ 152 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 3, 2000).
\textsuperscript{178} See de Preux, \textit{supra} note 176, at 1012.
\textsuperscript{179} Ambos, \textit{supra} note 173, at 866.
\textsuperscript{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).
\textsuperscript{181} \textit{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.\textsuperscript{182} Such information could come in the form of media accounts.\textsuperscript{183} The argument that a commander never read reports submitted by his subordinates is no defense.\textsuperscript{184} Nor is temporary absence from the command headquarters.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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,


\textsuperscript{183}Id. at 226.


\textsuperscript{185}Id. at 1260.

\textsuperscript{186}See supra Section III.H.


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

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 defens[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.
193 RS, supra note 77, art. 25(2-4), 28(a).
194 See Ambos, supra note 173, at 860.
195 Id.
zone, inter alia. 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.” 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.” 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. Article 26 vests Ukraine, the state of occurrence, with the responsibility to conduct the investigation. It provides that “the state in which the accident occurs will institute an enquiry.” 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.

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

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

Other States, as provided for under Annex 13, may also participate. 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.

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. Upon the downing of Flight MH17, UKSATSE shut down air routes over the disputed eastern part of the country. In July, prior to the downing of Flight MH17, several military aircraft had been shot down in the vicinity. These included a Ukrainian AN-26 military transport plane and a Su-25 war plane.

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

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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.
211 Croft, supra note 17.
airspace above the Donetsk Oblast province.\textsuperscript{214} At the time of its shooting down, Flight MH17 was flying above the 32,000 foot ceiling, below which airspace was temporarily restricted.\textsuperscript{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."\textsuperscript{216} This right is also referenced in Annex 2 of the Chicago Convention at 3.1.10.\textsuperscript{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."\textsuperscript{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.\textsuperscript{219} He acknowledges Malaysia Airlines "reacted not unreasonably," while suggesting that "the centre of gravity of wrongs rests with the Ukraine."\textsuperscript{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.\textsuperscript{221} Potential claims against States, at this


\textsuperscript{215} See \textit{Preliminary Report}, supra note 9, at 13.

\textsuperscript{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").

\textsuperscript{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.").


\textsuperscript{220} \textit{Australian Families Set to Launch Wide Ranging Lawsuit over MH17 Tragedy}, supra note 218.

\textsuperscript{221} \textit{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.


\(^{230}\) Id.
States as embodied in Articles 1 (Sovereignty), 6 (Scheduled Air Services) and 28 (Air Navigation Facilities and Standard Systems) of the Chicago Convention. 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.”

De Leon notes that in 2003, “Eurocontrol and the [European Community] Commission concluded a Memorandum Concerning a Framework for Cooperation.” 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.” The memorandum declared, “that it does not create rights and obligations under international law.” 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.”

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

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251 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.


253 De Leon, supra note 228, at 312.

254 Id.

255 Id. at 313.

256 Croft, supra note 17.


258 Id.
The IATA is a key player in all international aviation issues. IATA carriers comprise most of the world's airlines. 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. 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.

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.” 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. 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.”

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


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].


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)." However, ICAO acknowledged after the event that the loss of Flight MH17 occurred outside of the Simferopol FIR.

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, and issued a Joint Statement on Risks to Civil Aviation from Conflict Zones.

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. 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.

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. The ICAO

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

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

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252 Id. ¶ 3.
254 See id. at vi-1.
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

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."

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 UkSATS, and ATC surveillance data from the Russian Federation. 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." 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."

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. 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." 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.
been analyzed and therefore, does not claim to provide a definitive analysis.\textsuperscript{270}

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

\textbf{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."\textsuperscript{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.\textsuperscript{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'."\textsuperscript{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.\textsuperscript{276} It argues for a "stricter redefinition of the responsibility of states for their airspace."\textsuperscript{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.\textsuperscript{278} The Dutch Safety Board also envisaged ICAO issuing a State Letter where a state dealing with an armed

\footnotesize{\textsuperscript{270} See Preliminary Report, supra note 9, at 4.  
\textsuperscript{272} Id.  
\textsuperscript{273} MH17 Crash Report, supra note 56, at 137.  
\textsuperscript{274} Id. at 144, 147.  
\textsuperscript{275} Id. at 147.  
\textsuperscript{276} Id. at 264.  
\textsuperscript{277} Id.  
\textsuperscript{278} Id.}
conflict fails to provide such information.\textsuperscript{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.\textsuperscript{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 . . . .”\textsuperscript{281} In terms of operator accountability, the Dutch Safety Board has called for greater levels of public accountability for routes chosen.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{285} In this case, “the Chinese apologized for the incident and agreed to pay compensation for the resulting losses.”\textsuperscript{286}

\textsuperscript{279} Id.
\textsuperscript{280} Id.
\textsuperscript{281} Id. at 265.
\textsuperscript{282} Id. at 266.
\textsuperscript{284} Foont, supra note 283, at 705.
\textsuperscript{285} Id.
\textsuperscript{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. A Soviet military jet shot down the aircraft killing all 269 persons on board. 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. 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.” 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. At the time of the second investigation, Yeltzin characterised the KAL007 tragedy as involving “the most horrible catastrophe of the Cold War.” Despite this seemingly unequivocal statement, a subsequent Russian inquiry essentially resurrected their prior position on KAL007.

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. The ICAO Council met in September 1983 and passed a resolution deploring the use of armed force against civil aircraft. On May 10, 1984, the ICAO

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288 Id.


292 Id.


[294] Foont, supra note 283, at 708.

Assembly amended the Chicago Convention by adding a new Article 3 bis, which stated a prohibition on the use of force against civil aircraft.\textsuperscript{296} ICAO member States were slow to ratify Article 3 bis, and it was not until October 1998 that it entered into force.\textsuperscript{297} ICAO also developed specific procedures, signals and rules to guide states in implementing interceptions of civil aircraft if deemed necessary.\textsuperscript{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.\textsuperscript{299}

N. The U.S.S. \textit{Vincennes} Incident\textsuperscript{300}

During the 1988 Iran/Iraq conflict, the U.S.S. \textit{Vincennes} (\textit{Vincennes}) was patrolling the Strait of Hormuz on a mission to protect oil tankers.\textsuperscript{301} Following an attack on the U.S.S. Stark by an Iraqi military jet, the \textit{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.\textsuperscript{302} The incident was headed for the International Court of Justice before Iran and the United States settled and withdrew the matter.\textsuperscript{303} As Paul Dempsey observed, "[n]ot only was the U.S. legal case poor, its moral position was miserable."\textsuperscript{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

\begin{itemize}
  \item \textsuperscript{296} Chicago Convention, \textit{supra} note 199, art. 3 bis.
  \item \textsuperscript{297} \textit{Id.}
  \item \textsuperscript{298} Kido, \textit{supra} note 293, at 1067–68.
  \item \textsuperscript{299} \textit{Id.}
  \item \textsuperscript{301} George C. Wilson, \textit{Navy Missile Downs Iranian Jetliner}, \textit{Wash. Post} (July 4, 1988), \url{http://www.washingtonpost.com/wp-srv/inatl/longterm/flight801/stories/july88crash.htm}.
  \item \textsuperscript{302} See Paul Stephen Dempsey, \textit{Flights of Fancy and Fights of Fury: Arbitration and Adjudication of Commercial and Political Disputes in International Aviation}, 32 \textit{Ga. J. Int’l & Comp. L.} 231, 293 (2004) ("Until minutes before the missile launch, military transmissions from the \textit{Vincennes} warning the incoming aircraft had not been received by Iran Air 655, for they had been broadcasting on military frequencies.").
  \item \textsuperscript{303} Shapour Ghasemi, \textit{Shooting Down Iran Air Flight 655 [IR655]}, \textit{Iran Chamber Society} (2004), \url{http://www.iranchamber.com/history/Articles/shootingdown_iranair_flight655.php} \[http://perma.cc/2576-BjXE].
  \item \textsuperscript{304} Dempsey, \textit{supra} note 302, at 293.
\end{itemize}
the deceased victims.\textsuperscript{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.\textsuperscript{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 endorse making payments where a State has erroneously shot down a commercial airliner.\textsuperscript{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.\textsuperscript{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.

\section*{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)\textsuperscript{309} is in force in each State most integrally involved in the Flight MH17 incident.\textsuperscript{310} In Article 1(b) of the Montreal Convention

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{305} \textit{Id.} at 294.
\item \textsuperscript{306} Foont, \textit{supra} note 283, at 712.
\item \textsuperscript{307} \textit{Id.} at 716.
\item \textsuperscript{308} \textit{Id.}
\item \textsuperscript{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). \textit{See} Status List, ICAO, Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation Signed at Montreal on 23 September 1971,
\end{itemize}
\end{footnotesize}
of 1971, it states that an individual commits an offense if he or she unlawfully and intentionally destroys an aircraft.\textsuperscript{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).\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{316} The Board conceded that “there were many operators that were still flying over the conflict area.”\textsuperscript{317} It is the authors’ understanding that only one operator, Qantas, had ceased flying over the Ukraine at the time

\begin{itemize}
  \item \textsuperscript{311} Montreal Convention of 1971, \textit{supra} note 295, art. 1(b).
  \item \textsuperscript{312} Id.
  \item \textsuperscript{313} Id. art. 7.
  \item \textsuperscript{315} \textit{MH17 Crash Report}, \textit{supra} note 56, at 227.
  \item \textsuperscript{316} Id.
  \item \textsuperscript{317} Id.
\end{itemize}
of the incident. Coincidentally, both Malaysia Airlines and Qantas are linked in the One World Alliance with code sharing occurring on certain routes. In the case of MH17, there were "two passengers with a Qantas ticket" 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 Convention or the Montreal Convention (1999). 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). 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-
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." 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.* 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." According to Ronald Schmid, the objective of Article 17 "is to cover the typical risks in air carriage only." 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* and *Haddad c. Air France,* 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. Where Georgette Miller observes...
that the carrier "can exonerate himself if he establishes that all the required security measures had been taken."\footnote{Georgette Miller, Liability in International Air Transport 111 (1977).}

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,\footnote{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).} 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.\footnote{See Montreal Convention of 1999, supra note 322, art. 21(1)(a),(b).}

As Malaysian Airlines has acted promptly to provide the United States with $50,000 in advance payments,\footnote{Daisy Melwani, Malaysian Airlines Fights Back Against ‘Insulting’ Offer Claim, Travel Weekly (Oct. 27, 2014), http://www.travelweekly.com.au/news/malaysian-airlines-fights-back-against-insulting-of [http://perma.cc/8PP7-EYE8].} 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.\footnote{Montreal Convention of 1999, supra note 322.} This means that if there is no "accident" under Article 17 of the Convention,\footnote{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.").} 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.
Another potentially pressing matter for the dependents of the passengers is the limitations period under the Convention, which sits at two years.\textsuperscript{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."\textsuperscript{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.\textsuperscript{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

\textsuperscript{337} Id. art. 35.

\textsuperscript{338} Id.

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. 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). 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. The prior self-referral was temporally limited to the

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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.").

period from November 21, 2013 to February 22, 2014,\textsuperscript{343} ending approximately five months before the downing of Flight MH17. Though this referral is the subject of some controversy,\textsuperscript{344} particularly since a 2001 Ukrainian Constitutional Court case suggests the illegality of such a referral,\textsuperscript{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. \textit{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

\textsuperscript{343} \textit{Id.}


\textsuperscript{345} \textit{Id.}
parties, not passengers, Article 8 is worthy of examination.\textsuperscript{346} Chapter III, Article 8 of this Convention provides for the establishment of an International Civil Aviation Compensation Fund.\textsuperscript{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.\textsuperscript{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”\textsuperscript{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,\textsuperscript{350} so as to provide the fail-safe notifications asked for by IATA, such steps would be positive.

\textsuperscript{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.
\textsuperscript{347} \textit{Id.} art. 8.
\textsuperscript{349} Joint Statement on Risks to Civil Aviation Arising from Conflict Zones, \textit{supra} note 243.
\textsuperscript{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.