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Reparation for Victims of the International Civil Aviation Arising from Armed Conflict Zones

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Ⅰ. Introduction

While aviation is the safest form of transport, the downing of Malaysia Airline Flight MH17, the scheduled flight en route from Amsterdam, Netherland to Kuala Lumpur, Malaysia, on 18 July, 2014 has raised troubling concerns with respect to civilian aircraft operating to, from and over armed conflict zones. This tragedy caused all the 298 lives onboard the aircraft perished, including 283 passengers from ten countries as well as 15 crew members from Malaysia.[1] Soon after the incident happened, the UN Security Council adopted a Resolution at its 7221st meeting to explore the downing of the civilian aircraft on an international flight and reaffirm the rules of international law that prohibit acts of violence that pose a threat to the safety of international civil aviation. It also demanded that those responsible for this incident be held to account and that all States cooperate fully with efforts to establish accountability.[2]

Besides that, the International Civil Aviation Organization (ICAO), the International Air Transport Association (IATA), Airports Council International (ACI) and the Civil Air Navigation Services Organization (CANSO), jointly express their strong condemnation of the use of weapons against civil aviation in the Joint Statement on Risks to Civil Aviation Arising from Conflict Zones (hereinafter referred to as Joint Statement).[3] In line with the Joint Statement, all parties to the discussion agreed that ICAO now has an important role to play in working as urgently as possible with its Member States, in coordination with the aviation industry and other bodies within the United Nations, to ensure the right information reaches the right people at the right time.

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1) http://www.malaysiaairlines.com/mh17, accessed on 11 August, 2014.
2) S/RES/2166 (2014).
3) Joint Statement on Risks to Civil Aviation Arising from Conflict Zones, on line: http://www.icao.int/Newsroom/Pages/Joint-Statement-on-Risks-to-Civil-Aviation-Arising-from-Conflict-Zones.aspx.

For this purpose, the *Task Force on Risks to Civil Aviation Arising from Conflict Zones* (TF RCZ) was established and convened for its first meeting from 14 to 15 August 2014 at ICAO Headquarters in Montréal, Canada. The Joint Statement also declared that ICAO is going to convene a High-level Safety Conference with all of its 191 Member States in February 2015. Industry and governments stand united and committed to ensuring the safety and security of the global air transport system and its users.

The quick response of the international community in exploring the shooting down of the aircraft should be applauded on the one hand, on the other hand, however, we have to bear in mind that this is not the first incident involving the civil aircraft shot down by weapons taken place in the aviation history. Such disastrous accidents can be given easily: 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.[4] On April 29, 1952, MiG-15 jet fighters from the Soviet Union fired on a French commercial aircraft while it was en route from West Germany to West Berlin. Though the aircraft landed safely, two of its passengers were injured.[5] On July 23, 1954, Chinese fighter aircraft fired on a Cathay Pacific aircraft en route from Bangkok to Hong Kong. The pilot was forced to ditch the aircraft in the sea resulting in the loss of several lives.[6] On July 27, 1955, Flight L402 operated by EL AL, the State of Israel's national airline, was shot down by Bulgarian jet fighters while en route from Vienna, Austria to Tel Aviv, Israel. The aircraft crashed and all fifty-one passengers and seven crew members were lost.[7]

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4) Oliver J. Lissitzyn, *The Treatment of Aerial Intruders in Recent Practice and International Law*, 47 Am. J. of Int'l L. at 569-70 (1953). Hereinafter referred to as US-Yugoslavia case.

5) John T. Phelps, *Contemporary International Legal Issues----Aerial Intrusions by Civil and Military Aircraft in Times of Peace*, 107 Mil. L. Rev. 255, 276-277 (1985).

6) *Id*, at 278.

7) *Id*, at 279.

On February 21, 1973, Israeli fighter jets fired on a Libyan airline that was over one hundred miles off-course, killing 108 passengers.[8] On September 1, 1983, fighter jets from the Soviet Union shot down Korean Airlines Flight 007, operated with a Boeing 747-200 aircraft, while en route from New York to Seoul, South Korea, killing all 269 passengers and crew aboard.[9] On July 3, 1988, the U.S.S. Vincennes fired on and destroyed Iran Air Flight 655, and Airbus A300 en route from Bandar Abbas, Iran, to Dubai. All 290 passengers and crew members were killed.[10] On February 24, 1996, the Cuba Air Force shot down two unarmed aircraft operated by Brothers to the Rescue, a Miami-based humanitarian organization engaged in searching for and aiding Cuban refugees in the Strait of Florida.[11]

On August 29, 1999, at approximately 5:00 p.m. local time, the Ethiopian military, apparently without warning, opened fire on a civilian aircraft that was en route from Naples, Italy, to Johannesburg, South Africa, having departed from a refueling stop in Luxor, Egypt, only two hours earlier.[12] On October 4, 2001, Siberia Airlines Flight 1812 was a commercial flight shot down by the Ukrainian military over the Black Sea, en route from Tel Aviv, Israel to Novosibirsk, Russia. The plane, a Soviet-made Tupolev Tu-154, carried an estimated 66 passengers and 12 crew members. Most of the passengers were Israelis visiting relatives in Russia. No one on board survived.[13] In all these tragedies, the passengers are undoubtedly the victims. This current article is trying to analyze the possible victims of such tragedies happened in the airspace over the conflict zones as well as the reparation for them, subject to modern international law in general, and international aviation law in particular.

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8) *Id*, at 288.
9) http://en.wikipedia.org/wiki/Korean_Air_Lines_Flight_007.
10) http://en.wikipedia.org/wiki/Iran_Air_Flight_655.
11) http://en.wikipedia.org/wiki/Brothers_to_the_Rescue.
12) Ethiopian Forces Shoot Down Aircraft, Agence Fr. Press, Aug. 31, 1999.
13) http://en.wikipedia.org/wiki/Sibir_Airlines_Tupolev_154_air_disaster .

Ⅱ. Armed Conflict Zone

Although the international law is progressively developing, there is no definite and unambiguous definition of what constitutes an armed conflict under international law. However, there is consensus that all the situations which are referred to by international humanitarian law constitute an armed conflict.[14] For the purpose of this article, the term "armed conflict" is understood in the same way as under international humanitarian law, including such legally binding instruments as the four 1949 Geneva Conventions[15] and the 1977 Additional Protocols[16] as well as universally applicable human rights treaties. The armed conflict may cover international as well as non-international armed conflicts.

1. International armed conflict

International armed conflicts deal with situations where trans-boundary armed force is used between two or more states. In line with the common article 2 of the 1949 Geneva Conventions, the Conventions "shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized

14) International Law Association (ILA), *Reparation for Victims of Armed Conflict*, the Hague Conference (2010), *Commentary* on Article 2.

15) The four Geneva Conventions refer to *1949 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949 Geneva Convention (II) for the Amelioration of the Condition of the Wounded and Sick and Shipwrecked Members of Armed Forces at Sea, 1949 Geneva Convention (III) Relative to the Treatment of Prisoners of War, and 1949 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War.* All the four Conventions were adopted in Geneva, Switzerland on 12 August, 1949. As of 31 December, 2013, there are 194 parties to these Conventions.

16) The 1977 Additional Protocols refer to *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) and 1977 Additional Protocols refer to Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts* (Protocol II). The two Protocols were adopted in Geneva, Switzerland on 8 June, 1977. As of 2013, there are 164 parties to the two Protocols.

by one of them." The following paragraph further stipulates that the international armed conflict may also cover "all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance." Furthermore, the 1977 Additional Protocol I include the situations "in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations".[17)]

2. Non-international armed conflict

Non-international armed conflicts are referred to in common article 3 of the 1949 Geneva Conventions as follows: "In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions: ……"However, this provision leaves unclear what is exactly meant by an "armed conflict not of an international character". A distinction has historically been drawn between international and non-international armed conflict, [18)]founded upon the difference between inter-state relations, which was the proper focus for international law, and intra-state matters which traditionally fell within the domestic jurisdiction of states and were thus in principle impervious to international legal regulation. [19)] However, this difference has been breaking down in recent years. Partly due to the increasing frequency of internal conflicts and partly due to the increasing brutality in their conduct, the international community is now more willing to

17) Article 1 (1), 1977 Additional Protocol I.
18) See e.g. L. Green, *The Contemporary Law of Armed Conflict*, 2nd edn, Manchester, 2000, chapter 3.
19) See Malcolm N. Shaw, *International Law*, 6th edn, Cambridge University Press (2008), at 1191.

demand the application of international humanitarian law to internal conflicts.[20] Insofar, some developments may offer guidance when it comes to define the armed conflict not of an international character.

First, according to the 1977 Additional Protocol Ⅱ, all armed conflicts "which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol" shall be governed hereby.[21] The purpose of the Protocol Ⅱ is to develop and supplement article 3 common to the Geneva Conventions without modifying its existing conditions of application as well as cover the situations which are not covered by article 1 of the Protocol Ⅰ.

Second, the jurisprudence of the International Criminal Tribunal for the former Yugoslavia merits attention. In *Prosecutor v. Tadic*, the tribunal held that "an armed conflict exists whenever there is a resort to armed forces between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a States".[22]

Thirdly, the Rome Statute of the International Criminal Court (ICC) also offers guidance as to what constitutes a non-international armed conflict: "Paragraph 2(e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed

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20) See e.g. Security Council resolutions 788 (1992), 972 (1995) and 1001 (1995) with regard to the Liberian civil war; Security Council resolutions 794 (1992) and 814 (1993) with regard to Somalia; Security Council resolution 993 (1993) with regard to Georgia and resolution 1193 (1998) with regard to Afghanistan.

21) Article 1 (1) of the 1977 Additional Protocol II.

22) Prosecutor v. Tatic, Case No. IT 94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, at 70 (Oct. 2, 1995), para. 70.

groups or between such groups."[23] When it comes to interpret the term of "protracted", the following indicative factors elaborated in *Prosecutor v. Haradinaj et al.* by the Trial Chamber will be helpful: the number, duration and intensity of individual confrontations; the type of weapons and other military equipment used; the number and caliber of munitions fired; the number of persons and type of forces partaking in the fighting; the number of casualties; the extent of material destruction; the number of civilians fleeing combat zones as well as the involvement of the UN Security Council.[24] Therefore it is the intensity of the armed violence, rather than the duration that may qualify an armed conflict is protracted or not. Furthermore the groups involved in the conflict should feature an organized structure for the qualification of an armed conflict.

As mentioned above, the line between international and non-international armed conflicts is becoming more and more blurring, sometimes even disappears. In the *Tadic* case, the Appeals Chamber noted in its decision that, "It is indisputable that an armed conflict is international if it takes place between two or more States. In addition, in case of an internal armed conflict breaking out on the territory of a State, it may become international (or, depending upon the circumstances, be international in character alongside an internal armed conflict) if (i) another State intervenes in that conflict through its troops, or alternatively if (ii) some of the participants in the internal armed conflict act on behalf of that other States".[25]

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23) Article 8(2) (f) of the Rome Statute of the International Criminal Court.

24) *Prosecutor v. Ramush Haradinaj, Idriz Balaj, Lahi Brahimaj*, Case No. IT-04084-T, Judgment of 3 April 2008, para. 49.

25) Judgment of 15 July 1999, para. 84; 124 ILR, at 96.

Ⅲ. International Law Applicable to Armed Conflict Zones

Article 38 (1) of the Statue of the International Court of Justice is widely recognized as the most authoritative and complete statement as to the sources of international law. [26]It stipulates that: " the Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: (a) international conventions whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations; (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

Based on this universally accepted stipulation, the international law applicable to armed conflict zones, both in international and non-international character, may be classified as following regimes according to the special emphasis they lay on. Meanwhile, bearing in mind that the primary purpose of this article is to address the reparation of the victims of the international civil aviation arising from the conflict zones, the relating international air law will be discussed in particular.

1. International humanitarian law

The international humanitarian law was originally termed the laws of war and then the laws of armed conflict. Only until recently it has been called international humanitarian law. The international humanitarian law is one of the

26) See, e.g. I. Brownlie, *Principles of Public International Law*, 6th edn, Oxford (2003), at 5; *Oppenheim's International Law* (eds. R. Y. Jennings and A. D. Watts), 9th edn, London (1992), at 24.

most highly codified parts of international law since it is primarily derived from a number of international conventions. The four 1949 Geneva Conventions and the two 1977 Additional Protocols are particularly important conventions governing the situations involving the international humanitarian issues.

The four 1949 Geneva Conventions stipulate the scope of the protection based on the basic distinction between combatants and those who are not involved in actual hostilities. For example, the First Geneva Convention concerns the Wounded and Sick on Land and emphasizes that members of the armed forces and organized militias, including those accompanying them where duly authorized,[27] "shall be respected and protected in all circumstances". The Second Geneva Convention is very similar to the First Convention, aiming at providing the respect and protection to the wounded and sick at sea. The Third Geneva Convention is concerned with prisoners of war, and consists of a comprehensive code centered upon the requirement of humane treatment in all circumstances.[28] The Fourth Geneva Convention is aim to protect the civilians and occupation in time of war. The Convention comes into operation immediately upon the outbreak of hostilities or the start of an occupation and ends at the general close of military operations.[29]

For the purpose of developing and supplementing the four Geneva Conventions, the 1977 Addition Protocol (I) defines the civilians and civilian objects. According to the Protocol, "a civilian is any person who does not belong to one of the categories of person referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian".[30] As far as the civilian objects are concerned, they refer to all objects which are not military

27) Article 13 (4) of the 1949 Geneva Convention (I).
28) Malcolm N. Shaw, *International Law*, 6th edn, Cambridge University Press (2008), at 1172. See also the Regulations annexed to the Hague Convention IV on the Laws and Customs of War on Land, 1907, Section I, Chapter II.
29) Article 6 of the 1949 Geneva Convention (IV).
30) Article 50 (1) of the 1977 Additional Protocol (I).

objectives.[31] For the purpose of the Protocol, the military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.[32] Subject to the definition of the civilians and civilian objects, the Protocol explicitly stipulates that both the civilians and civilian objects shall not be the targets of attack. The Protocol further stipulates that "with respect to attacks, those who plan or decide upon an attack shall do everything feasible to verify that the objectives to be attached are neither civilians nor civilian objects"[33]. Even if the targeted objective is verified as a military one when the attack is planned, but "if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, the attack shall be cancelled or suspended"[34].

In line with the Conventions and Protocols, we may safely draw the conclusion that the civilian aircraft flying to, from or over the armed conflict zones shall be absolutely protected from any military attack. Even if the civilian aircraft strays into the airspace of the conflict zone either intentionally or negligently, the parties involved in the armed conflicts shall take all necessary means to instruct it to fly back to the scheduled route or land on the designated place where it suits for such landing, not endangering the safety of the aircraft and the persons onboard the aircraft.

The customary international law principles which are not codified into the conventions also merit the attention. Reliance may be put upon them where one or more of the states involved in a particular conflict is not a party to a pertinent convention.

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31) Article 52 (1) of the 1977 Additional Protocol (I).
32) Article 52 (2) of the 1977 Additional Protocol (I).
33) Article 57 (2) (a) (i) of the 1977 Additional Protocol (I).
34) Article 57 (2) (b) of the 1977 Additional Protocol (I).

2. International air law

For the purpose of "making arrangements for the immediate establishment of provisional world air routes and services" and "setting up an interim council to collect, record and study data concerning international aviation and to make recommendations for its improvement", [35]representatives of 54 nations at the invitation of the United States met at Chicago from November 1 to December 7, 1944 to this end. At the end of the Conference, a Convention on International Civil Aviation (also known as the Chicago Convention) was signed by 52 nations attending the Conference. Although the Chicago Conference failed in its attempt to formulate a comprehensive economic charter for international civil aviation or to effectuate an exchange of traffic rights, it laid the foundation for the postwar establishment of the International Civil Aviation Organization (ICAO).[36] Another important work accomplished by the Chicago Conference was in technical field because the Conference laid the foundation for a set of rules and regulations regarding air navigation as a whole which brought safety in flying a great step forward and paved the way for the application of a common air navigation system throughout the world.[37]

The Chicago Convention sets forth many of the guiding principles of public international air law and has been viewed as among the most successful multinational agreement in history.[38] Taking into consideration in the armed conflicts that are currently underway in various locations, the Chicago Convention sets forth some general and principle provisions in this regard.

Article 1 of the Chicago Convention recognizes the pre-existing rule of customary international law, that "every State has complete and exclusive

35) http://www.icao.int/ChicagoConference/Pages/default.aspx, visited 12 August 2014.
36) See Andreas Lowenfeld, Aviation Law II-5(1972).
37) http://www.icao.int/about-icao/pages/foundation-of-icao.aspx, visited 12 August 2014.
38) There are 191 contracting states to the Chicago Convention now. http://www.icao.int/secretariat/legal/Lists/Current%20lists%20of%20parties/AllItems.aspx, visited 13 August 2014.

sovereignty over the airspace above its territory." Territory is defined by Article 2 as "the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of each State." The territory of a sovereign State is three dimensional, including within such territory the airspace above its national lands and its internal and territorial waters. Based on the principle of national sovereignty over airspace, each contracting state may, for reasons of military necessity or public safety, restrict or prohibit uniformly the aircraft of other states from flying over its territory. Such prohibited areas, if needed, shall be of reasonable extent and location so as not interfere unnecessarily with air navigation.[39]

Under the umbrella of airspace sovereignty, the States shot down the civilian aircraft for more than ten times in aviation history, arguing that the downing aircraft violated or were suspected to violate the sovereignty of the States concerned by deviating the scheduled navigation route. One of the incidents attracted the world-wide condemnation and furthermore sparked the wide range debate on restricting the sovereign states from using weapons against the civilian aircraft. This incident involved a scheduled Korean Air Lines flight from New York City to Seoul via Anchorage. On September 1, 1983, the airliner serving the flight was shot down by a Soviet Su-15 interceptor near Moneron Island, west of Sakhalin Island, in the Sea of Japan. The interceptor's pilot was Major Gennadi Osipovich. All 269 passengers and crew aboard were killed, including Lawrence McDonald, representative from Georgia in the United States House of Representatives. The aircraft was en route from Anchorage to Seoul when it flew through prohibited Soviet airspace around the time of a U.S. reconnaissance mission.

Although the Soviet Union claimed that the aircraft was on a spy mission, it was condemned by the world community as well as sanctioned by a number of countries.[40] The United Nations Security Council met in a special session and

39) Article 9 of the Chicago Convention of 1944.

considered a draft resolution that included the statement that "such use of force against international civil aviation is incompatible with norms governing international behavior."[41] It was, however, vetoed by the Soviet Union.

Compared with the frustrated effort of UN Security Council, ICAO made more successful action in this regard. The membership of ICAO gathered for an emergency meeting on September 15, 1983, just two weeks after the incident, and the ICAO Council adopted the following resolution:

HAVING CONSIDERED the fact that a Korean Air Lines civil aircraft was destroyed on September 1, 1983, by Soviet military aircraft,

EXPRESSING its deepest sympathy with the families bereaved in this tragic incident,

URGING the Soviet Union to assist the bereaved families to visit the site of the incident and to return the bodies of the victims and their belongings promptly,

DEEPLY DEPLORING the destruction of an aircraft in commercial international service resulting in the loss of 269 innocent lives,

RECOGNIZING that such use of armed force against international civil aviation is incompatible with the norms governing international behavior and elementary considerations of humanity and with the rules, Standards and Recommended Practices enshrined in the Chicago Convention and its Annexes and invokes generally recognized legal consequences,

REAFFIRMING the principle that States, when intercepting civil aircraft, should not use weapons against them,

CONDERNED that the Soviet Union has not so far acknowledged the paramount importance of the safety and lives of passengers and crew when dealing with civil aircraft intercepted in or near its territorial airspace,

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40) John T. Phelps, *Contemporary International Legal Issues----Aerial Intrusions by Civil and Military Aircraft in Times of Peace*, 107 Mil. L. Rev. 255, (1985), at 261.

41) United Nations Security Council Consideration, 22 I.L.M. 1109, 1110 (1983).

EMPHASIZING that this action constitutes a grave threat to the safety of international civil aviation which makes clear the urgency of undertaking an immediate and full investigation of the said action and the need for further improvement of procedures relating to the interception of civil aircraft, with a view to ensuring that such tragic incident does not recur,

(1) DIRECTS the Secretary General to institute an investigation to determine the facts and technical aspects relating to the flight and destruction of the aircraft and to provide an interim report to the Council within 30 days of the adoption of this Resolution and a complete report during the 110th Session of the Council.[42)]

On May 10 of the following year, still reacting to the downing of KAL 007, the members of the ICAO Assembly unanimously adopted Article 3 *bis* to the Chicago Convention, which provides: (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 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

42) International Civil Aviation Organization (ICAO) Consideration, 22 I.L.M. 1149, 1150 (1983); ICAO Bull., Nov. 1983, at 10.

regarding the interception of civil aircraft. (c) Every civil aircraft shall comply with an order given in conformity with paragraph (b) of this Article. To this end each contracting State shall establish all necessary provisions in its national laws or regulations to make such compliance mandatory for any civil aircraft registered in that State or operated by an operator who has his principal place of business or permanent residence in that State. Each contracting State shall make any violation of such applicable laws or regulations punishable by severe penalties and shall submit the case to its competent authorities in accordance with its laws or regulations. (d) Each contracting State shall take appropriate measures to prohibit the deliberate use of any civil aircraft registered in that State or operated by an operator who has his principle place of business or permanent residence in that State for any purpose inconsistent with the aims of this Convention. This provision shall not affect paragraph (a) or derogate from paragraph (b) and (c) of this Article.[43)]

In the light of the Chicago Convention as well as Article 3 *bis* in particular, it is undoubtedly that the contracting States have complete and exclusive sovereignty over the airspace above their territory and are entitled to take all necessary means recognized by the UN Charter to safeguard their territory in case of any unlawful interference. One of the jurisprudence deserved attention is the right of self-defence stipulated in Article 51 of the UN Charter as follows: “Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security

43)) The amendment was only come into force until 1 October 1998, fourteen years later after it was adopted. It has been ratified by 143 parties now. http://www.icao.int/secretariat/legal/Lists/Current%20lists%20of%20parties/AllItems.aspx, visited August 14, 2014.

Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

Actually the right of self-defence is also regarded as an inherent right under customary international law as well as under the UN Charter.[44] For the purpose of resorting to force in self-defence, a state has to be able to demonstrate that it has been the victim of an armed attack and it bears the burden of proof.[45] It is necessary to show that the state seeking to resort to force in self-defence has itself been intentionally attacked and such attack is serious enough to validate a self-defense response. In many cases, however, it might be difficult to determine the moment when an armed attack had commenced in order to comply with the requirements of article 51 and the resort to force in self-defense. Even if the state may determine, at its best objective judgment based on the convincing evidence available under that particular circumstance, that it is under an armed attack, the necessity and proportionality of the self-defense should be abide by. The Court in the *Nicaragua* case stated that there was a "specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law".[46] Quite what will be necessary and proportionate will defend on the circumstances of the case.[47] Therefore, it is by no means that contracting states can act with unconstrained freedom of aviation. In fact, much of the rest of the Chicago Convention circumscribes the unlimited freedom purportedly conferred by Article 1. It is necessary that this be so in order to effectuate the overriding purpose of the Convention----to create uniformity of Air Law across national boundaries.[48]

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44) See the International Court of Justice in the *Nicaragua* case, ICJ Reports, 1986, pp. 14, 94; 76 ILR, pp. 349, 428.

45) The *Oil Platforms (Iran v. US)* case, ICJ Reports, 2003, pp. 161, 189 and 190; 130 ILR, pp. 323, 348-50.

46) ICJ Report, 1986, pp. 14, 94 and 103; 76 ILR, pp. 349, 428 and 437.

47) See Judge Ago's Eight Report on State Responsibility to the International Law Commission, *Yearbook of the ILC*, 1980, vol. II, part I, at 69.

48) Paul Stephen Dempsey, *Public International Air Law*, McGill University (2008), at 44.

Taking the restriction or prohibition of the airspace as an example, the contracting state has the right to do so on the one hand, but on the other hand, it must follow some restrictions in doing so. Firstly, the contracting state concerned shall treat all the aircraft registered in other contracting states equally, thus discrimination is by no means permissible. Secondly, whereas the airspace as well as many facilities and services should be used in common by civil aviation and military aviation, contracting states should as necessary initiate or improve the co-ordination between their civil and military air traffic services to ensure the safety, regularity and efficiency of international civil air traffic. The International Standards[49] and Recommended Practices[50] (SARPs)[51] in Annex 11[52], Chapter2, 2.15 and 2.16 contain provisions for co-ordination between military authorities and air traffic services and co-ordination of activities potentially hazardous to civil aircraft. These provisions specify that air traffic services authorities shall establish and maintain close co-operation with military authorities responsible for activities that may affect flights of civil aircraft. The provisions also prescribe that the arrangements for activities potentially hazardous to civil aircraft shall be coordinated with the appropriate air traffic services authorities and that the objective of this co-ordination shall be to achieve the best arrangements which will avoid hazards to civil aircraft and minimize interference with the normal operations of such aircraft.[53]

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49) "A Standard is defined as any specification for physical characteristics, configuration, material, performance, personnel or procedure, the uniform application of which is recognized as necessary for the safety or regularity of international air navigation and to which Contracting States will conform in accordance with the Convention; in the event of impossibility of compliance, notification to the Council is compulsory under Article 38 of the Convention." http://www.icao.int/safety/airnavigation/Pages/standard.aspx, visited August 13, 2014.

50) "A Recommended Practice is any specification for physical characteristics, configuration, material, performance, personnel or procedure, the uniform application of which is recognized as desirable in the interest of safety, regularity or efficiency of international air navigation, and to which Contracting States will endeavor to conform in accordance with the Convention. States are invited to inform the Council of non-compliance."
http://www.icao.int/safety/airnavigation/Pages/standard.aspx, visited August 13, 2014.

51) SARPs cover all technical and operational aspects of international civil aviation, such as safety, personnel licensing, operation of aircraft, aerodromes, air traffic services, accident investigation and the environment. Without SARPs, our aviation system would be at best chaotic and at worst unsafe.

52) Annex 11-Air Traffic Services.

In the event that military unit observes that a civil aircraft is entering, or is about to enter, a designated prohibited or danger area or any other area of activity which constitutes potential hazards, a warning to the aircraft should be issued through the responsible ATS unit. The warning should include advice on the change of heading required to leave, or circumvent, the area. If the military unit is unable to contact the responsible ATS unit immediately and the situation is deemed to be a genuine emergency, an appropriate warning to the aircraft may be transmitted on the VHF emergency channel 121.5 MHz. If the identity of the aircraft is not known, it is important that the warning include the SSR code, if observed, and describe the position of the aircraft in a form meaningful to the pilot, e.g. by reference to an ATS route and/or the direction and distance from an airport or an aeronautical radio navigation aid, an established waypoint or reporting point.

In the event of armed conflict or the potential for armed conflict, the need for close co-ordination between civil and military authorities and units is even more critical. The responsibility for initiating the coordination process rests with the State whose military forces are engaged in the conflict. The responsibility for instituting special measures to assure the safety and security of international civil aircraft operations remains with the State responsible for providing air traffic services in the airspace affected by the conflict, even in cases where co-ordination is not initiated or completed. Based on the information which is available, the State responsible for providing air traffic services should identify the geographical area of the conflict, assess the hazards or potential hazards to international civil aircraft operations, and determine whether such operations in or through the area of conflict should be avoided or may be continued under specific conditions.

An international NOTAM containing the necessary information, advice and safety measures to be taken should then be issued and subsequently updated in

53) *Manual Concerning Safety Measures Relating to Military Activities Potentially Hazardous to Civil Aircraft Operations*, Doc-9554-AN/932, para2.3.

the light of developments. All those concerned with initiating and issuing of NOTAM should be aware of the provisions governing the duration of the published NOTAM. If the necessary information is not forthcoming from the States whose military authorities are engaged in the armed conflict, the State responsible for providing air traffic services should ascertain the nature and scope of the hazards or potential hazards from other sources, such as aircraft operators, the IATA and IFALPA (the International Federation of Air Line Pilots' Associations), adjacent States or in some cases the relevant ICAO regional office in order to take the action outlined above.

Subject to the limitation on the resorting to the right of self-defense, it may be observed that it will be extremely difficult, if not impossible, to justify the shooting down of a civil aircraft which enters into or is about to enter into an airspace not according to the assigned route. In above-mentioned *US-Yugoslavia* case, although without any admission of wrongdoing, Josip Broz Tito, Yugoslavia's president, stated in a letter to the American Ambassador dated August 31, 1946: " …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 identity should be taken and the Yugoslav Government informed hereof so that any necessary steps could be undertaken through appropriate channels."[54] While likely unintentional, President Tito established a baseline for comparison on this issue. Surely if an unarmed military transport should never be fired upon, it is even more reasonable that a country should never fire on a civilian aircraft.[55]

In addition to international humanitarian law, there are also other regimes that may apply in armed conflict. Most importantly, there is increasing support for the general applicability of international human rights law in armed conflict.[56]

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54) 15 Dep't St. Bull. 505 (1946).

55) Brian E. Foont, *Shooting Down Civilian Aircraft: Is There an International Law?*, 72 J. Air L. & Com. (2007) at 701.

56) See e.g. United Nations Human Rights Committee, General Comment No. 31 (2004), U.N.Doc. CCPR/C/21/Rev.1/Add.13 para.11.

Ⅳ. Victims and Responsible Parties

1. Potential victims

i. In all these tragedies, the innocent passengers are undoubtedly the victims of the downing of the aircraft. The passengers and other people who is entitled to claim the compensation according to the relevant domestic laws may ask compensation against the air carrier based on the contractual relationship between thereof. Recognizing the importance of ensuring protection of the interests of consumers in international carriage by air and the need for equitable compensation based on the principle of restitution, the international community adopted a series of international conventions to govern the possible compensation between the passengers and air carries which are engaged in the international transportation.

The Montreal Convention of 1999 is such a widely accepted international instrument.[57] This Convention stipulates the two-tier liability system imposed on the air carrier. It also clarifies the damages suffered by the passengers to be recovered by the party who is entitled to claim.[58] In the situation where the carriage is not an international one falling into the scope of the Montreal Convention of 1999, the relationship between the passengers and air carrier should be governed by other international instrument, if there is any, or the domestic laws.

ii. The third parties on the surface are also the potential victims of the downing of the flight. It is very possible that the exploded aircraft may cause the damages to the people on the surface and the properties thereof. Currently

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57) *Convention for the Unification of Certain Rules for International Carriage by Air*, opened for signature on 28 May, 1999. As of 23 December, 2014, the contracting parties to the Convention are 108.

58) Article 21 of the Montreal Convention of 1999.

there is no such universally accepted international convention as the Montreal Convention of 1999 to govern the compensation arising between the surface injured parties and the air carrier or the aircraft operator. Although the international community has tried to adopt a world wide accepted international treaty in this regard, but the success has not been achieved until now.[59] Therefore, in terms of the civil compensation between the third parties, the domestic laws will be applied.

iii. Under the specific situation, the air carrier and the aircraft operator may also be the possible victims. For example, if the air carrier has followed all the legally prescribed procedure to execute the flight and is without any omission or negligence on its side, including its servant or agency, but for the purpose of the Montreal Convention of 1999, such air carrier shall also make compensation for the damages suffered by the passengers within the first tier liability. Notwithstanding this, the Convention stipulates “nothing in this Convention shall prejudice the question whether a person liable for damage in accordance with its provisions has a right of recourse against other person”.[60] Hence, if the aircraft is wrongfully shot down by a party, the air carrier is entitled to claim the compensation based on the right of recourse which may be governed by the applicable domestic law. Actually as for the damages suffered by the air carries, including the damage to the aircraft itself as well as the death or injury to the flight crew members, the air carrier is undoubtedly a victim which may claim the compensation against the responsible party.

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59) The Rome Convention of 1952 is the only effective international convention to deal with the compensation arising from the third parties on(in) the surface against the aircraft operator, however, this Convention has not collect the ratification of the aviation powers. The two Montreal Conventions of 2009 to modernize the Rome Convention of 1952 are very likely to repeat the bad fate of their predecessor. They are not come into force until now.

60) Article 37 of the Montreal Convention of 1999.

2. Potential responsible parties

As discussed above, each contracting State may, for reasons military necessity or public safety, restrict or prohibit uniformly the aircraft of other States from flying over its territory.[61] Such prohibited areas, if needed, shall be of reasonable extent and location so as not to interfere unnecessarily with air navigation. Notices to airmen (NOTAM) or other communication containing the necessary information, advice and measures to be taken should then be issued and subsequently updated in the light of developments.

The responsibility for initiating the coordination process rests with the State whose military forces are engaged in the conflict. The responsibility for instituting special measures to assure the safety and security of international civil aircraft operations remains with the State responsible for providing air traffic services in the airspace affected by the conflict, even in cases where coordination is not initiated or completed. Based on all available information, the State responsible for providing air traffic services should identify the geographical area of the conflict, assess the hazards or potential hazards to civil aircraft operations, and determine whether such operations in or through the area of conflict should be avoided or may be continued under specified conditions.

Therefore ,the potential responsible parties to make reparation include, but not limited to, the State which is responsible for providing air traffic services and the State which is the sovereign state controlling the armed conflict areas. However, if the armed conflict is of the non-international nature, it will be more complicated to attribute the responsibility. For example, if the armed conflict arises between the governmental authority representing the sovereign state and the rebel substantially controlling a specific area of the state in concern, is the rebel obligated to make the reparation in the situations under which it is proved that the civil aircraft is shot down by its military forces? This question is very controversial due to the international legal status of such rebel.

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61) Article 9 of the Chicago Convention of 1944.

Ⅴ. Reparations

The reparation is meant to cover measures that seek to eliminate all the harmful consequences of a violation of rules of international law applicable in armed conflict and to re-establish the situation that would have existed if the violation had not occurred. Reparation shall take the form of restitution, compensation, satisfaction and guarantees and assurances of non-repetition, either singly or in combination.[62)]

Notwithstanding the diversified forms of the reparation which may be imposed on the responsible State, it is very rare for such State to admit the wrongfully shooting down the civil aircraft flying through the air space over the armed conflict area. By reviewing the historical shooting down of civil air craft by the military forces of sovereign States, it is observed that such States either refusing to make any reparation to the victims[63)] or make compensation without admitting any responsibility[64)].

The United States even went so far as to assert that principles of international law that govern potential liability for injuries and property damage arising out of military operations are well-established: (1) indemnification is not required for injures or damage incidental to the lawful use of armed force;(2) indemnification is required where the exercise of armed force is unlawful; and (3) states may, nevertheless, pay compensation ex gratia without acknowledging, and irrespective of, legal liability.[65)] For the purpose of attributing the responsibility, the key

62) Article 1 of the Reparation for Victims of Armed Conflict (Substantive Issues), prepared by the International Law Association in the Hague Conference (2010).

63) For example, on April 20, 1978, the former Soviet Union took military action against a civilian jet operated by Korean Airlines, caused two killed and thirteen injured. Five years later, on September 1, 1983, again the former Soviet Union shot down the civilian aircraft operated by the same Korean Airlines, caused all 269 passengers and crew members perished. In both accidents, the government of Soviet Union refused to make any compensation to the victims based on different grounds.

64) For example, in the accident of the downing of Iran Air Flight 655 by the United States, the United States made compensation to the victims but denying the responsibility.

issue is to prove that the use of the armed force by a state is unlawful. This will be an extremely difficult task, if not completely impossible, particularly if the military action is taken against the civil aircraft which is flying through the air space over the armed conflict zone. By viewing this, the International Law Association is working hard to prepare the documents to deal with the procedure for reparation mechanisms.[66]

Ⅵ. Conclusion

Due to the risk and danger of the armed conflict zone, it is more than difficult to carry out the investigation of accident involving the civil aircraft. Even if the investigation is possible, it will be a time-consuming process. How to make the victims fully and promptly compensated, which deserves the concern of the international community. ICAO has an import role to play in working with its Member States, in coordination with the aviation industry and other bodies within the United Nations, to ensure the right information reaches the right people at the right time.

Furthermore, it is also very necessary to incorporate into international law, through appropriate UN frameworks, measures to govern the design, manufacture and deployment of modern anti-aircraft weaponry. Most importantly, as far as the author is concerned, giving the due respect to the international law applicable to the armed conflict zones by the parties involved is the fundamental way to achieve the security of the civil aircraft flying over thereof. Of course the restrictive implementation of such international law is the other side of the same

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65) Abraham D. Sofear, *Compensation of Iranian Airbus Tragedy*, 8 Dep't of St. Bull., Oct, 1988, at 58.

66) See the *Draft Procedure Principles for Reparation Mechanisms*, prepared by Shuichi Furuya (Co-Rapporteur) in Washington Conference(2014) of the International Law Association.

coin. Only doing this, the tragedy such as the downing of MH17 could be avoided in the future to the possible largest extent.

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Abstract

Reparation for Victims of the International Civil Aviation Arising from Armed Conflict Zones

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The downing of the MH17 reminds the world that the international civil aviation is not as safety and security as people expected. Such tragedy is partly due to the risk and danger of the armed conflict zones, but is more attributed to the ignorance to the international law by the responsible parties concerned.

International laws applicable to the armed conflict zones shall be strictly followed, and the reparation shall be provided to the victims, otherwise such disaster could not be avoided in the future.

Key words : MH17, aviation safety and security, international humanitarian law, conflict zone, reparation