War Crimes and the Downing of Malaysian Airliner MH-17

Mohammad Naqib Ishan Jan* and Abdulrashid Lawan Haruna

Department of Civil Law, Ahmad Ibrahim Kulliyyah of Laws, International Islamic University Malaysia, Kuala Lumpur, Malaysia

ABSTRACT

The downing of Malaysian Airliner MH 17 is not the first incident of shooting down a civilian airliner. There are several other cases where civilian aeroplanes carrying passengers were shot down. The case of MH 17 is a recent incident that attracts condemnation from the international community. MH 17 was shot down within the territorial air space of Ukraine, an area under the control of the separatists who are fighting against the government of Ukraine. It was alleged that the airliner was downed by the separatists who are enjoying the support of the Russian government. The same accusation is levied against the Ukrainian government. Thus, this article examines the shooting down of the Malaysian airliner MH 17 and determines who should be responsible for the heinous crime. It examines whether the conflict in Ukraine amounts to an international armed conflict under international humanitarian law (IHL) which can be linked with the downing of MH 17. The article further examines the probable responsibility and jurisdictional problems to be faced in prosecuting the crime of shooting down MH 17 and the possible claims for compensation to the victims’ family. The article posits that the situation in Ukraine is indeed an armed conflict and the shooting down of Malaysian airliner MH 17 constitutes a war crime of targeting civilians as envisaged under the Statute of the International Criminal Court (ICC). The jurisdictional problems in prosecution of the crime may be addressed by invoking universal jurisdiction. It is recommended that an international criminal investigation should be launched on the downing of MH 17 in order to find the culprits responsible for the crime for the purpose of subsequent prosecution for war crimes and compensation claims.

Keywords: MH 17, Ukraine, civilians, armed conflict, war crime

INTRODUCTION

The current crisis in the eastern part of Ukraine between the Ukrainian Army and
the Russian separatists who are fighting for regional autonomy has a relationship with the downing of MH 17. The conflict in the eastern Ukraine is connected with the recent annexation of Crimean and Sevastopol by the Russian Federation. Our concern with the Ukrainian conflict is central for the purpose of establishing and linking the shooting of MH 17 with war crimes. The existence of an armed conflict is a condition precedent to the commission of war crimes. Thus, it is necessary to establish the existence of either type of armed conflict before a wrongful act amounts to a war crime. In essence, the downing of MH 17 can only constitute a war crime if the armed conflict in eastern Ukraine has influenced or played a vital role in shooting down the plane.

The offence of war crime, as envisaged under Article 8 of the Statute of the International Criminal Court (ICC), may take different forms. The crime can be committed in either international or non-international armed conflict, provided that the wrongful act is directed against the people protected under the Geneva Conventions and other laws and customs applicable in armed conflicts. Thus, the downing of Malaysian airliner MH 17 with 298 civilian passengers on board may constitute a war crime since it has satisfied the \textit{actus reus} of the core international crime - war crime. This may raise issues concerning the appropriate venue for the prosecution of the crime and whether universal jurisdiction can be invoked in order to allow for the prosecution of the crime in the ICC. Another issue of concern is the possibility for compensation to the victims’ family, which may be through judicial or non-judicial process, as in the case of Iranian Air Flight 655.

A BRIEF BACKGROUND OF THE UKRAINIAN CONFLICT AND THE DOWNING OF MH 17

The current crisis in Ukraine can be traced to the Russian annexation of the Crimean peninsula. It was a direct aftermath of the Ukrainian revolution in February 2014, which forced President Viktor Yanukovych to leave the country for Russia. Following this event, the next day, the Ukrainian parliament impeached the President in flagrant abuse of the laid down constitutional due process (“Ukraine’s Political Crisis”, 2014). The parliament constituted a new interim government and an interim President. The newly constituted government of Ukraine has been considered as illegitimate by the Russian government. According to Russia, Yanukovych is still the Ukrainian president being the democratically elected president who was unlawfully deposed (Putzier, 2014). However, the United States of America, the European Union and the United Nations have recognised the newly constituted interim government in Ukraine despite the fact that due process was not followed in the usurpation of the elected president (“US, EU, UN Recognize”, 2014).

It is important to mention that Crimea has been annexed by Russia despite
condemnation from the West and the United Nations. The Crimean accession was followed by another secessionist’s movement from the eastern part of Ukraine (Byers-Lane, 2014). The secessionists are agitating for a regional autonomy and Russia has been accused of giving support to the rebels. Subsequently, Russia amassed a large number of its military on the Ukrainian border and it threatens to invade should the Ukrainian government continue to crackdown on the Russian separatists (Mearsheimer, 2014). Nevertheless, the Ukraine government continued to crackdown on protesters in the eastern Ukraine and this led to armed confrontations between the Ukraine Army and the separatists. Thereafter, Russia began to provide arms and diplomatic support to the separatists who are more or less dragging the country toward civil war (Chandrashekhar, 2015).

Meanwhile, on 17 July 2014, MH 17 was shot down when it was cruising over the air space of the Ukrainian territory under the control of the eastern separatists. The Malaysian Airliner en route from Amsterdam to Kuala Lumpur was shot down with 298 passengers on board including the cabin crews, and all the passengers died (Ngui, 2014; Rusli, 2014). A report of the preliminary investigation shows that MH 17 was flying on a safe zone and the airliner had neither mechanical nor crew fault. An initial review of the MH 17 black-box data revealed that “the crash was caused by shrapnel puncturing the fuselage, causing massive decompression and breakup of the Boeing 777 that had been flying at an altitude of more than 33,000 feet” (Zeitchik et al., 2014).

However, despite the fact that most experts believe the plane was downed by the Russian separatists, the report has not assigned blame or responsibility on anyone at this stage. The separatists in the eastern Ukraine have already dismissed any allegation linking them with the downing of MH 17 claiming that they lack a weapon that can shoot a plane cruising at 33,000 feet (“MH17 Preliminary”, 2014). Russia on its part has claimed to have a record of a Ukrainian combat jet approaching close to the MH 17 before it was shortly shot down (“Dutch report”, 2014). In view of the allegations and denials made, the nagging question has been who is responsible for the downing of MH 17 and whether the downing of the plane has any nexus with the conflict in eastern Ukraine in order to qualify the act as a war crime. It is vitally essential that the second limb of this question be answered in the affirmative before the shooting of the plane constitutes a war crime since war crimes can only be committed during an armed conflict.

THE CONCEPT OF ARMED CONFLICT AND THE UKRAINIAN CONFLICT

Although the term armed conflict is the preferred term in the contemporary IHL instruments, these instruments do not define the term. For instance, there is no definition of ‘armed conflict’ in the Geneva Conventions and their two Additional
Protocols. Substantial evidence suggests, in fact, that the drafters of the Geneva Conventions purposely avoided any rigid formulation that might limit the law’s field of application. However, jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY) has clarified the definition of “armed conflict”. In *Prosecutor v. Tadic*, Case IT-94-1-AR72 (Oct. 2, 1995), 35 I.L.M. 32, 54, the Tribunal’s first case, the Appeals Chamber defined the term “armed conflict” in the following words:

> [A]rmed conflict exists whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organised armed groups or between such groups within a state.

Thus, armed conflict generally refers to military confrontations between two or more States, a State and a body other than a state, a state and a dissident faction or two ethnic groups within a state territory (Carswell, 2009). Based on the above definition and as also inferred from the IHL legal instruments, armed conflict can be categorised into two broad categories, namely, International armed conflict and non-international (internal) armed conflict (Reisman *et al.*, 1988). This definition has shown that the situation in the eastern Ukraine is indeed an armed conflict between a State and an armed group, which is covered by the Geneva Conventions.

It is important to clarify whether the conflict in Ukraine is international armed conflict or non-international armed conflict because war crimes connected with international armed conflicts are distinguished from those connected with non-international armed conflicts, as provided in Article 8 of the Statute of International Criminal Court (ICC) (Henckaerts & Doswald-Beck, 2005). International armed conflict is defined as “a declared war or any other armed confrontation between two or more States, even if the state of war is not recognised by one of them”. It also includes wars of national liberation and cases of occupation (ICRC, 2008). On the other hand, non-international armed conflict refers to protracted armed confrontation between governmental armed forces and one or more armed groups, or between such armed groups arising on the territory of a State. Article 1(2) of the Additional Protocol II to the Geneva Conventions of 1949 further clarifies that armed conflict does not include situations of internal disturbances and tensions such as riots, isolated and sporadic acts of violence and other acts of a similar nature as not being armed conflicts. However, a non-international armed conflict may change its character to internationalise armed conflict where there is involvement of a state in support of an armed group (Vite, 2009).

Therefore, the conflict in the eastern Ukraine is a non-international armed conflict since it involves a state and an armed group. However, this raises question as to whether the involvement of Russia in the conflict in eastern Ukraine has internationalised the armed conflict or...
not. In the first place, the Tadić’s test for determining whether an internal armed conflict has become international is whether “some of the participants in the internal armed conflict act on behalf of an other State.” A similar question was raised in the Military and Paramilitary Activities in and against Nicaragua (Merits) case, (1986) ICJ Rep., where the International Court of Justice (ICJ) had to determine the responsibility of the United States for the armed conflict between the contras it had sponsored and the Nicaraguan government. The Court applied the “effective control” test to determine whether an insurgent’s acts can be attributed to a State. In applying this test to the facts, the ICJ found that despite a high degree of participation and a general degree of control over the contras, who were highly dependent on that foreign assistance, the United States was not responsible for the violations of humanitarian law perpetrated by the contras since those violations “…could be committed by members of the contras without the control of the United States.”

However, the Tadić case, as cited above, has overruled the strict “effective control” test espoused in the Nicaragua case, declaring the ICJ’s reasoning “unconvincing […] based on the very logic of the entire system of international law on State responsibility.” Consequently, an internal armed conflict may be considered as an international armed conflict if a foreign State has overall control over the conduct of the warring parties. Overall control test requires that a State has a role in organising, coordinating or planning the military actions of the group, in addition to financing, training and equipping or providing operational support to that group but that it “does not go so far as to include the issuing of specific orders by the State, or its direction of each individual operation.” This particular test may be invoked to determine whether the support Russian has provided to the separatists in the eastern part of Ukraine internationalizes the armed conflict.

The second limb of the Tadić’s test for determining whether an internal armed conflict has become international is whether “another State intervenes in that conflict through its troops”. In the Prosecutor v. Blaškić, Case No. IT-95-14, Judgement, 3 March 2000, the ICTY Trial Chamber after examining the evidences before it found that Croatia’s direct interference in the conflict in Bosnia-Herzegovina turned that internal conflict into an international one. In the case of Prosecutor v. Rajić, Case No. IT-95-12-R61, the ICTY found that an internal armed conflict could be rendered international if troops intervene “significantly and continuously”.

Therefore, based on the analysis of the decisions of the ICTY, the current conflict in Ukraine has been internationalised by the involvement of Russian. The Russian support in terms of arms, diplomatic support and military involvement has internationalised the armed conflict and consequently, the laws of international armed conflict apply. This raises question as to who bears the responsibility for the possible war crimes committed by the downing of Malaysian Airliner MH 17.
WAR CRIMES AND THE DOWNING OF MH 17

War crimes are grave breaches of the Geneva Conventions and other serious violations of the laws and customs applicable in both international and non-international armed conflicts as outlined in Article 8(2)(a) of the ICC Statute. The provision of Article 8 of the Rome Statute has provided for different categories of war crimes. It starts by defining war crimes as contained in the various provisions of the Geneva Conventions - meaning grave breaches of the Conventions. The second aspect of the provision considers other serious violations of the laws and customs applicable in international armed conflict within the established legal framework of international law as provided in Article 8(2)(b). Thirdly, the provision addresses non-international armed conflict and has made serious violations of Common Article 3 of the Geneva Conventions a war crime. Since the provision of Article 8 of the Rome Statute has spelt out several acts that constitute war crimes, we are only concerned with the acts that relate to targeting a civilian plane during armed conflicts as a war crime.

To begin with, in case of grave breaches of the Geneva Conventions, it is a war crime to wilfully kill a person who is protected under the Geneva Conventions or to cause extensive destruction of protected property, which is not justified by military necessity as contained under Article 8 (2)(a)(i) and (iv) of the ICC Statute. This provision depicts that killing of civilians who are not participating in hostilities as well as destruction of civilian property that has not been used for military purpose as war crimes. Invoking this position of the law, the shooting of MH 17 which is a civilian property not used for military purpose, as well as the killing of the 298 civilian passengers on board clearly constitutes war crimes. Thus, the act of shooting a civilian plane not used for military purpose and the killing or death of civilian passengers on board amount to grave breaches of the Geneva Conventions and therefore constitutes a war crime under Article 8(2)(a) of the ICC Statute.

In an international armed conflict, Article 8 (2)(b)(i) and (ii) provides that intentionally directing attacks against the civilian(s) or civilian objects which are not used for military purpose is a serious violation of the laws and customs applicable in international armed conflicts. According to Article 8 (2)(b)(iv) of the ICC Statute, it is equally a serious violation of laws and customs applicable in international armed conflicts to intentionally launch an attack with the knowledge that such “attack will cause incidental loss of life or injury to civilians or damage to civilian objects…. which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.”

It can be asserted that the aforementioned provisions clearly show that directing an attack against civilian(s) or civilian objects, which have not been used for military purpose constitutes a serious violation of the laws and customs applicable in international armed conflicts.
It is important to further stress that war crimes can only be committed during an armed conflict i.e. the crime must have some nexus with an armed conflict. In the case of Tadić cited earlier, the ICTY has made it clear that for an act to constitute a war crime, it must be closely related to the armed conflict as a whole. Likewise, in the case of Prosecutor v. Kayishima, Case No. ICTR-95-1-T, 21st May 1999, the Tribunal emphasises the need for “a direct link between crimes committed against these victims and the hostilities.” The ICTY in the case of Prosecutor v. Kunarac, Case No. IT-96-23/1-A, Judgement, 12 June 2002, has clarified that the mere existence of an armed conflict does not qualify every act of criminality as a war crime. The armed conflict must have influenced and played a significant role in the commission of the offense. However, the Tribunal agrees that it suffices the requirement of the law if “the perpetrator acted in furtherance of or under the guise of the armed conflict.” In other words, it constitutes a war crime if the conduct took place in the context of and was associated with an armed conflict.

Furthermore, for a war crime to be committed, the violation must be directed against protected person under IHL, it must be a breach of customary or treaty IHL binding on the accused, it must be a serious violation that involves grave consequences for the victim and the accused is aware of the existence of an armed conflict.

Applying this position to the case of MH 17, it is obvious that the downing of the airliner was done during an armed conflict.

applicable in international armed conflict. MH 17 is a civilian plane that is carrying civilians. Thus, directing an attack against MH 17 with civilians on board constitutes a serious violation of the laws and customs applicable in an international armed conflict, and this constitutes a war crime.

However, it is significant to mention that for a crime to be punishable as a war crime, it has to satisfy not only the actus reus of the crime but the requisite mental elements of the offence. The Rome Statute provides that unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge (Detter, 2000). A person is said to have intent where:

(a) In relation to conduct, that person means to engage in the conduct;
(b) In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events (Article 30(2); Keim, 2014).

While knowledge means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. This element of war crime is important in determining the responsibility for the commission of the crime. In this context, it is not yet due to ascertain whether the shooting down of MH 17 was done with the requisite mental element of war crimes. This is in view of the fact that international or criminal investigation on the commission of the crime has not been done.
Whoever might have shot down the plane did so under the pretext that it could be an enemy plane. The armed conflict in eastern Ukraine influences and plays a vital role in shooting down the Malaysian airliner. This conviction can be inferred from the fact that had the situation in eastern Ukraine was a ‘peace time’, it would be difficult or even impracticable for someone to just shoot down a civilian plane. Obviously, the persons on board were protected under IHL and the downing of the plane has serious consequences on the victims. In this context, the downing of MH 17 satisfied the law in terms of the requirements for war crimes. It is however not clear who bears the responsibility for the crime committed despite the fact that the plane was shot down in the airspace of Ukraine under the control of the Russian separatists.

ISSUES OF RESPONSIBILITY, JURISDICTION AND COMPENSATION

In the first place, international investigation has commenced on the shooting down of MH 17 but the report of the investigation is not yet available to be able to rely on for the purpose of determining responsibility. However, various accusations have been directed towards the Russian separatists in eastern Ukraine since the plane was downed within the territorial airspace under their control (Carroll, 2014). If the allegations are established, the separatists will be responsible for the crime committed. This will raise a question as to the extent of the Russian involvement in the armed conflict. As we have earlier established that where an armed group has received support from a particular state in an armed conflict, the character of the conflict would change to internationalised armed conflict. Meanwhile, if the allegations against the Kiev government turn out to be true, then the Ukrainian government should be held responsible (Pusztai, 2014).

Thus, the issue of state responsibility for acts of its agents either de facto or de jure agent cannot be denied. In this context, the separatists may be viewed as de facto agent of Russia. However, for responsibility to stem from this relationship, the law requires that the separatists are not only paid or financed by Russia and their actions coordinated by Russia, but also that they received specific instructions concerning the commission of the unlawful acts in question. This standard can only be established or denied when a criminal investigation on the downing of MH 17 has been concluded.

It is significant to mention that the principles of international law concerning the attribution to States of acts performed by private individuals are not based on rigid and uniform criteria. According to Article 8 of the Draft on State Responsibility adopted on first reading by the United Nations International Law Commission, if it is proven that individuals who are not regarded as organs of a State by its legislation nevertheless do in fact act on behalf of that State, their acts are attributable to the State. The justification for this rule is to preclude States from
denying international responsibility by making private individuals carry out responsibilities that may not or should not be performed by State officials, or by claiming that individuals actually participating in governmental authority are not classified as State organs under national legislation and therefore do not engage State responsibility (Sassoli, 2002). In other words, States are not allowed on the one hand to act *de facto* through individuals and on the other hand to disassociate themselves from such conduct when these individuals breach international law. In invoking this assertion, one may be tempted to conclude that the Russian involvement in the affairs of the separatists in eastern Ukraine may confer responsibility on Russia for any breach of international law committed by the separatists.

The next issue of concern is the venue for the prosecution of the perpetrators of the crime. MH 17 is an airliner belonging to Malaysia; it was downed within the territorial airspace of Ukraine under the control of the Russian separatists and the passengers on board made up of mainly (193) Dutch nationals. The act of shooting down of the plane could have been done by Ukrainian nationals or Russians as alleged, who are subject to either Ukrainian or Russian jurisdiction as the case may be (Füllsack, 2015). This is based on trite international criminal law consideration of territoriality of where the offence was committed and the nationality of the perpetrators or victims of the crime (Zemach, 2011). The problem is, however, what will happen to the interest of Malaysia being the owner of the airliner and Dutch government that suffers the highest number of victims? Does it mean that the Malaysian and Dutch governments should move to Ukraine for the purpose of prosecuting the crime?

In order to solve these probable jurisdictional conflicts, it is important to reflect on the nature of the offence committed. Since the crime alleged to have been committed is a war crime, it is subject to universal jurisdiction. Universal jurisdiction is a criminal jurisdiction based solely, on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction (Zemach, 2011). Under normal circumstances, a State assumes criminal jurisdiction only over crimes committed on its territory or by its nationals. However, IHL confers universal jurisdiction over grave breaches on all States. This means that states are required to prosecute war criminals, regardless of their nationality, the nationality of the victim, and where the crime was actually committed (Sassoli *et al.*, 1999). However, universal jurisdiction has no link to territoriality or nationality (of both the perpetrator and the victim) between the State and the conduct of the offender, nor is the State seeking to protect its security or credit (O’Keefe, 2004).

It is significant at this juncture to point out that universal jurisdiction only serves as a substitute for other countries who
would be in a better position to prosecute a crime by stepping in for the state in whose territory the crime was actually committed and has failed to prosecute for whatever reason. In other words, the exercise of universal jurisdiction centres on the inability or failure of the concerned state on whose territory the crime was committed to prosecute the criminals (O’Keefe, 2004). Therefore, it can be submitted that invoking the notion of universal jurisdiction to the crime of downing of MH 17 will solve the probable jurisdictional conflicts or forum inconveniences that may arise. The principle will confer jurisdiction on other States other than Ukraine to prosecute the crime.

More aptly, the crime can be prosecuted in the International Criminal Court (ICC). That is the reason behind allowing the ICC to assume jurisdiction over war crimes, particularly when the state concerned is unwilling or unable to genuinely carry out the investigation or prosecution (PCHR, 2010).

Furthermore, Articles 49, 50, 129 and 146 of the four Geneva Conventions respectively require that in cases of grave breaches of the Conventions, states are ‘under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts.’ The preamble of the ICC statute has called on states to cooperate for the purpose of ensuring the effective criminal prosecution of international crimes. It can be further submitted that the jurisdiction of the ICC is the suitable neutral forum for the prosecution of the crime of downing of MH 17.

Another issue that calls for concern is the issue of claims for compensation by the families of the victims of MH 17. Traditionally, violations of international law and IHL in particular are attributed to States and measures to stop, repress and redress such violations have to be directed against the State responsible for the violations. There was no provision for compensation in case of violation of the international law. Today, however, Article 91 of the Additional Protocol I to the Geneva Conventions of 1949 provides that a Party to the conflict which violates the provisions of the Conventions or of the Protocol shall, if the case demands, be liable to pay compensation. Thus, the families of the victims of MH 17 may claim for compensation against whichever state that is found responsible. If the Russian separatists are responsible for the downing of MH 17 as alleged, it then follows that Russia may equally bear responsibility and may be liable to pay compensation for the families of the victims of the Malaysian plane. Similarly, where the allegation against Ukraine has been established, the Kiev government will be responsible for the crimes committed and may as well pay compensation.

The issue of compensation may also be considered from the perspective of the Iranian Air Flight 655 incident. When the United States Navy shot down the Iranian plane in July 1988, Iran filed a suit against the United States in the International Court of Justice (ICJ). Though the United States failed to admit responsibility and liability for the downing of the plane and has shown no remorse for the wrongful act, the
compensation was paid. The case was settled out of court through non-legal process. The United States agreed to pay compensation of USD 61.8 million to the 243 Iranian passengers on board for Iran to discontinue the case (Ghasemi, 2004). It is important to mention that the United States did not admit liability for the heinous act but it has paid the compensation ex-gratia to Iran. Therefore, it can be submitted that the case of MH 17 may equally be settled through similar process, particularly where the report of the investigation shows that legal responsibility cannot be clearly established.

CONCLUSION AND POLICY RECOMMENDATIONS

The conflict in the eastern part of Ukraine has reached the required threshold for an armed conflict. The Russian involvement and support for the separatists in the conflict has internationalised the armed conflict. The downing of Malaysian airliner MH 17 in the territorial airspace of Ukraine under the control of the separatists is indeed a heinous act against humanity. Shooting down of a civilian plane that has nexus with an armed conflict may constitute a war crime under Article 8 of the Rome Statute. The party responsible for the commission of the crime has not been ascertained as international investigation into the incident is still going on. However, there are allegations that the plane might have been shot down by the separatists in eastern Ukraine, an accusation that has been dismissed by the group. Meanwhile, Russian support for the separatists may make Russia responsible should the accusation against the separatists turn out to be true. The prosecution of the crime committed may be done in the ICC where the concerned states fail to prosecute the perpetrators. Despite the recently released preliminary report of the joint investigation committee which highlights the causes of the downing of MH 17, it is suggested that a further independent criminal investigation should be launched into the downing of MH 17 in order to determine the party responsible for the crime in order to initiate criminal prosecution and obtain compensation for the victims’ family.

REFERENCES


Prosecutor v Blaski’c, Case No. IT-95-14, Judgement, 3 March 2000

Prosecutor v Clement Kayishema et al., Case No. ICTR-95-1-T, 2st May 1999

Prosecutor v Dragoljug Kunarac and Others, Appeal Chambers, Judgement, IT-96-23

Prosecutor v Kunarac et al., IT-96-23/1-A, Judgement, 12 June 2002

Prosecutor v Tadic, Appeal on Jurisdiction, Case IT-94-1-AR72 (Oct. 2, 1995), 35 I.L.M. 32, 54


