MH17: WHO IS TO BLAME?

The shooting down of Malaysia Airlines flight MH17 on 17th July was a tragedy. Naturally, if it is indeed proven that an anti-aircraft missile brought the aircraft down, those who fired the shot bear responsibility. However, the aviation industry must also ask itself the question as to whether it could have taken action to ensure that commercial flights did not operate over eastern Ukraine. Lucy Rawlings investigates the role of the airline, the State and international bodies, such as ICAO, EASA and Eurocontrol, in determining when aircraft should not operate over conflict zones. And, in conclusion, she considers some of the other volatile areas of the world where it may well be advisable to classify air space as being 'no-fly zones'.

Civil aviation is frequently faced with new threats which aviation authorities have to deal with, such as liquid explosives, or the latest, IEDs potentially concealed within switched off mobile phones or other electronic devices. Once these threats have been identified, national and international agencies will respond by creating rules and setting restrictions for passengers worldwide. However, until now, it appears that ground based threats have been overlooked, and the shooting down of Malaysia Airlines Flight MH17 on 17th July has raised new concerns about who in the global aviation sphere should be held responsible for safeguarding commercial flights against surface-to-air missiles.

The threat of commercial aircraft being struck by ground based anti-aircraft missiles over conflict zones has always been there. However, we would generally expect such long-range missiles to be controlled by national governments. Any deliberate attack on an aircraft could therefore be viewed as an act of war and so would be avoided. Aviation authorities (and others) have also believed that these anti-aircraft missiles could not be used against commercial planes flying at 30,000ft and above. However, since flight MH17 was cruising at 33,000ft, airlines, aviation regulators, and governments have been forced to re-think what can be done to safeguard civilian flights whose paths cross over conflict zones.

In order to decide who, if indeed it should be the obligation of one particular aviation sector, will be responsible for the closing off of airspace over conflict zones, we must first take into account the role and expectations we have of our governments, airlines, and aviation regulators.

At present, restrictions on airspace are set by the individual nations in which the conflict is taking place and airlines are given security briefings by intelligence services in their national country. Individual airlines then make their own decisions based on the information they receive, as to whether or not they should alter their routes. This can be problematic, however, as different carriers may interpret the information in different ways, and some may perceive a greater risk than others. It also raises the issue of airlines from different nations receiving different degrees of information, and could, for example, result in an airline from one nation obtaining certain vital security information, and another not, leading to the airline from the less-informed nation putting itself at a higher risk.

The acceptance that a difference in information and interpretation exists within the industry could, in part, be behind the fate of MH17. Malaysia Airlines was not the only carrier to continue flying over eastern Ukraine that day. Thai International Airways and Air France were also among some of the airlines who decided that the threat was not significant enough to alter their flight paths. However, British Airways, Lufthansa and KLM, the latter being a partner of Air France, all elected to divert their routes. This is not to say that that the decision to divert or not to divert was wrong, the government in Kiev closed off eastern Ukrainian airspace up to 32,000ft (MH17 was flying at 33,000ft), so why would airlines have reason to believe they would be at risk above this height? In the end it came down to luck, or a lack of it. As far as we are aware, MH17 was not specifically targeted which means that any of the flights travelling through the same airspace that day could just have easily met the same fate.

In an industry which is constantly fighting to protect itself from ever-more sophisticated technological threats, we need to erase this element of 'luck' and be able to ensure that something as straight forward as the route which an aircraft follows is safe.

This leads us to consider what we expect of the various aviation entities. Hugh Dunleavy, Commercial Director of Malaysia Airlines, says that authorities should take more responsibility for 'safe' flight paths. He argues that airlines have been taking responsibility for deciding what constitutes a safe flight path over areas of conflict for too long, and that, "we are not intelligence agencies, but airlines, charged with carrying

passengers in comfort between destinations. It is not reasonable for us to assess all of the issues going on in all of the regions of the world, and determine a safe flight path. For the sake of passenger and crew safety we need to insist on a higher level of authority."

If we choose to simply accept airlines as international modes of transport, then Dunleavy's argument is fair. After all, if a diversion is made to a bus route the driver on that bus route must follow the diversion. He does not choose for there to be a diversion; he just knows that to get his passengers safely to their destination he must comply. We know that the world of aviation is not quite that simple but, nevertheless, do we actually believe it reasonable for us to expect airlines to make this decision alone when we know that the information they receive may vary, their understanding of various conflicts may differ, and that their perceptions of risk may differ?

We need to ensure that airlines are not making decisions independently of one another. If airlines are making different decisions this is going to affect the choices made by those flying around the world. Given the number of high profile aviation incidents in the media recently, it is understandable that travellers may be feeling on edge, and, in order to ensure their own safety, will look to book flights on airlines which they believe to be doing the 'right thing' and not taking the risk of flying over certain conflict zones. This puts an added pressure on airlines and could cause airspace over countries, where the actual risk may be minimal, to be avoided, resulting in costly adjustments to flight paths and price increases for travellers which may be unnecessary. So, who else could make this decision?

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In response to the downing of MH17, the UN and global aviation bodies, including the UN's International Civil Aviation Organisation (ICAO), the International Air Transport Association (IATA), Civil Air Navigation Services Organisation (CANSO), and Airports Council International (ACI), set up a task force with the aim of reducing the risks to commercial aircraft flying over conflict zones and to ensure that the "right information reaches the right people at the right time" in order to prevent similar tragedies occurring in the future. The agencies highlighted the importance of timely and accurate information that may affect the safety of an aircraft and its passengers while noting that such a task will involve not only aviation regulators but also national security services and intelligence gathering organisations.

So, maybe the decision cannot be made by one body alone, and in fact, multiple entities may be needed in order to be confident that the overall ruling is based on sufficient expertise. In response to the industry calling for ICAO to address 'fail-safe' channels for threat information to be passed on to civil aviation authorities and the industry, the Organisation has agreed to convene a high-level safety conference in February 2015, to which it will call all of its 191 member states in an attempt to address this problem.

With regard to ICAO being responsible for determining actual flight paths and deciding whether or not they are safe, Olumuyiwa Benard Aliu of Nigeria, the President of the ICAO Governing Council, has explained that this is a frequent misconception, and that "once the routes are designed, of course in collaboration with the industry, it is the responsibility and the obligation of the state through which the route passes to undertake risk assessment, to regulate the operation on the route and to either decide to close the route or keep it open."

Eurocontrol, the European Organisation for the Safety of Air Navigation, who coordinate and plan air traffic control for

all of Europe, has also backed the view that it is the responsibility of governments to close the airspace above their country if they believe its current state is volatile. After the downing of MH17, Joe Sultana, Eurocontrol chief, told a news conference, "the responsibility to close the airspace is from the Ukrainian authorities. They provide air traffic services in that airspace. It is their responsibility to assess if the airspace is safe, or not, to fly".

It appears that responsibility is being pushed ever upward, and that actually, it is the responsibility of governments to decide whether or not it is safe for their airspace to be used by civil aviation. After all, airspace is the portion of the atmosphere controlled by that country, so if a nation can decide to press charges against a passenger who breaks the law while in their airspace, then surely any disaster that befalls that aircraft due to that country's airspace being unsafe is that national government's responsibility?

There are, however, complicated situations, particularly in civil wars, where governments may not actually be aware of what weapons are within their country or certain territories. Groups fighting within the country (possibly against the government) can often be backed by terrorist groups or other nations who support their cause, resulting in a multitude of weapons being passed into the country without the government's knowledge.

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So the question is, at what point is it reasonable for governments to conclude that the weapons harboured within their borders may have the potential to cause damage to civilian aircraft within their airspace? This, again, will all come down to opinion.

Overall, this is a challenging issue, and one which is not easily rectified. It is becoming increasingly clear that it will take time to build legislation and address the problems that MH17 has exposed. But, until a solution is found, what should be done with regard to flying over other areas currently in conflict or political turmoil?

Eastern Ukraine has now been declared a universal 'no-fly' area, a restriction previously only applied to North Korea; skies over other areas, such as Libya and Syria, are only avoided by certain airlines. An increasing number of airlines have recently decided to divert their flight paths away from Iraq. Royal Jordanian, Qantas and Lufthansa have joined Air France, Emirates and Virgin in avoiding the conflict zone and it is likely that others will follow.

At the end of July, European carriers were advised to avoid, and American carriers were told to cease, flying into Tel Aviv, Israel, due to the ongoing conflict in Gaza. Many airlines, including British Airways, Aeroflot and, unsurprisingly, El Al Israel Airlines, decided to continue with their scheduled flights as they determined that there was no risk to their flights. But, at what point does a 'warning' become a 'ban'? When an aircraft is hit? The 'grey area' as to when restrictions need to be enforced is simply too large.

The tragedy of MH17 has made it abundantly clear that this 'gap' in aviation safety needs to be closed, and it is going to take the work of airlines, regulating bodies, and governments to create a solution. Plane-based missile defence systems, like those on the US Presidential plane Air Force One are indeed an option but very costly. And so, hopes are now pinned on ICAO's conference in February 2015 coming up with a solution to ensure flying remains the world's safest mode of transport.