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Revisiting the Legal Position
Relating to Airline
Liability In International Air
Law.

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Faculty of Law University of Pretoria

Supervisor: Prof. Dr. Stephan Hobe

Ron Van Diermen

10483862

ronvandiermen@gmail.com

(076) 407 4412

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Chapter 1: Introduction

On Thursday 17 July 2014 a Malaysia Airlines plane carrying 298 passengers on board was unexplainably and without warning shot down over Ukraine, resulting in the deaths of all passengers on board. The bulk of the passengers originated from the Netherlands and Malaysia, including some from various European countries, as well as the United Kingdom. The insurmountable grief that the family members of the deceased passengers suffered, due to the tragic loss of loved ones, was only increased in the days to follow. Reports started coming in regarding the manner in which the remains of the deceased passengers as well as their personal belongings were handled, including various reports of looting corpses of their belongings.¹

Since the commencement of civil aviation in the 19th Century, the world has become significantly smaller and more accessible to travel and explore. Where one in the past could not visit far away nations, civil aviation has made this possible. It is therefore one of the most significant advances in human technology and mechanics. The passenger airline industry consists largely of three alliances, namely, Star Alliance, One World and Sky Team. These alliances contribute a third to the amount of daily flights. In addition to these alliances there are many independent civil aviation companies that transverse the skies on a daily basis, transporting both passengers and cargo. The amount of flights per day approximately amounts to a staggering 100 000 flights.²

In the past 100 years (1914 - 2014) more than 65,327,000,000 passengers have taken to the air. According to the Air Transport Action Group (ATAG) who released a detailed report on the aviation industry in 2014 named: Aviation Benefits Beyond Borders³ estimate that the next 65 billion air passengers will take to the air before the year 2030.⁴ Civil aviation therefore continues to rapidly grow, expand and perhaps monopolise long distance travel, both nationally and internationally.

¹ "MH17 plane crash: Dutch sadness turns to fury" <<http://www.bbc.com/news/blogs-eu-28411347>> (accessed 7 April 2015).

² "100,000 Flights a Day" <<http://www.garfors.com/2014/06/100000-flights-day.html>> (accessed 7 April 2015).

³ "Aviation Benefits Beyond Borders" http://aviationbenefits.org/media/26786ATAG__AviationBenefits2014_FULL_LowRes.pdf (accessed 7 April 2015).

⁴ *Ibid.*

It is for this reason incumbent upon the writer to reassess the international legal position relating to airline liability.

1.2 Abstract

“Aviation in itself is not inherently dangerous. But to an even greater degree than the sea, it is terribly unforgiving of any carelessness, incapacity or neglect.”
— Captain A. G. Lamplugh⁵

These words spoken by Captain Lumplugh ring true today to a far greater extent than they did when spoken in the early 1930's. Aviation has become inherently safe, however its risk and catastrophic death lies in carelessness, incapacity and negligence.

Aeronautical law has been defined and redefined on many occasions and no one definition satisfies all, but to the majorities' satisfaction it can be defined in the words of French author Lemoine, who considers it to be the branch of the law which determines and studies the law and legal regulations regarding air traffic and use of aircraft as well as relations arising therefrom.⁶

Aeronautical Law (hereinafter referred to as air law) is inherently vested in international law, due to its very nature of traversing across borders and making every corner of our world accessible to all. It is therefore that international air law will be the primary consideration in this dissertation. The writer will primarily focus on the following instruments:

Chicago Convention⁷, the Warsaw Convention⁸ and the Montreal Convention.⁹

⁵ Captain A. G. Lamplugh British Aviation Insurance Group, London. c. early 1930's.

⁶ Escalada (1979) 1.

⁷ Convention on International Civil Aviation, Signed at Chicago, On 7 December 1944.

⁸ Convention for the Unification Of Certain Rules Relating to International Carriage By Air, Signed at Warsaw On 12 October 1929.

⁹ Convention for the Unification of Certain Rules for International Carriage by Air, opened for Signed at Montreal on 28 May 1999.

1.3 Problem Statement

“Public international law determines inter alia, States’ control over the airspace above their territories, their duties and powers to prevent and punish crimes aboard or against an air craft, and the level of market access they provide to foreign air carriers.”¹⁰

As the above statement indicates, states have a significant amount of power as it relates to air law. The question then becomes: If the state has power over air law and transport agreements should it also bear responsibility? And if it should bear responsibility, should it also be held liable?

It is the writers contention that the answer to these questions on liability lies somewhere on a balancing scale between air carriers and their respective governments.

ICAO standards and recommended practices Annex 11 2.26.4 state the following:

“2.26.4 States shall identify actual and potential hazards and determine the need for remedial action, ensure that remedial action necessary to maintain an acceptable level of safety is implemented, and provide for continuous monitoring and regular assessment of the safety level achieved.

The ICAO Standards and Recommended practices in this instance places a positive obligation on states to identify actual or potential hazards and then to ensure that remedial action is taken to prevent such hazards.¹¹

It is the writers contention that this duty is of such a nature that in certain circumstances warrants liability on the states’ part as opposed to the airline.

1.4 Hypothesis

It is submitted that States’ have a responsibility to establish and enact precautionary measures in instances where there is reason to believe that the aircraft and its passengers are in danger. If states fail in their obligation to do so they should be held liable.

¹⁰ Havel BF & Sanchez GS (2014) 11.

¹¹ Bartsch RIC (2012) 271.

1.5 Research Aim

Airplane crashes are as a general rule catastrophic. The crash is usually coupled with severe loss of life of nearly everyone on board. It is for this reason that air carriers have to meet very stringent safety and security criteria, with good reason, resultant in air travel as being regarded the safest mode of transportation due to those criteria.

But what happens when a plane goes down due to reasons that are beyond its control, such as in Flight MH17? Who should be held liable?

The aim of this dissertation is to attempt to answer the following questions: Who is liable or should be liable, when a plane is deliberately shot out of the air over a territory of another state? In how far should states and airlines respectively be held liable in such extreme circumstances?

It is the writers contention that the current liability system under international air law, which only holds air carriers liable for death and damages is insufficient and incorrect. When the commissions or omissions of a state attribute to the downing of a plane, that state should be held liable.

It is on this basis that the writer will argue for an amendment to liability as it currently stands under ICAO and the Montreal Convention. Furthermore, that it is fundamentally unjust for an air carrier to be held exclusively liable for the downing of a plane, when the damage causing action is partly attributable to another party. If a state party has a responsibility to act, it concurrently should be liable for an omission on their part to do so.

Chapter 2: The Fundamental Sources of International Air Law

The majority of the content that comprises aeronautical law is derived from public international law, which in turn governs the conduct of states and international organisations. Public international law determines, amongst others, states' exclusive control over the airspace of their territory, their duties and powers to prevent and punish crimes happening aboard or against an aircraft registered within their state or flying within their territory, as well as the freedoms of the air and the market access that states provide to airlines.¹²

When one considers the relationship between law and technology, law as a general rule follows the innovations of mankind. Similarly, international humanitarian law always follows modern advances in war and therefore is always found wanting. However, aeronautical law is one of the exceptional instances where the legal process went ahead of technology.¹³ As early as 1900 when Fuachille suggested a code of international air navigation. One can delve deeper into national law and find that in France as early as 1784, a police directive was issued prohibiting the flight of balloons without prior authorisation.¹⁴ The first legal instrument to enter into force occurred in 1919 known as the Paris Convention,¹⁵ ratified by 32 countries, granting complete and exclusive sovereignty of states over the airspace above their territory.¹⁶

2.1 Customary International Law

Customary international law can be described as international obligations arising from established state practice. In a simplified sense, customary international law results from the general and consistent practice of states that they follow from a sense of legal obligation.¹⁷ In order for custom to exist, there are two requirements that need to be met, namely: *usus* and *opinion juris*. In the most simplified sense this means that states must accept a certain

¹² Havel BF & Sanchez GS (2014) 11.

¹³ Diederiks- Verschoor IHPH (2012) 2.

¹⁴ *Ibid.*

¹⁵ Convention Relating to the Regulation of Aerial Navigation, Paris, 13 October 1919, hereinafter referred to as the Paris Convention.

¹⁶ *Ibid* fn 13 at 3.

¹⁷ Legal Information Institute <https://www.law.cornell.edu/wex/Customary_international_law> (accessed 7 July 2015).

obligation and consequently act in accordance with that obligation in order for there to be both acceptance and state practice.¹⁸

The principle of aerial sovereignty captured in the maxim *cuis est solum, eius est usque ad caelum et ad inferos* (“for whomever owns the soil, it is theirs up to the sky and down to the depths.”)¹⁹ This maxim is a classic example of a legal principle that is entrenched in customary international law. One could argue that the ‘nationality’ rule in aviation law which states that airlines must be owned by citizens of their home state amounts that international custom. Although there are persistent objectors, namely: the 28 EU states who have undermined the crystallisation of this rule as custom.²⁰ Due to the nature of customary international law, it is no surprise that litigators are always debating which rules have become custom in every area of international law. For the purposes of this dissertation it suffices to say that customary international law does play a modest role in the establishment of air law.

2.2 Treaties

The Vienna Convention on the Law of Treaties 1969 defines a treaty as: “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments, whatever its particular designation.”²¹

In theory there is no hierarchy between the sources of international law, however, it is common practice that treaties are considered normatively superior. The reason for this is that, the written documentation of treaties are linguistically more concise and capable of expressing nuances, caveats, exceptions and particularities, whilst sources such as international customary law are almost invariably in dispute as to the interpretation of the various meanings that can be attributed to a single rule.²² That being said, there are many customary rules that have, through time, obtained clarity by means court decisions and state practice.

¹⁸ Dugard J (2011) 26.

¹⁹ Herbert David Klein, *Cujus Est Solum Ejus Est ... Quousque Tandem?*, 26 J. Air L. & Com. 237, 238-43 (1959) as cited in Havel BF & Sanchez GS (2014) 18.

²⁰ Havel BF & Sanchez GS (2014) 18.

²¹ Vienna Convention on the Law of Treaties 1969 art. 1(a).

²² *Supra* fn 18.

Due to the nature of international aviation law and its principles of sovereignty, aviation law consists largely and almost exclusively out of consent. It is for this reason that the single most important source on aviation law is found in treaties.

2.2.1 The Chicago Convention

The magna carta of aviation law is known as the Convention on International Civil Aviation,²³ better known as the Chicago Convention. The Convention has been ratified by 113 states of the 192 UN states and therefore remains the world's most ratified treaty.²⁴ It contains universal rules covering airspace sovereignty, aircraft registration and airworthiness, navigation, and global Standards and Recommended Practices (SARPs).²⁵ The Convention has also created ICAO²⁶ a United Nations intergovernmental organisation that fosters global technical cooperation within the aviation industry.²⁷

The basis of the Chicago Convention is found in its preamble which recognises that the abuse of international civil aviation can become a threat to general security and recognises the desirability of developing international civil aviation in a safe and orderly manner. The regulation of safety and order is carried out through development of standards and practices.²⁸

The general objectives of the Convention in 1944 was to promote international air transportation in both a technical and economic capacity. The economic objectives sought to promote the freedom of airspace to nations and airlines, develop procedures and systems to determine air fares, frequencies, schedules and capacities.²⁹ The technical standards on the other hand included, the establishment of technical standards, including the licensing of pilots and mechanics, registering and certifying the airworthiness of aircrafts and planning and developing navigational services and facilities *inter alia*.³⁰

²³ Convention on Civil Aviation, opened for signature 7 Dec, 1944 Stat. 1180, 15 U.N.T.S. 295 (entered into force Apr 7, 1947.) Hereinafter referred to as the 'Chicago Convention'.

²⁴ Bartsch RIC (2012) 18.

²⁵ *Supra* fn 21 at 20.

²⁶ International Civil Aviation Organisation.

²⁷ *Ibid*.

²⁸ *Ibid*,

²⁹ *Supra* fn 25 at 19.

³⁰ *Ibid*.

These two objectives were the central themes of the convention. In fact, the almost unanimous agreement with regards to the technical objectives of the conference led to the establishment of ICAO which will be discussed in more detail below. Without the Chicago Convention, the doctrine of sovereignty over airspace severely limited trade and international transport. The centralisation and standardisation of safety standards and the provision of valuable technical annexes also contributed to the growth and development of the industry.³¹

2.2.2 The International Civil Aviation Authority

The International Civil Aviation Organisation (ICAO) is a specialised organisation under the United Nations that is quite distinct from any other international organisation with respect to its powers and authority. It came into being on 7 December 1944, in terms of the Chicago Convention.³² ICAO was designed to operate under the auspices of the Chicago Convention.³³ Air transport is a cross-border activity. For safety and security reasons States wished to regulate their relationships in the field of air transport on a global level.³⁴ The Structure of ICAO after deliberation resulted in a compromise between the positions of the United States, United Kingdom, Australia, New Zealand and Canada.

Australia and New Zealand proposed a system of internationalisation of the aviation industry, including the establishment of a single international global airline as well as a International Air Authority, to organise and supervise the airline.³⁵ The United Kingdom similarly proposed an International Air Authority, which would have extensive regulatory powers in economic and technical matters.³⁶ It is no surprise that the United States proposed an entirely different approach to aviation. A model that proposed freedom of the air and a pro-competitive market, where airlines were free to be established and compete with one another. The US model envisaged the creation of an International Aviation Assembly to establish technical standards without encroaching on free competition.³⁷ The Canadian

³¹ Tomas L (2009) at para 22.

³² Hobe S *et al* (2013) 28.

³³ International Civil Aviation Authority Doc. 7300/9, Part 2.

³⁴ Mendes de Leon PMJ (2007) para 1.

³⁵ Hobe S *et al* (2013) 29.

³⁶ *Ibid.*

³⁷ *Ibid.*

proposition envisaged an International Air Authority with powers in the field of economic regulation on a regional basis.³⁸

The ICAO adopted in 1944 in the fashion of international law, that only binds subject to acceptance, is a true compromise of the proposals of the respective stake holders. ICAO was to become an organisation with wide technical standard setting responsibilities and only general supervisory functions. The economic regulations were to be left to the discretion of bilateral agreements between states as well as airline industry conferences whom had received state approval.³⁹ The economic regulations of ICAO are limited to Art. 44(e) which stipulates: “Prevent economic waste caused by unreasonable competition”. However, this principle is not elaborated on, nor creates any binding provision or obligation on part of the signatories.

2.2.3 Objectives

The objectives of ICAO are laid down in Art. 44 of the Chicago Convention.⁴⁰ ICAO has as its principal objectives the promotion of safety and the orderly development of civil aviation throughout the world. ICAO must also contribute to taking measures regarding aviation security and the protection of the environment.⁴¹

ICAO and the Chicago Convention are mandated to regulate and introduce measures for the benefit of civil aircraft and civil aviation.⁴² State aircrafts such as military jets and ar-

³⁸ *Ibid.*

³⁹ *Ibid* at fn 34 at 30.

⁴⁰ Article 44 Objectives

The aims and objectives of the Organization are to develop the principles and techniques of international air navigation and to foster the planning and development of international air transport so as to:

- (a) Ensure the safe and orderly growth of international civil aviation throughout the world;
- (b) Encourage the arts of aircraft design and operation for peaceful purposes;
- (c) Encourage the development of airways, airports, and air navigation facilities for international civil aviation;
- (d) Meet the needs of the peoples of the world for safe, regular, efficient and economical air transport;
- (e) Prevent economic waste caused by unreasonable competition;
- (f) Insure that the rights of contracting States are fully respected and that every contracting State has a fair opportunity to operate international airlines;
- (g) Avoid discrimination between contracting States;
- (h) Promote safety of flight in international air navigation; (i) Promote generally the development of all aspects of international civil aeronautics.

⁴¹ Mendes de Leon PMJ (2007) para 4.

⁴² *Ibid* at para 6.

guably those whom the head of state travels with, are subject to law outside of the Chicago Convention and ICAO, and are regulated domestically and subject to certain international provisions. Domestic commercial air travel is almost always regulated by domestic legislation. For the purposes of this dissertation the writer will exclusively focus on international civil aviation subject to ICAO.

One of the key elements that makes ICAO so distinct, is the function of the Air Navigation Commission, which assists the council in implementing Standards and Recommended Practices (SARPs). SARPs are made to create a uniform system of air navigation and include Standards containing rules on air navigation, certification of aircraft, personnel licensing, search and rescue, accident and incident investigation, security, infrastructure serving civil aviation, i.e airports and air traffic control, the environment, facilitation of air travel, and security.⁴³ The Air Navigation Commission makes proposals for SARPs and the council then votes to implement these as such.

Practice dictates that ICAO implements its SARPs in an entirely different manner than most other International Organisations, which is somewhat true. However the World Meteorological Organisation (WMO) and the World Health Organisation (WHO) both implement their regulations and practices in the same manner. Namely, when the council implements SARPs these are binding upon all member states, unless a state notifies ICAO that the SARP will not be applicable to them within 60 days, if the state fails to do so, that state is bound. This is completely juxtaposed to the manner in which countries enter into treaties or agreements under public international law which is always based on consent, but it is more common in specialised international organisations.⁴⁴

ICAO's contribution to improving international aviation safety and security cannot be underestimated. ICAO can be seen as a central legislator promoting uniformity of rule-making which is supported by its technical expertise. Its major achievements concern improving safety and security and promoting globally accepted standards.⁴⁵ It is generally agreed that without ICAO, the international airline industry would have faced great difficulty. The

⁴³ *Ibid* fn 41 at para 24.

⁴⁴ *Ibid*.

⁴⁵ Mendes de Leon PMJ (2007) para 33.

impact of ICAO and the Chicago Convention on organisation and uniform practice in international airline operations has been significant to say the least.⁴⁶

⁴⁶ Tomas L (2009) at para 22.

Chapter 3: Air Carrier Liability

3.1 The Warsaw Convention of 1929

Air carrier liability for damage, injury or loss is largely governed by international conventions. These conventions have through time developed and drastically changed in their nature. The starting point of air liability can be found in the Warsaw Convention of 1929.⁴⁷ The Warsaw Convention set legal standards for and limitations on a air carrier's liability for passengers, baggage, and goods in the event of an aviation accident. The carrier was liable for death, wounding or any other bodily injury suffered by the passenger on board, an aircraft or during the process of embarking and disembarking.⁴⁸ The carrier was also responsible for damage, destruction or loss of property sustained to goods whilst in carriage,⁴⁹ as well as damages caused by delay.⁵⁰ However, all these claims were subject to liability limitations which were unacceptably low, unless the damage was caused by the wilful misconduct or default on part of the carrier.⁵¹ An onus which was factually nearly impossible to prove. The Warsaw Convention served to create a uniform body of liability rules in international air transportation that was ratified or at least followed by the majority of the world's nations.⁵²

The Warsaw Convention was inherently in favour of the airline as opposed to the passenger, in fact its principal feature was to protect air carriers.⁵³ One of the manners in which Warsaw favoured the airline was in limiting the sum of compensation retrievable in cases of damage, injury or death to a very low sum. The sum of compensation retrievable in terms of Warsaw was widely regarded as unacceptably low. In fact, the Hague Protocol of 1955⁵⁴ doubled the liability limit. In 1966, airlines flying from and to the United States agreed to raise the liability limit to US\$75.000.⁵⁵

⁴⁷ Convention for the Unification Of Certain Rules Relating to International Carriage By Air, Signed at Warsaw On 12 October 1929.

⁴⁸ Art.17 of the Warsaw Convention. See also Hobe S *et al* (2013) 140.

⁴⁹ *Ibid* at Art.18.

⁵⁰ *Ibid* at Art.19.

⁵¹ *Ibid* Art.21 and 25.

⁵² Tomas L (2008) at para 13.

⁵³ Balfour J (1999) 113.

⁵⁴ The Protocol to amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air of 1955 hereinafter referred to as the "Hague Protocol".

⁵⁵ Tomas L (2008) at para 15.

3.2 The Montreal Convention of 1999

The Warsaw Convention has been largely replaced by the Montreal Convention of 1999.⁵⁶ The Montreal Convention completely changed the manner in which airline compensation was viewed. The new liability dispensation under Art.21 of Montreal⁵⁷ *inter alia* changed the airline liability to favour the passenger as opposed to the airline.⁵⁸ Firstly, a two tiered liability system was introduced. This two tiered liability system comprised both of strict and fault based liability in cases of death or injury. The first tier of liability is based on strict liability. The airline is obliged to compensate the passenger irrespective of the airline's fault or contribution to the damage causing event. The amount retrievable in terms of strict liability is limited to 113 100 SDR(Special Drawing Rights)⁵⁹ which amounts to approximately 150 000.00 USD which is in practice only granted in cases of death or severe injury. The second tier of the liability system in place is based on fault based liability. The quantum retrievable in terms of the second tier of liability is in principle unlimited, however the claimant in this instance has the onus of proving fault on part of the carrier. The Montreal Convention also specifically prohibits claiming punitive damages.⁶⁰

⁵⁶ Convention for the Unification of Certain Rules for International Carriage by Air, opened for Signed at Montreal on 28 May 1999 hereinafter referred to as the "Montreal Convention".

⁵⁷ Article 21 - Compensation in case of death or injury of passengers.

1. For damages arising under paragraph 1 of Article 17 not exceeding 100,000 Special Drawing Rights for each passenger, the carrier shall not be able to exclude or limit its liability.
2. The carrier shall not be liable for damages arising under paragraph 1 of Article 17 to the extent that they exceed for each passenger 100,000 Special Drawing Rights if the carrier proves that:
 - (a) such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; or
 - (b) such damage was solely due to the negligence or other wrongful act or omission of a third party.

⁵⁸ *Ibid* fn 52 at para 17.

⁵⁹ "SDR - Special Drawing Right. The SDR is an international reserve asset, created by the IMF in 1969 to supplement its member countries' official reserves. Its value is based on a basket of four key international currencies (US Dollar, Euro, Pound Sterling and Japanese Yen) and can be exchanged for free usable currencies. The current exchange rate can be found at <http://www.imf.org/external/np/fin/data.rms_sdrv.aspx>." as cited in Hobe S *et al* (2013) 144.

⁶⁰ "For air carriers licensed in the European (Economic) Community, the Warsaw Convention's passenger liability limit was abolished by Council Regulation (EC) 2027/97 of 9 October 1997 on Air Carrier Liability in the Event of Accidents (1997) (OJ L 285/1). This was amended by Regulation (EC) 889/2002 of the European Parliament and of the Council of 13 May 2002 amending Council Regulation (EC) 2027/97 on Air Carrier Liability in the Event of Accidents (2002 (OJ L 140/2) to align the liability position of Community carriers with that set out in the Montreal Convention". As cited in Tomas L (2008) *Air Law Max Planck Encyclopaedia of Public International Law* Oxford University Press Online.

The Montreal Convention provides for a synthesis of the numerous amendments that have been made to the Warsaw Convention and creates a standardised liability system that reflects the evolution of air carriage. However, the Montreal Convention only applies to countries who have signed and/or ratified the Montreal Convention. Unless a country has done so the Warsaw System will still apply. If only one country has ratified the Montreal Convention and the other is part of the Warsaw system, then the Montreal Convention will only apply to the country who is ratified thereto, and Warsaw will apply to the other.⁶¹

For the purposes of this dissertation it is important to understand the liability systems in place in terms of international air carriage. Furthermore, the depth in which liability is discussed in this dissertation is minimal at best, but due to length constraints, the writer will exclusively focus on the Montreal Convention as the Convention can be regarded as the primary source of air carrier liability with 113 state parties thereto as of 4 November 2004.⁶² Moreover, the Montreal System of liability as stated is a comprehensive up to date system of liability that reflects and protects the interest of the passenger as opposed to that of the air carrier. It is the opinion of the writer, that the Warsaw system of liability will through time and evolution of air law become obsolete, whereas the Montreal system of liability will continue to grow in its membership.

⁶¹ Art.55 of the Montreal Convention as cited in Hobe S *et al* (2013) 143.

⁶² http://www.icao.int/secretariat/legal/List%20of%20Parties/Mtl99_EN.pdf (accessed 4 August 2015).

Chapter 4: Use of Force Against a Foreign Civil Aircraft

The bringing down of an aircraft by intentional means, *inter alia*, forcing an aircraft to land or intentionally shooting it down, is usually met with tremendous catastrophic loss of life and damage to property to both the persons on board the craft, as well as third parties on the ground who fall subject to the initial impact, as well as any subsequent damage caused by the downing of the aircraft.

4.1 Important International Incidents

Several international incidents will be discussed under this heading because they are relevant to the development of Art. 3 *bis* and the use of force against a civil aircraft. Moreover, in several of the instances the government of the respective wrongdoer acknowledges guilt. In other instances, the government does not acknowledge guilt but nevertheless offers to pay compensation. This is relevant in context of the aim and purpose of this dissertation, namely: to critique the legal position relating to liability under Montreal that holds a commercial airline liable. Even instances where the fault and cause of the crash lies solely with a state.

4.1.1 Shooting down a French Airliner in 1952

In 1952, the Soviet Union scrambled jet fighters to intercept a French commercial aircraft whilst on route from West Germany to West Berlin. Though this is one of very few instances where the aircraft landed without any casualties, two of the passengers on board were injured.⁶³ The Soviet Union claimed that the aircraft had deviated from its designated flight path and was therefore liable to be fired upon.⁶⁴ The Allied High Commission at the time went on record to say the following: "Quite apart from these questions of fact, to fire in any circumstances, even by way of warning, on an un-armed aircraft in time of peace, wherever that aircraft may be, is entirely inadmissible and contrary to all standards of civilised behaviour."⁶⁵ In this matter the Soviet Union not only disagreed, but refused to pay any compensation.

⁶³ Phelps JT (1985) as cited in Foont BE (2007) *Shooting Down Civilian Aircraft: Is There an International Law?* J. Air L. & Com. Vol. 72 696-724.

⁶⁴ Foont BE (2007) 704.

⁶⁵ Lissitzyn OJ (1953) as cited in Foont BE (2007) *Shooting Down Civilian Aircraft: Is There an International Law?* J. Air L. & Com. Vol. 72 696-724.

4.1.2 July 23 1954 British Cathay Pacific Airliner

On 2 July 1954, two Chinese MIG fighters downed British Cathay Pacific Airliner en route from Hong Kong to Bangkok. The aircraft carried a total of 18 people on board, 12 passengers and 6 crew members. The craft was operating in a transit corridor previously recognised by the Chinese Government.⁶⁶ Protests immediately ensued characterising the atrocity as “barbarity for which the Chinese Communist regime must be held responsible.”⁶⁷ Three days after the shooting down of the aircraft the Chinese government asserted the wrongfulness of the action and consequently apologised to Great Britain. The Chinese Government furthermore offered to pay for compensation for both the loss of life of the passengers and crew, as well as for the cost of the aircraft. Moreover, they stated the reason for shooting down the plane as a mistake in their judgment, as they perceived the craft to be identified by the pilots as Nationalist Chinese Aircraft from Formosa.⁶⁸ It is important to note that the Chinese government implied that if they had known that the plane was a civil aircraft and not military in nature, then they would have not fired upon it.⁶⁹

The importance of this case to the discussion at hand, lies in the public apology and payment of compensation on part of China for their wrongful act. Furthermore, the government validated the customary international law position as entrenched by ICAO placing a prohibition on the use of force against a civil aircraft and later developed by Art. 3 *bis* as discussed below.⁷⁰ Moreover, it is important to take note that the region within which the airliner operated was unstable, with possible conflict arising, the importance of this lies arguably in the duty of states who enter into transit agreement to take cognisance and caution of the danger or prospective danger.

⁶⁶ Geiser EE (1998) 194.

⁶⁷ See *Plane Loss Laid to Peiping; U.S. Carriers Rush to Scene*, N.Y. TIMES, Jul. 25, 1954, at 1, as cited in Geiser EE (1998) *Fog of Peace: The Use of Weapons against Aircraft in Flight during Peacetime*, The, Geiser, Int'l Legal Stud. 187.

⁶⁸ See *Peiping, Apologizing, Calls Downing of Plane Accident*, N.Y. TIMES, Jul. 26, 1954, at 1 as cited in Geiser EE (1998) *Fog of Peace: The Use of Weapons against Aircraft in Flight during Peacetime*, The, Geiser, Int'l Legal Stud. 187 [187 to 240]

⁶⁹ Foont BE (2007) 705.

⁷⁰ *Ibid* fn 75.

4.1.3 July 27 1955

In 1955 Bulgaria had shot down Israeli El Al Commercial Airliner 4X-AKC.⁷¹ The Israeli aircraft had accidentally intruded into the the airspace of Bulgaria. The pilot had mistook the geographic references and consequently veered approximately 100 miles off course. The Bulgarian authorities ordered the downing of the plane, which resulted in the loss of life of all 58 people on board.⁷² The response of the Bulgarian authorities was similar to that of China. They both accepted responsibility, offered apologies and compensation to the families of the victims.⁷³ International outcry and condemnation seared from all angles of the globe. The acceptance of responsibility and payment of compensation is once again of importance for the purposes of this discussion.

4.1.4 Libyan Airliner Incident 1973

On 21 February 1973 a Libyan airliner was shot down after having strayed into Israeli occupied Sinai.⁷⁴ The shooting down by Israeli fighters resulted in the deaths of 108 passengers. It was uncontested that the Israeli fighter pilots had signalled the Libyan pilot to land. But despite their attempts to obtain cooperation, the Libyan pilot refused to do so. In fact, the co-pilot acknowledged that the pilot and himself were aware that the fighters wanted them to land, but decided not to comply with their orders due to the poor international relations between the two states.⁷⁵ The shooting down was severely criticised by ICAO.⁷⁶

Israel's defence to the shooting down of the aircraft was threefold. Firstly, they had instructed the pilot to land but he flagrantly refused to comply with their instructions, within their airspace. Secondly, the actions taken against the Libyan craft were intended to coerce to craft to land, not to destroy it. Lastly, Israel asserted that the aircraft had flown over sensitive security locations that coupled with the pilots refusal to comply with their instruc-

⁷¹ *Case concerning the Aerial Incident of July 27th, 1955* (Israel v Bulgaria) (Preliminary Objections) [1959] ICJ Rep 127) <http://www.icj-cij.org/docket/files/35/2325.pdf> (accessed 19 August 2015).

⁷² Donahue BE (1989) 55.

⁷³ See *Bulgaria Admits Downing Airliner; 58 Aboard Killed*, N.Y. TIMES, Jul. 29, 1955, at 1 as cited in Geiser EE (1998) *Fog of Peace: The Use of Weapons against Aircraft in Flight during Peacetime*, *The Geiser*, Int'l Legal Stud. 187 [187 to 240]

⁷⁴ A Aust (2007) para 8.

⁷⁵ Foont BE (2007) 706.

⁷⁶ ICAO Council Resolution concerning Israeli Attack on Libyan Civil Aircraft [4 June 1973] (1973) 12 ILM 1180).

tions nourished Israel's suspicions that the craft was in fact on a mission other than voyage, instead that it was a spy mission intended to ascertain information relating to Israel's secret air base at Bir Gafgha.⁷⁷ Nonetheless, Israel offered to pay compensation to the families of the victims on an *ex gratia* basis.⁷⁸ It should be mentioned that Israel expressed its profound sorrow at the tragedy.⁷⁹

For the purposes of this dissertation, it is important to note that the Libyan airliner was perceived to be a threat to security. A notion in itself which is irrelevant, but it does indicate that the region was unstable, the instability of which should create an increased awareness and caution on behalf of countries entering into international transit agreements.

4.1.5 Korean Airlines Incident of 1983

On 1 September 1983, Korean Airlines Flight 007 from New York bound for Seoul Korea was shot down in Russian Airspace by Soviet fighter pilots. Soon after taking off from Anchorage, Alaska flight 007 started to deviate from its designated route, the airplane then proceeded to enter Soviet Airspace over the Sakhalin Island.⁸⁰ Soviet Radar monitored and tracked the Korean Airline for a period of 2 hours and subsequently proceeded to intercept the civilian aircraft. Upon interception of the aircraft by two Soviet SU-15 fighters were scrambled from the Sokol Airbase towards the target⁸¹ and maintained a distance of four miles behind the target.⁸²

“The fighter pilot, in response to his controller's command, flashed his lights, and fired a burst of 200 bullets below the jetliner as a warning (hoping to force the aircraft to land at Sakhalin). The round of bullets did not include tracer bullets; and in the vast darkness, the bullets were not seen or heard. The entire chase, intercept, and the firing was not noticed by the crew of Korean Air Lines Flight 007, flying at night with window shades lowered.”⁸³

Thereafter, the lead Soviet pilot proceeded to fire a missile at the civilian aircraft, after receiving authorisation from Russian ground control. As a result, Korean Airlines flight 007 crashed into the Sea of Japan, killing all 240 passengers on board as well as 29 crew

⁷⁷ *Supra* fn 75.

⁷⁸ *Supra* fn 74.

⁷⁹ Brown R (2007) 79.

⁸⁰ Suarez SV (2007) para 1.

⁸¹ Degani A (year of publication unknown) 7.

⁸² *Ibid* at 8.

⁸³ *Ibid* at 9.

members on board.⁸⁴ Several states including the United States, Japan as well as the Soviet Union undertook rescue attempts to no avail.

The United States, together with the Republic of Korea, Japan, Australia and Canada, requested an emergency meeting with the United Nations Security Council.⁸⁵ In the meeting with the UNSC, Korea demanded the following from the Soviet Union: *a)* provide a full and detailed account of the incident, *b)* apologise to the families of the victims and provide compensation for the loss of the aircraft in accordance with standard international practice, *c)* adequately penalise those directly responsible for the incident, and *d)* guarantee representatives of international organisations full access to the crash site.⁸⁶

4.1.5.1 The Reason for Flight 007's Deviation

Two months after the downing of Flight 007, soviet divers retrieved the 'black boxes' from the debris, but kept the findings thereof a secret for a period of 10 years. After the fall of the Iron Wall and the demise of the Soviet Union the tapes were handed over to ICAO for analysis.⁸⁷ The aircraft accident investigation was completed in 1993.

Two minutes and ten seconds after liftoff the pilots engaged the autopilot according to the flight data recorder. The aircraft continued to fly under autopilot for the 5 hour duration of the flight from two minutes after lift off until it was shot down.⁸⁸ As many speculated, the auto pilot function or to be more specific, the malfunctioning thereof, directly contributed to the catastrophic events to follow.⁸⁹ The 'black box' clearly indicates that the pilots on board flight 007 had no idea that they had strayed from their path, nor that they were in imminent danger. Their recognisance of the detrimental circumstances they found themselves in, was only realised upon being struck by the missile and their imminent death to follow.⁹⁰ It

⁸⁴ *Ibid* at paras 2-3.

⁸⁵ Hereinafter referred to as the UNSC.

⁸⁶ Suarez SV (2007) para 5.

⁸⁷ *Supra* fn 65 at 3.

⁸⁸ *Ibid* at 11.

⁸⁹ For a detailed study and understanding of the malfunctioning of the auto pilot system on board Korean Flight 007 refer to Degani A *Korean Air Lines Flight 007: Lessons from the Past and Insights for the Future* NASA Ames Research Center Report. <http://ntrs.nasa.gov/archive/nasa/casi.ntrs.nasa.gov/20020043310.pdf> (accessed 5 August 2015). "The Crash of Korean Air Lines Flight 007" <http://ti.arc.nasa.gov/m/profile/adegani/Crash%20of%20Korean%20Air%20Lines%20Flight%20007.pdf> (accessed 5 August 2015).

⁹⁰ *Ibid*.

is incomprehensible to think that the malfunctioning of a auto-pilot system led to the demise of 269 innocent people. However, it is submitted that irrespective of the technical aspects contributory *in casu*, the main factor that led to the crash, was most obviously the intentional negligent shooting down of an aircraft that posed absolutely no threat to the territorial integrity of the Soviet Union, which is the emphasis of this dissertation.

It is important to note the following, subsequent to the shooting down of Flight 007, the claimants in this instance claimed that the United States Air Force weapons controllers in Alaska had a duty and obligation to warn the pilots of the flight of the impending danger. However, the district court in the United States dismissed the US as a defendant in this case, holding that no such duty existed. Moreover, the court stated that even if such a duty did exist, the actions by the Soviet Union was a *novus actus interveniens* thereby breaking any claim against the US.⁹¹

4.1.6 Downing of Tupolev 154

On October 4, 2001, a Tupolev air craft Tu-154 en route from Tel Aviv, Israel to Siberia, exploded and crashed into the Black Sea, resulting in the deaths of 78 passengers and crew. The Ukrainian government denied responsibility for the attack. Nonetheless, after extensive investigation as well as the use of an American spy satellite it became evident that Ukraine was indeed responsible for the attack. The missile originated from a SAM⁹² missile. After being ousted the Ukrainian government accepted responsibility.⁹³

In November 2003, an agreement was struck between Israel and Ukraine in terms of which Ukraine is obliged to pay \$200 000.00 to each of the families of each of the 40 Israeli citizens on board the craft.⁹⁴ An agreement containing the same conditions and amount was agreed to in June 2004. Ukraine therefore, accepted the practice established by states to pay for compensation where the shooting down of a plane was without merit.⁹⁵

⁹¹ *In re Korean Air Lines Disaster of September 1, 1983*, 646 F. Supp. 30 (D.D.C. 1986) as cited in Aly A & Stewart F (1990) 117.

⁹² SAM Missile: Surface-to-Air Missile.

⁹³ Foont BE (2007) 715.

⁹⁴ "Russia Agrees Airliner Payout" <http://news.bbc.co.uk/2/hi/europe/3806383.stm> (accessed 19 August 2015).

⁹⁵ *Supra* fn 91.

4.2 Article 3 *bis*.

When a state uses force against a civil aircraft that is registered with that state, the downing of the plane as such is primarily a domestic legal issue, although the state may be called to answer on questions relating to international human rights as well as arguably international humanitarian law. When a state downs a plane registered to it within the territory of another state, such an action will be handled in terms of international aviation law. Such an instance may hypothetically occur when a registered plane is hijacked and has proceeded into the territory of another state. Such an action will raise concerns as to the lawfulness thereof, as well as whether the right to self-defence applies in such an instance.⁹⁶ However, this dissertation focuses primarily on the use of force against an airplane that is registered in another state, therefore the issues relating to domestic crafts will not be discussed further.

The events discussed above, namely: the shooting down of Korean Airlines Flight 007, led to the Assembly of the ICAO adopting a new Protocol relating to an Amendment to the

⁹⁶ A Aust (2007) para 2.

Convention on International Civil Aviation by inserting a new provision namely,⁹⁷ Art. 3bis⁹⁸.

The aim and purpose of 3 *bis* is to prohibit and ban the use of force against a civil aircraft. “Every State must refrain from resorting to the use of weapons against civil aircraft in flight”.⁹⁹

Thus, air fighters may intercept civil aircrafts, who are without authorisation, flying within their territory. However, they may not fire upon that civil aircraft. Yet, states have interpreted the last sentence in 3 *bis* as a saving provision (a), namely: “This provision shall not be interpreted as modifying in any way the rights and obligations of State set forth in the Charter of the United Nations”. Meaning, that the sentence was widely understood to be a reference to the inherent right of states to rely on the right to self-defence as reflected in

⁹⁷ *Ibid* at para 3-4.

⁹⁸ The Protocol entered into force on 1 October 1988 after having received the required 102 ratifications. Currently some 137 countries have ratified the Protocol, including Russia, however the United States has not yet done so. It is important to note that Ukraine has also ratified 3bis on 21 January 2003.

Art.3bis states the following:

(a) The contracting States recognise that every State must refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of aircraft must not be endangered. This provision shall not be interpreted as modifying in any way the rights and obligations of States set forth in the Charter of the United Nations.

(b) The contracting States recognise that every State, in the exercise of its sovereignty, is entitled to require the landing at some designated airport of a civil aircraft flying above its territory without authority or if there are reasonable grounds to conclude that it is being used for any purpose inconsistent with the aims of this Convention; it may also give such aircraft any other instructions to put an end to such violations. For this purpose, the contracting States may resort to any appropriate means consistent with relevant rules of international law, including the relevant provisions of this Convention, specifically paragraph (a) of this Article. Each contracting State agrees to publish its regulations in force regarding the interception of civil aircraft.

(c) Every civil aircraft shall comply with an order given in conformity with paragraph (b) of this Article. To this end each contracting State shall establish all necessary provisions in its national laws or regulations to make such compliance mandatory for any civil aircraft registered in that State or operated by an operator who has his principal place of business or permanent residence in that State. Each contracting State shall make any violation of such applicable laws or regulations punishable by severe penalties and shall submit the case to its competent authorities in accordance with its laws or regulations.

(d) Each contracting State shall take appropriate measures to prohibit the deliberate use of any civil aircraft registered in that State or operated by an operator who has his principal place of business or permanent residence in that State for any purpose inconsistent with the aims of this Convention. This provision shall not affect paragraph (a) or derogate from paragraphs (b) and (c) of this Article.”, <http://www.mcgill.ca/iasl/files/iasl/montreal1984.pdf> (accessed 13 August 2015).

⁹⁹ A Aust (2007) para 4.

Art. 51 of the United Nations Charter.¹⁰⁰ The result thereof being that in truly exceptional circumstances a state can shoot down a civil plane and successfully rely on the right to self-defence. If that state could prove that in doing so they avoided a much greater loss to life provided the loss could have been reasonably anticipated.¹⁰¹

One of the most costly and infamous instances in aviation was the attack on the United States by four civil aircrafts hijacked by terrorists on 11 September, 2001. If the United States could have foreseen the occurrence of the attack and had good grounds for believing that the actual intention of the hijackers was to crash those planes into strategic locations, which would result in a greater loss than the shooting down thereof, they would have very likely able to successfully rely on the inherent right to self-defence.¹⁰²

During the 3 weeks deliberation and negotiation of Art 3 *bis* of ICAO, several South American states argued that they should have the right to shoot down a civil aircraft entering their airspace which is suspected of carrying narcotic drug substances. The proposal to allow such action was rejected.¹⁰³ Irrespective of the rejection thereof, on 20 April 2001 Peru who had not ratified 3 *bis* shot down a light aircraft suspected of carrying drugs in a anti-drug smuggling campaign supported by the United States. Moreover, no drugs were found aboard the craft only two Christian missionaries heading for Peru.¹⁰⁴ After the incident that led to the deaths of the missionaries the U.S support that served as a quintessential element of these drug trafficking defence mechanisms including the use of force was suspended. This cooperation programme between the United States, Peru and Colombia was known as Air Bridge Denial Program.¹⁰⁵

¹⁰⁰ Art 51 of the UN Charter states the following:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security. http://www.nato.int/cps/en/natohq/official_texts_16937.htm (accessed 13 August 2015.)

¹⁰¹ *Supra* fn 78 at para 5.

¹⁰² *Ibid.*

¹⁰³ A Aust (2007) para 6.

¹⁰⁴ *Ibid.* Missionary plane shot down in Peru: collateral damage in US "drug war" <<https://www.wsws.org/en/articles/2001/04/peru-a24.html>> (accessed 17 August 2015).

¹⁰⁵ Huskission DC (2005) 158.

The Preamble of the protocol makes clear that its intent is the “general desire of contracting States to reaffirm the principle of non-use of weapons against civil aircraft in flight...”¹⁰⁶ Therefore, even if the protocol had not yet entered into force or a country acted who has not ratified 3Bis its principles and prohibition apply to those non-member countries on the basis of customary international law. “In Resolution 1067 (1996) of 26 July 1996, para. 6, the UN Security Council recognised that Art. 3 *bis* of the ICAO Convention codified the relevant rules of customary international law”.¹⁰⁷

¹⁰⁶ Article 3Bis <<https://www.mcgill.ca/iasl/files/iasl/montreal1984.pdf>> (Accessed 17 August 2015).

¹⁰⁷ *Supra* fn 82 at para 6.

Chapter 5: State Liability as a Substitute for Air Carrier Liability

At international law, states have always insisted on retaining the ability to deal on the international forum with other states in order to protect the investments and property of their own nationals.¹⁰⁸ The problem in this regard is that, states are all equal under international law. One is not subservient to another, at least not in theory. It is therefore, almost impossible to enforce a claim against another state, hence the vast amount of *ex gratia*¹⁰⁹ payments.

At the outset of this dissertation it was submitted that public international law determines *inter alia*, States' control over the airspace above their territories, their duties and powers to prevent and punish crimes aboard or against an aircraft, and the level of market access they provide to foreign air carriers.¹¹⁰ In essence, states have a tremendous role in their right to determination with regard to airlines registered within their state. The irony with regard to this is, that for all their power in determination they bear none of the liability for civil carriers under the Chicago Convention, Warsaw and Montreal.

To put it differently, a puppet master is pulling the strings of his puppet and when the puppet damages, injures or causes the death of a person, the puppet is held liable, and not his master ultimately making the decisions. There is a fundamental error in the manner liability is dealt with under international aviation law. An airline should most certainly be held liable for those actions and damage causing events that they had a hand in by an act or omission on their part, or even due to *vis major* that they simply could not have foreseen.

Nevertheless, should an air carrier be held liable for the downing of an aircraft that falls exclusively within the governmental sphere of operations? For instance, the downing of an aircraft for political, ideological and more recently religious extremism.

In Chapter 4¹¹¹ various incidents were discussed, most of which occurred in the 20th century where states were directly responsible for the downing of an aircraft. In most of these instances the airplanes were shot down due to an error in identification on part of the wrongdoer state, but the underlying reason was political tensions and ideologies. More-

¹⁰⁸ Whelton C (1993) 609.

¹⁰⁹ *Ex gratia* payments in this regard, means a payment made based on humanitarian basis whilst rejecting the obligation to do so.

¹¹⁰ *Supra* fn 10.

¹¹¹ *Supra* p 15.

over, in most of the instances discussed, the wrongful state paid or offered to pay compensation for their actions to the families of the victims. The purpose of this dissertation as stated earlier needs to be reiterated, namely, to revisit the legal position under international air law relating to liability and to reassess that liability, to incorporate and implement state liability where applicable as a substitute for air carrier liability.

It is manifestly unjust that an airline is liable under the Montreal Convention for the damage, death or injury to a passenger as envisaged in Articles 17 and 21.¹¹² It is important to mention that a claimant will under such a circumstance in all likelihood will not be able to successfully claim in terms of Art. 21(2) for damages on the basis of fault. Nonetheless, in terms of Art. 21 the airline will be liable up to, and in most cases fully liable for 113 100 SDR, for an act by a state actor or non-state actor to which the air carrier had no contribution.

5.1 The Bombing of Pan AM Flight 103

High jacking, terrorism and sabotage have become additional risks inherent to flying.¹¹³ On 21 December 1988 Pan American Flight 103 departed from London Heathrow heading for New York. Shortly after takeoff the plane exploded mid air, its remains and passengers

¹¹² Article 17 - Death and Injury of Passengers:

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.

2. The carrier liable for damage sustained in case of destruction or loss of, or of damage to, checked baggage upon condition only that the event which caused the destruction, loss or damage took place on board the aircraft or during any period within which the checked baggage was in the charge of the carrier. However, the carrier is not liable if and to the extent that the damage resulted from the inherent defect, quality or vice of the baggage. In the case of unchecked baggage, including personal items, the carrier is liable if the damage resulted from

its

fault or that of its servants or agents.

Article 21 - Compensation in case of death and injury of passengers

1. For damages arising under paragraph 1 of Article 17 not exceeding 100,000 Special Drawing Rights for each passenger, the carrier shall not be able to exclude or limit its liability.

2. The carrier shall not be liable for damages arising under paragraph 1 of Article 17 to the extent that they exceed for each passenger 100,000 Special Drawing Rights if the carrier proves that:

(a) such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents; or

(b) such damage was solely due to the negligence or other wrongful act or omission of a third party.

¹¹³ Terrorism in the Terminal: Airline Liability Under Article 17 of the Warsaw Convention, 52 N.Y.U. L. REV. 283,300 (1977) as cited in Coleman & Kacey (1991) *Terror Takes to the Skies: The Bombing of Pan AM Flight 103* 7 Adelphia L.J. 109

crashing down over Lockerbie, Scotland. This catastrophic event led to the deaths of 243 passengers, 16 crew members and 11 townsfolk.¹¹⁴ After 3 years of extensive search and investigation conducted by a team of Scottish and American investigators, the recovered evidence implicated 2 Libyan nationals who were ultimately found responsible for the bombing. The greatest act of terrorism on an air carrier in history at that point in time.¹¹⁵

The United States government had received a tip prior to the flight that a Frankfurt originating flight would be the target of a bomb.¹¹⁶

The Lockerbie incident is separated from the incidents earlier described in Chapter 4¹¹⁷, because there followed an interesting discussion on the liability of the United States which directly applies to the discussion at hand. The question was whether there was a duty of the United States to warn the passengers of Flight 103.

In terms of the Federal Tort Claims Act¹¹⁸ (FTCA), the Act creates an exception to government liability. Meaning that a person can claim compensation from the government of the United States where the claimant can prove wilful misconduct on part of a government official exercising his or her discretionary function.¹¹⁹ The FTCA gives federal courts the jurisdiction to hear cases involving injury or death which were caused by a negligent act or omission of government employees whilst acting within the scope of their functions, in situations where a natural person would be held liable under the same applicable law and circumstances.¹²⁰ In terms of this Act, each head of a federal agency has the power to reach a settlement with a claimant without judicial determination, for both their affirmative actions and their failure to act where they had a duty to do so.¹²¹

The Act, does however provide for an exception to liability in terms of FTCA. Namely, the “discretionary function” exception which effectively grants a government agency immunity

¹¹⁴ Plachta M (2001) 125.

¹¹⁵ *Ibid* at 126; Dokas C (1991) 255.

¹¹⁶ Zeldis (1989) Pan Am 103 Litigation Taking Shape, N.Y.L.J., Jan 9, 1989, at I col. 3 as cited in Coleman & Kacey (1991) *Terror Takes to the Skies: The Bombing of Pan AM Flight 103* 7 Adelpia L.J. 110.

¹¹⁷ *Supra* p15.

¹¹⁸ Federal Tort Claims Act 28 U.S.C. 1364(b), 2671-2680 (1970).

¹¹⁹ Coleman & Kacey (1991) 111.

¹²⁰ *Ibid*.

¹²¹ *Ibid*.

for acts done in the execution of a regulation or statute or a discretionary function or duty. Therefore, in practice much will depend on whether one can prove wilful misconduct in the exercise of that discretion. In the case at hand, the Federal Aviation Administration pointed out that, hundreds of threats were received on a yearly basis and alerting airlines and airports to all those will effectively have a drastic impact on air travel. On this basis the United States in the case at hand will be determined to have acted within their discretionary power regarding their failure to act which contributed to the occurrence of the incident.

“Some plaintiffs likely considered legal action against the United States Government for its failure to warn passengers of a bomb threat but found they were probably barred by the Federal Torts Claims Act”¹²²

5.2 Forms of Compensation

Treaty law, international customary law and arguably *ius cogens* all indicate that the use of force against a civilian aircraft is expressly prohibited. In instances where states have in the past violated the prohibition on the use of force they have generally paid compensation on a *ex gratia* basis. *Ex gratia* compensation is compensation paid on humanitarian basis and not on a basis of legal obligation. In essence *ex gratia* compensation allows a state to pay compensation without admitting the violation of an international law obligation.¹²³

However, in the Cathay Pacific incident¹²⁴ the People’s Republic of China paid compensation to the families of the victims as if they were legally liable under an obligation of international law. In this instance, the quantum to be paid to the the families was calculated by the claimant nation and based on British tort principles.¹²⁵ Included in the claim the personal circumstances of each victim such as age, sex, health, earning capacity and dependants were taken into consideration in determining the quantum. Similarly, in the EI Al incident¹²⁶ the compensation claimed before the ICJ was based on tort liability. However, Bulgaria in this incident denied the claim based on tort, or in other words, based on legal liability and instead offered compensation on a *ex gratia* basis.¹²⁷ Moreover, compensation

¹²² Strantz NJ (1991) 418.

¹²³ Douglas A (1990) 671.

¹²⁴ *Supra* 16.

¹²⁵ Douglas A (1990) 671.

¹²⁶ *Supra* fn 17.

¹²⁷ *Ibid* fn 119.

was paid to the victims on a flat rate irrespective of the personal circumstances of the victim.¹²⁸ Similarly in the Libyan airliner incident of 1973 the Israeli government paid on a *ex gratia* basis.

Therefore, based on previous incidents where states have used force against a civil aircraft, the payment of compensation can be classified into two classes. Firstly, the minority class such as the Cathay Pacific incident, compensation had been paid on the basis of the recognition of legal liability. Secondly, the majority class, compensation had been paid on a *ex gratia* basis completely rejecting the duty to pay compensation.¹²⁹

5.3 Non-State Actors

“International law must recognise that today's world contains powerful non-state entities. Civil wars spawn powerful factions ready to terrorise the world to publicise their positions. Often, state governments are powerless to control these entities. Because governments are not responsible for individuals or groups that governments cannot control, traditional international law does not hold any entity internationally responsible for the damage these groups cause. Non-state entities, such as insurgent groups, must not be allowed to terrorise others with impunity. Modern governments must begin holding these entities responsible even though it may be more traditional to hold states responsible; continuing to hold only states responsible ignores the realities of today's world.”¹³⁰

It is submitted that the above statement bears merit only in an ideal world, where all countries work together for the betterment of the globe, and states openly and honestly rebuke terrorism within their borders. However, when one considers the world as it is, not as it *should* be, then a state's only recourse that it has is to hold the state responsible in which these non-state actors are operating. When considering the MH17 incident that occurred on 17 July, 2014,¹³¹ it is quite impossible for Malaysia or the Netherlands to hold a non-state actor rebel group responsible, when it is factually impossible to determine who they are and under whose auspices they act.

The history of aviation and its development, indicates that aviation is a mode of transport that is particularly vulnerable to different forms of abuse by non-state actors.¹³² It is important to note that, out of the thirteen UN conventions relating to international terrorism, four

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*

¹³⁰ Dickinson KR (1987) 368.

¹³¹ *Supra* 2.

¹³² Geib R (2006) 230.

of those are devoted to the correlation between aviation and terrorism. An example of which is the establishment of the Tokyo Convention¹³³ which regulates criminal jurisdiction for acts committed on board a flight.¹³⁴

However, the purpose of this dissertation as stated is to determine the legal position relating to liability and compensation under aviation law. In terms of liability, one cannot under current international air law hold a non-state actor liable for compensation. In fact, it is debatable whether one can hold a state-actor liable.

¹³³ Convention on Offences and Certain Other Acts Committed On Board Aircraft Signed at Tokyo 14 September 1963. http://www.icao.int/secretariat/legal/List%20of%20Parties/Tokyo_EN.pdf (accessed 30 August 2015).

¹³⁴ *Ibid* fn 129.

Chapter 6: A New System of Airline Liability

Since as early as 1900 when Fuachille suggested a code of international air navigation, international air law has been changing and advancing. From the outset the Warsaw Convention of 1919 sought to protect the airline from excessive claims. Through air legislation development the protection of the air carriers has become increasingly diminished and claims have become increasingly larger. Many, if not most authors and scholars including this writer, agree that the development of air liability in favour of the passenger is a positive evolution.¹³⁵

However, it is submitted that there is a profound *lacunae* in air law as it relates to liability. A gap so profound it makes the writer reflect and wonder whether the drafters of the Warsaw Convention in 1919 were incorrect after all. The drafters of the Warsaw Convention of 1919 were inherently and uncompromisingly in favour of protecting the air industry from claims by passengers. The writer fully agrees that passengers or their family members who have been deprived of a loved one, should be compensated as such, but the lurking question is, who needs to compensate them?

In an industry where air law is constantly developing, the writers argues that it once more needs to evolve and provide for an improved liability system that is in fact juxtaposed to the current system of liability.

6.1 Merging of Aviation Law and State Responsibility

Article 1 of the Articles on State Responsibility¹³⁶ (ARISWA) states; ‘every internationally wrongful act of a State entails the international responsibility of that State.’ Whether there has been a breach of an international obligation depends firstly, on the requirements of the obligation and secondly, on the framework conditions for such an obligation.¹³⁷ Article 2 states; ‘There is an internationally wrongful act of a State when conduct consisting of an act or omission: (a) is attributable to the State under International Law; and (b) constitutes a breach of an international obligation of the State.

¹³⁵ See the Montreal Convention Art 17 and 21.

¹³⁶ Draft Articles on Responsibility of States for Internationally Wrongful Acts 2001.

¹³⁷ Crawford JR (2001) Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries p32 para [1].

It is uncontested that the shooting down of a civil aircraft constitutes an internationally wrongful act, as breach of a primary obligation both under treaty, custom and well as arguably *erga omnes*. With regards to the payment of compensation ARISWA states that the state has an undeniable duty to provide restitution for their actions in a manner of forms.¹³⁸

The obligation to make full reparation is the second general obligation of the responsible State consequent upon the commission of an internationally wrongful act. The general principle of the consequences of the commission of an internationally wrongful act was stated by PCIJ in the *Factory at Chorzów* case.¹³⁹ Out of all the forms of restitution envisaged in Art. 34, compensation is the most common, as well as the most practical for the purposes of our discussion. In the *Gabcíkovo-Nagymaros Project* case,¹⁴⁰ the ICJ stated the following: “It is a well-established rule of international law that an injured State is entitled to obtain compensation from the State

¹³⁸ Article 34. Forms of Reparation;

Full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this chapter.

Article 35. Restitution;

A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

(a) is not materially impossible;

(b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.

Article 36. Compensation;

1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.

2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

Article 37. Satisfaction;

1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation

2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.

3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State.

¹³⁹ Crawford JR (2001) Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries p32 para [1]; *Factory at Chorzów*, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9, 21.

¹⁴⁰ *Gabcíkovo Nagymaros Project* (Hungary v Slovakia) [1997] ICJ Rep. 7.

which has committed an internationally wrongful act for the damage caused by it.”¹⁴¹ It is equally well established that a international court or tribunal which has jurisdiction with respect to a claim of State responsibility has, as an aspect of that jurisdiction, the power to award compensation for damage suffered.¹⁴²

Art. 31 of ARISWA also makes reference to reparation.¹⁴³ Art. 31(2) is of specific importance in this instance, because, the article states, “Injury includes any damage, whether material or moral”. On this basis there a clear cut obligations on states in several articles of ARISWA to retribute in a manner of forms for damage caused, the most applicable of those being compensation¹⁴⁴ and reparation.¹⁴⁵

The obligation to make full reparation comes into play directly after a state has committed and internationally wrongful act. The *Factory at Chorzów* case¹⁴⁶ states the following:

“It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself.”

The above extract indicates that reparation is not only an obligation for the commission of a wrongful act, but also indicates the use of complementarity. In this context complementarity is used as a concept where two separate international agreements are applicable to a specific factual situation and are therefore used in conjunction with one and other.

It has been established that the Montreal Convention is applicable when it comes to liability of loss or damage to an individual on board a civil aircraft in flight. It is sub-

¹⁴¹ *Ibid* at 99.

¹⁴² *Ibid* fn 139.

¹⁴³ Article 31. Reparation

1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

¹⁴⁴ Art. 36 of ARISWA.

¹⁴⁵ Art. 31 of ARISWA.

¹⁴⁶ *Factory at Chorzów Jurisdiction Judgment* No 8, 1927 PCIJ 21.

mitted that in terms of ARISWA a state when responsible for the commission or omission of a wrongful act is legally liable in terms of the Art. 31 and 34. The writer is of the opinion that on the basis of complementarity a state can be held liable instead of the airline.

6.2 State Responsibility in Respect of Individuals

The ILC articles on state responsibility focus on the rules by which states can invoke the responsibility of another state for breaching its international obligation. But the world has evolved considerably over the last five decades since the Commission began its deliberations.¹⁴⁷ One would be quick to conclude that the document applies to states *inter se*. However, it is submitted that the articles also apply to individuals who have suffered loss or damage as a result of the wrongful act of a state. In many instances, international agreements provide for individual complaint procedures. The widespread existence of *lex specialis* contributes to the development of international law regarding the invocation of state responsibility.¹⁴⁸

Various international organisations as well as regional forums provide individuals with *locus standi* to make claims against states for the commission of a wrongful act. Due to length constraints the writer will exclusively rely on human rights as authority. The United Nations has enacted four international instruments that furnish individuals or groups of individuals the right to complain and seek restitution about the violation of protected rights. Namely, the First Optional Protocol to the International Covenant on Civil and Political Rights,¹⁴⁹ the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women,¹⁵⁰ the Convention Against Torture and Other Forms of Cruel and Inhuman Punishment,¹⁵¹ and the International Con-

¹⁴⁷ Weiss EB (2002) 809.

¹⁴⁸ *Ibid.*

¹⁴⁹ International Covenant on Civil and Political Rights, Dec. 16, 1966, Art. 41, 999 UNTS 171 entered into force Mar. 23, 1976.

¹⁵⁰ Convention on the Elimination of Discrimination Against Women, opened for signature Mar. 1, 1980, 1249 UNTS 13, Optional Protocol, GA Res. 54/4, annex (Oct. 6, 1999) entered into force Dec. 22, 2000.

¹⁵¹ Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature Dec. 10, 1984, Art. 21, 1465 UNTS 85 entered into force June 26, 1987.

vention on the Elimination of All Forms of Racial Discrimination.¹⁵² Since the commencement of the First Optional Protocol to the ICCPR the council has heard more than 1100 cases. As of August 27, 2002, the Committee had expressed its views on the merits in 403 cases, and 242 cases were "living" or pending. The numbers of submissions are increasing annually.¹⁵³ Similarly, the Convention Against Torture had 200 open cases pending instituted by individuals to the Committee in 2002.¹⁵⁴ All four of the mentioned Protocols create an avenue for individuals to complain and claim from a state, directly invoking state responsibility. It is the opinion of the writer that an individual can indeed invoke state responsibility. Furthermore, the invocation of state responsibility must be applied in conjunction with international air law.¹⁵⁵

6.3 Joint and Several Liability

The principle of joint and several liability is largely undeveloped in international law. However in a recent case the issue was attended to. Joint and several liability arises when the actors involved contribute to the same damage. It said that joint and several liability arises 'where different entities have contributed to the same damage so that full reparation can be claimed from all or any of them.'¹⁵⁶ The very nature of joint and several liability is that two actors, act in such a way as to be contributory to the commission or omission of a wrongful act and therefore both liable. However, the tribunal speaks of contribution with respect to the same 'damage' whereas the ILC Draft Articles on State Responsibility in Art. 47¹⁵⁷ also makes reference to joint liability, however the articles refer to the same 'wrongful

¹⁵² International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature Dec. 21, 1965, Art. II, 660 UNTS 195 entered into force Jan. 4, 1969.

¹⁵³ Weiss EB (2002) 810.

¹⁵⁴ *Ibid.*

¹⁵⁵ A recent decision of I.D.G v Spain 17 September 2015 is also of specific importance to the discussion at hand. The very recent case is the first ever Committee has considered for the first time an individual complaint filed under the Optional Protocol to the Covenant on Economic, Social and Cultural Rights. The Optional Protocol, adopted in 2008, allows individuals to lodge complaints directly to the CESCR for violations of the Covenant. This once again shows to illustrate the changing tide in International law favouring the individual in his capacity to hold a state both responsible and liable.

¹⁵⁶ *Responsibilities and obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area Seabed Disputes* Chamber of the International Tribunal for the Law of the Sea 2001, no 17.

¹⁵⁷ Art 47

1. Where several States are responsible for the same internationally wrongful act, the responsibility of each State may be invoked in relation to that act.

act' and not damage. A point that might seem moot but the distinction is important. Common damage may result from two or more different wrongful acts whereas in terms of Art 47 the act must be the same. For the purposes of air law, it is the view of the writer that there is need to develop the liability regime that currently determines sole liability on part of the air carrier to a dual system of liability in such instances where a state has contributory fault for damage caused.

6.4 The Violation of a International Duty

It has already been established that the violation of an international duty by a state bears the responsibility of that state and is accompanied by the duty to provide restitution. Now it needs to be determined which duty has been violated.

6.4.1 Violation of Articles 3 bis.

The aim and purpose of 3 *bis* is to prohibit and ban the use of force against a civil aircraft. "every State must refrain from resorting to the use of weapons against civil aircraft in flight".¹⁵⁸ It is clear that 3 *bis* as discussed above places a clear obligation on a state to refrain from the use of force in relation to a civil aircraft. However, it is important to note that Art 89¹⁵⁹ of the Chicago Convention states that in cases of war the 'provisions of the Convention do not affect the freedom of action of any of the contracting States affected, whether as belligerents or as neutrals.' Ukraine could potentially raise the argument that a state of war existed at the time of the downing of the plane and therefore art 3 *bis* did not apply.

6.4.2 ICAO Standards and Recommended Practices

ICAO standards and recommended practices Annex 11 2.26.4 state the following:

"2.26.4 States shall identify *actual and potential hazards* and determine the need for remedial action, ensure that remedial action necessary to maintain an acceptable level of safety is implemented, and provide for continuous monitoring and regular assessment of the safety level achieved." (emphasis added)

¹⁵⁸ A Aust (2007) para 4.

¹⁵⁹ Article 89 War and emergency conditions

In case of war, the provisions of this Convention shall not affect the freedom of action of any of the contracting States affected, whether as belligerents or as neutrals. The same principle shall apply in the case of any contracting State which declares a state of national emergency and notifies the fact to the Council.

The ICAO Standards and Recommended practices in this instance places a positive obligation on states to identify actual or potential hazards and then to ensure that remedial action is taken to prevent such hazards.¹⁶⁰ The omission of such action constitutes an international wrongful act. Ukraine has deposited its instrument of ratification to the Chicago Convention on 10 August 1992, its responsibility must lie in an interpretation of its duties to other contracting States under the Convention.¹⁶¹

6.4.3 Article 28 of the Chicago Convention¹⁶²

Article 28 of the Convention requires the contracting State to provide aircrafts flying over its territory air navigation facilities and services. Therefore only Ukraine had the duty to provide air traffic control (ATC) services over its territory.¹⁶³ It was up to Ukraine to caution and inform states of the potential hazard of flying over its territory in terms of both art 28 as well as SARPs Annex 11, 2.26.4. It must be noted that the obligations under Art 28 of the Chicago Convention are not absolute because the provision reads: ‘A state is called upon to provide such services *only in so far as it finds practicable to do so*’(emphasis added).

However, the ICAO council having considered the eventuality that certain states would have difficulty to comply, enacted article 69 and 70 which provide for co-operation between the state and ICAO to meet reasonably adequate air navigation services for the safe, regular, efficient and economical operations of aircraft. The convention imposes art 69 as an overall obligation applying to all party states.¹⁶⁴ While it is true that art 28 merely provides that states should, as far as practicable, provide air navigation facilities over their territories, this provision must be interpreted within the umbrella of the Preamble to the Convention which sets the basic philosophy of State duties and responsibilities. The Preamble

¹⁶⁰ Bartsch RIC (2012) 271.

¹⁶¹ Abeyratne R (2014) 357.

¹⁶² Article 28 Air navigation facilities and standard systems

Each contracting State undertakes, so far as it may find practicable, to:

- (a) Provide, in its territory, airports, radio services, meteorological services and other air navigation facilities to facilitate international air navigation, in accordance with the standards and practices recommended or established from time to time, pursuant to this Convention;
- (b) Adopt and put into operation the appropriate standard systems of communications procedure, codes, markings, signals, lighting and other operational practices and rules which may be recommended or established from time to time, pursuant to this Convention;
- (c) Collaborate in international measures to secure the publication of aeronautical maps and charts in accordance with standards which may be recommended or established from time to time, pursuant to this Convention.

¹⁶³ Abeyratne R (2014) 349.

¹⁶⁴ *Ibid* at 353.

stipulates that states agree on certain principles and arrangements in order that international civil aviation may be developed in a safe and orderly manner and that international air transport services may be established on the basis of equality of opportunity and operated soundly and economically.¹⁶⁵ Therefore, being a member of ICAO implies a serious commitment to the development of safe aviation. It is the opinion of the writer that Ukraine, the Netherlands and Malaysia in this instance failed in their duties under the ICAO SAPRs as well as Art 28. Furthermore, Ukraine in addition to their duties mentioned also failed to uphold Article 3 *bis*.

6.4.4 Closing of Airspace

One could conclude that there was a duty on Ukraine to temporarily close their airspace because they could not guarantee the safety of civil airliners passing through their sovereign airspace. Such a duty can only be argued implicitly because there does not seem to be a clear provision under international aviation that directs a state to do so. However, when one considers SAPRs Annex 11, 2.26.4 which states; “States shall identify *actual and potential hazards* and determine the need for remedial action, ensure that remedial action necessary to maintain an acceptable level of safety is implemented.” Implicitly one could argue that remedial action can imply the closing or blockade of air space, because the state could not guarantee the prevention of hazard whether potential or actual.

6.5 Insurgency and State Responsibility

In the 1986 *Nicaragua* case,¹⁶⁶ the ICJ states that: for the Contra guerrillas to conduct themselves in the manner in which they did, could be attributable or even imputable to the United States. It would have to be proved that the United States had effective control of the Contras’ military or paramilitary operations.¹⁶⁷ The salient element for imputation of responsibility for an act by a rebel force within a state’s territory is *effective control*. If one were to hold either the Ukraine or Russia responsible for the actions of the rebel militants, the burdensome test of effective control would need to be established.

¹⁶⁵ *Ibid* at 357.

¹⁶⁶ *Nicaragua v USA* ICJ Reports, 1986 at pp. 14, 64–5. Also ILR at p. 349.

¹⁶⁷ Abeyratne R (2014) 352.

Chapter 7: Conclusion and Recommendation

As stated in the introductory chapter, the writer fully acknowledges that commercial air carriers under the Montreal Convention are liable for damage or injury to a person or their belongings. However, when considering accidents such as Flight MH17, the writer asks whether it is correct that only the airline carrier is liable? Should governments have a duty to prescribe different routes in *inter alia* volatile political geographical areas?

Based on the aerial incidents discussed in the dissertation, the payment of compensation of states in cases where airplanes are shot down, can be divided into 2 categories. Firstly, those states who pay compensation for their wrongful action based on a legal duty to do so.¹⁶⁸ Secondly, those states who pay compensation on a *ex gratia* basis whilst completely refuting any legal obligation to do so.

In most of the discussed instances in this dissertation, the downing of a plane was connected to a politically volatile international issue. In most instances, the wrongdoer and victim were on opposing sides of ideology, which made the transgression of the act so much easier. In the Cathay Pacific incident, the Chinese government believed it was shooting down a nationalist plane. In the Libyan incidents, Israel to precautionary measures. In the Korean Flight 007, Russia believed that they were shooting down a US military craft. All these instances, are comparable at least in virtue, to the MH17 incident that took place on 17 July 2014, namely, political strife between states.

It is manifestly unjust that an airline is liable under the Montreal Convention for the damage, death or injury to a passenger as envisaged in Articles 17 and 21, where the actions that cause the downing of the plane are either entirely or in part out of their control. The purpose of this dissertation as stated in the beginning needs to be reiterated, namely, to revisit the legal position under international air law relating to liability and to reassess that liability, to incorporate and implement state liability where applicable as a substitute for air carrier liability.

Based on the analysis of this dissertation and the conclusion thereto, the author makes the following recommendation.

¹⁶⁸ Cathay Pacific Incident *Supra* 16.

In the past 100 years air crafts have become the standard for the long distance travel. So much so that 100 000 flights take off and land every day. At any point in time there are several million people transferring the skies. Air carriers are in theory privatised institutions however, due to the principles of public international law, they have to strictly work in co-operation with states and their respective governments. Public international law determines *inter alia*, States' control over the airspace above their territories, their duties and powers to prevent and punish crimes aboard or against an aircraft, and the level of market access they provide to foreign air carriers. States also determine the flight plans and routes that airplanes take.

We have seen throughout this dissertation that not only do states determine and control the aviation industry, on occasion they also interfere and cause catastrophic damage and loss of life. The need for the development of air law liability would not be of great consequence if the shooting down of civil air carriers would have been a thing of the past. States still to this day violate their primary obligations under international law. The irony is that when states fail in their obligation to protect and serve, the air carrier pays the price. In terms of the Montreal Convention the air carrier is solely liable for damage and loss caused.

In an industry that is ever evolving, there is once more a need for evolution.

It is the recommendation of the writer that in instances where a state is contributory to the damage and/or wrongful act, the victim is entitled to claim damage from the state and airline on the basis of joint and several liability. It has been established that states have a primary obligation not to shoot down a plane, both in treaty and custom, moreover to take progressive action to avoid such an instance. Furthermore, that states have a secondary obligation to right their wrongs in terms of the ILC draft articles on state responsibility.

On the basis of complementarity the author is of the opinion that the *lex specialis* needs to merge with public international law and create a new form of liability or amend the current system of liability. It has been established and is good in law that states are obliged to provide restitution for their wrongfulness. When considering the MH17 incident of 17 July 2014 it is clear to the writer that both the Netherlands, Malaysia, Ukraine as well as the air carrier Malaysian airlines were contributors to the shooting down of the plane.

The air carrier, the Netherlands and Malaysia had a duty to avoid a dangerous zone or potentially dangerous zone. Ukraine had a duty to exercise effective control over its territory and prevent such a catastrophe from taking place.

The only logical conclusion for restitution in the form of compensation where more than one party is at fault, is joint and several liability. This is a legal principle applied in many if not most domestic legal systems. It is time for international aviation law to evolve.

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