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Research Article

Legal consequences for the state arising from the use of weapons against civil aircraft: review and legal framework development

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Abstract. The authors elaborate on one of the controversial issues of international air law — safety of civil aircraft in flight in respect of the use of weapons against it. The first part of the present article considers major aerial accidents arising from shooting down the civil aircraft for the last 70 years as a factual basis for further legal analysis. In the second part, the authors back up customary prohibition of the use of weapons against civil aircraft in flight and legal consequences for states for violating the mentioned principle. The authors investigate the grounds for the ‘security exception’ and conclude that the only grounds for derogation from the principle of non-use of weapons against civil aircraft is Article 51 of the UN Charter proclaiming the inherent right of the state to self-defence. Even in this case, the application of the ‘security exception’ by the state is tolerated by using a set of precautions before employment of weapons. Finally, authors conclude that compensation for victims reflects the inevitable monetisation of human lives. Moreover, states’ negotiations reveal the controversial reality of trade-offs between them, where compensation amounts are occasionally affected by external political factors and current position of a particular state in the international community.

Key words: aerial accident, international air law, principle of non-use of weapons against civil aircraft, security exception, self-defence, compensation, international civil aviation

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Научная статья

**Правовые последствия для государства,
возникающие из использования вооружения
в отношении судов гражданской авиации:
обзор и развитие правовой базы**

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Аннотация. Рассматривается один из самых неоднозначных вопросов международного воздушного права — безопасность гражданского воздушного судна в случае применения вооружения государством в отношении такого самолета. В первой части настоящей статьи авторы оценивают крупнейшие воздушные инциденты, связанные со сбитыми самолетами гражданской авиации за последние 70 лет как фактическую основу для дальнейшего правового анализа. Во второй части авторами приводятся аргументы в поддержку обычно-правового характера принципа запрещения использования вооружения в отношении самолетов гражданской авиации в полете и последствий, возникающих из нарушения указанного принципа. Авторы исследуют основания для применения исключения по соображениям безопасности и приходят к выводу, что единственным исключением к названному принципу может служить право на самооборону в рамках статьи 51 Устава ООН. Однако даже в случае применения права на самооборону государству необходимо исчерпать ряд мер предосторожностей до принятия решения об использовании вооружения. Авторы также заключают, что компенсационные выплаты жертвам таких воздушных инцидентов неуклонно отражают процесс монетизации человеческой жизни. Более того, переговоры государств вскрывают неоднозначную реальность торгов между ними, в которой сумма компенсации напрямую связана с внешними политическими факторами и текущим положением того или иного государства в международном сообществе.

Ключевые слова: воздушный инцидент, международное воздушное право, принцип запрещения использования вооружения в отношении судов гражданской авиации, исключение по соображениям безопасности, самооборона, компенсация, международная гражданская авиация

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Introduction

Civil aviation's influence on the social and economic areas of our lives is increasingly active these days. The modern world could hardly exist without the transportation of its inhabitants that air travel provides. On a typical day, more than 10,000 aircraft are flying simultaneously around the world. Even during the COVID-19 pandemic, air travel, though under considerable restrictions, continues. The safety of passengers on board is the primary interest of the crew members, airlines, each state, and the global community. Legal rules are the essential guards of civil aviation safety. The desire to create a safe environment for civil aviation and favourable conditions for its development is the leading force for the International Civil Aviation Organization's (ICAO) work.

However, to date, aerial accidents arising from shooting down a civil aircraft by states continue to occur. Moreover, such cases take place regardless of the out-right prohibition to use weapons against civil aircraft in flight. This inconsistency between the existing rule of law and states' actions in civil aviation prompted us to conduct research and expound upon its results.

The first part of this article aims to discuss the factual background of the topic. An evidence-based analysis provides the grounds for further legal research and constitutes the foundation of any comprehensive study. There have been ten major aerial accidents from 1954 to the present day, which form the basis for legal analysis of states' conduct. The second part of this article covers the major legal issues which arise from factual analysis. Within this section, we will first propose arguments in favour of the acknowledgement of the customary nature of the principle of non-use of weapons against civil aircraft in flight, obligatory for any state regardless of its participation in the Chicago Convention and / or its Article 3 *bis*. Secondly, we will examine the grounds for substantiating the 'security exception' from the aforementioned principle, which sets up the standard for lawful derogation from prohibition to use weapons against civil aircraft. Thirdly, we will raise several sensitive issues regarding compensation as a common legal consequence for the violation of the principle of non-use of weapons against civil aircraft, including the issue of monetizing human lives and calculating their 'value'.

The key practical point of this article is substantiating the existing customary rule of international law that generally prohibits the use of weapons against civil aircraft in flight. This principle is regarded as a cornerstone of safety in civil aviation and as a primary precondition for its normal functioning.

1. Case Study of Aerial Accidents

1.1. 1954 Cathay Pacific Airways

On 23 July 1954, during a flight from Bangkok, Thailand to Hong Kong, China, Cathay Pacific Airways aircraft (Douglas DC-4) crashed with 17 passengers on board¹. The fighters of the People's Republic of China (PRC) performed an attack on the civil aircraft ten miles east of the international air corridor (Hughes, 1980)².

Two passengers died during the attack; seven drowned due to the hard landing on water; a US Navy flying boat picked up eight surviving passengers (Phelps, 1985).

Chinese authorities made an official statement which pointed out the erroneous identification of Douglas DC-4 as a military aircraft belonging to Chinese Nationalist officials to attack the military base at Port Yulin (Beckham, 2015; Foont, 2007).

The UK and the US expressed unanimous condemnation of the Chinese actions³. Both states spoke of the legal and financial responsibility of the PRC (Beckham, 2015). In September 1954, the British government presented an official claim for £367,000 that included four essential points for compensation: compensation for the deaths of passengers and crew members, for the injured survivors, for the loss of the aircraft, and the loss of cargo and baggage (Whiteman, 1967). After the claim was presented, Chinese authorities 'immediately informed the British Government that they took the responsibility for the incident' (Beckham, 2015)⁴.

The Cathay Pacific Airways accident is an example of the case in which the state accepted legal responsibility for shooting down a civil aircraft and paid the monetary compensation as requested — £367,000 total.

1.2. 1955 El Al

On 27 July 1955, during a scheduled Flight 402 from London, UK to Tel Aviv, Israel via Paris, Vienna, and Istanbul, a civil aircraft of Israel Airlines El Al was shot down ten miles away from Petrich, Bulgaria⁵. All 51 passengers and seven crew members died (Hughes, 1980; Phelps, 1985)⁶.

The attack started with two Bulgarian MiG-15 fighters after the El Al aircraft had violated Bulgarian sovereign airspace by more than 25 miles (Oron, 1960). A primary Bulgarian report stated that the aircraft was shot down due to the inability to identify the airliner (Phelps, 1985). However, on 30 July 1956, an independent investigation team's report indicated that the MiGs shot down the aircraft during its preparation for landing (Phelps, 1985; Foont, 2007). Four days after the report, the Bulgarian authorities admitted that MiG-15 fighters attacked the aircraft because of ignoring an order to land immediately and agreed to pay compensation for the accident. Later,

¹ *The Sydney Morning Herald*. (Saturday 24 July 1954) Plane Down in Ocean: Eight Saved. P. 1.

² *The Times*. (Saturday 24 July 1954) Airlines Survivors in Hong Kong. P. 6.

³ *Protest against attack on British Cathay Pacific Airliner* (1957), U.S. Government Printing Office. American Foreign Policy 1950—1955 Basic Documents Vol. II 2522.

⁴ *The Times*. (Saturday 24 July 1954) Airlines Survivors in Hong Kong. P. 6.

⁵ *The Times*. (Thursday 28 July 1955) Greek Frontier Report. P. 8.

⁶ *The Times*. (Thursday 28 July 1955) Plane Down After Shots. P. 8.

Bulgaria once again changed its position regarding the accident, refusing any kind of responsibility and proposing an *ex gratia* payment instead of compensation (Phelps, 1985).

Bulgaria's change of official position regarding the accident led Israel, the UK, and the US to submit their claims to the International Court of Justice (hereinafter — the ICJ or the Court) in 1957. The Memorial of the US supported the argument in the Israeli Memorial that even though the El Al aircraft had violated Bulgarian sovereign airspace, Bulgaria had to refrain from using weapons against civil aircraft. It should have assessed the gravity of the threat and taken into consideration 'the elementary obligation of humanity'⁷. The UK, in its Memorial, noted that 'no justification for the use of force against civil aircraft ... which enters, without authorization, the airspace of another state' can be derived from treaty norms of International Law⁸.

Eventually, Bulgaria agreed to provide an *ex gratia* payment to Israel of \$195,000, or \$8,236 for each of the 22 Israelis who died and refused to accept responsibility for destroying the aircraft⁹. It is worth noting that, initially, Israel claimed compensation in the amount of \$2,559,688.65 (with 22 victims)¹⁰, the US — \$257,875 (with nine victims)¹¹, and the UK — £58,869 (with five victims)¹².

The El Al accident shows several important developments. First, in this case, Bulgaria refused to accept legal responsibility and has never been held responsible. Second, the state paid *ex gratia* monetary compensation, but only for the deaths of the Israeli passengers' — \$195,000 total or \$8,236 each. Third, the unanimous condemnation of Bulgaria's actions and calls for legal accountability prove the precedence of civil aviation safety, even when it is opposed to the territorial sovereignty of states.

1.3. 1973 Libyan Airlines

On 21 February 1973, over the Sinai Peninsula, Israeli interceptors shot down a Libyan civil airliner Boeing 727 (5ADAH) on a scheduled flight from Benghazi, Libya to Cairo, Egypt with 113 passengers on board; it was off course by more than 100 miles in Israeli territory (Phelps, 1985)¹³. It crashed in the Sinai desert; 106 people died, seven were injured.

The Israeli fighters had taken at least three undisputed precautions before the attack (*The Times*, 1973; Hughes, 1980; ICAO, 1973):

⁷ Memorial of Israel, *The Aerial Incident of 27 July 1955 (Israel v. Bulgaria)*, 1958 ICJ Pleadings 45. P. 83; see Memorial of the United States of America, *The Aerial Incident of 27 July 1955 (United States of America v. Bulgaria)*, 1958 ICJ Pleadings 167. Pp. 209—210.

⁸ Memorial of the United Kingdom, *The Aerial Incident of 27 July 1955 (United Kingdom v. Bulgaria)*, 1958 ICJ Pleadings 331. Pp. 363—364.

⁹ Jewish Telegraphic Agency Daily News Bulletin New York. (Tuesday 4 June 1963) Bulgaria Agrees to Pay \$195,000 to Israel for Shot Down Plane. P. 2.

¹⁰ *The Aerial Incident of 27 July 1955*, Memorial of Israel, *supra* note 7. P. 116.

¹¹ *The Aerial Incident of 27 July 1955*, Memorial of the United States of America, *supra* note 7. Pp. 252—253.

¹² *The Aerial Incident of 27 July 1955*, Memorial of the United Kingdom, *supra* note 8. Pp. 365—366.

¹³ *The Times*. (Thursday 22 February 1973). p. 1; International Civil Aviation Organisation [hereinafter 'ICAO'], *Minutes of Plenary Meetings 19th (Extraordinary) Session*. P. 30, ICAO Doc. 9061 A19-Resolution, Minutes.

1) had been trying for 15 minutes to communicate with the airlines' pilots through radio to provide information for immediate landing,

2) had made visual contact with the captain of the aircraft and through visual signals indicated a call for immediate landing,

3) had made warning shots not aiming at the aircraft.

Moreover, the Israeli interceptors noticed the obvious refusal to obey the landing order through visual contact (Phelps, 1985). Israel also highlighted that the airliner was moving towards a secret military base, Rafidim (Bir Gafgfa) (Phelps, 1985)¹⁴. Israel claimed that 'the aircraft was hit and attempted to land but crashed when it touched the ground'¹⁵. It justified the attack with the 'security exception' (Phelps, 1985) which was dismissed by the ICAO. The US, which rejected the applicability of the security exception in the El Al case¹⁶, also did not accept Israeli's argument and condemned the attack (Phelps, 1985).

Both the ICAO and individual states condemned the actions of Israeli authorities (Foont, 2007)¹⁷. Despite the fact that Israel denied its responsibility for the accident, it made an *ex gratia* payment to Libya for damages in an undisclosed amount (Beckham, 2015).

The Libyan Airlines accident shows an ambiguous trend in the legal consequences of shooting down a civil aircraft. In fact, Israel represented the victims in the El Al case, but was the state that destroyed the aircraft of the Libyan Airlines; it refused to accept legal responsibility for the accident but made *ex gratia* payment. Israeli actions received universal condemnation. Moreover, both the ICAO and states rejected Israel's recourse to the security exception, even though extensive precautions had been taken.

1.4. 1978 Korean Airlines Flight 902

On 20 April 1978, Boeing 707 of Korean Airlines Flight 902 (hereinafter — KAL 902) was on a scheduled flight from Paris, France to Seoul, South Korea via Anchorage, Alaska for refuelling. En route from the North Pole to Alaska, KAL 902 lost its way and strayed into the Soviet Union's airspace near Murmansk, Russia, at least 1,000 miles off course¹⁸.

Soviet interceptors ordered the airliner to land; afterwards, they started the attack. KAL 902 was lucky enough to land on a frozen lake 280 miles south of Murmansk, Russia. Of the 97 total passengers, two died, and 13 were wounded (Foont, 2007).

The official statement of the Soviet Union justified the attack and noted that the aircraft had failed to obey instructions and had refused to follow the interceptors (Phelps, 1985). The Soviet Union has never held international responsibility for the

¹⁴ ICAO, *Minutes of Plenary Meetings 19th Session*, *supra* note 13. P. 50.

¹⁵ ICAO, *Minutes of Plenary Meetings 19th Session*, *supra* note 13. P. 50.

¹⁶ *The Aerial Incident of 27 July 1955*, Memorial of the United States of America, *supra* note 7. Pp. 210—211.

¹⁷ ICAO, *Minutes of Plenary Meetings 19th Session*, *supra* note 13. P. 11; The United States of America. Department of State. (1973) *The Department of State Bulletin No 1749*. Washington, D.C., U.S. Government Printing Office. Pp. 369—370.

¹⁸ *The Times*. (Saturday 22 April 1978) South Korean pilot forced down after refusing to land off-course airliner. P. 1.

incident and has never offered any form of compensation, not even *ex gratia* payment. The Republic of South Korea never protested regarding the incident and expressed appreciation for the transfer of the surviving passengers (Phelps, 1985). Some scholars assessed the absence of protest from the Republic of South Korea as the ‘presence of a security necessity’ (Hughes, 1980).

The Korean Airlines Flight 902 accident is unique since the state not only refused to accept responsibility but also did not provide any form of compensation, not even *ex gratia* payment. Although some scholars assessed the Soviet Union’s position as unclear or at least disputed, others detected the case as grounds for possible validation of the security exception.

1.5. 1983 Korean Airlines Flight 007

Five years later, on 1 September 1983, Soviet interceptors again shot down a Korean Airlines civil aircraft. Boeing 747 was on a scheduled Flight 007 (KAL 007) from New York, US to Seoul, South Korea via Anchorage, Alaska for refuelling. En route from Anchorage to Seoul, the airliner started to deviate from its course by 310 miles and invaded Soviet sovereign airspace above Sakhalin Island¹⁹. Soviet interceptors destroyed the aircraft by missile, and the airliner crashed into the Pacific Ocean²⁰. All 268 passengers and crew died²¹.

The Soviet Union’s authorities once again justified its actions claiming that they were protecting the sovereign airspace against ‘spy aircraft’ (Foont, 2007). They stated that the aircraft was flying across the ‘sensitive zone’ above Sakhalin Island towards a secret military base (Owen, 1983). The Soviet Union rejected any form of responsibility and refused to pay any compensation (Beckham, 2015).

No wonder widespread condemnation of Soviet actions took place²². It is worth noting that ten years earlier, the Soviet Union itself condemned the actions of Israel in the Libyan Airlines’ case²³.

The culmination of condemnation in this case led to the discussion and adoption of Article 3 *bis* to the Chicago Convention, at the 25th ICAO Session of the Assembly (Extraordinary) in 1984²⁴.

The Korean Airlines Flight 007 accident revealed the unwavering official position of the Soviet Union. Any aircraft invading Soviet airspace was labelled a trespasser and was under attack within the lawful security mission. Since the actions of the Soviet authorities were self-proclaimed as lawful, compensation was not an issue. But despite the official position of the Soviet Union, universal condemnation of its actions in both Korean Airlines cases was necessary. Eventually, it even led to the amendment of the existing treaty regime of the Chicago Convention, expressly prohibiting the use of weapons against civil aviation.

¹⁹ *The Times*. (Friday 2 September 1983) Airliner was Shot Down with 269 Passengers on Board, says Shultz. P. 1.

²⁰ *The Times*. (Saturday 3 September 1983) Russians Warned Pilot of ‘Right to Shoot. P. 4.

²¹ *The Times*. (Saturday 3 September 1983) Trust Shot Down. P. 7.

²² *The Times*. (Saturday 3 September 1983) Pope Shocked and the World Outraged. P. 4.

²³ ICAO, Minutes of Plenary Meetings 19th Session, *supra* note 13. P. 38.

²⁴ ICAO, Resolution A25-1. P. 14 (I—9), ICAO Doc. 9443.

1.6. 1988 Iran Airlines

Five years after condemning the Soviet actions towards the Korean airliner, which President Regan called ‘crimes against humanity’ that ‘must never be forgotten’²⁵, the US itself shot down an Iranian civil aircraft²⁶.

On 3 July 1988, Iran Air Airbus A300 operating as Flight 655 (Flight 655) was en route from Tehran, Iran to Dubai, United Arab Emirates via Bandar Abbas²⁷. With two surface-to-air missiles, the USS Vincennes cruiser shot down Flight 655 on its way from Bandar Abbas to Dubai above Iranian territorial waters in the Persian Gulf²⁸. All 290 passengers and crew members died (Linnan, 1991).

An official US statement justified the attack and said that the Vincennes’ crew had mistakenly identified Flight 655 as a military aircraft F-14 (Linnan, 1991). President Regan stressed that ‘in the course of the U.S. response to the Iranian attack, an Iranian civilian airliner was shot down by the Vincennes, which was firing in self-defense at what it believed to be a hostile Iranian military aircraft’²⁹.

It seems that tensions in the region influenced the Vincennes crew’s decision-making process. A day before the accident, United States military cruisers, during a routine response to a tanker’s distress signal, recorded F-14 flights within seven nautical miles (Linnan, 1991). In this case, the psychological state of the Vincennes’ crew may have been a decisive factor for launching a missile.

The Vincennes’ crew took precautions before the attack. First, since the launch of their operations, the US had announced that all aircraft should avoid flying lower than 2000 feet above and five nautical miles near the US warships. Second, the Vincennes’ crew sent warnings by radio signal (Linnan, 1991).

The US authorities officially rejected accepting legal responsibility for the accident and claimed ‘justifiable defensive actions’³⁰. US President’s Assistant Max Marlin Fitzwater stated that ‘this tragic accident was ultimately the result of the conflict between Iran and Iraq’³¹. President Regan underlined that the ‘humanitarian traditions

²⁵ Ruzindana, A. (25 July 2014) Lessons from Aviation History of Tragic Passenger Airline Shoot Downs. *The Daily Monitor*. <https://www.monitor.co.ug/OpEd/Commentary/Lessons-from-aviation-history-of-tragic-/689364/2396448/-/14nl4uk/-/index.html> [Accessed 10th April 2021].

²⁶ Fisher, M. (16 October 2013) The Forgotten Story of Iran Air Flight 655. *The Washington Post*. <https://www.washingtonpost.com/news/worldviews/wp/2013/10/16/the-forgotten-story-of-iran-air-flight-655/> [Accessed 10th April 2021].

²⁷ Halloran, R. (Monday 4 July 1988) The Downing of Flight 655: U.S. Downs Iran Airliner Mistaken for F-14, *New York Times*. P. A1.

²⁸ Memorial of the Islamic Republic of Iran, *The Aerial Incident of 3 July 1988 (Islamic Republic of Iran v. United States of America)*, 1990 ICJ Pleadings 1. P. 1.

²⁹ The United States of America National Archive. (1988) *President Regan’s Letter to the Speaker of the House of Representatives and the President Pro Tempore of the Senate on the Destruction of an Iranian Jetliner by the United States Navy Over the Persian Gulf*. <https://www.reaganlibrary.gov/research/speeches/070488a> [Accessed 10th April 2021].

³⁰ The United States of America National Archive. (1988) *Statement by Assistant to the President for Press Relations Fitzwater on United States Policy Regarding the Accidental Attack on an Iranian Jetliner Over the Persian Gulf*. <https://www.reaganlibrary.gov/research/speeches/071188b> [Accessed 10th April 2021].

³¹ The United States of America National Archive. (1988) *Statement by Assistant to the President for Press Relations Fitzwater on the Investigation of the Accidental Attack on an Iranian Jetliner*. <https://www.reaganlibrary.gov/research/speeches/081988a> [Accessed 10th April 2021].

of our [American] nation and prior international practice' affected the decision to offer payment on *ex gratia* basis³².

Moreover, Abraham David Sofaer, the US Legal Adviser of the Department of State, admitted that in the case of damages arising from military operations, the state might offer an *ex gratia* payment 'without acknowledging, and irrespective of, legal liability'³³.

In 1996, the US Administration agreed to pay *ex gratia* \$131,000,000 (approximately \$62,000,000 was assigned for the victim's families) (Beckham, 2015).

The Iran Airlines accident is another example that demonstrates consistent state practice in cases involving shooting down a civil aircraft: they first reject legal responsibility but then offer monetary compensation *ex gratia*. Moreover, comparative analysis of cases shows that depending on the position of the state (representing victims or answering for the attack), it may claim quite opposing legal arguments. Thus, the US, representing victims in El Al and Libyan Airlines cases, rejected the applicability of the security exception but when answering for the attack in the Iran Airlines case, claimed this exception in its favour.

1.7. 1988 Pan Am (Lockerbie case)

Pan American Airlines Flight 103 was a routine scheduled transatlantic flight from Frankfurt am Main, Germany to Detroit, USA via London and New York. On 21 December 1988, en route from London, a bomb exploded on board, destroying Boeing 747-121 (Pan Am Flight 103)³⁴. Wreckage of the aircraft fell on Lockerbie, Scotland. The victims were 243 passengers, 16 crew members, and 11 villagers in Lockerbie³⁵.

As a result of a complicated multi-national investigation, two Libyan citizens, Abdel Basset al-Megrahi (the head of airline security for Libyan Arab Airlines) and Al-Amin Khalifa Fahima (the airline's station manager at Luqa Airport, Malta), were revealed to be the main suspects in organising and executing the terrorist attack. Megrahi was imprisoned in 2001; Fahima was acquitted (Beckham, 2015)³⁶.

In September 2003, continued political and economic pressure compelled Libya to accept legal responsibility for the accident³⁷. Libyan authorities offered an 'unprecedented' amount of \$2,700,000,000 (approximately \$10,000,000 for each of the

³² Sofaer, A.D. The United States of America. Department of State. (1988) *Compensation for Iranian Airbus Tragedy*. The Department of State Bulletin No 2139. Washington, D.C., U.S. Government Printing Office.

³³ Sofaer, A.D. The United States of America. Department of State. (1988) *Compensation for Iranian Airbus Tragedy*. The Department of State Bulletin No 2139. Washington, D.C., U.S. Government Printing Office.

³⁴ Cody, E. (Thursday 22 December 1988) Pan Am Jet Crashes in Scotland, Killing 270. *Washington Post Foreign Service*. P. 1; Cody, E. (Thursday 29 December 1988) Bomb Caused Pan Am Crash, British Probers Conclude. *Washington Post Foreign Service*. P. 1; *The Guardian*. (27 February 2000) What Really Happened on Flight 103? <https://www.theguardian.com/uk/2000/feb/27/lockerbie.life1> [Accessed 10th April 2021].

³⁵ Allison, D. (19 December 2018) Pan Am Flight 103: Finding Words to Describe Lockerbie Tragedy. *BBC News*. <https://www.bbc.com/news/uk-scotland-46605438> [Accessed 10th April 2021].

³⁶ Cook, J. (20 May 2012) Lockerbie Questions Remain Following Megrahi's death. *BBC News*. <https://www.bbc.com/news/uk-scotland-south-scotland-12191604> [Accessed 10th April 2021].

³⁷ S.C. Res. 1506, (Sept. 12, 2003).

270 victims)³⁸. Libyan payments were made in three steps, through an escrow account, on the following conditions:

- 1) to remove UN sanctions against Libya,
- 2) to lift the US sanctions against Libya and
- 3) to remove Libya from the US list of ‘state sponsors of terrorism’.

Scholars criticized Libya’s acceptance of responsibility on at least two grounds (Beckham, 2015, Foont, 2007). First, long years of political and economic pressure from international organisations, including the UN and individual states, undermined Libya’s autonomy in decision making. Second, the conditions for compensation set by Libya, and especially the postponement of the third payment due to the untimely fulfilment of the third condition, highlights Libya’s external interests in paying off such an extraordinary amount of money. Prior to the Lockerbie case, even *ex gratia* payments were never accompanied by conditions.

The Pan Am accident differs from other cases in many aspects. First, it was not the case of shooting down an aircraft, but an act of terrorism committed by nationals of the state. Second, the state accepted responsibility under continued political and economic pressure. Thirdly, and most notably, it allocated an extraordinary sum of money (\$2,700,000,000 total or approximately \$10,000,000 per each of the 270 victims) with very specific conditions of broader political interest. It even postponed the last payment due to the untimely fulfilment of the last condition.

1.8. 2001 Siberian Airlines

On 4 October 2001, Siberian Airlines Flight 1812 operated by Tu-154 (Flight 1812) was on a scheduled flight from Tel Aviv, Israel to Novosibirsk, Russia³⁹. On the same day, Ukrainian armed forces conducted naval exercises in the Black sea with their Russian counterparts. Ukrainian military troops fired at Flight 1812 with a surface-to-air missile over the Black sea⁴⁰. The aircraft crashed into the sea. All 66 passengers and 20 crew members died⁴¹.

Ukrainian President Kuchma stated that ‘Ukraine was at fault’ and promised to ‘appropriately compensate the families’⁴². Ukraine concluded separate agreements with Israel and Russia for \$15,600,000. Israel and Russia received \$200,000 per victim (with 40 Israeli and 38 Russian victims on board) (Beckham, 2015).

The Siberian Airlines accident is in line with other cases, where monetary compensation is the typical cost when an erroneous attack towards civil aircraft takes human lives.

³⁸ Wald, M.L. (Wednesday 29 May 2002) Libya is Offering to Pay \$2.7 Billion for Pan Am Blast. *New York Times*. P. A1.

³⁹ *BBC News*. (20 July 2014) MH17 crash: History of Passenger Planes Shot Down. <https://www.bbc.com/news/world-asia-28361223> [Accessed 10th April 2021].

⁴⁰ *The Guardian*. (12 October 2001) Ukraine Admits Missile may have Downed Russian Plane. <https://www.theguardian.com/world/2001/oct/12/russia.israel> [Accessed 10th April 2021].

⁴¹ Wines, M. (Friday 5 October 2001) 76 on Board Perish as a Jet from Israel Explodes Off Russia. *New York Times*. P. A1.

⁴² Tavernise, S. (Wednesday 10 October 2001) Russians Say Evidence Indicates Ukrainians Shot Down Jet. *New York Times*. P. A6; Aris, B. (13 October 2001) Ukraine Admits it Shot Down Russian Airliner. *The Telegraph*. <https://www.telegraph.co.uk/news/worldnews/europe/ukraine/1359353/Ukraine-admits-it-shot-down-russian-airliner.html> [Accessed 10th April 2021].

1.9. 2014 Malaysian Airlines (MH17 case)

Malaysian Airlines Boeing operating as Flight 17 (MH17) was a scheduled international flight from Amsterdam, the Netherlands to Kuala Lumpur, Malaysia⁴³. On 17 July 2014, at 13:20:03 (GMT), MH17 disappeared from radar. The flight data recorder and the digital cockpit voice recorder stopped; the aircraft was dispersed over a large area in the territory of eastern Ukraine⁴⁴.

It is worth noting that at the time of the accident, a non-international armed conflict was taking place in Ukraine. As a result, the aircraft's wreckage fell on territory that was not under the control of Ukraine's official authorities (Nase, 2015). The preliminary report of the Dutch Safety Board and further investigations stated that MH17 was shot down by a surface-to-air missile from the territory of Ukraine⁴⁵. All 298 passengers and 15 crew members died (Beckham, 2015).

Regarding the tensions in Ukraine, MH17 was flying within the prescribed air corridor and did not deviate from its course (Nase, 2015). Moreover, its flight data recorder and digital cockpit voice recorder did not indicate any received warnings or attempts to contact the pilots⁴⁶.

At the time, the case turned out to be an issue of individual criminal responsibility. Four individuals were charged with launching the missile towards the aircraft⁴⁷. Nevertheless, state responsibility regarding the accident remains uncertain. There are three main suspects: Ukrainian authorities, Ukrainian rebels, and Russian authorities (Beckham, 2015). For example, UK Prime Minister David Cameron, in a call with Russian President Vladimir Putin, argued that 'the evidence suggested that <...> separatists were responsible and <...> made clear that if Russia wants to put the blame elsewhere, they would need to present compelling and credible evidence'⁴⁸.

The Malaysian Airlines accident is unique due to the political ambiguity and uncertainty regarding effective control over eastern Ukrainian territory. Unfortunately, tensions in Ukraine cost 313 innocent lives (adding to those who perished in the conflict), for which no one was held responsible.

⁴³ Tavernise, S. et al. (17 July 2014) Jetliner Explodes Over Ukraine; Struck by Missile, Officials Say. *New York Times*. <https://www.nytimes.com/2014/07/18/world/europe/malaysian-airlines-plane-ukraine.html> [Accessed 10th April 2021].

⁴⁴ Dutch Safety Board. (9 September 2014) *Preliminary report: Crash involving Malaysia Airlines Boeing 777-200 Flight MH17*. https://www.onderzoekraad.nl/nl/media/inline/2019/1/10/prem_rapport_mh_17_en_interactief2.pdf [Accessed 10th April 2021]; see *BBC News*. (26 February 2020) MH17 Ukraine Plane Crash: What we know. <https://www.bbc.com/news/world-europe-28357880> [Accessed 10th April 2021].

⁴⁵ Dutch Safety Board. *Preliminary report. supra* note 44. Pp. 21—25; see Silk, M. (9 June 2020) US may have Photos of MH17 missile: Court. *The Canberra Times*. <https://www.canberratimes.com.au/story/6785661/us-may-have-photos-of-mh17-missile-court/?cs=14232#gsc.tab=0> [Accessed 10th April 2021].

⁴⁶ Dutch Safety Board. *Preliminary report. supra* note 44. Pp. 13-14.

⁴⁷ *BBC News*. (19 June 2019) MH17: Four Charged with Shooting Down Plane over Ukraine. <https://www.bbc.com/news/world-europe-48691488> [Accessed 10th April 2021].

⁴⁸ The UK Government. (20 July 2014). *Press release, 'The Prime Minister spoke to President Putin this evening about the shooting down of Malaysia Airlines flight MH17'*. <https://www.gov.uk/government/news/pm-call-with-president-putin-on-the-flight-mh17-disaster> [Accessed 10th April 2021].

1.10. 2020 Ukrainian Airlines

Ukraine International Airlines Boeing operating as Flight 752 (hereinafter — Flight 752) was a scheduled international flight from Tehran, Iran to Kyiv, Ukraine. On 8 January 2020, shortly after take-off from Tehran, the aircraft crashed not far from the runway. All 167 passengers and nine crew members died⁴⁹.

Again, the background of the accident played a predominant role, as in the Iranian airliner case in 1988. Iranian armed forces were on full alert after US forces killed Iranian general Qasem Soleimani in Iraq on 3 January 2020⁵⁰. In response, Supreme Leader of Iran Ayatollah Khamenei stated that ‘severe revenge awaits the criminals’⁵¹. So, at the time of the accident, the level of tension between the US and Iran was very high.

Iranian authorities admitted that Iranian armed forces mistakenly identified the airliner as a hostile target and ‘unintentionally’ shot it down⁵². Iranian President Rouhani called the accident a ‘disastrous mistake’⁵³.

Ukrainian authorities rejected the compensation offer of \$80,000 per victim and requested to increase the amount⁵⁴. Ukraine stressed that if negotiations did not succeed, it would bring the issue to ‘international arbitration courts, including the International Court of Justice’⁵⁵. To date, Ukraine has claimed that Iran refused to set up negotiations⁵⁶. At the same time, authorities of Afghanistan, the UK, Canada, and

⁴⁹ *BBC News*. (14 January 2020) Iran Plane Crash: What We Know about Flight PS752. <https://www.bbc.com/news/world-middle-east-51047006> [Accessed 10th April 2021].

⁵⁰ *BBC News*. (3 January 2020) Qasem Soleimani: US kills top Iranian general in Baghdad air strike. <https://www.bbc.com/news/world-middle-east-50979463> [Accessed 10th April 2021]; Crowley, M. et al. (7 January 2020) U.S. Strike in Iraq Kills Qasim Su-leimani, Commander of Iranian Forces. *New York Times*. <https://www.nytimes.com/2020/01/02/world/middleeast/qassem-soleimani-iraq-iran-attack.html> [Accessed 10th April 2021].

⁵¹ *BBC News*. (3 January 2020) Qasem Soleimani: Iran vows ‘severe revenge’ for top general’s death. <https://www.bbc.com/news/world-middle-east-50986185> [Accessed 10th April 2021].

⁵² *The Times of Israel*. (11 January 2020) ‘Disastrous mistake’: Iran admits it mistakenly downed Ukraine plane, killed 176. <https://www.timesofisrael.com/iran-admits-it-unintentionally-shot-down-ukrainian-jetliner/> [Accessed 10th April 2021]; Sanchez, R. et al. (11 January 2020) Iran plane crash: Boris Johnson calls for independent investigation as Supreme Leader expresses ‘condolences’. *The Telegraph*. <https://www.telegraph.co.uk/news/2020/01/11/iran-plane-crash-tehran-admits-unintentionally-shot-plane/> [Accessed 10th April 2021].

⁵³ McKernan, B. (11 January 2020) Iran Admits Unintentionally Shooting Down Ukrainian Airliner. *The Guardian*. <https://www.theguardian.com/world/2020/jan/11/iran-admits-shooting-down-ukrainian-airliner-unintentionally> [Accessed 10th April 2021]; Haghdoost, Y. et al. (11 January 2020) Iran Admits Downing Jetliner, Sparking Global Anger and Protests. *Bloomberg*. <https://www.bloomberg.com/news/articles/2020-01-11/iran-says-it-accidentally-shot-down-ukraine-plane-isna> [Accessed 10th April 2021].

⁵⁴ *The U.S. News*. (3 February 2020) Ukraine Wants Larger Compensation for Its Citizens Killed in Plane Shoot Down in Iran. <https://www.usnews.com/news/world/articles/2020-02-02/ukraine-wants-larger-compensation-for-its-citizens-killed-in-plane-shootdown-in-iran> [Accessed 10th April 2021]; *SHAFQA News*. (3 February 2020) Ukraine Move Internationally to Obtain ‘Greater’ Compensation from Iran. <https://www.shafaaq.com/en/world/ukraine-move-internationally-to-obtain-greater-compensation-from-iran/> [Accessed 10th April 2021].

⁵⁵ *National News Agency of Ukraine — Ukrinform*. (18 May 2020) Plane Crash in Iran: Ukraine Ready to Appeal to International Court of Justice. <https://www.ukrinform.net/rubric-politics/3027251-plane-crash-in-iran-ukraine-ready-to-appeal-to-international-court-of-justice.html> [Accessed 10th April 2021].

⁵⁶ *Interfax-Ukraine News Agency*. (8 July 2020) Iran does not Accept Ukraine’s Invitation for Talks on Compensation for UIA Downed Plane — FM. <https://en.interfax.com.ua/news/general/673711.html> [Accessed 10th April 2021].

Sweden, whose citizens were also on board, stated that their families also expect compensation directly from Iranian authorities. Moreover, Canada itself decided to pay the families of the 57 Canadian citizens and 29 permanent residents who died \$19,122 each ‘for funerals, travel to Iran and bills’⁵⁷.

To date, the Ukrainian Airlines accident is the last case involving the shooting down of a civil aircraft. It illustrates the trend of monetizing passengers’ lives. If state authorities, regardless of motivation or circumstance, shoot down a civil aircraft, monetary compensation appears to be due, either as a form of responsibility or as an *ex gratia* payment. Nevertheless, the amount of compensation is critically unclear and results in trade-offs between the responding state and the passengers’ states, for which the Ukrainian Airlines case is an ongoing example.

2. Legal Consequences of Shooting Down Civil Aircraft

2.1. Does International Law Prohibit the Use Weapons Against Civil Aircraft?

This section considers arguments regarding the nature of the principle of non-use of weapons to indicate binding states, or, in other words, to prove that it currently represents a norm of universally binding customary international law.

2.1.1. Article 3 bis of the Chicago Convention as a Treaty Law

The Chicago Convention is a classic example of a law-making treaty with 193 UN members⁵⁸. On 10 May 1984, the 25th ICAO Session of the Assembly (Extraordinary) adopted a Protocol relating to an Amendment to the Convention on International Civil Aviation (the Protocol)⁵⁹. It entered into force on 1 October 1998 and introduced Article 3 *bis* to the Convention. To date, 156 states have ratified the Protocol⁶⁰.

Article 3 *bis* prescribes three obligations for states and one for aircraft. On one side, states must:

Paragraph a) — refrain from the use of weapons against civil aircraft in flight and preserve the safety of persons on board in case of interception,

Paragraph b) — give orders for immediate landing or any other instructions for the interceptor if a flight is not entitled to enter state airspace or if ‘there are reasonable grounds to conclude’ that the aircraft is acting inconsistently with the purpose of the Chicago Convention,

Paragraph d) — take measures for prohibiting the deliberate use of weapons against civil aircraft.

⁵⁷ Gilles, R. (17 January 2020) Canada Provides Money to Families of Those Killed in Plane Shot Down by Iran. *The Times of Israel*. <https://www.timesofisrael.com/canada-provides-money-to-families-of-those-killed-in-plane-shot-down-by-iran/> [Accessed 10th April 2021].

⁵⁸ Convention on International Civil Aviation [hereinafter — Chicago Convention], Dec. 7, 1944, 15 UNTS 295.

⁵⁹ ICAO, Resolution A25-1. *supra* note 24. P. 13.

⁶⁰ ICAO. Parties to the Chicago Convention, Secretariat. https://www.icao.int/secretariat/legal/List%20of%20Parties/Chicago_EN.pdf [Accessed 10th April 2021].

On the other side, an aircraft must:

Paragraph c) — obey the orders and instructions described in paragraph b).

Some authors debate on the legal framework of the Article 3 *bis* due to its ambiguous or even controversial wording (Geiß, 2005; Cheng, 2017; McCarthy, 1984). Their arguments are based on assumption that clause included in the final draft “must refrain from resorting to the use of weapons”, instead of “must not use weapons”, indicates parties’ intention not to create direct prohibition. Nevertheless, we are convinced that even such wording does not destroy the common desire of the parties to confirm the existence of the customary principle of non-use of weapons against civilian aircraft which in any event seems to exclude any kind of weapons involvement.

Accordingly, Article 3 *bis* establishes the following framework. The aircraft ‘AA-001’ registered in state A intrudes sovereign airspace of state B without authorization, or ‘AA-001’ obtained authorization but is acting inconsistently with the purpose of the Chicago Convention. State B is entitled to give orders or any other instructions to ‘AA-001’ to cease violations. ‘AA-001’ is obliged to obey such orders and / or instructions. State B is under the obligation not to use weapons against ‘AA-001’.

It is not clear how the algorithm should be modified if an aircraft disobeys orders. Moreover, no provision of the Chicago Convention or any other relevant norm of International Air Law specifies the responsibility of states in case of nonfulfillment of the obligations set in Article 3 *bis*.

Well-established norm of International Law proclaims that the state that is not a party to a particular international treaty is not bound by it (Crawford, 2012; Shaw, 2017)⁶¹. In this respect, it is worth noting that even among the states parties to the Chicago Convention, almost 40 states, including two top-10 largest countries, the United States and India, are not bound by Article 3 *bis*.

2.1.2. *Prohibition to Use Weapons Against Civil Aircraft as a Customary Law*

The crucial point for states which are not parties to the Chicago Convention or are parties to the Chicago Convention but did not ratify the Protocol is whether the obligations prescribed by Article 3 *bis* constitute customary international law. There are three options:

- 1) Article 3 *bis* is merely a provision of the treaty and does not create any obligations for third states;
- 2) Article 3 *bis* is a codification of customary international law and, therefore, for states not parties to the Protocol, its rules are binding as an international custom;
- 3) Due to subsequent state practise and *opinio juris* rules, Article 3 *bis* has become customary international law.

Concerning the first option, we claim that in the modern world prohibiting the use of weapons against civil aircraft is not a matter of treaty obligation between its parties.

Regarding the second option, it is worth mentioning that the ICAO Assembly in Resolution which introduced Article 3 *bis* and was adopted unanimously stated ‘the

⁶¹ Vienna Convention on the Law of Treaties, art. 34, May 23, 1969, 1155 UNTS 331.

general desire of contracting states to reaffirm the principle of non-use of weapons against civil aircraft in flight'⁶². Representatives of states on the ICAO Assembly admitted the reaffirmation of the existing prohibition. For example, Australia, Austria, Cuba, Japan, and the Republic of Korea directly indicated the existence of the mentioned principle, and the UK argued for 'codification of the relevant International Law'. Moreover, the ICAO Assembly highlighted that 'none [of the delegates] had denied the paramount importance of reaffirming the principle of non-use of weapons against civil aircraft which had already been established in International Law'⁶³.

Turning to the third option, we must note the following. On the one hand, an analysis of aerial accidents shows that no state (with the exception of the Soviet Union) involved in a major tragic aerial accident with civil aircraft claimed an absolute right to shoot down civil aeroplanes. On the other hand, in some cases (El Al, Libyan Airlines, and Iranian Airlines aerial accidents), states which perpetrated an attack against civil aircraft preferred to compensate the families of victims on an *ex gratia* basis (thus not acknowledging effective legal responsibility) (Leich, 1989). In general, any event that involved the use of weapons by the state against civil aircraft was condemned, regardless of the facts of the case and the grounds for justification by such actors including the US, the UK, the Soviet Union, and Israel (Hughes, 1980; Foont, 2007; Beckham, 2015).

The ICJ in the *North Sea Continental Shelf case* with respect to international custom formation stated that 'an indispensable requirement would be that <...> State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; — and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved'⁶⁴.

The potential persistent objection to the indicated rule might be the Soviet Union, which in two cases of aerial accidents (Korean Airlines 1978 & 1983) rejected any responsibility for shooting down civil aircraft and any form of compensation (including *ex gratia*). The Soviet authorities argued the right to defend its airspace irrespective of the type of aircraft and number of human beings on board. It is indicative that the actions of the Soviet Union in two consecutive aerial accidents led the ICAO to adopt Article 3 *bis*, which directly proclaims the prohibition to use weapons against civil aircraft. Therefore, Article 3 *bis*, as an international treaty norm, raised a process 'when norms of treaty origin crystallize into new principles or rules of customary law' with a separate identity (Crawford, 2012).

Moreover, the Soviet Union changed its position by ratification on 24 August 1990 of the Protocol. The Russian Federation — a successor to the Soviet Union⁶⁵

⁶² ICAO, Resolution A25-1. *supra* note 25. P. 15 (1—10); ICAO, *Minutes of Plenary Meetings 25th (Extraordinary) Session*, ICAO Doc. 9437 A25-Resolutions, Minutes. P. 18.

⁶³ ICAO, *Minutes of Plenary Meetings 25th (Extraordinary) Session*, ICAO Doc. 9437 A25-Resolutions, Minutes. P. 30, para. 5; 31, para. 6; 37, para. 3; 56, para. 3; 64, para. 2.

⁶⁴ *North Sea Continental Shelf (Federal Republic of Germany/Netherlands, Federal Republic of Germany/Denmark)*, Judgement of 20 February 1969, [1969] ICJ Rep. 3. P. 43, para. 74.

⁶⁵ Constitution of the Russian Federation. Russian Federation Collection of Legislation. 2014, No. 31, Item 4398.

(Crawford, 2006) — is bound by the provision of Article 3 *bis*; it sets Rules for the use of weapons for state border protection in airspace with an elaborated algorithm⁶⁶.

The International Law Commission (hereinafter — the ILC) stated that ‘the effect of practice in line with the supposed rule may be nullified by contemporaneous statements that no such rule exists’ (e.g., *ex gratia* payments in case of armed conflicts)⁶⁷. Therefore, payment on an *ex gratia* basis is the simplest method to intentionally impede the establishment of international custom.

We claim that generally in a case involving the shooting down of a civil aircraft, there is no place for *ex gratia* payment. The payment is almost always (in seven out of ten aerial accidents to date) given not ‘as a favour’ but as a legal consequence of violating the prohibition to use weapons against civil aircraft.

Therefore, we submit that either within the second option (as a reaffirmation of the principle) or within the third option (as a result of subsequent practice and *opinio juris*), the prohibition to use weapons against civil aircraft has a customary nature. As such, it extends to each state of the world, irrespective of its participation in the Chicago Convention or the Protocol.

Consequently, we argue that, to date, the prohibition of the use of weapons against civil aircraft constitutes a customary rule of international law binding upon all states.

2.2. Is There Any ‘Security Exception’ for Shooting Down Civil Aircraft?

This section elaborates upon three separate grounds for establishing the ‘security exception’: Article 3 *bis* of the Chicago Convention, claims of injured states, and Article 51 of the UN Charter. At the same time, the authors consider such exception as a set of precautions that the state should take before an attack.

2.2.1. Article 3 *bis* Obligations as a Ground for Exception

The obligations contained in Article 3 *bis* provide a legal framework for potential navigation failure of a civil aircraft, which aim for an outcome acceptable to both the aircraft and the territorial state. However, the toughest question is *What if the aerial intruder to the territorial state does not obey orders and/or instructions?* The reasons for disobedience are not relevant and might range from the menacing hijacking of the aircraft to the crew’s simple misunderstanding.

In this highly probable event, Article 3 *bis* does not provide direct guidance to the territorial state. There are two possible options, which depend on whether or not the nonfulfillment of obligation to comply by the aircraft allows the territorial state not to follow its obligation not to use weapons.

Answering ‘yes’ leads to the conclusion that an aircraft’s slight deviation from given orders may be assessed as a breach of its obligation to comply and could entail

⁶⁶ Decree of the Russian Federation Government ‘About the order of use of weapons and military equipment in the protection of the state border of the Russian Federation in the airspace’. Russian Federation Collection of Legislation. 2020, No. 9, Item 1201.

⁶⁷ International Law Commission. (2016) *Report on the work of Its Sixty-Eighth Session*, UN Doc. A/71/10. Pp. 100—101.

the immediate use of weapons against an ‘intractable’ aeroplane by the state. This would be directly inconsistent with the purposes of the adopted Article 3 *bis*, one of which is ‘to enhance further the safety of international civil aviation’⁶⁸.

Accordingly, the norm of Article 3 *bis*, which represents one of the basic principles of international civil aviation, inserted in Part I Chapter I of the Chicago Convention ‘General Principles and Application of the Convention’, cannot be dismissed by an aircraft’s slight deviation from given orders.

On the other hand, answering ‘no’ leads to the conclusion that any aircraft’s actions do not affect the principle of non-use of weapons against civil aircraft in flight. But this conclusion entails questions *What were the reasons to oblige the aircraft to obey orders and/or instructions?* and, *What legal or factual consequences should follow in case of nonfulfillment of this obligation?*

The answer comes from paragraph b) of Article 3 *bis* and one of the purposes of its adoption. Paragraph b) of Article 3 *bis* provides a wide range of measures against the intruder, which are not listed and are only limited by the rules of international law, specifically by the prohibition to use weapons according to paragraph a) of Article 3 *bis*. The general purpose of Article 3 *bis* is ‘to enhance further the safety of international civil aviation’⁶⁹. Therefore, we conclude that the character and contents of measures taken by the territorial state will generally depend on the degree of disobedience by the aircraft, but these measures remain under the prohibition to use weapons.

Consequently, the analysis of Article 3 *bis* indicates that no exception can be derived from the prohibition to use weapons against civil aircraft.

2.2.2. *Exceptions Derived from Claims of States*

Throughout the history of aerial accidents, exceptions to the principle of non-use of weapons against civil aircraft have been repeatedly discussed both by the states that have shot down an aircraft and the victim states⁷⁰.

Israel, in the Libyan Airlines case, claimed the ‘security exception’ at the 19th ICAO Session of the Assembly (Extraordinary) (Phelps, 1985)⁷¹. It stated that the accident was the result of ‘errors and omissions on the part of the Libyan aircraft and the Egyptian control system which had led the Israeli air defence system to assume that the aircraft had penetrated closed military zone in Sinai on hostile mission’⁷².

To date, there have been two major proceedings concerning aerial accidents involving civil aircraft before the ICJ: *Aerial Incident of 27 July 1955 (Israel v. Bulgaria; United Kingdom v. Bulgaria; United States of America v. Bulgaria)* and *Aerial Incident of 3 July 1988 (Islamic Republic of Iran v. United States of America)*.

⁶⁸ ICAO, Resolution A25-1. *supra* note 24. P. 15 (I—10).

⁶⁹ ICAO, Resolution A25-1. *supra* note 24. P. 15 (I—10)

⁷⁰ *The Aerial Incident of 27 July 1955*, Memorial of the United States of America, *supra* note 8. p. 210; The United States of America National Archive. (1988) *Statement by Assistant to the President for Press Relations Fitzwater on United States Policy Regarding the Accidental Attack on an Iranian Jetliner Over the Persian Gulf*. <https://www.reaganlibrary.gov/research/speeches/071188b> [Accessed 10th April 2021].

⁷¹ ICAO, *Minutes of Plenary Meetings 19th Session*, *supra* note 13. P. 50.

⁷² ICAO, *Minutes of Plenary Meetings 19th Session*, *supra* note 13. P. 50.

In the *Aerial Incident of 3 July 1988 case*, the US, as the state that shot down the civil aircraft, claimed the ‘necessity to protect essential security interest’. In objections to Iran’s Memorial, the US stated that Vincennes’ crew protected the ‘security interest of the United States’⁷³.

Moreover, in the *Aerial Incident of 27 July 1955 case*, the US, as a state of the victims, referred the Court several times to the ‘security necessity’ and ‘security considerations’ but argued the lack of evidence that Bulgaria’s actions were under such security exceptions and insisted upon establishing legal responsibility. It claimed that ‘the cases where bringing a plane down is resorted to must be justified by *special security considerations*, which were not asserted to be present in this case [emphasis added]’⁷⁴. Accordingly, the US consistently argues in favour of the security exception to the principle of non-use of weapons against civil aircraft.

Notably, in every case mentioned, states (Israel, Bulgaria and the US) preferred to provide payments on an *ex gratia* basis. That leads us to conclude that when the ‘security exception’ issue is on the agenda, states, even when providing compensation, prefer to do it *ex gratia*. We argue that in such cases, the *ex gratia* character of payment is intentionally used to emphasize the denial of responsibility for the civil aircraft shot down due to security considerations.

Nevertheless, it is disputable that the claims of only several affected states constitute an explicit and universally recognized exception to the fundamental principle of non-use of weapons against civil aircraft. So far it has not been settled that security considerations empower states to lawfully shoot down any invading civil aircraft.

2.2.3. Article 51 of the UN Charter as a Basis for Exception

Generally, there are two main options for the legitimate use of force by a state: under the UN Security Council resolution (Article 39 of the UN Charter) or as self-defence (Article 51 of the UN Charter).

Concerning Article 39 of the UN Charter, it is worth noting that violation of the sovereign airspace and subsequent decision-making process regarding the aircraft take place immediately. Therefore, addressing the issue of such situations to the UN Security Council is objectively unfeasible.

It is worth noting that paragraph a) of Article 3 *bis* contains a clause which proclaims that ‘this provision [prohibition of use of weapons against civil aircraft in flight] shall not be interpreted as modifying in any way the rights and obligations of states set forth in the Charter of the United Nations’ (Chicago Convention, 1944). Moreover, the ICJ confirmed that the inherent right to self-defence exists under customary international law as well as under the UN Charter (Shaw, 2017)⁷⁵.

Therefore, we claim that the only grounds for the use of weapons against civil aircraft invading sovereign airspace might be self-defence under Article 51 of the UN Charter (Linnan, 1991).

⁷³ *The Aerial Incident of 3 July 1988*, Memorial of the Islamic Republic of Iran, *supra* note 28. P. 229.

⁷⁴ *The Aerial Incident of 27 July 1955*, Memorial of the United States of America, *supra* note 7. P. 210.

⁷⁵ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Merits, Judgement, 1986 I.C.J. 14, 94 (June 27).

Individual attempts to substantiate exceptions from prohibition to use weapons against civil aircraft have taken place in legal doctrine. For example, Brian E. Foont proposed a four-step algorithm for allowing the use of weapons against civil aircraft:

1) the territorial state, in the event of airspace intrusion by civil aircraft, must give orders and/or instructions to land or to leave,

2) the aerial intruder continues the violation, takes no actions to obey given orders, and there are no objective reasons for disobedience,

3) the territorial state assesses threats from the aircraft as ‘more than mere speculation’ (hijacking, engagement in terroristic act or perfidy, moving towards a populated area or vulnerable targets, *e.g.*, secret military base),

4) in compliance with the mentioned preconditions, the territorial state has the right to shoot down the aircraft, with further *ex gratia* compensation to victims’ families and the injured (Foont, 2007).

Without calling into question the substantial reasonableness of the algorithm, we argue that shooting down a civil aircraft in flight generally leads to the deaths of a considerable number of people and, therefore, requires the utmost solid factual and legal grounds. From our point of view, such legal grounds might be not only disobedience or threat, but the state’s inherent right to self-defence.

Article 51 of the UN Charter authorizes ‘self-defence if an armed attack occurs against’ a state. Judge James Richard Crawford supports a broader approach, which indicates that Article 51 does permit the exercise of self-defence against non-state actors (Crawford, 2012). This approach has evolved since the 9/11 terrorist attacks, for which al-Qaeda took responsibility and consequently became the target of the US self-defence campaign.

It is crucial that those 9/11 terrorist attacks, which took place on 11 September 2001 in New York, Washington, D.C., and Pennsylvania, were, unfortunately, *post factum* regarded by the UN Security Council as ‘threats to international peace and security’⁷⁶. The attacks were committed with four hijacked civil aircraft: two were directed to the World Trade Centre’s Towers, one to the Pentagon, and one crashed in Pennsylvania. The 9/11 attacks stand as the gravest acts of terrorism: 2,977 victims and 19 terrorists died; more than 6,000 people were injured.

Even a hypothetical projection of a similar situation forces us to weigh the right to preventive self-defence against the safety of passengers on the aircraft. On the one hand, it would have been a difficult call for the US authorities to shoot down the aircraft involved, and thus put at stake the principle of non-use of weapons against civil aircraft in flight. But on the other hand, neutralization of those hijacked aircraft would have saved many more lives on the ground (sadly, facts show that in the 9/11 attacks, 246 victims were passengers and crew, whereas 2,731 people died on the ground).

Therefore, we argue that the only valid ground for the use of weapons against civil aircraft might be the inherent right of the state to self-defence, according to Article 51 of the UN Charter. It constitutes the ‘security exception’ to the established principle of non-use of weapons against civil aircraft in flight. This exception may result in dramatically grave consequences and the deaths of people and, therefore, is under a set of precautions, including but not limited to:

⁷⁶ S.C. Res. 1368 (Sept. 12, 2001).

1. Orders and/or instructions to land or leave (arising from Article 3 *bis*);
2. Analysis of reasons which might have caused disobedience (Foont, 2007);
3. Analysis of actual threats posed by the aircraft's trajectory approaching huge, inhabited areas (*e.g.*, big cities, capitals), strategic objects of civil infrastructure (*e.g.*, hydro or atomic electric power stations) or military objects (Foont, 2007);
4. Employment of other 'non-lethal' measures aimed to inform the aircraft crew about unlawful invasion and, if applicable, to force it to land or leave with minimum possible damage to its safety (in the light of the purpose of the Chicago Convention to enhance the safety of civil aviation).

2.3. How Much Do Passengers' Lives Value?

This section reflects on the appropriate legal consequences for the state which has shot down a civil aircraft and provides an analysis of various approaches to compensation calculation.

2.3.1. Are there any alternatives for monetization of human lives?

The position of this paper is that every violation of the prohibition to use weapons against civil aircraft in flight entails certain legal consequences. The predominant practice of aerial accidents shows that the sole and routine consequence of shooting down a civil aircraft is monetary compensation. Such compensation usually covers the loss of lives and, occasionally, of property.

In fact, there are several instruments of compensation as a legal consequence for the loss of lives arising from aerial accident. For example, Montreal Convention 1999⁷⁷ as a successor of the Warsaw Convention 1929⁷⁸ contains rule on the liability of the carrier in case of death or injury to the passengers. However, universal application of the mentioned rule in respect of the elaborated issue is precluded by the limits of the carrier's liability in case where 'such damage was not due to the negligence or other wrongful act or omission of the carrier or its servants or agents' (article 21 of the Montreal Convention). Moreover, the issue at stake is responsibility of the state for internationally wrongful act rather than liability of the private company for loss of lives.

The question is whether compensation or, in other words, monetization of lives should be tolerated as an acceptable cost for taking human life. Sadly, due to the irreversible character of damage caused, payment seems to be the only option.

However, we argue that in any case, compensation should not be the only consequence. The due compensation might be accomplished by:

- 1) official apologies,
- 2) proper investigation and, if applicable, corresponding measures with regards to the officials in charge,
- 3) a system of various measures to assure the non-repetition of tragedy to the highest possible degree (*e.g.*, to provide training for military staff on international

⁷⁷ Convention for the Unification of Certain Rules for International Carriage by Air. 28 May 1999, 2242 UNTS 309.

⁷⁸ Convention for the Unification of certain Rules relating to International Carriage by Air. 12 October 1929, 137 UNTS 11.

aspects of civil aviation functioning, to improve communication among Air Traffic Control services worldwide, to develop cooperation on the international level in the field of civil aviation safety, etc.).

2.3.2. *The value of passengers' lives — is there a standard?*

Previous aerial accidents show that the states that shot down aircraft offered and/or provided radically different amounts of compensation. In the Pan Am case, Libya provided the largest payment of \$2,700,000,000 for the 270 victims (\$10,000,000 per victim) (Beckham, 2015)⁷⁹. In the El Al case, Bulgaria made the lowest total payment of \$195,000 for 22 Israeli victims (approximately \$8,000 per victim)⁸⁰.

The US in the Iran Airlines case and Ukraine in the Siberian Airlines case provided approximately \$200,000 per victim (Beckham, 2015). China, in the Cathay Pacific case, provided £367,000 (or approximately \$1,000,000 according to the exchange rate in 1954) for the nine people who died, the eight survivors, the baggage, and loss of the aircraft⁸¹.

The UK made a remarkably different claim in the *Aerial Incident of 27 July 1955 case*. It requested different amounts of compensation for the five victims. The 'amount claimed in respect of pecuniary loss arising from death' was determined as £40,000 for Mr Jack Brass, £9,850 for Mr Herbert Laster, £4,800 for Commander S.R. Hinks, £1,850 for Master C. Foxworthy-Windsor and £1,500 for Mrs M. Morgan⁸². It is unclear what factors influenced the different amounts of compensation to the extent that Mrs Morgan's life ended up costing more than 26 times less than Mr Brass's life.

We assume that different claims might be explained by a flexible approach to calculating the 'loss arising from death'. Compensation paid to the families might have depended on the victim's salary, activities, or other relevant factors. At the same time, such an approach touches upon two problematic issues. The first issue is whether it is possible to objectively calculate the value of a person's life and even acknowledge that one life is valued less than the other.

The second issue relates to the broader matter of interstate negotiations concerning compensation. Some questions arise. What if states are unable to settle the amount? Who should adjudicate on the matter? How? The ICJ has never considered such matters substantively. However, at present, in the 2020 Ukrainian Airlines case, Ukraine refused to accept Iran's offer of compensation for \$80,000 per victim. It announced that, if negotiations fail, they will appeal to international arbitration courts, the ICJ⁸³.

⁷⁹Wald, M. L. (Wednesday 29 May 2002) Libya is Offering to Pay \$2.7 Billion for Pan Am Blast. *New York Times*. P. A1.

⁸⁰Jewish Telegraphic Agency Daily News Bulletin New York. (Tuesday 4 June 1963) Bulgaria Agrees to Pay \$195,000 to Israel for Shot Down Plane. P. 2.

⁸¹*The Times*. (Saturday 24 July 1954). P. 8.

⁸²*The Aerial Incident of 27 July 1955*, Memorial of the United Kingdom, *supra* note 8. Annex. P. 42.

⁸³*National News Agency of Ukraine — Ukrinform*. (18 May 2020) Plane Crash in Iran: Ukraine Ready to Appeal to International Court of Justice. <https://www.ukrinform.net/rubric-politics/3027251-plane-crash-in-iran-ukraine-ready-to-appeal-to-international-court-of-justice.html> [Accessed 10th April 2021].

In this respect, the most notable example is the largest payment offered and provided by Libya in the Pan Am case. This case was not even about shooting down the civil aircraft; it was rather about Libyan officials contributing to the terroristic act. The amount of compensation was the result of more than ten years of unprecedented political pressure on Libya from both the UN and individual states, with the US and the UK as major actors. What is critically indicative of negotiations of this type is that, in this case, external concessions on the part of the victim states determined the amount of compensation. Moreover, when in 2003 one concession (to remove Libya from the US 'list of designated state sponsors of terrorism' (Beckham, 2015) was not fulfilled timely⁸⁴, Libya did not provide the third transfer to the victims (Schwartz, 2007). Eventually, they approved the transfer in 2008, only after the US had removed Libya from the list in 2006⁸⁵.

Therefore, negotiations regarding the legal consequences of violation of the non-use of weapons against civil aircraft principle are very often dependent on politics and show neither consistent practice regarding compensation amounts, nor how the procedures are applied.

2.4. Driving Force in case of Aerial Accident: The Domain of Law or the Domain of Politics?

Provided analysis of aerial accidents and its consequences leads us to reflect on the overlapping domains of law and politics. The critical contiguity of law and politics in the field results from three paradoxical premises. First, despite the existence of the principle of non-use of weapons against aircraft, airliners are still shot down (the latest example being the Ukrainian Airlines case in January 2020). Second, despite any circumstances justifying the 'security exception', a state which shoots down an aircraft still faces condemnation from international organisation and individual states. Third, despite the issue of responsibility for the accident, in the vast majority of cases, states which shoot down airliners make payments in respect to the victims.

Moreover, the payment for human lives, very often labelled as *ex gratia*, seems to be an inevitable but self-sufficient consequence of shooting down a civil aircraft. In contrast, the acceptance of responsibility seems to be irrelevant. Finally, the amount of payment turns out to be a purely political matter, very often depending on external political factors and concessions.

Overlapping of law and politics is an inevitable trend in the modern world, especially in the field of international relations. Nevertheless, our position is that the goal of International Law must be to safeguard, at minimum, the essential values upon which the international community rests. Without doubt, international civil aviation rests on the principle of non-use of weapons against civil aircraft in flight. This very principle must be proclaimed as a universally legal binding customary rule of International Law, to which this article aims to contribute.

⁸⁴ The United States of America. Department of State. (2006) *Press Release, U.S. Diplomatic Relations with Libya*. <https://2001-2009.state.gov/secretary/rm/2006/66235.htm> [Accessed 10th April 2021]; see also Kaplan, E. (2006) *How Libya got off the List. Council on Foreign Relations*. <https://www.cfr.org/background/how-libya-got-list> [Accessed 10th April 2021].

⁸⁵ The United States of America. Department of State. (2008) *Press Release, Implementation of the Libyan Claims Settlement Agreement*. <https://2001-2009.state.gov/r/pa/prs/ps/2008/oct/111600.htm> [Accessed 10th April 2021].

Conclusion

Aerial accidents arising from shooting down civil aircraft by states continue to occur in the modern world. Case studies reveal several common trends in the field:

1. If a state shoots down a civil aircraft, it accepts responsibility for the accident, and, subsequently, provides monetary compensation to the victims.

2. A state may shoot down a civil aircraft yet refuse to accept responsibility for the accident. In particular, the state may rely upon the ‘security exception’. In these circumstances, previously, states preferred to provide payment on an *ex gratia* basis to the victims. The unique exception was the Soviet Union, which rigorously protected its sovereign airspace to the detriment of civil aviation safety but ratified the Protocol regarding Article 3 *bis* in 1990.

3. Every state which shoots down a civil aircraft faces unanimous condemnation, even if its actions formally fall under the ‘security exception’.

Second, we conclude that to date, the prohibition against using weapons against civil aircraft in flight constitutes the customary rule of international law binding upon all states. We support this position with the case studies of relevant aerial accidents that show sufficient state practice and *opinio juris*. Therefore, as our analysis demonstrates, any state is bound by the prohibition to use weapons against civil aircraft in flight.

Third, we acknowledge the existence of the ‘security exception’ from prohibition to use weapons against civil aircraft in flight. However, this ‘security exception’ cannot be derived either from Article 3 *bis* or from claims of several affected states. We argue that the only relevant grounds for the ‘security exception’ is Article 51 of the UN Charter, which proclaims the inherent right of the state to self-defence. As the ‘security exception’ leads to tragic consequences (above all, the deaths of passengers and crew), any derogation from the prohibition to use weapons against civil aircraft must be under a set of precautions.

Four, compensation reflects the inevitable monetization of human lives. Nevertheless, we argue that it should not be the only ‘simple’ legal consequence for shooting down a civil aircraft in flight. Moreover, the negotiation practice of states shows that we are currently witnessing a highly controversial reality of trade-offs between the respective states, in which compensation amounts are occasionally affected by external political factors that are neither transparent nor predictable.

References

- Beckham, J.A. (2015) Nation-State Culpability and Liability for Catastrophic Air Disasters: Reforming Public International Law to Allow for Liability of Nation-States and the Application of Punitive Damages. *Florida International University Law Review*. 10 (2), 585—633.
- Cheng, C. (eds.) (2017) *The Destruction of KAL Flight KE007, and Article 3 Bis of the Chicago Convention*. In: *Studies in International Air Law*, Leiden, The Netherlands: Brill. https://doi.org/10.1163/9789004345140_015 [Accessed 10 July 2021].
- Crawford, J.R. (2006) *The Creation of States in International Law*. 2nd ed. Oxford University Press.
- Crawford, J.R. (2012) *Brownlie’s Principles of Public International Law*. 8th ed. Oxford University Press.
- Foont, B.E. (2007) Shooting down Civilian Aircraft: Is There an International Law. *Journal of Air Law and Commerce*. 72 (3), 695—725.

- Geiß, R. (2005) Civil Aircraft as Weapons of Large-Scale Destruction: Countermeasures, Article 3BIS of the Chicago Convention, and the Newly Adopted German “Luftsicherheitsgesetz”. *Michigan Journal of International Law*. 27 (1), 227—256.
- Hughes, W.J. (1980) Aerial Intrusions by Civil Airliners and the Use of Force. *Journal of Air Law and Commerce*. 45 (3), 595—620.
- Leich, M.N. (1989) Denial of Liability: Ex Gratia Compensation on a Humanitarian Basis. *American Journal of International Law*. 83 (2), 319.
- Linnan, D.K. (1991) Iran Air Flight 655 and Beyond: Free Passage, Mistaken Self-defence, and State Responsibility. *The Yale Journal of International Law*. 16 (2), 245—389.
- McCarthy, G.M. (1984) Limitations on the Right to Use Force Against Civil Aerial Intruders: The Destruction of KAL Flight 007 in Community Perspective. *New York Law School Journal of International and Comparative Law*: 6 (1), 177—209.
- Nase, V. et al. (2015) A Call for Legal Accountability in the Wake of the MH17 Tragedy. *Journal of Air Law and Commerce*. 80 (4), 639—692.
- Oron, Y. et al. (1960) *Middle East Record Vol. I*. London, Reuven Shiloah Research Center, Israel Oriental Society.
- Phelps, J.T. (1985) Aerial Intrusions by Civil and Military Aircraft in the Time of Peace. *Military Law Review*. (107), 256—303.
- Schwartz, J.B. (2007) Dealing with a “Rogue State”: The Libya Precedent. *American Journal of International Law*. (101), 553—570.
- Shaw, M.N. (2017) *International Law*. 8th ed. Cambridge University Press, p. 71.
- Whiteman, M. M. (ed.) (1967) *Digest of international law Vol. VIII*. Washington, D.C., U.S. Government Printing Office.

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