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Mandate of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Killings

STATEMENT

Commercial Airlines and conflict zones: Recommendations to strengthen air safety and prevent of unlawful deaths

On 8 January 2020, 176 persons lost their lives when their Ukraine International Airline (UIA) Flight PS752, en route from Tehran to Kiev, was struck by two Iranian missiles a few minutes after take-off from Teheran airport. The targeting of UIA Flight PS752 occurred in the context of heightened tensions between the Islamic Republic of Iran and the United States (US). This preventable tragedy raises the question of civilian air safety in the context of military tensions that may or may not have been recognised as amounting to an international or non-international armed conflict.

This statement is produced on the occasion of the first-year anniversary of the disaster to present a range of recommendations to strengthen the protection of the right to life of passengers on board civilian airlines. The strike against Flight PS752 highlights the insufficiencies of the international conventions related to air safety, as presently interpreted and applied, when dealing with military actions against civilian planes. The conventions and current practices are inadequate both in preventing such attacks and in ensuring their proper investigation, should they occur.

The Netherlands, and now Canada, are leaders in advocating changes to protect civilian aviation in or near conflict zones. Based on its 2015 investigation of the downing of Flight MH17, the Dutch Safety Board outlined 11 recommendations, addressed to the international agencies responsible for global air safety, including the UN agency, the International Civil Aviation Organization (ICAO), and the trade agency, the International Air Transport Association (IATA), States where planes are registered, and individual aircraft operators.¹ Building on the work of the Netherlands, Canada has spearheaded the Safer Skies Initiative, an effort to develop and enforce standards applicable to States and operators and to increase communication about potential dangers.²

¹ <https://www.government.nl/topics/mh17-incident/investigation-by-the-dutch-safety-board>

² <https://tc.canada.ca/en/initiatives/safer-skies-initiative/safer-skies-commitment-statement>.

In a world of heightened military and political tensions, with a resurgence of conflicts and access to a multiplication of military grade weapons, the UN Special Rapporteur for extrajudicial, summary or arbitrary killings is of the opinion that the international system responsible for civilian air safety is not fit for purpose. It must be urgently optimized to effectively address the issue of air safety in conflict zones or indeed a far more complete overhaul and reform ought to be on the agenda.

State responsibilities regarding the closing of the airspace under their jurisdiction

In terms of security, the most critical decision for the State is whether to keep the airspace open. States can impose prohibitions or restrictions on the use of their airspace and determine along which routes and at which minimum altitude aircraft may fly within that airspace. However, the States concerned usually find it difficult to prohibit or restrict use of their airspace, often, it seems, because of the economic benefits of keeping airports open.

Under international aviation law, the Chicago Convention and its Annexes set forth the existing standards for ensuring the safety of civilian flights; these standards are supplemented by ICAO's guidance.³ The prevalent interpretation is that international aviation law does not impose upon States a clearly-defined obligation to close their airspace in case of conflicts.

Following the downing of flight MH17, the Dutch Safety Board highlighted the need for the ICAO and the international community to "*clarify the responsibility of States related to the safety of their airspace so that States are clear about the cases in which the airspace must be closed.*"⁴ Clarification is required because States are failing to fulfill their obligation to close airspace to protect civilian life, so this known obligation must be made more explicit and mandatory, with enforceable mechanisms.

The ICAO has been in the process of amending Annexes and guidance manuals, but the standards and recommendations in effect at the time of the crash of PS 752 required that that the State responsible for air traffic services should "assess the hazards or potential hazards" and determine whether civil aviation flights in the location "***should be avoided or may be continued under specified conditions***" (emphasis added).⁵

³ The Manuals are advisory in nature but are relevant in determining whether a State has met its duty of care. See ICAO, Manual Concerning Safety Measures Relating to Military Activities Potentially Hazardous to Civil Aircraft Operations, Article 1.1. available at <http://www.wing.com.ua/images/stories/library/ovd/9554.pdf>. (Manual)

⁴ Dutch Safety Board, "Flying over Conflict Zones, Follow-up Recommendations, MH17 Crash Investigation," February 2019 available at <https://www.onderzoeksraad.nl/en/page/4953/flying-over-conflict-zones--follow-up-recommendations-mh17-crash>.

⁵ Manual, Article 10.3

“Normally, civil aircraft should not operate in an area of hazardous military activity.”⁶ If airspace remains open, the State should issue a NOTAM⁷ containing all “necessary information, advice and safety measures.”⁸ While these standards and recommendations should be more specifically delineated to reduce discretion, they establish at a minimum that a State must exercise due care to ensure civil aviation is not threatened by any military operations.

International human rights and humanitarian law also apply to the management of airspace and impose clear obligations on States in terms of respecting and protecting the lives of those on board aircrafts within their jurisdiction but also extra territorially.

In particular, under international human rights law States must not only “refrain from engaging in conduct resulting in the arbitrary deprivation of life,” they must also protect the right to life against “reasonably foreseeable threats and life-threatening situations that can result in loss of life.”⁹ The responsibility to protect may be invoked in response to threats originating from private persons and entities as well as against threats by other States, and by agents of the State itself.

This responsibility to protect imposes a duty on government authorities to take all reasonable measures to avoid a real and immediate risk to life of which they had or ought to have had knowledge. It also imposes on States a duty to warn intended victims of threats to their safety. While the nature and extent of these measures can only be assessed in the light of all the circumstances of any particular case, in situations of armed conflict or tensions, the closure of the airspace is a reasonable and evident measure to be taken to protect lives.

Under international humanitarian law and customary international law, each party to a conflict (both international and non-international) has an obligation to “spare the civilian population, civilians and civilian objects” and to “do everything feasible to verify the objectives to be attacked are neither civilians nor civilian objects.”¹⁰ While international humanitarian law does not impose an obligation to close the airspace to civilian airlines, a failure to do so followed by an unintentional strike against a civilian airliner would amount to a violation of international humanitarian law, and an intentional one a likely war crime.

⁶ Manual, Article 5.6.

⁷ A NOTAM is a “notice distributed by means of telecommunication containing information concerning the establishment, condition or change in any aeronautical facility, service, procedure or hazard, the timely knowledge of which is essential to personnel concerned with flight operations,” ICAO, Annex 15 to the Convention on International Civil Aviation, Definitions, available at <https://www.icao.int/NACC/Documents/Meetings/2014/ECARAIM/REF05-Annex15.pdf>.

⁸ Manual, Article 10.3; see Chicago Convention, Annex 15, Article 5.1.1.1.(l)(requiring States to issue a NOTAM informing pilots of the “presence of hazards which affect air navigation,” including “military exercises”).

⁹ Human Rights Committee, General Comment 36, para. 7

¹⁰ Additional Protocol I to the Geneva Conventions, Article 57. See also, International Committee of the Red Cross, Customary International Humanitarian Law, 2005, Volume I: Rules, Rules 15 and 16

Recommendations:

- 1. Protection against arbitrary killings:** In situations of international and non-international armed conflicts, as well as situation of high military tensions, the most effective means to prevent attacks on civil aviation is closing the airspace. All other options are secondary and may subject civil aircraft to risk.
- 2. Standard setting:** The international community must establish clear and explicit standards on when States should close airspace under their jurisdiction - standards that will hold States accountable should they fail to do so. Cases in which airspace must be closed should be set out as unambiguously as is feasible.
- 3. Reversal of the burden of proof:** Under both international aviation and human rights law, if a State decides NOT to close its airspace, the burden of proof should be on the State to prove that the airspace under their jurisdiction is safe. States should explain why they are keeping the airspace open.
- 4. International monitoring and benchmarking:** It is regrettable that there is no UN agency with an explicit mandate to issue international advice or decision regarding the safety of airspace. The ICAO or another UN agency or decision-making body ought to play a far more active role in urging States facing an armed conflict or high military tensions to prohibit or restrict the use of their airspace in a timely manner.

State Responsibility to protect the right to life

All States must continuously monitor the nature of threats to civil aviation, in addition to the level of threat. While such a duty is higher for airspace under a State's jurisdiction, this responsibility applies extra territorially as well, particularly with respect to aircraft registered in a State.

There have been past initiatives designed to share security information more broadly for airlines. However, they have not had the expected results, possibly because of reticence in sharing intelligence information. Some States and airlines may distrust the information provided: they might question whether information on potential dangers has been shared for political or economic reasons. States or airlines who have less information may be unsure whether they have the correct analysis as to risk. Canada's recent Safer Skies Initiative appears focused on addressing these issues.

As noted elsewhere¹¹, there is currently no international institution with the mandate to determine whether there is an armed conflict. There is a similar vacuum in determining whether heightened tension calls for airspace restrictions. There is a compelling need for the international community to address this gap.

Recommendations:

- 5. Passengers and flight crew cannot be left at the mercy of States and airlines who put revenue and other motives ahead of safety.**
- 6. Governments should become (more) active in issuing urgent recommendations or obligations to their country's airlines related to the airspace of other States in which an armed conflict is ongoing or where certain threats exist.**
- 7. Under the duty to warn obligation¹², States should be required to issue clear guidance and advice to airlines and to the public in relation to air safety. Under the Chicago Convention and its Annexes, it is compulsory for a State to issue NOTAMs to communicate risks associated with conflict zones within its jurisdiction. Under international human rights law, this should be compulsory for all States with relevant knowledge about risks to aviation in any airspace, not just those over which they have sovereignty.**
- 8. Appropriate domestic Air Traffic Services authorities, in collaboration with military and intelligence agencies, should conduct risk assessments of airspaces in relation to activities potentially hazardous to civil aircraft and implement appropriate risk mitigation measures.**
- 9. As Canada's Minister of Transport has stated, if operators and authorities are not acting responsibly to close airspace or restrict flights, then the international community needs "to take immediate action to restrict their domestic carriers from flying over or near a conflict zone."¹³**

Airlines Responsibilities regarding airspace and decision to fly

In its *MH17 Crash* reports, the Dutch Safety Board recommended measures that would increase the accountability of airlines for their flight decisions. As the attack on Flight PS752 demonstrates, just because the airspace in or above a conflict area is open does not mean that it is safe.

¹¹ A/HRC/44/38

¹² For an analysis of how the duty to warn applies extra territorially, see A/HRC/41/CRP.1, Part IV.

¹³ <https://www.canada.ca/en/transport-canada/news/2020/12/speaking-notes-for-the-minister-of-transport-the-honourable-marc-garneau-at-the-safer-skies-forum.html>.

At the time of the attack on Flight PS752, the United States had already issued a NOTAM banning US aircrafts from Iranian airspace, thereby warning other airliners of a potential danger. This type of information is not generally available to the public, but the international community, third party businesses (including airlines) and NGOs could find means to inform the public as to the risk to civil aviation in particular regions.

Efforts to increase knowledge of potential threats are critical, but these efforts must be extended to include the public. While the public should not be expected to analyze safety and threat data, its general availability would allow third party businesses and NGOs to provide guidance to passengers in selecting their airlines and flights. Some of the passengers of Flight PS752 were concerned about the heightened tensions between the United States and Iran, and a third-party source helping them decide whether to get on that flight would have been a valuable resource.

Recommendations:

- 10. Domestic civil aviation authorities should develop clear requirements for air operators who fly internationally to incorporate risk assessment and mitigation protocols related to conflict zones into their safety and security management systems.**
- 11. As recommended by the Dutch Safety Board,¹⁴ Airlines should have to make their flight paths available to the public in order to encourage accountability on the part of carriers and ensure they act responsibly.**
- 12. Airlines must strengthen their capacity for risks assessment, including by following the highest standards and checking all information sources when planning flights routes. They should inform their passengers of any risks in relation to the flight routes.**
- 13. States and/or Airlines should establish a completely independent body (from both States and airlines) or mandate an existing one to monitor air safety in relation to conflicts, and to compile and disseminate information about risks to civil aviation related to flying over conflict zones. Such information should be made available to the public at large.**

¹⁴ Dutch safety board, MH17 Crash report, 11. Recommendations, page 266, available at <https://www.onderzoeksraad.nl/en/page/3546/crash-mh17-17-july-2014>

Obligation to investigate, reparation and non-repetition

The procedures for investigating accidents are likewise inadequate in circumstances where the State responsible for the investigation under the Chicago Convention is also the State that launched the military attack against a civilian airliner. These investigations are unlikely to meet international standards of fairness, impartiality and transparency. Investigation requirements and protocols appropriate for mechanical failures and pilot error are ineffective and inappropriate for military attacks and must be reformed to prevent States from escaping responsibility and to allow all interested parties to participate fully.

Recommendations:

- 14. Investigation protocols and standards should be reformed so that the State that launched the military attack is not solely in charge of the investigation. The international community should consider whether it should establish a panel of third-party, independent experts to participate in and guide these investigations.**
 - 15. States whose nationals or residents were harmed should have full status as participants in the investigation, because of their obvious State interest.**
 - 16. Family members must be provided a role in the investigation that meets the requirements of international human rights law. They should at a minimum be afforded the opportunity to have representatives observe all proceedings.**
 - 17. In situations where the State(s) responsible for the strike against a civilian airline fails to acknowledge its responsibilities, and fails to compensate the victims adequately, the international community ought to consider effective sanctions against the State(s). These might include, for example, placing restrictions on the use of commercial or cargo aviation facilities by such State(s) until these failures are remedied.**
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