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**AN EXAMINATION OF THE LEGAL QUESTION
OF SHOOTING DOWN HIJACKED PLANES
THROUGH AN
EMPHASIS ON PAST PASSENGER AIRCRAFT
INCIDENTS**

BY JOSEPH STUHLMANN¹

“After the morning of September 11, 2001, it seems that no one doubts that not only are there times when it is permissible to shoot down a civilian aircraft, there are times when it is imperative. The question remains, however, when?”²

On October 17, 2016, the German people made their decision in a lopsided vote: a fighter pilot is not guilty of murder if he shoots down a hijacked passenger plane that is planned to be used as a weapon against people on the ground.³ *Terror* is a play turned television movie that opened in Berlin in 2015. The play was written by criminal defense attorney and writer, Ferdinand von Schirach.⁴ The basic plot of *Terror* is this: “German fighter pilot, Major Lars Koch, has shot down a Lufthansa plane that has been hijacked by a terrorist. The plane is heading for a [soccer] stadium of 70,000 people (watching a Germany/England game).”⁵ “After several unsuccessful tries to force the plane to land, [Maj. Koch] finally shoots it down.”⁶

¹ Joseph Stuhlmann, J.D., University of St. Thomas, School of Law, 2019.

² BRIAN FOONT, *Shooting Down Civilian Aircraft: Is There an International Law*, 72 J. AIR L. & COM. 695 (2007) <https://scholar.smu.edu/jalc/vol72/iss3/10>.

³ Carla Bleiker, “‘*Terror*’ Movie: Hero or Murderer,” Deutsche Welle (Oct. 17, 2016) <https://www.dw.com/en/terror-movie-hero-or-murderer/a-36079572>.

⁴ Kate Kellaway, *Terror Review—Intriguing but Laboured*, The Guardian (June 25, 2017), <https://www.theguardian.com/stage/2017/jun/25/terror-lyric-hammersmith-review>.

⁵ Bleiker, *supra* note 2.; Kellaway, *supra* note 3.

⁶ *Id.*

Audiences “see [Maj. Koch’s] witness statement and hear impassioned speeches from the defense and prosecution...[Then they] g[e]t to vote on the verdict...After the summations [viewers] could call in or vote online.”⁷ Audience members at the live play “are issued...gadgets, like pocket calculators, upon which to press 1 (guilty) or 2 (not guilty).”⁸ The play/movie was written with alternate endings and ends based on how the audience of a particular night vote on the verdict.⁹

For this showing of *Terror – Ihr Urteil (The Verdict)*, 6.88 million German viewers tuned in, quite a high number for a weeknight program in Germany.¹⁰ This night, “in Germany, 86.9 percent of participants voted for innocent, saying that the [pilot] had made the right decision. Only 13.1 percent voted for guilty and were in favor of [Maj.] Koch going to prison for murder.”¹¹

The play/movie is a good way to get people thinking and talking about the question of shooting down hijacked passenger planes. Of course, domestic laws must be looked at when dealing with this question. However, the focus of this paper is limited to: the little international law available on shooting down civilian aircraft; international incidents in which nations have shot down passenger planes; and two instances in which government leaders ordered hijacked or supposed hijacked planes be shot down. This list is not exhaustive of all passenger planes that have ever been shot down (*see* Air Rhodesia incidents of 1978 and 1979;¹² *see also* Transair Georgia incidents of September 1993), but focuses on events involving legitimate governments (*see* “International Incidents”; *see also* Brothers to the Rescue incident of 1996; Eritrea Learjet incident of 1999).¹³

International Law – The Chicago Convention

“While aircraft were used in World War I, World War II truly demonstrated the overwhelming significance of flight for both military and civilian use. As a consequence, an international conference on the regulation of aviation

⁷ *Id.*

⁸ Kellaway, *supra* note 3.

⁹ *Id.*

¹⁰ Bleiker, *supra* note 2.

¹¹ *Id.*

¹² John Burns, *All 59 Die on Rhodesia Airliner Shot Down by Missile*, The New York Times (Feb. 13, 1979), <https://www.nytimes.com/1979/02/13/archives/all-59-die-on-rhodesia-airliner-shot-down-by-missile-top-general-on.html>.

¹³ Foont, *supra* note 1 at 713-14; Reuters, *Plane is Downed off Georgia*, The New York Times (Sept. 22, 1993), <https://www.nytimes.com/1993/09/22/world/plane-is-downed-off-georgia.html>; *U.S. Civilian Planes Shot Down Near Cuba*, CNN (Feb. 24, 1996) http://www.cnn.com/US/9602/cuba_shootdown/25/.

was held in Chicago, Illinois” on December 7, 1944.¹³ The Convention on International Civil Aviation (the “Chicago Convention”), brought about the creation of the International Civil Aviation Organization (the “ICAO”) “which evolved into a specialized agency of the United Nations after [its] creat[ion] on October 24, 1945.”¹⁴ The ICAO seeks to “[p]romote safety of flight in international air navigation.”¹⁴ This convention does have limitations: “First, it does not apply to military aircraft.”¹⁵ Second, it specifically provides that “[t]he contracting States recognize that every State has complete and exclusive sovereignty over the airspace of its territory.”¹⁶ The Chicago Convention “d[id] not explicitly address the issue of when a country may fire on civilian aircraft, nor d[id] it prohibit doing so.”¹⁷

On May 10, 1984, in response to the Soviet shoot down of a Korean Airlines passenger aircraft eight months prior (*see* “*Soviet Union → Korean Commercial Aircraft – 1983*”), the ICAO adopted Article 3 to the Chicago Convention.¹⁸ The first two sections state:

- (a) The contracting States recognize 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 recognize 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

¹³ *Id.* at 699, MAJ. ANNE DE LUCA, *Using the Air Force against Civil Aircraft*, AFRICA AND FRANCOPHONIE AIR AND SPACE POWER JOURNAL, 45, 46 (2012) <https://scholar.smu.edu/jalc/vol72/iss3/10>.

¹⁴ Foont, *supra* note 1 at 699-700.

¹⁴ *Id.* at 700 (quoting *Convention on International Civil Aviation*, 61 Stat. 1180, 15 U.N.T.S. 295, art. 44(h) (Dec. 7, 1944) (“Chicago Convention”).

¹⁵ *Id.* (citing “Chicago Convention” at art. 3(a): “providing that “[t]his Convention shall be applicable to civil aircraft, and shall not be applicable to state aircraft”).

¹⁶ *Id.* (quoting Chicago Convention at art. 1).

¹⁷ *Id.*

¹⁸ *Id.* at 709.

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.¹⁹

It took another event, fourteen years later, to get the support of enough ICAO member states to ratify Article 3 in October 1998 (*see United States → Iranian Commercial Aircraft – 1988*).²⁰ The ICAO also created a “Manual Concerning Interception of Civil Aircraft” to help nations cope with such a high-pressure, high-stakes situation.²¹

As there is “no explicit treaty law on the subject of firing on civilian aircraft” other than Article 3, the question concerning the rules for firing on civilian aircraft can thus only be addressed by examining the various incidents themselves.”²²

International Incidents

Yugoslavia → American Military Transport Aircraft – 1946

This first incident did not involve a passenger aircraft, but it did perhaps “establish...a baseline for comparison on this issue.”²³ “On August 9, 1946, an unarmed American military transport aircraft, a C-47, while on a regular flight from Vienna, Austria to Udine, Italy, was forced to crash-land in Yugoslavia after having been fired upon by a Yugoslav fighter plane.”²⁴ Ten days after this first incident, “Yugoslav fighters shot down another unarmed American military transport aircraft with all hands lost.”²⁵ After heavy protest from the United States, Yugoslavia’s president, Josip Broz Tito, wrote to the American Ambassador on August 31, 1946, stating:

¹⁹ Foont, *supra* note 1 at 709-710 (quoting *Protocol Relating to an Amendment to the Convention on International Civil Aviation*, 23 I.L.M. 705-07 (May 10, 1984)).

²⁰ *Id.* at 710 (citing *ICAO, Assembly Resolutions in Force*, ICAO Doc. 9790 (1st ed. 2002)).

²¹ *Id.* at 710-711.

²² *Id.* at 700-701.

²³ *Id.* at 701.

²⁴ *Id.* at 700 (citing LISSITZYN OLIVER, *The Treatment of Aerial Intruders in Recent Practice and International Law*, 47 AM. J. OF INT’L L. 559, 560-570 (1953)).

²⁵ Foont, *supra* note 1 at 700 (citing LISSITZYN, 47 AM. J. OF INT’L L. at 570).

I have issued orders to our military authorities to the effect that no transport planes must be fired at any more, even if they might intentionally fly over our territory without proper clearance, but that in such cases they should be invited to land; if they refused to do so their identity should be taken and the Yugoslav Government informed hereof so that any necessary steps could be undertaken through appropriate channels.²⁶

Yugoslavia, although never taking any responsibility for the incidents, paid \$150,000 total to the families of the five crewmen who lost their lives in the August 19, 1946 shoot down.²⁷

“Surely if an unarmed military transport should never be fired upon [as President Tito stated], it is even more reasonable that a country should never fire on a civilian aircraft.”²⁸ Perhaps, this analysis is irrelevant here, as it almost certainly fails to account for a situation involving a commercial aircraft that has become a weapon which could be used to take countless lives and cause indestructible damage, all at the whims of its hijackers. There are no international instances of hijacked passenger planes being shot down. So, the analysis here widens to include all commercial planes that have been shot down, regardless of whether they were hijacked.

Soviet Union → French Commercial Aircraft – 1952

“On April 29, 1952, MiG-15 jet fighters from the Soviet Union fired on a French commercial aircraft...en route from West Germany to West Berlin.”²⁹ The aircraft landed, and no lives were lost.³⁰ The Soviet Union claimed it had valid reason to fire on the aircraft: the flight had gone outside the boundary in which it was allowed to travel.³¹ The Allied High Commission disputed this but found it irrelevant in answering the question of whether the Soviets should have fired at the plane.³² The Commission stated: “quite apart from these questions of fact, to fire in any circumstances, even by way of warning on an unarmed aircraft in time of peace, where the aircraft may be, is entirely inadmissible and contrary to

²⁶ *Id.* at 701 (quoting 15 DEP'T ST. BULL. at 505 (1946)).

²⁷ *Id.* (citing LISSITZYN, 47 AM. J. OF INT'L L. at 573”).

²⁸ *Id.* at 701.

²⁹ *Id.* at 704 (citing Phelps John, *Contemporary International Legal Issues-Aerial Intrusions by Civil and Military Aircraft in Time of Peace*, 107 MIL. L. Rev. 255, 276-277 (1985)).

³⁰ *Id.* (citing PHELPS, 107 MIL. L. REV at 277).

³¹ Foont, *supra* note 1, at 704.

³² *Id.* (citing LISSITZYN, 47 AM. J. OF INT'L L. at 574).

standards of civilized behavior.”³³ Still, the Soviet Union did not compensate anyone as a result of its actions.³⁴ On first glance, this sentiment, like that of President Tito, fails to take into account a situation in which a plane has been hijacked and is threatening more lives on the ground. Such a situation, were it to occur, would surely not constitute a “time of peace” and must be treated differently.

People’s Republic of China → British Commercial Aircraft – 1954

Cathay Pacific Airways made headlines this year for a spelling error.³⁵ The airline had a plane at Hong Kong International Airport marked “Cathay Pacific.”³⁶ Cathay Pacific found itself in a much worse situation on July 23, 1954.³⁷ At the time, the airline was under British control.³⁸ A C-54 Skymaster aircraft was en route from Bangkok to Hong Kong with nineteen passengers and crew.³⁹ The plane was shot down by the People’s Liberation Army of China, and “the pilot was forced to ditch the aircraft in the sea.”⁴¹ Ten people on board the plane lost their lives.⁴⁰ “The Chinese claimed that the aircraft had been mistaken for a Nationalist Chinese military aircraft on a mission to raid a Chinese military base at Port Yulin.”⁴¹ China apologized, and, like Yugoslavia in 1946, compensated the victims.⁴² Here was an instance, at least if we take the Chinese at their word, of an inadvertent shoot down, a serious and costly case of mistaken identity.⁴³ According to the Chinese, they thought they were acting against an enemy aggressor.⁴⁴ This certainly does not excuse the nation’s actions, but it is important to take into account when dealing with the question of China’s culpability. A conflict ensued between U.S. Navy planes looking for survivors and People’s Liberation planes.⁴⁵ For purposes of this paper, those events will not be examined in detail here.

³³ *Id.*

³⁴ Foont, *supra* note 1.

³⁵ Ashley Hoffman, *Something Amiss? Cathay Pacific Misspelled Its Own Name on the Side of an Airplane*, TIME (Sept. 20, 2018), <http://time.com/5401421/cathay-pacific-airplane-typo-misspelled-name/>.

³⁶ *Id.*

³⁷ Foont, *supra* note 1, at 705 (citing PHELPS, 107 MIL. L. REV at 277).

³⁸ Dylan Matthews, *7 times militaries have shot down civilian planes*, Vox, (Jul. 17, 2014), <https://www.vox.com/2014/7/17/5912699/7-times-militaries-have-shot-down-civilian-planes>.

³⁹ *Id.*

⁴¹ Foont, *supra* note 1, at 705 (citing PHELPS, 107 MIL. L. REV at 277).

⁴⁰ Matthews, *supra* note 37.

⁴¹ Foont, *supra* note 1, at 705 (citing PHELPS, 107 MIL. L. REV at 277).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ Matthews, *supra* note 37.

Bulgaria → Israeli Commercial Aircraft – 1955

El Al is arguably most famous for being the airline that smuggled Nazi war criminal, Adolf Eichmann, out of Argentina and transported him to Israel.⁴⁶ It is also the national airline for the State of Israel, that, on July 27, 1955, half a decade before “Operation Eichmann,” had Flight L402 scheduled to run from Vienna, Austria to Tel Aviv, Israel.⁴⁷ The route took the plane through Yugoslavia near its border with Bulgaria.⁴⁸ “The aircraft strayed into Bulgarian airspace and was intercepted by [two] MiG-15 jet fighters, who ordered it to divert to a military airbase west of Bulgaria’s capital, Sofia. The aircraft complied, but as it was [preparing to land], the MiGs opened fire.”⁴⁹ All 58 people on the plane perished.⁵⁰ The final position the Bulgarian government took regarding the incident was denial of any responsibility.⁵¹ However, “eight years after the attack, Bulgaria agreed to pay a total of \$195,000 to Israel, having already compensated non-Israeli passengers.”⁵²

Israel → Libyan Commercial Aircraft – 1973

Libyan Airlines functions within the Libyan government.⁵³ On February 21, 1973, the airline had a Boeing 727 flying from Tripoli, Libya to Cairo, Egypt.⁵⁴ The aircraft, “got lost and flew over the Sinai [P]eninsula, which had been under Israeli control since the Six-Day War in 1967. After giving signals to land and firing warning shots, Israeli jets shot down the plane, killing 108 of the 113 people on board.”⁵⁵ Libya called the attack “a criminal act,” and the Soviets sang a similar tune, referring to the incident as “a monstrous new crime.”⁵⁶ Israel defended its actions stating: (1) it had directed the pilot to land; (2) its actions were meant to result in a forced landing rather than a crash; and (3) “the aircraft had flown over sensitive security locations, and the pilot’s refusal to land only fed into Israeli suspicions that the aircraft was on a spy mission over Israel’s secret air base

⁴⁶ See Bill O’Reilly and Martin Dugard, “Killing the SS: The Hunt for the Worst War Criminals in History,” Henry Holt and Co. (Oct. 9, 2018).

⁴⁷ Foont, *supra* note 1, at 705 (citing Marvin Goldman, *El Al: Star in the Sky*, World Transport Press, 51 (Sept. 1 1990); PHELPS, 107 MIL. L. REV at 277)).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 706.

⁵² Matthews, *supra* note 37.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.*

at Bir [Gifgafa].”⁵⁷ The ICAO condemned the attack and “rejected Israel’s claim that [its actions were] a matter of defense of its national security interests in maintaining the secrecy of its secret air base.”⁵⁸ Finally, as had become custom in passenger shoot downs by governments other than the Soviet Union, Israel offered *ex gratia* payment.⁵⁹

Soviet Union → Korean Commercial Aircraft – 1978

On April 20, 1978, Korean Airlines Flight 902 was flying from Paris, France to Seoul, South Korea via Anchorage, Alaska.⁶⁰ The aircraft got lost and traveled into Soviet airspace.⁶¹ The passenger plane was fired upon by the Soviets, but “was fortunately able to land on a frozen lake about 280 miles south of Murmansk, Russia.”⁶² One thing that remains uncertain is whether the Soviets provided any warning to the Korean Airlines pilot before firing.⁶³ There were two fatalities and thirteen injuries among the ninety-seven total people on board.⁶⁴ As in Israel five years prior, the Soviets contended that they fired upon the plane because they thought it was a spy plane.⁶⁵ However, unlike Israel, but mirroring the Soviet response to the shoot down of the French passenger plane in 1952, the Soviets offered no *ex gratia* payments.⁶⁶

Soviet Union → Korean Commercial Aircraft – 1983

This incident is remembered as “that time the Soviet Union killed a sitting U[nited] S[tates] Congressman.”⁶⁷ On September 1, 1983, Larry McDonald (D-GA) was serving in his fourth term when he and 268 other passengers and crew boarded Korean Airlines Flight 007 in New York bound for Seoul, South Korea via Anchorage, Alaska.⁶⁸ “As it approached its final destination, the plane began to veer off its normal course by nearly 200

⁵⁷ Foont, *supra* note 1, at 706-707 (citing PHELPS, 107 MIL. L. REV at 289).

⁵⁸ *Id.* at 707.

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ Foont, *supra* note 1, at 706-707 (citing *The Target is Destroyed* at 3-4).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ Matthews, *supra* note 37.

⁶⁸ Foont, *supra* note 1, at 708 (citing Note, *Legal Argumentation in International Crises: The Downing of Korean Air Lines Flight 007*, 97 HARV. L. REV. 1198, 1198 (1984)); FOONT, *supra* note 1, at 708 (citing Note, *Legal Argumentation in International Crises: The Downing of Korean Air Lines Flight 007*, 97 HARV. L. REV. 1198, 1198 (1984)); MATTHEWS, *supra* note 37.; *Korean Airlines Flight Shot Down by Soviet Union*, History (Nov. 13, 2009), <https://www.history.com/this-day-in-history/korean-airlines-flight-shot-down-by-soviet-union>.

miles. In just a short time, the plane flew into Russian airspace and crossed over the Kamchatka Peninsula, where some top-secret Soviet military installations were known to be located.”⁷² Two Soviet fighter jets intercepted the plane, one firing a missile at the Korean Airlines flight, which was nearing its destination.⁷³ The plane crashed into the Sea of Japan, taking the lives of all passengers and crewmembers.⁶⁹ The missile had been fired despite no communication from the passenger plane.⁷⁰ International reaction was pretty strong against the Soviets.⁷¹ The United States, among other countries, “imposed various sanctions on the Soviet Union.”⁷² President Ronald Reagan referred to the incident as a “massacre” and a “crime against humanity.”⁷³ Like the incident five years prior, “the Soviet Union claimed that the aircraft had violated its airspace, speculated that it was on a spy mission,” and [in typical Soviet fashion] offered no *ex gratia* payments.⁷⁹ One positive outcome of this incident was that GPS was introduced into civilian aviation, making course navigation much easier for pilots.⁷⁴

United States → Iranian Commercial Aircraft – 1988

On July 3, 1988, Iran Air Flight 655 left Bandar Abbas Airport in Iran headed for Dubai, UAE.⁷⁵ As the Airbus A300 took off with its 290 passengers and crew, the *Vincennes*, a United States Navy ship, was involved in a skirmish in the Persian Gulf with some small Iranian ships.⁷⁶ The *Vincennes* was there “to protect oil trade routes.”⁷⁷ The naval ship thought that the Airbus A300 was an F-14 fighter jet, even though Airbus A300s are much bigger and slower than F-14s.⁷⁸ “The flight allegedly did not identify itself [and the *Vincennes*] fired two surface-to-air missiles, killing all 290 passengers and crew members on board.”⁷⁹ The United States made \$62 million in *ex gratia* payments despite concluding it was

⁷² *Id.*

⁷³ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Foont, *supra* note 1, at 708 (citing PHELPS, 107 MIL. L. REV at 257).

⁷² *Id.* (citing PHELPS, 107 MIL. L. REV at 261).

⁷³ History.com Editors, *supra* note 67; MATTHEWS, *supra* note 37.

⁷⁹ Foont, *supra* note 1, at 708 (citing Church, George, *The Price of Isolation*, TIME, 34 (July 25, 1988)).

⁷⁴ Matthews, *supra* note 37.

⁷⁵ Max Fischer, *The Forgotten Story of Iran Air Flight 655*, The Washington Post (Oct. 16, 2013) https://www.washingtonpost.com/news/worldviews/wp/2013/10/16/the-forgotten-story-of-iran-air-flight-655/?utm_term=.2d6f968d14f5.

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

under no obligation to do so.⁸⁰ This was an unfortunate situation, but unlike other similar disasters, the United States was faced with an extremely short time frame in which to react to the incoming plane. The *Vincennes* did not have time to assess the perceived incoming threat, attempt to communicate with the aircraft, or force it to land. Loss of innocent human life must be avoided at all costs. However, while this incident is a tragedy, because of the added element of an ongoing battle, it should not be treated the same as an incident in which a nation has time to deal with the perceived threat but chooses only to take instant and aggressive action.

Ukraine → Russian Commercial Aircraft – 2001

“On October 4, 2001, [Siberian Airlines Flight SB1812], a Tupolev Tu-154 en route from Tel Aviv, Israel, to Novosibirsk, Siberia, exploded and crashed in to the Black Sea with all hands, sixty-six passengers and twelve crew, lost.⁸¹ The Ukrain[ian] government initially denied any involvement in the incident.”⁸² On October 12, 2001, “Evhen Marchuk, the chairman of Ukraine's security council, conceded that the plane had probably been brought down by ‘an accidental hit from an S-200 rocket fired during exercises.’”⁸³ Within 3 years of the incident, Ukraine had agreed to pay \$200,000 to all 78 victims’ families all of whom were either Israeli (40) or Russian (38) citizens.⁸⁴ This sort of reckless, even if not intentional, takedown of a plane full of innocent passengers must be avoided through safer military practices and heavy sanctions to those who cause such avoidable death and destruction.

Russia → Malaysian Commercial Aircraft – 2014

On July 17, 2014, Malaysia Airlines Flight 17, a Boeing 777 took off from Amsterdam toward Kuala Lumpur, India “when it was shot down over the conflict zone in eastern Ukraine...All 298 people on board were killed.”⁸⁵

⁸⁰ Foont, *supra* note 1, at 712 (citing Wright, Robin *U.S. to Pay Iranians Who Lost Kin on Downed Plane*, Los Angeles Times (Feb. 23, 1996)).

⁸¹ *Russian and Ukrainian Officials: Missile Downed Plane*, ABC News, (Oct. 12, 2001) <https://abcnews.go.com/International/story?id=80485&page=1>.

⁸² Foont, *supra* note 1, at 715 (citing Sadler, Brent, *Israel Shoots Down Light Aircraft*, CNN (May 24, 2001) <http://archives.cnn.com/2001/WORLD/meast/05/24/israel.plane/index.html>).

⁸³ Ben Aris, *Ukraine Admits it Shot Down Russian Airliner*, The Telegraph (Oct. 12, 2001) <https://www.telegraph.co.uk/news/worldnews/europe/ukraine/1359353/Ukraine-admits-it-shot-down-Russian-airliner.html>.

⁸⁴ Foont, *supra* note 1, at 716 (citing *Russia Agrees Airliner Payout*, BBC News (June 14, 2004) <http://news.bbc.co.uk/2/hi/europe/3806383.stm>).

⁸⁵ Shaun Walker, *MH17 Downed by Russian Military Missile, Say Investigators*, The Guardian (May, 24, 2018) <https://www.theguardian.com/world/2018/may/24/mh17-downed-by-russian-military-missile-system-say-investigators>.

“The actual pieces of a spent Buk M1, 9M38 series Russian surface-to-air missile [was] found among the wreckage.”⁸⁶ Russia has denied any responsibility for the incident.⁸⁷

Without dissecting these incidents any further, it is important to connect them to a potential incident in which a commercial airplane has been hijacked and is intended to be used by its hijackers as a weapon of mass destruction. Many of the incidents described above involved reckless behavior. This should never be the case when we are dealing with innocent human lives. That said, when many more lives are at stake on the ground, it is important to take controlled, necessary action to limit the amount of lives lost. “Article 51 of the Charter of the United Nations provides for each member's right of self-defense.”⁸⁸ Taking action to destroy the weapon of mass destruction, while first doing everything possible to save all of the lives on board the civilian aircraft, would constitute such defense.

Leaders Order Shoot Down of Passenger Planes

United States → American Commercial Aircraft – 2001

The events of September 11, 2001 need no introduction. It is because of these tragic events that the question of shooting down hijacked jets is being examined in the first place. Al Qaeda terrorists hijacked four commercial passenger planes and used them to cause death and destruction on the ground. Two of the planes destroyed the iconic Twin Towers of the World Trade Center in New York City. The third crashed into and damaged the Pentagon. As a result of the attacks, 2,977 innocent people lost their lives.⁸⁹ Thanks to the brave actions of those on board the fourth hijacked plane, United Airlines Flight 93, the aircraft did not reach its intended target in Washington D.C., and crashed into a field in Shanksville, Pennsylvania, killing all on board. By the time Flight 93 went down, the United States was aware that the day's events were not accidents and were a result of a larger plot. It fell upon the commander-in-chief to figure out how to deal with any additional hijacked planes.

⁸⁶ Jerry Skinner, *Justice for MH17 Victims Demands the Ultimate Joint Effort*, The Sydney Morning Herald (May 27, 2018), <https://www.smh.com.au/world/europe/justice-for-mh17-victims-demands-the-ultimate-joint-effort-20180527-p4zhri.html>.

⁸⁷ Walker, *supra* note 84.

⁸⁸ Foont, *supra* note 1, at 711 (quoting *Protocol Relating to an Amendment to the Convention on International Civil Aviation*; citing U.N. Charter art. 51).

⁸⁹ CNN Library, *September 11 Attacks Fast Facts*, CNN (Sept. 3, 2018)

<https://www.cnn.com/2013/07/27/us/september-11-anniversary-fast-facts/index.html>.

President George W. Bush later “revea[ed that after the two planes crashed into the World Trade Center] he gave the order for any further suspected hijacked planes to be shot down.”⁹⁰ In fact, the United States scrambled two F-16 fighter jets to search for Flight 93.⁹¹ The planes were unarmed because of the urgency of the situation, and their hero pilots were ready to perform a kamikaze takedown of the hijacked plane.⁹² President Bush initially thought that it was because of his order that Flight 93 had crashed.⁹³

That Flight 93 had been hijacked, was on its way to Washington D.C., and would have caused additional death and destruction had the passengers not intervened is certain. So, if the United States military, rather than the passengers, had brought down Flight 93, surely the actions would have been defensible under Article 51 of the Charter of the United Nations. On September 11, 2001, four planes were hijacked and used as weapons against the American people. That the passengers of Flight 93 were going to die after their plane was hijacked was all but certain; that additional lives on the ground in Washington D.C. would be lost was uncertain and avoidable if appropriate action was taken. President Bush took action to protect innocent lives on the ground, but so did those on Flight 93. Not long after President Bush made his decision, so did the passengers on the flight: “You ready[?] Okay, let’s roll,” Todd Beamer famously stated as the passengers prepared to fight back.⁹⁴

Russia → Turkish Commercial Aircraft – 2014

According to Russian President Vladimir Putin, on February 7, 2014, “he received a phone call from Olympic security officials saying a [Pegasus Airlines Boeing 737] plane carrying 110 people had been hijacked.”⁹⁵ The plane was en route from Kharkiv, Ukraine to Istanbul, Turkey.⁹⁶ “Pilots on board reportedly said a passenger had a bomb and the plane needed to reroute to Sochi, where more than 40,000 people had gathered at the stadium for the opening

⁹⁰ James Meikle, *George Bush Thought 9/11 Plane Had Been Shot Down on His Orders*, The Guardian (Oct. 29, 2010), <https://www.theguardian.com/world/2010/oct/29/george-bush-thought-9-11-plane-shot-down>.

⁹¹ Greg Timmons, *On 9/11, Heather Penney Tried to Bring Down Flight 93 in a Kamikaze Mission*, History (Sept. 7, 2018) <https://www.history.com/news/911-heather-penney-united-flight-93>.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Ed Vulliamy, ‘Let’s Roll...’ The Guardian (Dec. 1, 2001) <https://www.theguardian.com/world/2001/dec/02/september11.terrorism1>.

⁹⁵ Casey Quackenbush, *Vladimir Putin Gave the Order for a Passenger Plane to Be Shot Down in 2014*, TIME (Mar. 12, 2018) <http://time.com/5195107/vladimir-putin-plane-threat-shot-down/>.

⁹⁶ *Id.*

ceremony.”⁹⁷ President Putin ordered the commercial aircraft to be shot down, before learning several minutes later that the incident was a false alarm.⁹⁸ All of this information was told to the world in the documentary titled *Putin*, released in 2018.⁹⁹ It is difficult to take the Kremlin leader at his word, but it would be an eerie thing to fabricate such a story. Had this situation involved an actual hijacking, it would have been much like the events shown in the German movie *Terror*. Forty thousand lives on the ground would have been in immediate danger, and the president should have taken action to ensure that the least amount of lives were lost. However, had his orders actually been followed in this instance, many innocent lives would have been senselessly lost. These high stakes are the very reason that nations must have thorough protocol in place to deal with such situations by being able to take informed action. Is it legal for a country to shoot down a hijacked passenger airplane whose known target is a stadium of 40,000 or 70,000 people? Article 3(a) of the Chicago Convention states that “the contracting States recognize 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.”¹⁰⁰ Notwithstanding this, nations are still entitled to take action necessary for their self-defense, as stated in Article 51 of the Charter of the United Nations. Shooting down a hijacked passenger plane that has become a weapon falls under self-defense.

Conclusion

International law on shooting down civilian passenger planes is contradictory and can be summed up like this: it is never acceptable to shoot down a civilian airplane, *but* every nation is entitled to defend itself. There have been far too many incidents of nations shooting down passenger airplanes. Some incidents have been tragic mistakes, others much more nefarious. When we are faced with a situation in which hijackers intend to use planes as missiles against those on the ground, the answer should be clear. Take the enemy out; limit the lives lost. Of course, each situation brings with it its own special set of factors and shooting down planes carrying innocent civilians should always be the last resort. If forced landings or some kind of aid in helping the passengers retake control of the plane from the hijackers is a viable option, then, by all means, these and

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Foont, *supra* note 1, at 709-710 (quoting *Protocol Relating to an Amendment to the Convention on International Civil Aviation*, 23 I.L.M. 705-07 (May 10, 1984)).

other actions that do not involve the passengers losing their lives should be explored. Such situations can bring confusion and a lack of understanding about what is actually taking place; diligence in these situations is of the utmost importance, and the dignity of every human person should never be far from the minds of those making these difficult decisions.