The Statute of the International Criminal Tribunal for Malaysia Airlines Flight MH17—An Aborted Take Off

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Abstract
On 17 July 2014, Malaysia Airlines Flight MH17, a civilian aircraft on an international flight was downed whilst overflying the airspace above Donetsk Oblast, Ukraine, leading to the loss of a life for all on board. The flight manifest indicated fifteen crew plus 283 passengers on board. There were eleven affected countries whose nationals perished. The United Nations Security Council swiftly issued a press statement in which it called upon all member states to cooperate with investigations; and to assist in bringing all those responsible to justice. Thus, the United Nations Security Council adopted Resolution 2166 in 2014. A year later, on Malaysia's insistence, a draft resolution was tabled before the United Nations Security Council to create a tribunal to punish those responsible for the Flight MH17 disaster. This endeavour failed when the Russian Federation used its veto power to block the draft resolution. Whilst the efforts to give justice to victims of the crash are commendable, there remains some doubt over the efficacy of the piecemeal approach to punishing crimes of international air law, especially given the high politicisation of international law itself. The questions to be answered, therefore are whether current international air law sufficiently provides for the punishment of perpetrators of crimes involving aircraft and whether the veto by Russia impedes or advances the fight against impunity in international air law.

BACKGROUND

In July 2015, the United Nations Security Council (UNSC), acting under Chapter VII of the United Nations Charter failed to garner sufficient support for a resolution which would have seen a special tribunal set up to investigate and prosecute those responsible for the Flight MH17 tragedy.[1] This followed the use of veto power by the Russian Federation. The draft resolution, which had been presented by the Malaysian Minister for Transport on behalf of the

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1 United Nations Press Statement, SC11990, 'Security Council Fails to Adopt Resolution on Tribunal for Malaysia Airlines Crash in Ukraine, Amid Calls for Accountability, Justice for Victims' (29 July 2015) <http://www.un.org/press/en/2015/sc11990.doc.htm> accessed 7 August 2015.

Joint Investigation Team (consisting of Australia, Belgium, Malaysia, the Netherlands, and Ukraine) garnered only eleven affirmative votes. Three states abstained (Angola, China, and Venezuela) whilst Russia voted in the negative, thereby effectively defeating the resolution. Russia enjoys this veto power, which is sanctioned by Article 27(3) of the United Nations Charter,[2] together with four other states, all permanent members of the UNSC. These are France, the United Kingdom (UK), China, and the United States of America (US). In any decision of the UNSC, which does not concern procedural matters, if any of these permanent five member states vote in the negative, that effectively translates to a veto, which precludes that particular resolution from being adopted and coming into effect.

The downing of the aircraft whilst traversing the upper airspace of Ukraine, overhead Donetsk Oblast led to the immediate perishing of all on board.[3] Needless to say, as a result of this incident, and in light of the failed July 2015 resolution, the question of which state would have jurisdiction over the perpetrators cannot be avoided. According to Malcolm Shaw,[4] when dealing with the issue of jurisdiction in international criminal law, there are three different concepts at play. These are: (i) prescriptive jurisdiction, which is the power of a state to make legal rules; (ii) enforcement jurisdiction, which is the power of a state to enforce legal rules by executive action; and (iii) judicial jurisdiction, which is the power of the courts of a state to apply legal rules and punish their contravention. This enquiry is limited to the latter form of jurisdiction.

The article's focus is to examine the impact of state jingoism, competing jurisdictions and the current piecemeal approach on punishing international air law crimes.[5] It thus interrogates whether the foregoing, as reflected in the Russian veto and other state behaviours, actually lead to impunity for the perpetrators who cannot be brought to book. It therefore poses the following questions:

- Does current international air law provide sufficiently for the punishment of perpetrators of international crimes?

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2 Article 27(3) of the United Nations Charter of 1945 provides that: 'Decisions of the Security Council on all other matters [other than procedural matters] shall be made by an affirmative vote of nine members [non-permanent members] including the concurring votes of the [five] permanent members.' Article 27(2) stipulates that on procedural matters, the UNSC only requires an affirmative vote of nine members.

3 United Nations Press Statement SC/11483, 'Security Council Coalesces around Resolution 2166 (2014) on Malaysian Jet Crash Demanding Accountability, Full Access to Site, Halt to Military Services' (21 July 2014) <http://www.un.org/press/en/2014/sc11483.doc.htm> accessed 7 August 2015.

4 Malcolm Shaw, *International Law* (4 edn, Cambridge UP 1997) 452.

5 John Dugard, *International Law: A South African Perspective* (Juta 2011) 157. Dugard defines an international crime as a crime, which threatens the good order not only of a particular state but of the international community as a whole. This could be an offence under customary international law or under a particular treaty.

- Does the Russian veto impede or advance the fight against impunity for international air law crimes?
- What lessons can be learnt from the history of *ad hoc* international criminal tribunals?

UNSUITABILITY OF THE PIECEMEAL APPROACH TO DEALING WITH INTERNATIONAL AIR LAW CRIMES

International criminal law has developed significantly since the very first attempts to create international criminal tribunals to deal with international crimes, such as genocide, war crimes and crimes against humanity. However, this development was focused on crimes of a specific genus, atrocious crimes which shocked the conscience of humankind. International air law, on the other hand, had very little to benefit from the history and jurisprudence of the various *ad hoc* international criminal tribunals that were established over time. For instance, tribunals such as the Nuremberg Tribunal,[6] the International Military Tribunal for the Far East (IMTFE),[7] the International Criminal Tribunal for Rwanda,[8] the International Criminal

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6 See Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, and Charter of the International Military Tribunal. London, 8 August 1945. See also, generally Michael Marrus, *The Nuremberg War Crimes Trial, 1945-46: A Documentary History* (St Martins 1997); Ann Tusa and John Tusa, *The Nuremburg Trial* (Skyhorse 2010) 50.

7 The International Military Tribunal for the Far East informally known as the Tokyo War Crimes Trial, lasted two and a half years, from April 1946 to November 1948. See 'The Tokyo War Crimes Trial' <http://imtfe.law.virginia.edu/> accessed 10 August 2016.

8 The OAU responded to the Rwanda genocide by appointing the International Panel of Eminent Personalities to Investigate the 1994 Genocide in Rwanda and Surrounding Events in 1998. The Panel submitted their report, titled 'Rwanda: The Preventable Genocide', which they requested should be transmitted to the UN Secretary General for discussion by the UNSC. Its mandate included the investigation of the 1994 genocide in Rwanda and the surrounding events in the Great Lakes Region as part of efforts aimed at averting and preventing further wide-scale conflicts in that region. It was further asked to establish the facts of the genocide; how it was conceived, planned, and executed, and also to investigate the failure to enforce the UN Genocide Convention in Rwanda and in the Great Lakes Region. The Panel was also tasked with recommending measures aimed at redressing the consequences of the genocide and at preventing any possible recurrence of such a crime. The ICTR was clothed with jurisdiction to try, amongst other crimes, genocide, crimes against humanity, violations of Article 3 common to the Geneva Conventions and of Additional Protocol II. Its jurisdiction *ratione temporis* was limited to crimes committed between 1 January and 31 December 1994.

Tribunal for the former Yugoslavia,[9] the Special Court for Sierra Leone,[10] and the Extraordinary African Chambers,[11] were all focused on either genocide, war crimes and crimes against humanity or some other heinous international crimes.[12] So are the two permanent criminal tribunals, the International Criminal Court[13] and the African Criminal Court. [14]

Despite the fact that states concluded various treaties regarding the safety of aviation, there does not seem to have been a clear intention to create an international tribunal to punish offenders. Instead states assumed that principles of international law, such as *aut dedere aut punire (judicare)*, would suffice, in terms of which a state in whose custody an offender is, has an obligation to either extradite or punish such offender.[15] The Flight MH17 saga has proven that such assumptions are not necessarily true. This article points out the deficiencies in the criminal aspects of international air law, and the complexity of holding perpetrators of crimes of international aviation to account through an international tribunal. It also alludes to the difficulties of, and the undesirability of, dealing with such accountability

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9 See United Nations, 'International Criminal Tribunal for the former Yugoslavia' <www.icty.org> accessed 11 August 2016. The Statute of the Tribunal lists: (i) grave breaches of the Geneva Conventions of 1949; (ii) violation of the laws and customs of war; (iii) crimes against humanity and; (iv) genocide as crimes over which the ICTY would have jurisdiction.

10 The Special Court came into existence after the UNSC requested the UN Secretary General through UNSC Resolution 1315(2000) to negotiate an agreement with the Government of Sierra Leone to create an independent special court consistent with the resolution. The UNSC expressed deep concern at the very serious crimes committed within the territory of Sierra Leone against the people of Sierra Leone as well as the UN and associated personnel and at the prevailing situation of impunity. The UNSC then requested the UN Secretary General to negotiate an agreement with the Government of Sierra Leone to establish an independent special court to prosecute persons who bear the greatest responsibility for the commission of serious violations of international humanitarian law and crimes committed under Sierra Leonean law.

11 The Extraordinary African Chambers were established pursuant to a treaty between Senegal and the AU, and only have competence to deal with four crimes, genocide, war crimes, crimes against humanity and torture. See Arts 5–8 of the EAC Statute.

12 Angelo Dube, 'The AU Model Law on Universal Jurisdiction: An African Response to Western Prosecutions based on the Universality Principle' (2015) 18(3) Potchefstroom Electronic LJ 450–486, 476.

13 The Rome Statute only received the 60th ratification that was necessary to trigger the entry into force on 11 April 2002, and it eventually entered into force on 1 July 2002. It also has jurisdiction over the crimes of genocide, war crimes and crimes against humanity.

14 Article 14 of the Malabo Protocol, which set up the African Criminal Court, introduced a new Art 28A of the Statute which lists the crimes over which the court shall have jurisdiction, and at the top of the list are the core crimes of genocide, war crimes and crimes against humanity. It then goes on to list other serious offences of international concern, *viz*: the crime of unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money-laundering, trafficking in persons, trafficking in drugs, trafficking in hazardous wastes, illicit exploitation of natural resources and the crime of aggression. The court can only deal with crimes of international air law if they flow from any of the abovementioned offending conduct.

15 Dugard (n 5) 157. Dugard states that the principle of *aut dedere aut punire (judicare)* is the basis for the enforcement of international criminal law.

in a piecemeal fashion. It is thus very relevant in the era of competing jurisdictions and the need to fight impunity for international air law crimes.

INTERVENTIONS BY ICAO, EUROJUST AND THE UNITED NATIONS

The Role of the International Civil Aviation Organisation

As an oversight body for international aviation, the Chicago Convention established the International Civil Aviation Organisation (ICAO).[16] It is a specialised agency of the United Nations (UN) and its role is limited to offering guidance only on civil aviation matters at the global level. The ICAO was preceded by the Provisional International Civil Aviation Organisation (PICAO), due to delays in ratification of the Chicago Convention.[17] As a result, states signed an Interim Agreement which gave birth to the transitional PICAO to serve as a temporary advisory and coordinating body. The PICAO was later transformed into the ICAO when a sufficient number of ratifications of the Chicago Convention were obtained on 4 April 1947.[18] The organisation later became a specialised agency of the UN, linked to the Economic and Social Council (ECOSOC).[19] Its main objectives include the development of principles and techniques of international air navigation and to foster the planning and development of international air transport.[20]

The ICAO has a section, the Accident Investigation Section (AIG), which is dedicated to the development of policies for aircraft accident and incident investigations conducted by member states.[21] Its sole objective is the prevention of accidents and incidents and not the apportionment of blame or liability. Apart from developing Standards and Recommended Practices (SARPs) which give guidance to states, the AIG is also tasked with analysing accident and incident data.[22]

In the spirit of ensuring a full, thorough and independent international investigation into the incident the ICAO decided to send a team to work in coordination with the Ukrainian National Bureau of Incidents and Accidents Investigation of Civil Aircraft in this investigation. This followed a request

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16 Convention on International Civil Aviation, done at Chicago on 7 December 1944. Article 43 provides: 'An organisation to be named the International Civil Aviation Organisation is formed by the Convention. It is made up of an Assembly, a Council, and such other bodies as may be necessary.'

17 ICAO, 'The History of ICAO and the Chicago Convention' <http://www.icao.int/about-icao/History/Pages/default.aspx> accessed 10 August 2016.

18 Angelo Dube, 'Of Neighbours and Shared Upper Airspaces: The Role of South Africa in the Management of the Upper Airspaces of the Kingdoms of Lesotho and Swaziland' (2016) 48(2) Comparative and Intl LJ 219–253, 223.

19 See UN, 'What does ECOSOC do?' <http://www.un.org/en/ecosoc/meetings/2005/hl2005/ECOSOCinfo%20rev%20et.pdf> accessed 10 August 2016.

20 Article 44 Chicago Convention.

21 See ICAO, 'Safety' <http://www.icao.int/safety/airnavigation/Pages/aig.aspx> accessed 9 August 2016.

22 See ICAO, 'Accident Investigation Section (AIG)' <http://www.icao.int/safety/airnavigation/AIG/Pages/default.aspx> accessed 22 August 2015.

for assistance by Ukraine.[23] At the request of Ukraine, the Netherlands was put in charge of investigating the cause of the disaster. The Dutch Safety Board carried out the investigation,[24] largely because there were 196 passengers who were Dutch citizens on board Flight MH17.

Coordination Efforts by Eurojust

Hardly two weeks after the tragic incident, the eleven countries whose nationals died when the aircraft went down met under the auspices of Eurojust in The Hague to discuss their judicial cooperation strategy.[25] Eurojust is a judicial cooperation unit of the European Union (EU), and its main goal is to support and strengthen coordination and cooperation between national investigating and prosecuting authorities in relation to serious crimes affecting EU member states. In its 28 July 2014 meeting, Eurojust revealed that a criminal investigation had already been commenced by Ukrainian, Dutch, Australian, American and Malaysian investigators. At this meeting, the Joint Investigation Team (made up of Australia, Belgium, the Netherlands, and Ukraine) was launched and was charged with bringing the 'perpetrators of the attack on Flight MH17 to justice.' Malaysia was only added to the Joint Investigative Team at its December 2014 meeting.[26] It is this same group of countries that would later approach the UNSC with a draft of the failed 2015 resolution which sought to create an international criminal tribunal to prosecute perpetrators of the Flight MH17 attack.

Apart from the EU response, the UNSC also responded promptly, convening an emergency meeting on the Ukraine tragedy. On 18 July 2014, the UNSC issued a press statement in which it expressed its deepest sympathies and condolences to the families of the victims, and to the people and governments of all those killed in the crash. The members of the UNSC called for a full, thorough and independent international investigation into the incident in accordance with the international civil aviation guidelines and for appropriate accountability. It further called for immediate access to

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23 See Australian Minister for Foreign Affairs Press Release, 'UN Security Council Resolution on the Downing of Flight MH17' (22 July 2014) <http://foreignminister.gov.au/releases/Pages/2014/jb_mr_140722.aspx?ministerid=4> accessed 20 August 2015.

24 See Government of the Netherlands, 'MH17 Accident' <www.government.nl/topics/mh17-incident> accessed 10 August 2016.

25 See Eurojust, 'Eurojust Coordination Meeting: Investigations into Flight MH 17' Press Release (28 July 2014) <http://www.eurojust.europa.eu/press/pressreleases/pages/2014/2014-07-28.aspx> accessed 20 August 2015.

26 See Eurojust, 'MH17 Coordination Meeting held at Eurojust' Press Release (4 December 2014) <http://www.eurojust.europa.eu/press/PressReleases/Pages/2014/2014-12-04.aspx> accessed 20 August 2015.

be granted to investigators wishing to visit the site.[27] This was followed four days later by Resolution 2166 (2014) adopted by the UNSC.[28]

UNSC Resolution 2166 (2014)

The resolution reaffirmed the position that the rules of international law prohibit acts of violence that pose a threat to the safety of international civil aviation. In it, members of the UNSC also expressed the centrality of accountability to the safety of aviation, which could only be achieved by bringing those responsible to justice. The UNSC further urged all states which are party to the Convention on International Civil Aviation to observe to the fullest extent applicable,[29] the international rules, standards, and practices concerning the safety of civil aviation. The importance of preventing similar incidents in the future was also emphasised. The UNSC also called on all states and actors in the region to accord full cooperation in the conduct of the international investigation of the incident, and further demanded that all states and other actors refrain from acts of violence against civilian aircraft.

Whilst Resolution 2166 (2014) demanded that those responsible for this incident be held to account and that all states should cooperate fully with efforts to establish accountability, it came short of calling for the establishment of an international criminal tribunal to facilitate such accountability.[30] All that the resolution did was to call for all member states of the UN to cooperate fully with the international investigation team.[31]

The UNSC's July 2015 Meeting—the Impact of the Russian Veto

In July 2015, at the insistence of the Joint Investigation Team and a proposal made by Malaysia, the UNSC convened a meeting in which the Statute of the International Criminal Tribunal for Malaysian Airlines Flight MH17 was scheduled to be adopted. The Statute was designed as an annexure to the resolution which the UNSC had hoped to secure positive votes for. In introducing the text of the provisions, the Malaysian Minister of Transport indicated that his country was keen to fight impunity and punish perpetrators of crimes against international aviation. He insisted that there was a need for the UNSC to fight against impunity and ensure accountability, especially

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27 See UNSC, 'Security Council Press Statement on Malaysian Plane Crash' Press Release SC/11480 (18 July 2014) <http://www.un.org/press/en/2014/sc11480.doc.htm> accessed 20 August 2015.

28 See Resolution 2166 (2014) adopted by the Security Council at its 7221st meeting on 21 July 2014, S/Res/2166(2014).

29 Paragraph 12.

30 Paragraph 11.

31 Paragraph 9.

given the rise in the number of non-state actors with the capacity to carry out such attacks.[32]

Had the UNSC managed to get all the required affirmative votes for the draft resolution in July 2015, this would have led to the creation of the Statute of the International Criminal Tribunal for Malaysia Airlines Flight MH17. The UNSC was acting under Chapter VII of the UN Charter, which it can only do if it is addressing a matter that touches on international peace and security. This means that proponents of the failed resolution perceived the Flight MH17 disaster as a threat to international peace, a form of aggression or a breach of the peace as laid down in Article 39 of the UN Charter.[33] The UN Charter makes the determination of whether a particular situation amounts to a threat to the peace, an exclusive preserve of the UNSC, taking into account several factors. In the past, for example, the UNSC has identified potential or generic threats as threats to international peace and security, such as terrorist acts, the proliferation of weapons of mass destruction as well as the proliferation and illicit trafficking of small arms and light weapons.

The proposed resolution failed after it received eleven affirmative votes, three abstentions (Angola, China, and Venezuela) and one negative vote from the Russian Federation.[34] The Russian veto effectively stopped the creation of an international tribunal, leaving the task of punishing perpetrators of the Flight MH17 attack to the domestic courts of the various states affected.

THE INTERNATIONAL AIR LAW FRAMEWORK: MORE RESPONSIVE THAN PROACTIVE

The reactionary approach to rule making in international air law is not necessarily novel. The Convention on Offences and Certain Other Acts Committed on Board Aircraft of 1963 (Tokyo Convention) was developed at a time when most threats to aviation emanated largely from physical interference. Hence, in its list of offences, it includes endangering aviation safety through various actions, such as unlawful seizure of aircraft, destruction of aircraft in service, as well as hostage-taking on board aircraft and at aerodromes.

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[32] See UNSC, 'Security Council Fails to Adopt Resolution on Tribunal for Malaysia Airlines Crash in Ukraine, Amid Calls for Accountability, Justice for Victims' Press Release SC/11990 (29 July 2015) <http://www.un.org/press/en/2015/sc11990.doc.htm> accessed 22 August 2015.

[33] Article 39 of the UN Charter provides that: 'The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.'

[34] See UN, 'Security Council Fails to Adopt Resolution on Tribunal for Malaysia Airlines Crash in the Ukraine Amid Calls for Accountability, Justice for Victims' (29 July 2015) <http://www.un.org/press/en/2015/sc11990.doc.htm> accessed 11 August 2016.

The Convention for the Suppression of Unlawful Seizure of Aircraft of 1970 (The Hague Convention) was also adopted after the fact, in response to phenomena which had not been catered for under the Tokyo Convention some seven years earlier. Hence, two reasons are often cited for the conclusion of the Hague Convention. First, the expansion of the dimensions of the aerial hijacking problem prevalent in the 1960s, spurred in part by military espionage; and secondly, as a response to the failings of the 1963 Tokyo Convention.

Again when states realised that not all acts which endanger aviation are necessarily carried out on board the aircraft, they concluded the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation of 1971 (The Montreal Convention). The Montreal Convention was signed in September 1971 and was aimed at preventing acts of violence generally and not just hijacking and acts of unlawful seizure of aircraft. Article 1.1(e) of the Montreal Convention proscribes human conduct where the role actor 'unlawfully and intentionally destroys or damages air navigation facilities or interferes with their operation, if any such act is likely to endanger the safety of aircraft in flight.' Only the Montreal Convention is pertinent here.

The reactionary nature of international air law can also be seen in the amendment of Article 3 of the Chicago Convention in 1984, as a response to the Soviet Union having shot down a trespassing civilian aircraft, Korean Airlines Flight 007. The aircraft had veered off course, and flown over prohibited airspace near the southern tip of the Sakhalin Island at 33 000 feet (the area contained the Soviet Union's most sensitive military installations). The jet had strayed as much as 312 miles from its designated route.[35] Military jets from the Soviet Union had intercepted the South Korean Airlines flight in exercise of the right to self-defence, and when communications could not be established between the interceptors and the jetliner, the interceptors shot it down, killing all 269 persons on board. This prompted the amendment of the Chicago Convention to include article 3*bis*. This article provides that member states 'recognise that every state must refrain from resorting to the use of weapons against civil aircraft in flight and that in the case of interception, the lives of persons on board and the safety of the aircraft must not be endangered.'

Article 3*bis*(a) continues to stipulate that the foregoing shall not be interpreted as modifying the rights and obligations of states as contained in the UN Charter. Such rights would include the right of self-defence, which the Soviet Union insisted it was exercising when it shot down Flight 007. The article further enjoins state parties to publish interception protocols, and stipulates that the exercise of sovereignty by a state over its airspace means that such a state may resort to any appropriate means consistent

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[35] Farooq Hassan, 'A Legal Analysis of the Shooting of Korean Airlines Flight 007 by the Soviet Union' (1984) 49 J of Air, Law and Commerce 557.

with international law and the Chicago Convention in order to protect its airspace. This too was a reaction to the Soviet Union's shooting down of a civilian aircraft.

Although the foregoing provisions were created in a piecemeal fashion and in reaction to unfortunate incidents, today they serve as the bedrock of international aviation law. To give effect to these international agreements, member states would have to arraign and prosecute those responsible for downing civilian aircrafts in their own domestic courts. Central to such judicial proceedings would be the question of jurisdiction in international law.

JURISDICTIONAL LINKS IN INTERNATIONAL LAW

The issue of jurisdiction has been at the heart of international criminal law for centuries, and continues to be of relevance even today. This is evident in the insistence on an investigation as well as calls for prosecution of the perpetrators in the Flight MH17 saga. It is trite that there were competing jurisdictional interests in relation to this incident. First, there were competing jurisdictional interests in terms of investigation of the crash site; investigation into who was responsible for the crash; and criminal jurisdiction in respect of which state or states would prosecute these perpetrators once identified. This article limits itself to jurisdiction in respect of prosecuting those responsible for the deaths that resulted from the crash.

There are various jurisdictional links in international law, some of which are largely accepted by states as flowing from customary international law. Sadly, others are still the subject of contestation as they are viewed as controversial by some states. According to Dugard, international law knows five such jurisdictional links, namely: territoriality, passive personality, nationality (also known as active personality), protected interest, and universal jurisdiction. Apart from the territoriality principle, the other forms of jurisdiction allow states to prosecute offenders for crimes committed extraterritorially.[36]

The first jurisdictional link, namely that of territoriality, is largely influenced by the desire by states to assert sovereignty. It flows from the basic principle of international law that a crime committed in a state's territory (water, land, and airspace) is capable of being tried in the courts of that state.[37] Indeed this legal standpoint is also supported by jurisprudence, which reveals that conferring jurisdiction on the territorial state is based on the practical reasoning that the territorial state is the most reasonable place for a trial as witnesses and items of evidence are present there, and could

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[36] Robert Cryer, *Prosecuting International Crimes* (Cambridge UP 2005) 75.

[37] Dugard (n 5) 149. See also *Bankovic v Belgium* (2002) 41 ILM 517; 123 ILR 94 para 59. This case views jurisdictional competence of the territorial state as having primacy of place.

more readily be accessed.[38] The fact that the crash occurred over Ukraine airspace has become settled. International law regards the airspace above the territory of a state as belonging to that particular state, although this extends upwards only to a specified limit. This limit is determined by the end of the troposphere where it is possible to conduct civil aviation, and the beginning of the stratosphere where outer space begins. This block of air is often said to extend up to FL460.[39] Reports place the aircraft at FL330 at the time of impact, and as this falls within the troposphere, Ukraine is entitled under international law to assert jurisdiction over and prosecute those responsible.[40]

Some scholars are of the opinion that territorial jurisdiction has been supported by many international courts and international studies, and as such, it is as much applicable to aliens as it is to citizens.[41] Despite the territoriality principle's highly favoured position as a primary jurisdictional link in international law, it does not enjoy absolute primacy. This position was laid down in the *Case of the SS Lotus (France v Turkey)*.[42]

Apart from the territoriality principle, a state whose national is the victim of an incident occurring outside its territory can still assert jurisdiction under the principle of passive personality.[43] This principle often finds justification in the argument that every state has a right to protect its citizens regardless of where they are. This is much more so in cases where the territorial state is unwilling or unable to punish the person who caused the injury. The state

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38 Mitsue Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law* (Intersentia 2005) 65.

39 Angelo Dube, 'Towards a Single African Sky: Challenges and Prospects' (2015) 23(2) African J of Intl and Comparative L 250–272, 254.

40 Flight levels are used in order to indicate the vertical distance of an aircraft above a particular threshold, taken to be the point where the atmospheric pressure is equal to 1013.25 hPa. This allows pilots to maintain vertical separation as they fly by selecting an altitude that complies with the semi-circular rule. This vertical altitude is expressed in hundreds of feet.

41 Shashi Verma, *An Introduction to Public International Law* (Prentice Hall 1998) 53.

42 *The Case of the SS Lotus* (France v Turkey) 1927 PICJ Reports, Series A No.10. *In casu* a collision occurred on the high seas between a French vessel—Lotus—and a Turkish vessel—Boz-Kourt. The Boz-Kourt sank and killed eight Turkish nationals on board the Turkish vessel. The ten survivors of the Boz-Kourt (including its captain) were taken to Turkey on board the Lotus. In Turkey, the officer on watch of the Lotus (Demons), and the captain of the Turkish ship were charged with manslaughter. Demons, a French national, was sentenced to eighty days of imprisonment and a fine. The French government protested, demanding the release of Demons or the transfer of his case to the French Courts. Turkey and France agreed to refer this dispute on the jurisdiction to the Permanent Court of International Justice (PCIJ). The question before the court was: did Turkey violate international law when Turkish courts exercised jurisdiction over a crime committed by a French national, outside Turkey? If yes, should Turkey pay compensation to France? The court found that Turkey, by instituting criminal proceedings against Demons, did not violate international law. The full judgment is available at <http://www.icj-cij.org/pcij/serie_A/A_10/30_Lotus_Arret.pdf> accessed 11 August 2016.

43 Regula Echle, 'The Passive Personality Principle and the General Principle of *ne bis in idem*' (2013) 9 Utrecht LR 55–67, 60.

whose national was maimed is then entitled to proceed against the perpetrator if he comes within its jurisdiction.[44] The flight manifest indicated that the deceased (fifteen crew plus 283 passengers) came from different countries, namely: Malaysia, Canada, the UK, the Netherlands, Australia, Germany, Belgium, Philippines, and Indonesia.[45] In terms of this principle, any of these states could assert jurisdiction over the offenders as their nationals were victims of the offending conduct.[46] The major considerations here are the effects of the crimes and not the location of its consummation. Cassese asserts that this jurisdictional link is largely influenced by a particular state's desire to protect its nationals wherever they may be.[47] Of course, prosecution of this matter outside the territory of Ukraine poses the usual problems of difficulty in securing witnesses and evidence and obtaining the surrender of the accused.

The acceptance of the passive personality principle as a jurisdictional link was also demonstrated in the case of *United States v Yunis,*[48] where the US prosecuted a Lebanese citizen for hijacking a Jordanian aeroplane in the Mediterranean in June 1985.[49] As the offence took place outside American soil, the only nexus between the hijacking and the US courts was the presence of US nationals on the aircraft. The court held that the US assertion of passive personality jurisdiction was proper under both US domestic law and international law.

In terms of the nationality principle, it is the nationality of the perpetrator that clothes the national court with jurisdiction. This jurisdictional link is often termed active nationality or active personality.[50] At this moment, the causes of the crash are mere speculation, and those responsible for it have not yet been identified. Speculation is rife that Russia had a hand in it, whilst other sources point towards Ukrainian rebels on Ukrainian soil. For instance, the final report of the Dutch Safety Board confirmed that the airline was shot down by a missile. In it, the Dutch Safety Board concluded in October 2015 that the missile was a Russian-made surface-to-air Buk missile. Again, once identified, the state of nationality of the perpetrators would be entitled to exercise jurisdiction over them, subject to the rights of other states who also claim jurisdiction on any of the other grounds under international law.

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44 Alfred Boll, *Multiple Nationality and International Law* (Martinus Nijhoff 2007) 130.

45 See the passenger manifest released by the airline at <http://www.malaysiaairlines.com/content/dam/malaysia-airlines/mas/PDF/MH17/MH17%20PAX%20AND%20CREW%20MANIFEST%20200714.pdf> accessed 19 August 2015.

46 ibid.

47 Antonio Cassese, *International Criminal Law* (Oxford UP 2003) 281.

48 *United States v Yunis* 681 F. Supp. 896 (D.D.C. 1988).

49 ibid 899.

50 For example, both Cryer and Dugard refer to this ground as nationality, whilst Schabas calls it active personality. See generally, Cryer (n 36); Dugard (n 5); and William Schabas, *Genocide in International Law: The Crime of Crimes* (2 edn, Cambridge UP 2009).

The protective principle enables a state to exercise its jurisdiction over foreigners, acting in foreign territory but threatening the national security of the prosecuting state. According to Verma, this form of jurisdiction can be extended over conduct which affects the security of a particular state, its integrity and independence, including vital economic interests.[51] Under this heading as well, various states could claim jurisdiction on the basis that the effects of the crash were felt on their territory, and as such threatened some interest of theirs. For example, Malaysia could claim that its tourism and its aviation industry, which are key economic drivers in any state, suffered from the negative impact of the crash.

Universal jurisdiction allows a state which has no connection with either the individual or the crime or the victim, to be seized of the matter provided certain prerequisites are met. These are: (i) that the crime is of a heinous character; (ii) that it is an affront to entire humankind; and (iii) the crime took place on *terra nullius*. Universal jurisdiction is also connected to the concept of *jus cogens*, in terms of which certain international law obligations are binding on all states.[52] Jessberger notes that universal jurisdiction is useful to punish perpetrators of the core crimes of aggression, genocide, war crimes, and crimes against humanity, which are directed against the interests of the international community.[53] The Flight MH17 saga does not give rise to any of the international crimes that can be subjected to universal jurisdiction, and as such, this jurisdictional link cannot be invoked.

PENAL TRIBUNALS UNDER INTERNATIONAL LAW: THE ROCKY PATH FROM AD HOC TO PERMANENT

From the Nuremberg Tribunal, created to prosecute perpetrators of the crimes committed against victims of the holocaust and war crimes emanating from the Second World War, all the way to the late 1990s, international criminal law is awash with *ad hoc* tribunals. The International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY), the Special Tribunal for Lebanon (STL), the Special Court for Sierra Leone (SCSL), the Extraordinary African Chambers (EAC), and the Special Tribunal for Lebanon were all created as *ad hoc* criminal tribunals in response to atrocities that had been committed.

As highlighted above, in trying to create the Flight MH17 Tribunal, the UNSC was acting under Chapter VII of the UN Charter. This Chapter empowers the UN to take action with respect to threats to the peace;

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51 Verma (n 42) 151.

52 This can also be gleaned from Justinian c 485–565 in the Roman era, where he opined that all nations are governed partly by their own particular laws, and partly by those laws which are common to all, and that natural reason appoints for all mankind.

53 Florian Jessberger, 'On Behalf of Africa: Towards the Regionalisation of Universal Jurisdiction?' in Gerhard Werle, Lovell Fernandez and Moritz Vormbaum (eds), *Africa and the International Criminal Court* (TMC Asser Press 2014) 157.

breaches of the peace; and acts of aggression. Article 39 of the Charter provides that the UNSC has the power to 'determine the existence of any threat to the peace, breach of the peace or act of aggression and shall make recommendations, or decide what measures shall be taken … to maintain or restore international peace and security.' The provocative question therefore is whether the downing of Flight MH17 was a threat to the peace; a breach of the peace; or an act of aggression as provided for in Article 39. To answer this, it is imperative to look at what these terms mean.

For a long time, aggression as a crime of international law remained without a definition. For instance, the Nuremberg Tribunal was seized with jurisdiction to hear matters where an allegation of waging a war of aggression was made. Prior to that, history records the failed attempt to prosecute Kaiser Wilhelm II after the First World War for initiating a war of aggression. However, the instrument designed to do that was not couched in clear and unambiguous words.[54] Despite the lack of a clear definition, legal developments over the past few decades have confirmed that aggression entails individual criminal responsibility and that it is not exclusively an inter-state issue, and that it is a crime of serious concern. This lack of a definition resulted in the International Criminal Court (ICC) not exercising jurisdiction over this crime, even though it appears on the Rome Statute as a prosecutable offence.[55] Only in 2010 did the Assembly of States Parties meeting in Kampala, Uganda agree on a definition of the crime of aggression.[56] In Article 8(1)*bis*, the 2010 amendment to the Rome Statute defined the crime of aggression as:

> the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.

In Article 8(2)*bis*, an act of aggression was defined as 'the use of armed force by a state against the sovereignty, territorial integrity or political independence of another state, or in any other manner inconsistent with the Charter of the United Nations.' It is not necessary that a declaration of war be made for an act to constitute aggression. The amendment contains the threshold requirement that the act of aggression must constitute a manifest

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54 Matthew Gillett, 'The Anatomy of an International Crime: Aggression at the International Criminal Court' (2013) 13(4) International Criminal LR 829–864.

55 Article 5 of the Rome Statute of the International Criminal Court lists genocide, war crimes, crimes against humanity and the crime of aggression as crimes over which the ICC can exercise jurisdiction.

56 See Resolution RC/Res.6, 'The Crime of Aggression' adopted at the 13th plenary meeting on 11 June 2010 by consensus of the Assembly of States Parties (Kampala, Uganda) <http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf> accessed 7 August 2015.

violation of the UN Charter.[57] There is nothing to indicate that the Flight MH17 attack was an act of aggression. The matter was also not classified as a threat to the peace, or an act of terror, or even a breach of the peace.

Given the above, the botched resolution would have been an anomaly in international law for various reasons. First Resolution 2166 (2014), which the failed 2015 resolution was referencing, did not consider the downing of the aircraft as a threat to international peace and security. Resolution 2166 (2014) only labelled this as an 'act … of violence that pose a threat to the safety of international civil aviation.' This sentiment was also expressed by the representative of the Russian Government at the July 2015 meeting of the UNSC, who indicated that his government was pushing for a resolution that would create a thorough and impartial investigation. Russia was also pushing to have ICAO more closely involved in the investigation.

Secondly, it does not appear from the above definitions that the Flight MH17 incident can be classified as a threat to international peace and security, neither is there any evidence at this stage that it can be regarded as an act of aggression. The Ukraine conflict had not been classified as a full-blown conflict on the day of the crash.[58] It was neither a non-international armed conflict, nor an international one. The International Committee of the Red Cross (ICRC) only released a statement on 23 July 2014 declaring *inter alia* that the conflict in eastern Ukraine was of a non-international nature.[59] Even if the downing of the aircraft came as a result of the 'conflict' in Ukraine, it could not be regarded as a war crime as no war existed at the time of the incident.

The push for an *ad hoc* tribunal could have seen the proposed Tribunal for Flight MH17 undergo similar criticism to the STL. The STL is accused of being a costly exercise, even though it is not delivering as expected.[60] The STL, which was also *ad hoc* in nature, was created to deal solely with specific crimes relating to a specific incident. Its primary mandate was to prosecute persons accused of carrying out an attack on 14 February 2005 in Beirut which killed twenty-two people, including the former Lebanese Prime Minister Rafiq Hariri, and injured many others.

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57 Coalition for the International Criminal Court, 'Delivering on the Promise of a Fair, Effective and Independent Court – The Crime of Aggression' <http://www.iccnow.org/?mod=aggression> accessed 7 August 2015.

58 Noelle Quenivet, 'Trying to Classify the Conflict in Eastern Ukraine' (28 August 2014) <http://ilg2.org/2014/08/28/trying-to-classify-the-conflict-in-eastern-ukraine/> accessed 7 August 2015.

59 ICRC Statement, 'Ukraine: ICRC Calls on All Sides to Respect International Humanitarian Law' (23 July 2014) <https://www.icrc.org/eng/resources/documents/news-release/2014/07-23-ukraine-kiev-call-respect-ihl-repatriate-bodies-malaysian-airlines.htm> accessed 17 August 2015.

60 Adam Taylor, 'The UN's Tribunal in Lebanon has Cost Millions and Made No Arrests: Now Journalists are on Trial' *Washington Post* (Washington 7 April 2015) <https://www.washingtonpost.com> accessed 31 May 2018.

Hence, its jurisdiction was heavily circumscribed. It could thus be seized of matters emanating from two things. The first is attacks carried out in Lebanon between 1 October 2004 and 12 December 2005 if they were connected with the attack of 14 February 2005 and were of a similar nature and gravity. The second is crimes carried out on any later date, decided by the parties and with the consent of the UNSC, if they were connected to the 14 February 2005 attack. The STL was established by UNSC through Resolution 1595 in April 2005, following an investigation of the attack by a UN-led body. It is partly financed by contributions of other states (fifty-one per cent) and the balance is covered by the Lebanese Government.[61]

DID THE RUSSIAN VETO IMPEDE OR ADVANCE THE FIGHT AGAINST IMPUNITY FOR INTERNATIONAL AIR LAW CRIMES?

The international legal framework for aviation was drafted at a time when the international community had confidence in the ability and willingness of states to use their domestic courts to prosecute offenders regardless of where the crime was committed. Hence, the Montreal Convention, which is most applicable here, makes provision for member states to be able to prosecute offenders on any of the following grounds: (i) territoriality; (ii) state of registration of the aircraft; and (iii) where an aircraft is leased without a crew, the state where the lessee is permanently resident or has a place of business (Article 5, Montreal Convention).

The inclusion of the *aut dedere aut judicare* principle in these agreements was also aimed at forcing unwilling states to extradite offenders to other states which were willing and able to prosecute,[62] on the basis of any of the jurisdictional grounds listed above.

Given the hardships of prosecuting such offenders under domestic law, the affected states lobbied for the creation of a specific tribunal to try those responsible. Using its veto power, Russia[63] blocked the resolution from being adopted. Many politicians and state officials blamed Russia for frustrating efforts aimed at stemming impunity. Whilst that may be partially true, the concerns raised by Russia, such as the lack of impartiality in the current investigation, should not be overlooked. The history of the formation and performance of *ad hoc* tribunals also reveals that such *ad hoc* tribunals are very expensive to set up, and to maintain. For instance, the budget of the ICTY over the years showed how expensive *ad hoc* tribunals can be: for the year 2014–2015: US$ 179 998600; 2012–2013: US$ 250 814000; and

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61 UN Fact Sheet, 'Special Tribunal for Lebanon' <www.un.org/apps/news/infocus/Lebanon/tribunal/factsheet.shtml> accessed 31 May 2018.

62 Andre Ferreira, Cristieli Carvalho, Fernanda Machry, 'The Obligation to Extradite or Prosecute (*aut dedere aut judicare*)' UFRGS Model United Nations Journal 202–221, 202.

63 Michelle Nichols, 'Russia Vetoes Bid to Set Up Tribunal for Downed Flight MH17' *Reuters* (29 July 2015) <http://www.reuters.com/article/2015/07/29/us-ukraine-crisis-mh17-un-idUSKCN0Q32GS20150729> accessed 30 July 2015.

2010–2011: US$ 286 012600.[64] Between 1993 and 2007 the official budget of the ICTY amounted to US$1 243 157722, thereby indicating the massive expense of international justice.[65] By 2015, the STL had cost US$500 million.[66]

It is clear that the handling of the MH17 saga, especially the initial frustration of first responders and denial of access to the crash site had quickly turned into a political football. The Russian veto attracted widespread condemnation particularly from Western states. The Dutch government minister labelled this a political game that should not be allowed in the future.[67] The Russian veto was labelled by the Chairperson of State Duma's Committee on Security and Fighting Corruption, Irina Yarovaya, as deliberately biased and illegal.[68] The US Ambassador to the UN, Samantha Power, felt that Russia had abused the privilege given to it by the UN,[69] whilst Dutch Foreign Minister, Bert Koenders, felt that this was a noble attempt to set up a prosecution mechanism that transcended politics, and found Russia's actions an obstruction of justice, which will only encourage impunity.[70]

The Russian veto has some positive elements. The nature of the Flight MH17 Tribunal would have been very different from the previous *ad hoc* tribunals listed above. First, the creation of the tribunal did not arise from a systematic violation of international criminal law, but from a remote incident, which took place once and there is no likelihood of it happening again.

Secondly, although Ukraine is in conflict, the Flight MH17 incident is merely incidental to that conflict. It is not integral to it. All the other *ad hoc* tribunals were set up in the context of a post-conflict state, with the aim of punishing violators of international criminal law and international human

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64 See UN, 'International Criminal Tribunal for the Former Yugoslavia' <http://www.icty.org/en/about/tribunal/the-cost-of-justice> accessed 11 August 2016.

65 Robert Cryer, Hakan Friman, Darryl Robinson, *An Introduction to International Criminal Law and Procedure* (Cambridge UP 2007) 112.

66 Taylor (n 60).

67 Editorial Staff, 'MH17: UN Security Council Backs Australian Resolution Condemning Malaysia Airlines Plane's Downing' *ABC News* (22 July 2014) <http://www.abc.net.au/news/2014-07-22/mh17-un-backs-australian-resolution-condemning-plane-downing/5613214> accessed 5 August 2015.

68 See Editorial Staff, 'Russia Vetoes "Deliberately Biased and Illegal" Draft UNSC Resolution – Lawmaker' *Russian News Agency* (30 July 2015) <http://tass.ru/en/world/811611> accessed 30 July 2015.

69 See Christopher Harress, 'Russia Vetoes MH17 United Nations Security Council Resolution' *International Business Times* (29 July 2015) <http://www.ibtimes.com/russia-vetoes-mh17-united-nations-security-council-resolution-2030442> accessed 22 August 2015.

70 See Christopher Harress, 'US "Outraged" After Russia Vetoes UN resolution on MH17' *VOA News* (30 July 2015) <http://www.voanews.com/content/un-security-council-to-vote-on-mh17-draft-resolution/2883270.html> accessed 22 August 2015.

rights law. This incident does not mirror those earlier situations that led to the creation of tribunals such as the SCSL, ICTY, ICTR, EAC and the STL.

Thirdly, the proliferation of *ad hoc* international criminal tribunals is not healthy for international criminal law. It has the potential to trivialise international criminal justice, as international criminal tribunals are created haphazardly.

Fourthly, such tribunals often face numerous challenges. These range from funding, staffing, and other logistical issues. The manner in which personnel for these tribunals is selected, the perceived bias, and related issues often lead to the legitimacy of these tribunals being eroded.

Fifthly, as reports from the Joint Investigative Team were still outstanding at the time, the creation of an international tribunal would therefore have been premature. At that stage, the drafters of the failed Statute of the International Criminal Tribunal for Malaysian Airlines Flight MH17 could work on the basis of conjecture and speculation, in deciding which crimes the tribunal would have jurisdiction over.

For the above reasons, the Russian veto actually preserved the value of international law, and will likely force states to revisit the other unexplored avenues for holding perpetrators accountable under international law.

CONCLUSION AND RECOMMENDATIONS

It is clear that the Flight MH17 saga caught the international community unprepared. This is largely because no penal tribunal exists to try offenders who perpetrate international air law crimes, but states are expected to utilise their domestic courts to prosecute such individuals. However, several lessons can be learnt from this incident, which if applied correctly could improve aviation safety and security and ensure a future-oriented penal system for individuals who transgress against international aviation. The following interventions are proffered as possible recommendations:

- The investigation of the causes of the crash needs to be carried out in a transparent manner in order to conclude a thorough and impartial investigation. Perhaps the proposal of the Russian Federation to appoint a Special Representative of the UN Secretary-General would ensure an element of fairness; and impartiality could be useful here.
- There is also a need to have ICAO more closely involved in the investigation, in order to give the investigation legitimacy and depoliticise it.
- The role of law enforcement institutions such as Interpol, Europol and Eurojust must be strengthened.
- The states affected, working in conjunction with the Joint Investigative Team, must determine which states will pioneer the prosecution of the perpetrators of the attack, as guided by the rules of international law on jurisdiction.