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**ICAO AND THE USE OF FORCE
AGAINST CIVIL AERIAL INTRUDERS**

by

John V. Augustin

**A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfilment
of the degree of Master of Laws (LL.M.)**

**Institute of Air and Space Law
Faculty of Law, McGill University
Montreal, Quebec, Canada
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ABSTRACT

There have been many cases of intrusion of civil aircraft into the airspace of foreign States. On occasion, the subjacent State has reacted by using force against such aircraft, sometimes with fatal consequences. Customary international law admits the use of force only in exceptional circumstances. As the United Nations specialized agency responsible for international civil aviation, ICAO has conducted fact-finding investigations into a number of cases of aerial shootdowns and adopted resolutions and taken decisions in this connection. Such resolutions and decisions have clearly been influenced by political factors.

The Organization has also taken specific legal and technical steps aimed at reducing the dangers to civil aircraft and their occupants arising out of an intrusion. In the legal field, its principal achievement has been the adoption in 1984 of an amendment (Article 3 *bis*) to the Chicago Convention which is, however, not free of ambiguities and obscurities in meaning and which, despite numerous assertions to the contrary, does not reflect the exact scope of customary international law in this area. On the technical side, the Organization has successfully developed a number of detailed provisions in Annexes to the Convention which are universally respected and accepted by its Member States.

RÉSUMÉ

Il y a eu de nombreux cas d'intrusion d'aéronefs civils dans l'espace aérien de pays tiers. A l'occasion, l'Etat sous-jacent a réagi en utilisant la force, entraînant parfois des conséquences fatales. Le droit international coutumier n'admet l'emploi de la force que dans des circonstances exceptionnelles. En tant qu'agence spécialisée des Nations Unies responsable pour l'aviation civile internationale, l'OACI a mené des enquêtes dans un certain nombre de cas où des aéronefs avaient été abattus, et a adopté des résolutions ou pris des décisions s'y rapportant. De telles résolutions et décisions ont manifestement été influencées par des facteurs politiques.

L'Organisation a également pris des mesures spécifiques tant juridiques que techniques visant à réduire les dangers encourus par les aéronefs civils et leurs occupants suite à une intrusion. Sur le plan juridique, sa réalisation principale a été l'adoption en 1984 d'un amendement (Article 3 *bis*) à la Convention de Chicago dont le sens, cependant, n'est pas exempt d'ambiguïtés ni de zones d'ombre. Du point de vue technique, l'Organisation a développé avec succès de nombreuses dispositions détaillées incorporées dans les Annexes à la Convention qui ont été universellement respectées et acceptées par ses Etats membres.

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LIST OF ABBREVIATIONS

A.A.S.L.	Annals of Air and Space Law
AIP	Aeronautical Information Publication
A.J.I.L.	American Journal of International Law
ANC	Air Navigation Commission
ATC	Air Traffic Control
A.T.S.	Australian Treaty Series
ATS	Air Traffic Services
B.Y.I.L.	British Yearbook of International Law
C.L.R.	Columbia Law Review
Cmd.	Command Papers
C.T.S.	Canadian Treaty Series
CVR	Cockpit Voice Recorder
C-WP	ICAO Council Working Paper
C.Y.I.L.	Canadian Yearbook of International Law
DFDR	Digital Flight Data Recorder
FAA	Federal Aviation Administration (United States)
G.A.O.R.	General Assembly Official Records
I.C.J.	International Court of Justice
I.C.L.Q.	International and Comparative Law Quarterly
IFALPA	International Association of Airline Pilots Association
I.L.M.	International Legal Materials
ITA	Institute of Air Transport
J.A.L.C.	Journal of Air Law and Commerce
L.N.T.S.	League of Nations Treaty Series
NOTAM	Notice to Airmen
N.Z.T.S.	New Zealand Treaty Series

PANS	Procedures of Air Navigation Services
P.C.I.J.	Permanent Court of International Justice
R.I.A.A.	United Nations, Reports of International Arbitral Awards
SARPS	ICAO Standards and Recommended Practices
S.C.O.R.	Security Council Official Records
SSR	Secondary Surveillance Radar
T.I.A.S.	Treaties and other International Acts Series
U.K.T.S.	United Kingdom Treaty Series
U.N.T.S.	United Nations Treaty Series
U.S.T.S.	United States Treaty Series
WP	Working Paper

INTRODUCTION

On November 7, 1944, at a conference held in Chicago and attended by 52 States, the *Convention on International Civil Aviation*¹ was adopted, regarded as the constitution of transnational civil air navigation. In addition to incorporating a set of principles and rules governing various aspects of international civil aviation, the Convention established the International Civil Aviation Organization (ICAO), which eventually became a specialized agency of the United Nations. One of the principal "aims and objectives" of the Organization, spelled out in Article 44, is to "[p]romote safety of flight in international air navigation". Article 3 specifies that the Convention is applicable to civil aircraft only, and not to state aircraft; aircraft used in military, customs and police services are deemed to be state aircraft.

Article 1 of the Chicago Convention reflects the well-established principle of customary international law that "every State has complete and exclusive sovereignty over the airspace above its territory". There is consequently no automatic right of passage of aircraft of one State over the territory of another State. It follows that, in general, every State also has the right to prohibit foreign aircraft from flying over the whole or part of its territory, and to require that its laws relating to the admission, departure and navigation of aircraft be complied with.

It may happen that a civil aircraft registered in one State will enter the territory of another State without permission, or fly into a prohibited area or outside an assigned flight corridor. On occasion, the subjacent State will react by using force against such intruding aircraft, often with fatal consequences to the passengers and crew.

In light of the fundamental objective of ICAO to promote the safety of flight in international air navigation or, more precisely, the safety in flight of civil aircraft engaged in international air navigation, and keeping in mind the occasional use of force by States against foreign civil aerial intruders, this thesis will examine the actions of the

¹15 U.N.T.S. 295; ICAO Doc. 7300/7; 1957 A.T.S. 5; 1944 C.T.S. 36; 1953 U.K.T.S. 8; [hereinafter "Chicago Convention"].

Organization to enhance the safety of such aircraft. In particular, the Organization's role in the development or re-affirmation, as the case may be, of the legal standards applicable in relation to the use of force against foreign civil aerial intruders will be explored.

To facilitate an understanding of the problem of the use of force against aerial intruders, a factual and legal background will be provided.

The thesis will also offer a synopsis and evaluation of actions taken by ICAO when it has dealt with the question of use of force against civil aircraft. The Organization has had occasion to consider several instances of shoot-downs of civil aircraft, and has in fact carried out factual investigations in four cases, three of which concerned aerial intrusions.

Next, ICAO's contribution to the development of the law governing the use of force against aerial intruders will be examined. In particular, a 1984 amendment to the Chicago Convention (Article 3 *bis*) as well as the resolutions adopted and decisions taken by the Organization when considering the subject of use of force against civil aircraft, will be analyzed.

Since general technical standards developed by ICAO are meant to protect civil aircraft from the use of weapons, they too will be discussed.

Because of special rules prevailing in times of war and in particular those relating to the rights and duties of belligerents and neutrals, this enquiry will be limited to aerial intrusions in peacetime only, except insofar as wartime rules may shed light on applicable standards in peacetime.² Besides, in time of war, parties to the Chicago Convention are not obliged to act in accordance with it.³

²For rules governing civil aircraft in times of war, see J.M. Spaight, *Air Power and War Rights*, 3rd ed. (London: Longmans, Green, 1947) at 394-419.

³Article 89 of the Chicago Convention reads:

"In case of war, the provisions of this Convention shall not affect the freedom of action of any of the contracting States affected, whether as belligerents or as neutrals. The same principle shall apply in the case of any contracting State which declares a state of national emergency and notifies the fact to the Council."

CHAPTER I

LEGAL AND FACTUAL BACKGROUND

Article 1 of the Chicago Convention states the rule of customary international law that each State has complete and exclusive sovereignty over the airspace above its territory; for the purposes of the Convention, "territory" is deemed to be the land and territorial waters adjacent thereto.¹

According to Cooper, by 1910 there was already "general agreement that usable space above the lands and waters of a State is part of the territory of that State."² In any event, by the time of the adoption in 1919 of the first multilateral treaty³ to regulate international civil aviation, namely, the *Convention Relating to the Regulation of Aerial Navigation*,⁴ the predecessor of the Chicago Convention, the rule of customary international law was so well established that the contracting parties had no difficulty in recognizing "that every power has complete and exclusive sovereignty over the airspace

¹*Chicago Convention, supra*, Introduction, note 1 at Article 2. The *Geneva Convention on the Territorial Sea and the Contiguous Zone*, done at Geneva on 29 April 1958 (516 U.N.T.S. 205; 1965 U.K.T.S. 3; 52 A.J.I.L. 834) and the *United Nations Convention on the Law of the Sea*, done at Montego Bay on 10 December 1982 (*The Law of the Sea: Official Text of the United Nations Convention on the Law of the Sea with Annexes and Index* (New York: United Nations, 1983); UN Doc. A/CONF. 62/122 and Corr. 1-11) both reiterate in their respective Articles 2 that the sovereignty of a State extends to the airspace above the territorial sea. The outer limit of the territorial sea was undefined in the 1958 Convention, but the 1982 Convention specifies a breadth "up to a limit not exceeding 12 nautical miles". The upper limit of airspace and the boundary with outer space remains unsettled. No State may claim sovereignty to any part of outer space: see Article 2 of the *Treaty on the Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and other Celestial Bodies*, done at London, Moscow and Washington on 25 January 1967 (610 U.N.T.S. 206; 1968 U.K.T.S. 10; Cmnd. 3519; 1967 A.T.S. 24; T.I.A.S. 6347).

²I.A. Vlasic, ed., *Explorations in Aerospace Law - selected essays by John Cobb Cooper, 1946-1966*, (Montreal: McGill University Press, 1968) [hereinafter *Explorations*] at 105. For a contrary view, see D.H.N. Johnson, *Rights in Airspace* (Manchester: Manchester University Press, 1965) at 23-24.

³With thirty-eight parties.

⁴Done at Paris on 13 October 1919, 11 L.N.T.S. 173 [hereinafter "Paris Convention"].

above its territory",⁵ a principle twenty-five years later incorporated into the Chicago Convention.⁶

The Arbitrator in the *Island of Palmas Case* (The Netherlands v. U.S., 1928) made some general comments on the concept of sovereignty, stating that:

"Sovereignty in the relations between States signifies independence. Independence in relation to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. The development of the national organization of States during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations."⁷

In the same judgement, he further stated that, "Territorial sovereignty...involves the exclusive right to display the activities of a State."⁸ Such exclusive competence is, of course, subject to whatever limitations which may exist by reason of international law.

Flowing from the principle of the complete and exclusive sovereignty of each State over its territory is the right to exclude foreign aircraft (i.e. aircraft not possessing its nationality), civil or military, from entering its airspace or overflying or landing in its territory, or to admit them subject to such conditions as it may stipulate. There is with respect to aircraft no customary law right analogous to the innocent passage of ships

⁵*Ibid.* at Article 1. See also Article 1 of the *Convention on Commercial Aviation*, done at Havana on 20 February 1928, U.S.T.S. 840 [hereinafter "Havana Convention"]. This regional agreement for pan-American States had 11 parties but like the Paris Convention, was superseded by the Chicago Convention by virtue of Article 80 of the latter.

⁶For further discussion of the evolution of the concept of State sovereignty in airspace, see M.S. McDougal, D.L. Lasswell and I.A. Vlasic, *Law and Public Order in Space* (New Haven: Yale University Press, 1963) at 257-267; Johnson, *supra*, note 2; P.H. Sand, G.N. Pratt and J.T. Lyon, *An Historical Survey of the Law of Flight* (Montreal: McGill University, 1961); *Explorations, supra*, note 2 at 55-136; A.I. Moon, "A Look at Airspace Sovereignty" (1963) 29 J.A.L.C. 328; J.M. Denaro, "States' Jurisdiction in Aerospace Under International Law" (1970) 36 J.A.L.C. 688; R.Y. Jennings, "International Civil Aviation and the Law" (1945) XXII B.Y.I.L. 191; and F. Hassan, "The Shooting Down of Korean Airlines Flight 007 by the USSR and the Future of Air Safety for Passengers" (1984) 33 I.C.L.Q. 712.

⁷II R.I.A.A. 829 at 838.

⁸*Ibid.* at 839.

through territorial waters. Rights of an aircraft to enter, overfly or land in, foreign territory must be based on the agreement of the foreign State concerned. Concerning state aircraft, the Chicago Convention is explicit:

"No state aircraft of a contracting State shall fly over the territory of another State or land thereon without authorization by special agreement or otherwise, and in accordance with the terms thereof."⁹

The Paris Convention contained a similar provision in Article 32. With respect to all aircraft, civil or state, authorization may be granted on a multilateral or a bilateral basis.

In respect of civil aircraft, each party to the Chicago Convention agrees in Article 5 that aircraft of the other contracting States *not engaged in scheduled international air services* shall have the right to make flights into or in transit non-stop across its territory and to make stops for non-traffic purposes (commonly referred to as the "first two freedoms" of the air) without the necessity of obtaining prior permission. Each "contracting State nevertheless reserves the right, for reasons of safety of flight, to require aircraft desiring to proceed over regions which are inaccessible or without adequate air navigation facilities to follow prescribed routes, or to obtain special permission for such flights." The Article further provides that such aircraft, "if engaged in the carriage of passengers, cargo or mail for remuneration or hire...shall also...have the privilege of taking on or discharging passengers, cargo, or mail, subject to the right of any State where such embarkation or discharge takes place to impose such regulations, conditions or limitations as it may consider desirable."

As far as *scheduled international services* are concerned, Article 6 is emphatic:

"No scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or other authorization of that State and in accordance with the terms of such permission or authorization."

Consequent thereto, permission or authorization for scheduled international air services, and sometimes for non-scheduled international air services engaged in the carriage of passengers, cargo or mail for remuneration or hire, are reciprocally exchanged under

⁹*Supra*, Introduction, note 1 at Article 3(c).

bilateral air transport agreements between States, of which thousands have been concluded. More rarely, such rights are unilaterally granted to foreign aircraft.

Earlier, each party to the Paris Convention agreed by virtue of Article 2 "in time of peace to accord freedom of innocent passage above its territory to the aircraft of the other contracting States"¹⁰ This freedom of innocent passage was restricted by Article 15 which required such aircraft to follow the route fixed by the State over which the flight took place, and to land if ordered to do so for reasons of general security. Article 15 was modified in 1929 with the inclusion of the following provision:

"Every contracting State may make conditional on its prior authorization the establishment of international airways and the creation and operation of regular international air navigation lines, with or without landing, on its territory."

Consequently, the establishment of scheduled services was subject to the consent of the overflown State.¹¹

In respect of scheduled international air services, each party to the *International Air Services Transit Agreement* (Chicago, 1944)¹² agree to grant to other contracting States the two technical freedoms i.e. the privilege to fly across its territory without landing and to land for non-traffic purposes. However, these privileges are subject to the right of each contracting State to designate the route to be followed within its territory. The Transit Agreement currently has 115 parties, including most of the major civil aviation countries. More extensive commercial rights can be exchanged multilaterally through the *International Air Transport Agreement* (Chicago, 1944)¹³ and are also

¹⁰An identical provision is found in Article 4 of the Havana Convention (*supra*, note 5).

¹¹For the relationship between Articles 1, 2 and 15 of the Paris Convention, see McDougal, Lasswell and Vlastic, *supra*, note 6 at 261-262; Johnson, *supra*, note 2 at 34-35; Jennings, *supra*, note 6 at 197-198; and Denaro, *supra*, note 6 at 692-694.

¹²84 U.N.T.S. 38; ICAO Doc. 7500.

¹³171 U.N.T.S. 387.

subject to the right of each contracting State to designate the route to be followed; however, this "five-freedoms" agreement is limited to a mere twelve parties.

The qualified authorizations granted by the Chicago Convention in respect of non-scheduled services (including general aviation) suggests that there is no additional requirement of a permit from the State to be entered. However, advance notice of intended arrival for traffic control, public health and similar purposes could be required,¹⁴ and indeed, for safety purposes is almost invariably required. More specifically, even for flights in transit (i.e. exercising the first two freedoms of the air) the "general practice" is "to require the filing of a flight plan or some form of prior notification for air traffic control, immigration, customs and public health purposes. The period of prior notification varies from State to State, the most common being twenty-four hours".¹⁵ With respect to non-scheduled commercial flights with traffic stops, some form of advance permission is sometimes required from the foreign State.¹⁶

Annex 2 to the Chicago Convention requires a flight plan to be submitted prior to operating, *inter alia*, any flight or portion thereof to be provided with air traffic control service or any flight across international borders. The flight plan must include the route to be followed as well as destination aerodrome. These rules form part of most national regulations and are followed in common practice.

Consequently, although the right to enter foreign territory may exist in principle under the Chicago, Transit, and Transport agreements or bilateral agreements, nevertheless, for appropriate control of air traffic, States require additional prior knowledge of incoming flights, without which an aircraft may be perceived by air traffic control and military authorities of a State to be an "intruder".

Additionally, the Chicago Convention in Article 9 allows each contracting State for reasons of military necessity or public safety to restrict or prohibit the aircraft of

¹⁴ICAO Doc. 9587: *Policy and Guidance Material on the Regulation of International Air Transport* (1992) at 11.

¹⁵ICAO Circular 136-AT/42: *Policy Concerning International Non-Scheduled Air Transport* at 17.

¹⁶*Ibid.* at 17-19.

other States from flying over certain areas of its territory; each contracting State also has the right "in exceptional circumstances or during a period of emergency, or in the interest of public safety, and with immediate effect, to restrict or prohibit flying over the whole or any part of its territory." The Paris Convention also contained comparable provisions.¹⁷

Under Article 11 of the Chicago Convention, the laws and regulations of a contracting State relating to the admission to, or departure from, its territory of aircraft engaged in international air navigation, or to the operation and navigation of such aircraft while within its territory, must be respected by such aircraft.

It sometimes happens that a civil aircraft may deliberately or inadvertently:

- i) enter without prior permission the airspace of a foreign State; or
- ii) having obtained such permission, deviate from its assigned route or a designated air corridor; or
- iii) having prior authorization to enter under one of the general conventions or a bilateral agreement, nevertheless does not meet the requirements of the State regarding advance notifications of the particular flight to an extent that the State does not know of its intended entry; or
- iv) enter a prohibited or restricted area.

Such aircraft may be regarded as having committed an "aerial intrusion".¹⁸

The frequency of aerial intrusions is difficult to ascertain since it is not known how many remain unreported, and the vast majority it is believed end without newsworthy incident. One writer, without indicating the basis upon which he has drawn his conclusions, states that "in view of the speed...of civil transport (*sic*) and poor weather conditions, it is not rare for such aircraft to stray from their route when it runs

¹⁷*Supra*, note 4 at Article 3. See also Article 5 of the Havana Convention (*supra*, note 5).

¹⁸Hereinafter, the term "aerial intruder" will be used in this broad sense to refer to such aircraft, unless the context indicates otherwise. The question of the status of a civil aircraft which breaches the laws and regulations of some States relating to air defense identification zones deserves separate treatment and will not be covered in this enquiry to the extent that such breach does not bring the aircraft within this definition of "aerial intruder".

along the airspace of a State."¹⁹ He adds that "violations by aircraft operating scheduled services, ...occur practically every day."²⁰ While the last statement may be an exaggeration, in 1983 the prestigious Flight International Magazine reported that the shooting down of aircraft "has occurred at least once a year during the last 20 years and at least 33 times since 1947."²¹ Although the circumstances of these incidents were not given, nor whether the victim aircraft were civil or military, one suspects that most of the shootings can be attributed to aerial intrusions.

The record shows, however, that there have been numerous intrusions by military aircraft in peacetime, by civil commercial aircraft as well as by general aviation aircraft.²² For example, in 1994 it was reported that Japan had been understating for decades the number of aircraft violating its airspace in order to avoid diplomatic squabbles, and that about twenty-eight such violations had been made public since 1967; information about other incidents had been suppressed.²³ Also in 1994, an Afghanistan airliner entered Pakistani airspace without prior clearance and was ordered back to Kabul; a Pakistani Government spokesman said that both civilian and military aircraft

¹⁹G. Fouilloux, "The Destruction of the K.A.L. 747 and the Law" ITA Magazine No. 10 - November 1983, 56 at 61.

²⁰*Ibid.* at 65. On another occasion, he states that "violations of airspace recorded by States in a position to identify them exceed ten a day on average" (G. Fouilloux, "The Protocol of 10 May 1984 Amending the Convention on International Civil Aviation" ITA Magazine No. 17 - June/July 1984, 51 at 51).

²¹Issue of week ending 17 September 1983 at 732.

²²See McDougal, Lasswell and Vlasic, *supra*, note 6 at 269-276; Johnson, *supra*, note 2; O.J. Lissitzyn "The Treatment of Aerial Intruders in Recent Practice and International Law " (1953) 47 A.J.I.L. 559; W.J. Hughes, "Aerial Intrusions by Civil Airliners and the Use of Force" (1980) 45 J.A.L.C. 595; G. Richard, "KAL 007: The Legal Fallout" (1984) IX A.A.S.L. 147; F. Hassan, "A Legal Analysis of the Shooting of Korean Airlines Flight 007 by the Soviet Union" (1984) 49 J.A.L.C. 555; J. Sundberg, "Legitimate Responses to Aerial Intruders" (1985) X A.A.S.L. 251; Fouilloux, *supra*, note 19; K. Hailbronner, Protection of Aerial Frontiers (LL.M. Thesis, McGill University, 1969); and A.K. Thaker, International Law and the Legal Status of Military Aircraft in Peacetime (LL.M. Thesis, McGill University, 1969).

²³IFALPA International Civil Aviation Executive News Service, 16-18 April 1994 at 1.

from Afghanistan had repeatedly violated Pakistani air traffic control procedures and safety requirements.²⁴

The flight of aircraft over the territory of foreign States without their prior consent or knowledge dates back to the early days of manned flight. Before 1910, authorization of the subjacent State was not required or sought, perhaps because the concept of State sovereignty in the airspace and its scope in relation to overflight by foreign aircraft had not been settled. In the words of Cooper:

"When the [Paris] conference met in 1910, international flight was practically unregulated. Free balloons took off from one State and landed in another or wherever they might drift. The early zeppelins started on test and training flights from their base in Germany and directed their flight over Switzerland without consideration of the need for a permit. The French aviator Bleriot took off on his famous 1909 airplane flight and crossed the English Channel from France to Great Britain without thought of creating an international incident.

Between April and November of 1908 at least ten German balloons crossed the frontier and landed in France carrying over twenty-five aviators at least half of whom were German officers...."²⁵

The first recorded shoot-down of a civil aerial vehicle, at least in peacetime, occurred in 1904 when Russian soldiers shot down a German balloon.²⁶ In 1910, Russian guards fired at "aeronauts" who had crossed the frontier of Russia.²⁷ Both these incidents resulted from real or perceived intrusions into the airspace of a foreign State.

While the vast majority of aerial intrusions are handled without serious danger to the aircraft and its occupants, on occasion force, often fatal, is used to end the violation. The hazards of even the most innocuous intrusions are illustrated by a fairly recent incident when, on 12 September 1995, a Belorussian helicopter shot down an American

²⁴IFALPA International Civil Aviation Executive News Service, 18 August 1994 at 3.

²⁵See *Explorations*, *supra*, note 2 at 106. See also Sand, Pratt and Lyon, *supra*, note 6 at 9-10; and D.W. Freer, "The Roots of Internationalism - 1783 to 1903" ICAO Bulletin, March 1986, 30 at 30-31.

²⁶Johnson, *supra*, note 2 at 70-71; Sand, Pratt and Lyon, *supra*, note 6 at 12.

²⁷Sand, Pratt and Lyon, *ibid.*

hot-air balloon, killing both pilots. The balloon had been competing in an international race and had drifted into Belorussian airspace without permission.²⁸ Even more recently, real or perceived violations of Cuba's territorial airspace by civil aircraft from the United States led to the shooting-down of two such aircraft on 24 February 1996 by Cuban military aircraft, resulting in the death of four persons.²⁹

In terms of sheer number of fatalities resulting from the use of force to end an aerial intrusion, two cases stand out. First, on 21 February 1973, a Libyan Airlines Boeing 727 on a flight from Tripoli to Benghazi and then on to Cairo (Egypt) deviated from its course and was shot down by Israeli fighter aircraft over the Israeli-occupied Sinai Peninsula; 110 persons died.³⁰ Second, on the night of 31 August 1983, a South Korean Air Lines Boeing 747 (designation KE 007) with 269 persons on board deviated from its planned route from Anchorage, Alaska, to Seoul, penetrated Soviet airspace and was shot down by interceptor aircraft, with the loss of all lives on board.³¹

Another noteworthy case involving the shooting down in peacetime of a civil commercial airliner with an even greater loss of lives, which did not, however, arise out

²⁸IFALPA International Civil Aviation Executive News Service, 15 September 1995 at 1; IFALPA International Civil Aviation Executive News Service, 3 October 1995 at 1; The (Montreal) Gazette, 15 September 1995.

²⁹The facts of this case are set out in ICAO Council Working Paper (C-WP)/10441.

³⁰For the facts of this incident, see C-WP/5764, Attachment; and Hughes, *supra*, note 22 at 611-612. For a related analysis of the legality of Israel's actions, see K. Hailbronner, "Topical Problems of International Aviation Law" (1973) 8 Law and State 96.

³¹Probably no case of the destruction by force of an aerial intruder has generated as much literature as this incident. E.g., see P. Martin, "Destruction of Korean Air Lines Boeing 747 over Sea of Japan, 31 August 1983" (1984) IX:3 Air Law 138; B. Cheng "The Destruction of KAL Flight KE 007, and Article 3 *bis* of the Chicago Convention" in J.W.E. Storm van's Gravesande & A. van der Veen Vonk, eds., *Air Worthy - Liber Amicorum Honouring Professor Dr. I.H.PH. Diederiks-Verschoor* (Deventer: Kluwer Law and Taxation, 1985) 47; Hassan, *supra*, notes 6 and 22; Richard, *supra*, note 22; Fouilloux, *supra*, note 19; G. Guillaume, "The Destruction on 1 September 1983 of the Korean Airlines Boeing (Flight KE 007)" ITA Magazine No. 0-18, September 1984, 27; F. Machado, "The Destruction of the KAL 007 (KE 007) - How did it happen?" ITA Magazine No. 12, January 1984, 15; M. Sayle, "Closing the File on Flight 007" The New Yorker, 13 December 1993, 90. Additionally, for the facts of the case, see C-WPs/7764 and 9781.

of an aerial intrusion into foreign airspace, was the destruction of Iran Air IR655 over the high seas by a United States warship on 3 July 1988, with 290 fatalities.³²

Two relatively recent incidents illustrate different treatment accorded civil aerial intruders as compared to the incidents mentioned immediately above. On 20 July 1995, a Jordanian pilot flew his light plane into Israel by mistake. Israeli Air Force planes intercepted the aircraft and directed it to land. Jordan later sent a plane to pick him up.³³ On the very *same* day, Russia forced a United Kingdom commercial airliner to land in Moscow "because it had not secured approval to fly over the city. After more than eight hours on the ground, the plane had to return to London with 255 angry passengers and 16 crew."³⁴

As can be seen, the treatment afforded intruding civil aircraft varies widely. In the next chapter, an examination will be made of the applicable legal standards as they existed before the adoption of the Protocol introducing Article 3 *bis* into the Chicago Convention.

³²The facts are given in C-WP/8708, App.

³³IFALPA International Civil Aviation Executive News Service, 28 July 1995 at 1.

³⁴The (Montreal) Gazette, 22 July 1995.

CHAPTER II

THE USE OF FORCE AGAINST CIVIL AERIAL INTRUDERS IN INTERNATIONAL LAW BEFORE THE ADOPTION OF ARTICLE 3 bis

Professor Lissitzyn, in his authoritative article on this subject, succinctly states that:

"Aerial intrusions may occur for a variety of reasons and in a variety of circumstances. They may be deliberate and with hostile and illicit intentions such as attack, reconnaissance, aid to subversive activities, smuggling, or calculated defiance of the territorial sovereign. They may be deliberate but with essentially harmless intentions such as shortening a flight or avoiding bad weather. They may be necessitated by distress or caused by mistakes. They may occur in peacetime or wartime...."¹

Essentially, the broad classification is, on the one hand, of voluntary intrusions and, on the other hand, involuntary intrusions caused by necessity, mistake, distress or *force majeure*.

In light of the customary and conventional principle of the complete and exclusive sovereignty of a State over its airspace, the question is whether a State whose airspace was violated had an unfettered discretion in dealing with a civil aerial intruder and, in particular, whether it could use force against such aircraft; or whether and to what degree its actions were circumscribed by international law, prior to the adoption of Article 3 *bis*.

It is generally accepted that the sources of international law are set out in Article 38 of the Statute of the International Court of Justice (I.C.J.), namely:

- (a) international conventions or treaties, whether general or particular;
- (b) international custom, as evidence of a general practice accepted as law;
- (c) general principles of law recognized by civilized nations; and

¹Lissitzyn, *supra*, Ch. I, note 22 at 559-560.

- (d) judicial decisions and "the teachings of the most highly qualified publicists, as subsidiary means for the determination of rules of law."²

This Chapter will examine the provisions governing the use of force against aerial intruders, in treaties and in other sources of international law, before the adoption of Article 3 *bis*.

1. TREATY LAW

Treaty law on this subject is to be found mainly in the Chicago Convention and in the Charter of the United Nations. However, to facilitate an interpretation of the relevant provisions of the Chicago Convention, it is proposed to consider first the applicable treaty law prior to the adoption of the Chicago Convention in 1944.

a) Prior to the Chicago Convention

An *International Air Navigation Conference* held in *Paris* in 1910 completed all but a few clauses of a draft convention, which was however, never finalized. The Conference's First Commission which dealt with the admission of foreign aircraft agreed, *inter alia*, that each contracting State shall permit the navigation of aircraft of other contracting States over its territory "subject to restrictions necessary to guarantee its own security and that of the persons and goods of its inhabitants". However, "sojourn required by necessity can not be refused in any case to aircraft of a contracting State."³

²The Statute is annexed to the Charter of the United Nations. A number of inter-related questions have been raised in connection with Article 38, such as whether the list is set out in an order of priority; the meaning of c) and its relationship with b); and whether decisions, resolutions and declarations adopted by international organizations should be regarded as a separate category or source.

³See *Explorations, supra*, Ch. 1, note 2 at 115-116.

*A bilateral agreement of 1913 between France and Germany*⁴ dealt with the mutual admission of each State's aircraft into the other's territory. Aircraft were divided into those belonging to the military service or the crew of which was composed entirely or in part of soldiers in uniform, and all other aircraft. Aircraft of the first category from one State were not allowed to fly over the other State's territory or to land therein except upon invitation of the latter. However, in case of necessity, permission to "remain" on the latter's territory was not to be refused. If such an aircraft was (involuntarily) "carried" over the territory of the foreign State, it had to display the signal of distress as provided by that State's regulations, to effect a landing as quickly as possible, and immediately to notify the nearest authorities of that State; a military authority was obliged to start an inquiry to ascertain whether or not this really was a case of necessity, and if so, the aircraft was to be released. If the intrusion or landing did not arise out of necessity, the agreement foresaw the possibility of judicial action by the State of landing.

The second category of aircraft (non-military) were allowed to fly over and to land under certain conditions, except in forbidden zones. However, even if these conditions were not met, in case of necessity, such aircraft were allowed to "remain" (or enter) the territory of the other State. The authorities of the State of landing were obliged to take necessary steps to protect the aircraft from damage and to assure the safety of the crew.

Under this agreement, non-military aircraft were to be treated leniently in case of intrusion caused by necessity; there was no explicit or implicit authorization for the use of force against the aircraft in such cases. Nothing was said as to action which might be taken in respect of intruding military aircraft which either did not give the distress signal or refused to land, or both.

By virtue of Article 32 of the Paris Convention⁵ of 1919, it was forbidden for military aircraft of a contracting State to fly over the territory of another contracting

⁴*Exchange of Notes between France and Germany Concerning Aerial Navigation* (1914) 8 A.J.I.L. Supp. 214. See also *Explorations*, *ibid.* at 130-132.

⁵*Supra*, Ch. 1, note 4.

State without special authorization. Where such authorization was obtained, the aircraft enjoyed the privileges which were customarily accorded to foreign warships, but if a military aircraft was forced to land or was requested to land, it enjoyed no such privileges. Every aircraft, military or "private", which "finds itself" over a prohibited area was required, as soon as it became aware of the fact, to give a specified signal of distress "and land as soon as possible outside the prohibited area at one of the nearest aerodromes of the State unlawfully flown over."⁶ Article 22 stipulated that aircraft of other contracting States were entitled to the same measures of assistance for landing, particularly in case of distress, as national aircraft; Lissitzyn is of the view that a right of entry in distress could be implied from the language of this Article.⁷ There was nothing stated as to action which might be taken in respect of violation of the borders as opposed to flight over a prohibited area, nor in respect of an aircraft which did not give the distress signal or land or both.⁸

Draft Article 42 of the *1923 Hague Rules on Aerial Warfare*⁹ provides that in time of war a "neutral government must use the means at its disposal to prevent the entry within its jurisdiction of belligerent military aircraft and to compel them to alight if they have entered such jurisdiction." In a comment on another draft article, the Commission of Jurists which drafted the Rules stated:

"Where aircraft and their personnel are in distress and seek shelter in neutral territory, knowing that their fate will be internment, or where the entry is due to the fact that the aircraft has lost its bearings or experienced engine trouble or run out of fuel, the neutral State is under no obligation

⁶Article 4.

⁷Lissitzyn, *supra*, Ch. I, note 22 at 565; he also points out (at 560-561) that the Legal Subcommittee of the Aeronautical Commission of the Peace Conference (1919) which drafted the Convention indicated its belief that foreign military aircraft should not be penalized for an intrusion caused by distress.

⁸The Havana Convention also required aircraft overflying a prohibited area to land as soon as possible outside said area. That Convention also foresaw the possibility of deviation from prescribed routes (Article 5) or landing in other than "the corresponding customs airdrome" because of *force majeure* (Article 18).

⁹(1938) 32 A.J.I.L. Supp. 12.

to exclude them; it is, in fact, morally bound to admit them. This is due to the principle that those who are in distress must be succoured. The prohibition in the article is aimed at those who enter in violation of the rights of the neutral state."¹⁰

Although the Rules were never adopted in treaty form, they are commonly regarded as authoritative statements of the law. *A fortiori*, one could conclude that at a minimum, the same considerations would apply to civil aerial intruders in peacetime.

b) The Chicago Convention

Like the Paris Convention, the Chicago Convention does not deal explicitly with the use of force against civil aircraft.

In Article 3(d), the "contracting States undertake, when issuing regulations for their state aircraft, that they will have due regard for the safety of navigation of civil aircraft." This may be taken, *inter alia*, as an implied obligation that in any interaction between state (including military) aircraft and civil aircraft, "due regard" shall be paid to the safety of such civil aircraft.

Under paragraph (c) of Article 9, each contracting State is authorized to require any foreign aircraft entering a prohibited or restricted area "to effect a landing as soon as practicable thereafter at some designated airport within its territory." The Convention does not specify the remedies available to the subjacent State in case the aircraft does not land "as soon as practicable", or otherwise disobeys orders to change course.

On at least two occasions, governments have engaged in the interpretation of Article 9(c). The United Kingdom Memorial to the I.C.J. relating to the *Aerial Incident of 27 July 1955*, stated that:

"since the Conventions on Aerial Navigation do not sanction the use of force against aircraft flying above prohibited or restricted areas, no Contracting State can be in any stronger position against civil aircraft on

¹⁰*Ibid.* at 35.

scheduled flights which overfly other areas of their territory without permission."¹¹

And in 1983, in a statement before the governing body of ICAO, the Council, the United States' Representative said:

"...Article 9(c) contemplates that the remedial measure for aircraft entering a prohibited area is a requirement to land.... By its actions and words, the Soviet Union has declared the right to guard its prohibited areas by the destruction of civil aircraft, even those which have left or are about to leave its airspace. Such actions clearly go far beyond the rights of states contemplated in Article 9, or reflected elsewhere in international law."¹²

For these two States then, the remedies available to the territorial sovereign against civil aircraft unlawfully flying over its prohibited areas are strictly limited to those expressly mentioned in Article 9, viz., to require landing as soon as practicable at a designated airport; the subjacent State may not use force to enforce its rights.

Article 25 of the Chicago Convention provides that:

"Each contracting State undertakes to provide such measures of assistance to aircraft in distress in its territory as it may find practicable, and to permit, subject to control by its own authorities, the owners of the aircraft or authorities of the State in which the aircraft is registered to provide such measures of assistance as may be necessitated by the circumstances."

There has been debate whether the obligation to assist extends to an aircraft which unlawfully intrudes, or whether the Article applies only to cases where the aircraft had prior permission to enter. Views are divided on the subject. Lissitzyn, for example, believes that "the article...may, perhaps, be interpreted like the corresponding provision in the Paris Convention as implying the existence of a right of entry for such aircraft."¹³

¹¹*Aerial Incident of 27 July 1955 (Israel v. Bulgaria; United States of America v. Bulgaria; United Kingdom v. Bulgaria)*, [1959] I.C.J. Pleadings at 364.

¹²ICAO Doc. 9416-C/1077, C-Min. EXTRAORDINARY (1983)/1-4: Council - Extraordinary Session (Montreal, 15 and 16 September 1985) Minutes at 24-25.

¹³*Supra*, Ch. I, note 22 at 569. Hassan, *supra*, Ch. I, note 22 at 580, after quoting Article 25, states that "if a trespassing aircraft gives an indication of its distress to the subjacent State, it should be provided with suitable assistance". In a Note entitled "Legal Aspects of Reconnaissance in Airspace and Outer Space" (1961) 61 C.L.R. 1074 at 1078, it is stated that "the Chicago Convention and customary law impose a positive duty to aid civil aircraft in distress". For similar opinions, see

An opposite view is taken by Hailbronner, who states categorically that Article 25 refers only to cases of authorized entry.¹⁴ Others recognize a lack of clarity in the wording of Article 25. A 1958 Study by the Legal Bureau of ICAO pointed out that a "question arising is whether a contracting State is obliged [under Article 25] to allow an aircraft in distress to enter its territory."¹⁵

It bears emphasis that the Chicago Convention was not drafted in a vacuum. Its provisions were heavily influenced by the Paris Convention and through that Convention, by the product of the 1910 Conference and State practice, including the 1913 French/German Agreement and the wartime practices reflected in the 1923 Hague Rules. On balance, therefore, the better view, and indeed the predominant view, would seem

S.M. Beresford "Surveillance Aircraft and Satellites: A Problem of International Law" (1960) 27:2 J.A.L.C. 107 at 113; and Fouilloux, *supra*, Ch. I, note 19 at 60-61.

The United States has strongly implied that Article 25 applies to an intruding civil aircraft: "A commercial airliner found to be flying off course should not be presumed to be hostile. It is likely that such aircraft is lost and in need of assistance. Under Article 25...each ICAO State has promised 'to provide such measures of assistance to aircraft in distress in its territory as it may find practicable....' This obligation to assist is a reaffirmation of basic principles of humanitarian behaviour.... Then, apparently without adequate warning and without any known attempt to assist the aircraft back on its course, the Soviet Union fired on the airliner and its 269 occupants. This action was precisely the opposite of what the Chicago Convention seeks to ensure" (*ibid.* at 25).

See also a Canadian statement at the 25th Session (Extraordinary) of the ICAO Assembly (ICAO Doc. 9437, A25-Res., P-Min.: *Assembly - 25th Session (Extraordinary), Plenary Meetings, Resolutions and Minutes* at 69). Additionally, some speakers at the 19th Session (Extraordinary) of the ICAO Assembly which considered the 1973 shooting down of the Libyan Arab Airlines Boeing 727 expressed the view that there was an obligation under the Chicago Convention to render assistance to aircraft in distress, including in this case an aerial intruder (ICAO Doc. 9061, A19-Res., Min.: *Assembly - Nineteenth Session (Extraordinary), Resolutions and Minutes* at 29-63).

¹⁴*Supra*, Ch. I, note 30 at 103, an opinion shared by McDougal, Lasswell and Vlasic (*supra*, Ch. I, note 6 at 269).

¹⁵C-WP/2609 para. 19. A similar question is posed by the United Kingdom in its Memorial to the I.C.J. in the *Aerial Incident of 27 July 1955* (*supra*, note 11 at 359) and by F. Fedele, *Peacetime Reconnaissance from Air Space and Outer Space: A Study of Defensive Rights in Contemporary International Law* (LL.M. Thesis, McGill University, 1965) at 98.

to be that Article 25 was meant also to cover intruding civil aircraft in distress,¹⁶ but it must be recognized that the wording is open to a different interpretation.¹⁷

Under Article 37 of the Chicago Convention, ICAO is given the authority to adopt and amend international Standards and Recommended Practices (SARPs) and procedures in a number of technical aeronautical fields, contained in documents designated as Annexes to the Convention.¹⁸ The 7th Edition of Annex 2 (*Rules of the Air*), which was in effect at the time of the adoption of Article 3 *bis*, contained a number of provisions on interception of civil aircraft, including action to be taken by intercepted aircraft and intercepting aircraft, such as visual signals for use in the event of interception and to warn unauthorized aircraft flying in, or about to enter, a restricted or prohibited area. Special Recommendations in *Attachment A* to Annex 2 warned, *inter alia*, that interceptions of civil aircraft were in all cases potentially hazardous and should be avoided and be undertaken as a last resort only; however, if undertaken, interception should be limited to determining the identity of the aircraft and providing any navigational guidance necessary for the safe conduct of the flight; and interceptors should refrain from the use of weapons in all cases of interception of civil aircraft. However, the Annexes are not an integral part of the Convention and the SARPs are not automatically binding on States by virtue only of their being party to the Convention. Except in the limited case of the applicability of Annex 2 Standards over the high seas, States are entitled to file a difference to any particular Standard they do not comply with. Furthermore, the Special Recommendations in the *Attachment* are, as the name suggests,

¹⁶Neither the Paris Convention nor the Chicago Convention, defines distress. The facts which may cause an aircraft to be in distress within the natural meaning of the word of being in a state of danger, are infinite. Annex 12 (*Search and Rescue*) to the Chicago Convention defines "distress phase" as "A situation wherein there is reasonable certainty that an aircraft and its occupants are threatened by grave and imminent danger or require immediate assistance."

¹⁷In an interesting analogy, the *Treaty of Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies*, provides in Article 5 that State parties are to render to astronauts all possible assistance in the event of accident, distress or emergency landing on the territory of another State party (*supra*, Ch. I, note 1).

¹⁸See *infra*, Chapter V for a more detailed examination of SARPs, and in particular, those relevant to the use of force against civil aircraft.

recommendatory in nature only and there is no need to file a difference in case of non-compliance. Finally, although the Special Recommendations urge States to "refrain from the use of weapons" in cases of interception of civil aircraft, the SARPs themselves do not indicate the manner in which the subjacent State may act if the intruding aircraft disobeys or ignores the instructions and warnings which are given to it.

On 4 June 1973, the Council of ICAO adopted a resolution in connection with the shooting down of the Libyan Airlines passenger aircraft, in which it referred to the Israeli action as a flagrant violation of the principles enshrined in the Chicago Convention, without identifying which principles. On two occasions in the Korean Airlines 747 (KE 007) incident and also twice in its consideration of the incident concerning two U.S.-registered civil aircraft on 24 February 1996, the Council expressed the opinion that the use of weapons against civil aircraft in flight was incompatible with, *inter alia*, not only the Chicago Convention, but also the SARPs in the Annexes.¹⁹

c) The Charter of the United Nations

In some cases involving the use of force against intruding aircraft, States have claimed that such act was a violation of the provisions of the Charter of the United Nations.

On 9 and 19 August 1946 respectively, two American military transport aircraft found without authorization in Yugoslav airspace were brought down by Yugoslav fighters. The United States claimed in a Note to Yugoslavia that the use of force under the circumstances was a violation of Yugoslavia's obligations under the Charter not to use force except in self-defence.²⁰ *A fortiori*, a use of force under similar circumstances against civil aircraft would, under the United States' position, also constitute a breach of Charter obligations.

¹⁹*Infra*, Ch. III, 1 b).

²⁰(1946) 15 U.S. Department of State Bulletin at 417-418; also cited in Lissitzyn (*supra*, Ch. I, note 22 at 571).

In the *Aerial Incident of 27 July 1955* concerning the use of force by Bulgaria against an El Al aircraft, the United Kingdom maintained in its Memorial to the I.C.J. that the use of armed force against foreign ships or aircraft is not justified in international law unless it is used in the legitimate exercise of the right of self-defence, and that this basic principle was reflected in the Charter in Article 2(4). As a logical conclusion to this interpretation, the United Kingdom asserted that:

"...there can be no justification in international law for the destruction, by a State using armed force, of a foreign civil aircraft, clearly identifiable as such, which is on a scheduled passenger flight, even if that aircraft enters without previous authorization the airspace above the territory of that State."²¹

Likewise, in the ICAO Council's consideration of the Korean Airlines incident, the United States' Representative was of the view that use of force by military aircraft against a civil airliner in peacetime was a violation, *inter alia*, of the "fundamental norms of international law enshrined in the Charter".²²

The Charter of the United Nations is universally accepted and its substantive provisions are commonly regarded as forming part of general international law. It aims to prohibit the use of force in international relations, except as specifically authorized. According to Article 2(4):

"All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

This general prohibition is, however, subject to an important exception contained in Article 51, which reads:

²¹*Supra*, note 11 at 358. In the Session of the ICAO Assembly which adopted Article 3 *bis*, the UK made a statement to the effect that Article 2(4) forbids the use of force against civil aircraft on the basis that it prohibits the use of force in any manner inconsistent with the purposes of the UN; one of these purposes is the promotion of human rights, one of the most important of which is the right to life (ICAO Doc. 9437, *supra*, note 13 at 28). See also the Canadian statement (ICAO Doc. 9437, *supra*, note 13 at 68).

²²ICAO Doc. 9416, *supra*, note 12 at 23.

"Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations...."

Brownlie, after examination of the *travaux préparatoires* and basing himself on the principle of effectiveness, concludes that Article 2(4) does not by implication sanction the use of force not directed against the territorial integrity or political independence of a State, or which is not in any other manner inconsistent with the purposes of the United Nations.²³

The conditions for the lawful employment of force in self-defence are encapsulated in correspondence arising out of the *Caroline* case where a British force destroyed a U.S. ship which had been supplying Canadian rebels, resulting in the death of two U.S. nationals. The United States' Secretary of State, Webster, wrote to the British Ambassador in Washington on 24 April 1841, stating that the British Government would need to show:

"... a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation. It will be for it to show, also, that the local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories of the United States at all, did nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it."²⁴

Two principles emerge from this case which govern the right of self-defence to this day: the principle of necessity (or rule of last resort) to take the action in self-defence and the principle of proportionality of the action taken in response to the threat or use of force. The World Court in the *Nicaragua* case expressly sanctioned these two principles.²⁵

²³I. Brownlie, "The Use of Force in Self-Defence" (1961) XXXVII B.Y.I.L. 183 at 232-236.

²⁴29 British and Foreign State Papers 1137-1138; 30 British and Foreign State Papers 195-196. See also R. Higgins "The Legal Limits to the Use of Force by Sovereign States-United Nations Practice" (1961) XXXVII B.Y.I.L. 269 at 298-299; Brownlie, *ibid.* at 186; and the C.L.R. Note *supra*, note 13, at 1096 n. 123.

²⁵*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, [1986] I.C.J. Rep. 14 para. 176 [hereinafter *Nicaragua* case]. The Court held that the Charter did not "cover the whole area of the regulation of the use of force in international relations"; that Article 51, with its usage of the words "inherent right", referred to the customary law of self-

Brownlie, writing in 1961, notes that for at least the previous thirty years, self-defence "appeared in State practice principally as a reaction to the use of force against the territorial domain, the physical entity, of a State", and that it was not surprising that the drafters of the Charter should define it by reference to "armed attack".²⁶ Regarding the meaning of the phrase "armed attack" which would justify a response in self-defence, Brownlie cites the U.S. Senate Foreign Relations Committee in a comment on the North Atlantic Treaty that, "'armed attack is ordinarily self-evident...; ... the words...clearly do not mean an incident created by irresponsible groups or individuals, but rather an

defence. The Court found:

"that Article 51 of the Charter is only meaningful on the basis that there is a 'natural' or 'inherent' right of self-defence, and it is hard to see how this can be other than of a customary nature, even if its present content has been confirmed and influenced by the Charter. Moreover the Charter, having itself recognized the existence of this right, does not go on to regulate directly all aspects of its content. For example, it does not contain any specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law. Moreover, a definition of the 'armed attack' which, if found to exist, authorizes the exercise of the 'inherent right' of self-defence, is not provided in the Charter, and is not part of treaty law. It cannot therefore be held that Article 51 is a provision which 'subsumes and supervenes' customary international law. It rather demonstrates that in the field in question, the importance of which for the present dispute need hardly be stressed, customary international law continues to exist alongside treaty law. The areas governed by the two sources of law do not overlap exactly, and the rules do not have the same content."

For further discussions on whether and to what extent the customary right of self-defence still exists or has been modified or superseded by Article 51, see Brownlie, *supra*, note 23; Higgins, *supra*, note 24; and D.W. Bowett, *Self-Defence in International Law* (Manchester: Manchester University Press, 1958).

²⁶Brownlie, *supra*, note 23 at 223. W.W. Bishop, "General Course of Public Law" (1965) 115: II Académie de Droit Internationale - Recueil des Cours 151 at 435-437, states:

"The much more serious problem with Article 51, of course, is whether the right of self-defence covered by Article 51 is limited to cases where an armed attack has occurred or may be extended to cases where it is threatened or is believed to be imminent or probable. Most writers and statesmen believe that the combination of the plain wording of Article 2, paragraph 4, with Article 51, leaves unlawful under the Charter any use or threat of force unless the case is one falling squarely within the language of Article 51, 'if an armed attack occurs'.

...[W]e might well wish that the Charter had been drafted differently on this point. But in my opinion the wording 'if an armed attack occurs' is too clear to be swept aside."

attack by one State on another".²⁷ The World Court has held in the *Nicaragua* case that leaving aside the question of anticipatory self-defence, the exercise of the right of individual self-defence "is subject to the State concerned having been the victim of an armed attack" and that there was now "general agreement on the nature of the acts which can be treated as constituting armed attacks". It continued:

"In particular, it may be considered to be agreed that an armed attack must be understood as including not merely action by regular armed forces across an international border, but also 'the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to' (*inter alia*) an actual armed attack conducted by regular forces, 'or its substantial involvement therein'. This description ...may be taken to reflect customary international law."²⁸

Under this reasoning it would be difficult, if not impossible, to postulate a scenario under which the Charter's right of self-defence would apply in the case of an intrusion by civil aircraft, since as a rule civil aircraft could not by definition carry out State-sanctioned armed attacks on another State, because in such an instance they would more properly be regarded as military or police (state) aircraft.²⁹

If it is deemed that the use of force against civil aerial intruders is governed primarily by the Charter, then the conclusion of the United Kingdom in the *Aerial Incident of 27 July 1955* that there can be no justification for the destruction by a State of a clearly identifiable civil airliner, cannot be challenged. However, there is a

²⁷Brownlie, *supra*, note 23 at 245.

²⁸*Nicaragua* case, *supra*, note 25 para. 195.

²⁹For a clear exposition of this last point, see e.g., the statement of the Delegation of New Zealand at the 25th Session (Extraordinary) of the ICAO Assembly (ICAO Doc. 9437, *supra*, note 13 at 60-61). Brownlie is of the view that there may be situations where no state responsibility is involved, for example, where nationals undertake expeditions in conditions of secrecy, and he believes that a right of self-defence could be claimed in such cases. Such an assertion was made "on the basis of principle and policy since the legal materials relating to self-defence in international law contemplate action against States only"; he recognized that use of force to repel pirates at sea had the character of "a sanction, an exercise of jurisdiction, rather than mere self-defence" (*supra*, note 23 at 262).

convincing contrary view that the Charter is not *per se* relevant or applicable to cases involving the use of force against intruding civil aircraft. According to Hailbronner:

"...the prohibition of the use of force does not affect the inherent right of a sovereign State to defend its frontiers. The right of a State to prevent, or put an end to, any unauthorized entry into its territory is an essential element of territorial sovereignty. The proscription of the use of force in international law has its field of application in the prevention of international conflicts, but does not constitute a restriction on the sovereign rights of States within their own territories. Hence, coercive measures may be used to enforce the landing of ships and aircraft entering foreign territory without permission, just as frontier guards who have inadvertently crossed into foreign territory may be arrested."³⁰

A leading commentator, Professor Cheng, writing about references to Articles 2(4) and 51 by delegates to the ICAO Assembly which adopted Article 3 *bis*, puts it even more clearly:

"...But, with the greatest respect, the entire reference to the United Nations Charter, especially its Articles 2(4) and 51, seems misconceived.

The United Nations Charter in general and its Articles 2(4) and 51 in particular are concerned primarily with inter-State relations and relations between the Organization and its Members. They were never intended to lay down specific rules on how States, especially within their own territory, should treat or should not treat either own nationals or foreign nationals, into which category civil aircraft really fall. The question of how a State should deal with civil aircraft is in essence one of treatment of nationals and foreigners, and it should have been approached as such."³¹

³⁰*Supra*, Ch. I, note 30 at 102.

³¹Cheng, *supra*, Ch. I, note 31 at 70-71. But see A.A. Majid, "Treaty Amendment Inspired by Korean Plane Tragedy: Custom Clarified or Confused?" (1986) 29 *German Yearbook of International Law* 190 at 195. Brownlie makes the point that in relation to intruding aircraft, "the materials are often equivocal and do not make a clear distinction between the problem of self-defence against a use of force and the different question of apprehending trespassers." He states that in general, the practice seems to be that there is no right to shoot down trespassers unless they refuse or appear to refuse to land, but that in certain exceptional circumstances and in light of the potential destructive power of an aircraft, the subjacent State may take immediate preventive measures without warning; he describes this as a rare instance in which force may be used although no actual attack has taken place (*supra*, note 23 at 261).

There is strong circumstantial evidence that the above view is shared by States and international organizations. When the UN General Assembly considered the El Al incident and adopted Resolution 927 on 14 December 1955,³² it did not therein make any reference to a breach of Charter obligations. Likewise, on other occasions when the UN has pronounced on the use of force against civil aircraft, for example in relation to the 24 February 1996 incident involving two US-registered civil aircraft, it failed to express the view that such action constituted a violation of the Charter. The United States, in its draft resolution submitted to the Security Council on the 24 February 1996 shoot-down,³³ invited the Security Council to condemn the use of weapons against civil aircraft in flight as being incompatible with elementary considerations of humanity, rules of customary international law and ICAO SARPs, but did not refer to the UN Charter. ICAO, in its various resolutions and decisions on the subject, has also not deemed the use of force against civil aircraft as being contrary to the norms in the Charter.

Although the Charter right of self-defence seems to be inapplicable *per se* in a case not involving the use of a State-sanctioned or State-supported armed attack by aerial intruders, it seems that the customary right of self-defence, using the *Caroline* test, still exists and would operate to allow a State to take action against a civil aircraft which carries out an armed attack for private purposes or which acts in a way inimical to important security interests of the subjacent State, provided always that the twin criteria of necessity and proportionality are met.

³²*Infra*, Ch. III, note 2.

³³S/1996/596. The resolution adopted by the Security Council at its 3683rd meeting on 26 July 1996 in relation to this incident also failed to characterize the actions of Cuba as a breach of Charter obligations (S/RES/1067, UN S.C.O.R., 51st year, UN Doc. S-INF/52 (1996); S/RES/1067 (1996) in UN Press Release, SC/6315, *Resolutions and Statements of the Security Council*, at 54, (22 January 1997)).

d) Summary

The Chicago Convention deals with the problem of civil aerial intruders in a very narrow and ambiguous manner. The Convention requires landing in case of unauthorized overflight of prohibited areas, but there is no guidance as to the rights of the subjacent State in case such aircraft refuse to land or otherwise comply with its orders. It would seem that in cases of distress, aerial intruders are to be given such assistance as the subjacent State finds practicable; quite apart from the vagueness of the content of the obligation, it has to be admitted that to this day the law is not definitively settled as to whether Article 25 applies also to intruders or only to aircraft overflying with prior permission, although prevailing opinion favours the former interpretation. Apart from these two limited aspects of aerial intrusions, namely, overflight of prohibited areas and cases of distress, international conventional air law is silent on the matter of civil aerial intruders and, in particular, on the use of force against them.

The technical regulations in the 7th Edition of Annex 2 (and indeed, the current edition) were more detailed on unauthorized flight over prohibited areas and interception of civil aircraft, but the SARPs do not conclusively answer the question of the remedies available to the subjacent State where the intruder does not obey its orders or warnings. Furthermore, in general, Standards and especially Recommended Practices, are not binding on States, without their agreement. The "Special Recommendations" which urge States to limit interceptions to determining aircraft identity and to providing navigational assistance, and to "refrain" from the use of weapons against civil aircraft, are for guidance only.

Despite the occasional claims by States that use of force against civil aircraft is a breach of UN Charter obligations, the better view would seem to be that the Charter was not intended to, and does not, govern this matter.

It is to other sources of international law, therefore, that one must turn to obtain further clarification of the principles which govern the use of force against civil aerial intruders.

2. OTHER RELEVANT SOURCES OF INTERNATIONAL LAW

Under this head, it is proposed to examine relevant principles of customary international law before 1984 as evidenced by the practice of States. Subsequently, judicial and arbitral decisions ("subsidiary means for the determination of rules of law") will then be considered.

a) Customary International Law

Article 38 of the I.C.J. refers to international custom "as evidence of a general practice accepted as law". The I.C.J. has elaborated on this source in a number of cases. In the *Colombian-Peruvian Asylum* case, the Court held that:

"The Party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other party. The Colombian Government must prove that the rule invoked by it is in accordance with a constant and uniform usage practiced by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State."³⁴

Further, in the important *North Sea Continental Shelf* cases, the Court referred to an indispensable requirement of extensive and virtually uniform State practice, and continued:

"Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it."³⁵

Consequently, there must be a practice coupled with a belief (*opinio juris*) that the practice or behaviour is required by law, and not by mere courtesy.

³⁴(*Colombia v. Peru*), [1950] I.C.J. Rep. 266 at 276.

³⁵(*Federal Republic of Germany v. Denmark; Federal Republic of Germany v. The Netherlands*), I.C.J. Rep. [1969] 3 para. 77. See also the *Fisheries case (United Kingdom v. Norway)*, [1951] I.C.J. Rep. 116; and the *Lotus case (France v. Turkey)*, [1927] P.C.I.J. Ser. A, No. 10.

However, complete uniformity and universality of practice is not required. A certain degree of opposition to a rule will not necessarily prevent it from coming into being,³⁶ although there is a division of views as to whether an objecting State will be bound by the rule.³⁷

Lissitzyn has made a comprehensive study of State practice on the treatment of aerial intruders up to 1953. He found that before World War I, aerial intrusions became a concern to governments but did not generally result in serious incidents or diplomatic controversies; usually the intruders were permitted to leave after an investigation, although customs duties were sometimes levied on the aircraft.³⁸

During World War I, he points out, neutrals closed their airspace to belligerent aircraft and in numerous cases enforced this by firing at intruding military aircraft. Although the instructions of some neutral States provided for the firing "only when necessary or after a warning, the Dutch and Swiss often opened fire without any warning".³⁹ In a note dated 18 March 1916, the Netherlands Government nevertheless stated that:

"Considerations of humanity may lead the authorities to defer the resort to force until the aviator has been warned that he is above neutral territory, but no such warning is obligatory."⁴⁰

³⁶Judge Tanaka, in his dissenting opinion in the *South West Africa cases (Ethiopia v. South Africa; Liberia v. South Africa)*, *Second Phase* [1966] I.C.J. Rep. 6 at 291, expresses this clearly:

"Concerning the question whether the consent of all States is required for the creation of a customary international law or not, we consider that the answer must be in the negative for the reason that Article 38, paragraph 1(b), of the Statute does not exclude the possibility of a few dissidents for the purpose of the creation of a customary international law and that the contrary view of a particular State or States would result in the permission of obstruction by veto, which could not have been expected by the legislator who drafted the said Article."

³⁷See Majid, *supra*, note 31 at 219-220 for the view that an objector will be bound; and the Dissenting Opinion of Judge Ad Hoc Sorensen in the *North Sea Continental Shelf cases (supra*, note 35 at 247) for the opposite opinion.

³⁸Lissitzyn, *supra*, Ch. 1, note 22 at 561.

³⁹*Ibid.* at 562.

⁴⁰Spaight, *supra*, Introduction, note 2 at 422.

Later, it agreed not to fire at an aircraft in distress when such aircraft gave agreed signals.

Lissitzyn concludes that between the two World Wars:

"[T]here were many instances in which foreign aircraft intruding by mistake or in distress were permitted to enter and depart without molestation.... States enacted laws imposing penalties for the unauthorized entry of foreign aircraft, ...but at least in some instances a distinction was made in such laws between avoidable and unavoidable intrusions, the latter being exempt from penalties. National regulations generally provided that unauthorized aircraft flying over prohibited areas were to be ordered to land, and force was to be applied only if they disobeyed."⁴¹

During World War II, "neutrals once more resorted to firing on intruding belligerent aircraft, although some...regulations again provided that such aircraft should first be warned."⁴²

Lissitzyn reports that between the end of World War II and 1953, cases of intrusion of foreign civil and military aircraft were numerous. He states that:

"In many instances, even when such intrusions occurred across the Iron Curtain, the intruding aircraft, whether civil or military, and their occupants were released and permitted to leave. In some instances, no action was taken to control the intruders' movements, although diplomatic protests may have been subsequently lodged.... In some other instances, the intruding aircraft were fired upon."⁴³

He examined a number of incidents concerning intrusions or alleged intrusions of military aircraft into Soviet airspace and concludes that:

"...the Soviet Government has in no case claimed the right to open fire on an intruding aircraft without warning, but alleged in most of these cases that the intruders had been the first to open fire. In some cases where this was not alleged, the Soviet fighter was said to have opened fire by way of warning only.... It is, furthermore, significant that there have been numerous alleged, and several admitted, cases of deviation of allied aircraft from the corridors prescribed for flights to Berlin over East

⁴¹Lissitzyn, *supra*, Ch. I, note 22 at 566-567.

⁴²*Ibid.* at 567.

⁴³*Ibid.* at 569.

Germany in which the Soviet forces apparently refrained from firing on the intruders."⁴⁴

The correspondence arising out of the August 1946 shootdowns of American military air transport aircraft by Yugoslavia is instructive in relation to the minimum standard of treatment to be accorded military, and *a fortiori*, civil aircraft in cases of intrusion caused by bad weather. The United States claimed that if one of its aircraft was found over Yugoslav territory, it was only because the pilot had been forced by bad weather to deviate from the prescribed route. It stated:

"It would be assumed that the authorities of Yugoslavia would wish to render a maximum of assistance and succour to aircraft of a friendly nation when the latter was forced by the hazards of navigation in bad weather...to deviate from their course.... On the contrary, Yugoslavia fighter aircraft have seen fit without previous warning to take aggressive action against such a United States transport plane...";

and requested a Yugoslav statement on:

"whether in the future the United States Government can expect that the Yugoslav Government will afford the usual courtesies, including the right of innocent passage over Yugoslav territory, to United States aircraft when stress of weather necessitates such deviation from regular routes."⁴⁵

The United States further stated that the aircraft were unarmed passenger planes; that their flight did not constitute a threat to the sovereignty of Yugoslavia; that the use of force under the circumstances was without justification in international law, was inconsistent with relations between friendly States, and was a violation of the UN Charter; and that the deliberate firing without warning on the unarmed passenger planes of a friendly nation was an offence against the law of nations and the principles of humanity.⁴⁶ It informed Yugoslavia that U.S. planes would not overfly Yugoslav

⁴⁴*Ibid.* at 580. For some cases of intrusion of military aircraft after 1953, see Hailbronner (*supra*, Ch. I, note 22 at 6-35) which supports Lissitzyn's conclusion that at least a prior warning was required before the application of force.

⁴⁵U.S. Department of State Bulletin, *supra*, note 20 at 415-416.

⁴⁶*Ibid.* at 417-418.

territory without prior clearance unless forced to do so by circumstances over which there was no control such as bad weather, loss of direction and mechanical trouble.⁴⁷

Yugoslavia, in turn, demanded that unauthorized flights be stopped unless due to emergency owing to bad weather, but stated that instructions had been issued to the effect that no transport planes were to be fired upon even in cases of unauthorized overflight; they would be invited to land, and if they refused, their identity would be established and the Government would take the necessary action through appropriate channels.⁴⁸

In relation to civil aerial intrusions, the following cases illustrate what States believed the law to be.

(a) On 29 April 1952, an Air France scheduled flight from Frankfurt to Berlin through the agreed air corridor in the Soviet zone of occupation was fired upon by Soviet fighters, ostensibly for deviation from the corridor and penetration into East German airspace. The Soviet Union stated that the aircraft had disobeyed orders to land, and that in fact it had been inadvertently hit by shots meant as a warning. The Allied High Commissioners in Germany denied that the aircraft had left the corridor and stated that:

"Quite apart from these statements of fact, to fire in any circumstances, even by way of warning, on an unarmed aircraft in time of peace, wherever that aircraft may be, is entirely inadmissible and contrary to all standards of civilized behaviour."⁴⁹

(b) On 23 July 1954, a British airliner on a scheduled flight from Bangkok to Hong Kong was shot down east of an international air corridor off Hainan Island by fighters of the People's Republic of China, killing thirteen persons. The captain of the airliner was reported to have said that the attack took place without warning. The Chinese Government took responsibility for the incident and maintained that the aircraft had been fired upon due to a mistake in identification.⁵⁰

⁴⁷*Ibid.* at 504.

⁴⁸*Ibid.* at 505.

⁴⁹Reproduced in Lissitzyn, *supra*, Ch. I, note 22 at 574; A.F. Lowenfeld, "Looking Back and Looking Ahead" (1989) 83 A.J.I.L. 336 at 338-339; and Majid, *supra*, note 31 at 197-198.

⁵⁰Hughes, *supra*, Ch. I, note 22 at 602; Lowenfeld, *ibid.* at 339.

(c) On 27 July 1955, an airliner belonging to El Al Israeli Airlines Ltd., flying from London to Tel Aviv with stops in Paris and Vienna, strayed in bad weather into Bulgarian airspace and was shot down, resulting in the death of all 58 persons on board.⁵¹ It was disputed whether the aircraft had been warned prior to the shootdown, Bulgaria claiming that the aircraft had ignored the signal to land. In connection therewith, the UN General Assembly adopted Resolution 927 which nevertheless failed to give clear guidance to States as to the circumstances which would permit them to use force against aerial intruders; the Resolution instead called upon States to take measures to avoid such incidents. Israel, the United States and the United Kingdom sought to bring the incident before the I.C.J., but the Court decided it lacked jurisdiction.

In a Diplomatic Note dated 28 July 1955 from Israel to Bulgaria, the former stated that since there could have been no genuine difficulty in identifying an unarmed civil airliner of the Constellation type, the actions of Bulgaria exhibited "a wanton disregard of human life and of the elementary obligations of humanity."⁵² In its Memorial to the I.C.J., Israel stated that:

"...when measures of force are employed to protect territorial sovereignty, ...their employment is subject to the duty to take into consideration the elementary obligations of humanity, and not to use a degree of force in excess of what is commensurate with the reality and gravity of the threat (if any).⁵³

...

When a State party to the Chicago Convention in time of peace encounters instances of an infringement of its airspace...it normally reacts in one or both of two ways. In the first place, if this is physically possible, it indicates to the aircraft in the appropriate manner, and without causing an undue degree of physical danger to the aircraft and its occupants, that it is performing some unauthorized act. In taking this action that State may also, always exercising due care, require the intruder either to bring the intrusion to an end (i.e. to return to its authorized position, within or

⁵¹For the facts as reported by the Israeli Commission of Inquiry, see ICAO Circular 50-AN/45: *Aircraft Accident Digest No. 7*, No. 35, 146.

⁵²*Aerial Incident of 27 July 1955, supra*, note 11 at 11.

⁵³*Ibid.* at 84.

without the airspace in question) or to submit itself to examination after landing...in the territory of the State in question.... In the second place...it may deal with the infringement of its sovereignty by making the appropriate *démarche* through the diplomatic channel."⁵⁴

For its part, the United States expressed the view that no pilot of a civil airliner would expect to be shot down without opportunity adequate to give him a safe alternative, i.e. the aircraft should have been informed that it was off course and escorted elsewhere; if there had been a threat to Bulgarian security, the aircraft should have been led to a designated airport using reasonable methods. The United States also believed that in a case where the aircraft had been identified as being civil in character, the appropriate solution for Bulgaria would have been to make diplomatic representation.⁵⁵

As previously indicated, the United Kingdom's position was that the use of armed force against foreign aircraft was not justified unless used in the legitimate exercise of the right of self-defence; there could be no justification for the destruction, by a State using armed force, of a foreign civil aircraft, clearly identifiable as such, which was on a scheduled passenger flight, even if that aircraft intruded into the airspace of a foreign State.⁵⁶ The United Kingdom cited the *Corfu Channel* case⁵⁷ in support of a proposition that "international law condemns actions by States which in time of peace unnecessarily or recklessly involve risk to the lives of the nationals of other States or destruction of their property."⁵⁸

(d) In the case of the Libyan Arab Airlines Boeing 727 which was shot down on 21 February 1973 by Israeli fighters when it intruded into a prohibited military zone over the occupied Sinai peninsula, it was claimed by the pilot of the intercepting aircraft that he had followed ICAO recommended procedures and signals for interception as contained

⁵⁴*Ibid.* at 86-87.

⁵⁵*Ibid.* at 210-211.

⁵⁶*Supra*, note 21 and accompanying text.

⁵⁷*Corfu Channel case (U.K. v. Albania)*, [1949] I.C.J. Rep. 4.

⁵⁸*Aerial Incident of 27 July 1955*, *supra*, note 11 at 358.

in the Aeronautical Information Publication (AIP) of Israel, but as there was no compliance by the airliner, he fired a burst of gunfire (with tracer) across the path of the aircraft. Only when the airliner also failed to obey this signal did he open fire in an attempt to force it to land.⁵⁹ Egypt, on its part, denied that there had been any warnings given.

The ICAO Assembly adopted a Resolution in which it condemned the Israeli action.⁶⁰ The ICAO Council also, on 4 June 1973, condemned Israel, and described its action as a flagrant violation of the principles in the Chicago Convention.⁶¹

(e) On 20 April 1978, a Korean Air Lines Boeing 707 aircraft on a polar flight from Paris to Seoul strayed deep into Soviet airspace. According to the uncontested Soviet version of events, the aircraft did not comply with orders given by Soviet fighters, and did not land until two hours after the unauthorized penetration inside Soviet territory.⁶² The pilot and the navigator of the airliner confirmed that they had understood the orders of the Soviet aircraft but chose not to obey them. Subsequently, the interceptors fired a missile which tore off part of a wing of the Boeing 707, but its pilots managed to land it on a frozen lake, with two fatalities. In the light of the factual circumstances, criticism of the Soviet action was muted.

(f) On the night of 31 August - 1 September 1983, a Korean Airlines Boeing 747 with 269 persons on board, engaged in a scheduled commercial flight from New York to Seoul (KE 007), with a stopover in Anchorage, deviated significantly from its planned route, penetrated Soviet airspace over sensitive military areas and was shot down by

⁵⁹C-WP/5764, Attachment at 21.

⁶⁰Resolution A19-1, ICAO Doc. 9124: *Assembly Resolutions in Force (as of 15 October 1974)* at 29; ICAO Doc. 9061, *supra*, note 13 at 11.

⁶¹ICAO Doc. 9097-C/1016: *Action of the Council - 79th Session* at 33; the debates in the Assembly and the Council are summarized at *infra*, Ch. III 1 b).

⁶²Hughes, *supra*, Ch. I, note 22 at 613-614; Lowenfeld, *supra*, note 49 at 340; Majid, *supra*, note 31 at 203-205.

USSR interceptor aircraft. The shooting down of KE 007 provided an opportunity for many States to express their views on the use of force against civil aircraft.

Several States wrote to the President of the UN Security Council requesting an urgent meeting of the Council.⁶³ The United States' letter stated that:

"This action by the Soviet Union violates the fundamental legal norms and standards of international civil aviation. These norms and standards do not permit such use of armed force against foreign civil aircraft. There exists no justification in international law for the destruction of an identifiable civil aircraft."

It also referred to "this unprovoked resort to the use of force...in contravention of international civil aviation organization standards and the basic norms of international law...". The Republic of Korea was of the view that the Soviet Union had committed an "unprovoked barbaric act...in blatant violation of basic norms of international law and practice in international civil aviation" while Canada believed that "[t]hese actions are flagrant and unacceptable violations of the norms and practices of international civil aviation and international law." Australia expressed the opinion that this was an act "incompatible with civilized behaviour between States."

During the debates in the Security Council (2-12 September 1983), the Republic of Korea stated that the Soviet Union had committed "a criminal act in violation of all the legal norms and standards of international civil aviation" and that there was "no provision in international law that justifies the use of force against an unarmed civilian airliner under any circumstances."⁶⁴ The United States' Representatives also believed that a "criminal act" had taken place. They referred to legal obligations which flow from "elementary considerations of humanity", and believed that these principles would rule out shooting a passenger aircraft; Annex 2 to the Chicago Convention set out the procedures to be used when intercepting a foreign aircraft, and these did not include

⁶³The text of the letters to the President of the Security Council are reproduced in "Documents Concerning the Korean Air Lines Incident - United Nations Security Council Consideration" (1983) 22:5 I.L.M. at 1109-1113.

⁶⁴*Ibid.* at 1114.

shooting it down.⁶⁵ The Representative of Japan also called for respect for the ICAO Annex provisions which provide "for abstention from the use of weapons" and stated that "in the light of the provisions of the [Chicago] Convention as well as of the basic norms of international law, the action of the Soviet Union can in no way be justified."⁶⁶ The Canadian Representative described the action of the Soviet Union as "nothing short of murder" and in contravention of the international law principle of proportionality: the act of firing "on the Korean aircraft was in excess of what is commensurate with the gravity of the threat represented by the presence of a civilian aircraft in Soviet air space".⁶⁷ Similarly, the Australian Representative expressed the view that there was "no circumstance in which any nation can be justified in shooting down an unarmed civilian aircraft serving no military purpose", and that "procedures governing the situation where a civil aircraft may have strayed into another country's airspace are laid down in the Chicago Convention."⁶⁸ The French Representative described the destruction of the Korean aircraft as being "in disregard of elementary considerations and the demands of civil aviation safety as recognized by the international community,"⁶⁹ The Representatives of Zaire,⁷⁰ the Federal Republic of Germany,⁷¹ Fiji⁷² and Liberia⁷³ also believed that the shooting down was disproportionate to the violation of Soviet

⁶⁵*Ibid.* at 1114-1115. The Representatives were equally emphatic in a later statement: "We do not believe that the protection of the sovereignty of any nation gives that nation a right to shoot down any plane in peacetime, flying any place over its territory" (*ibid.* at 1146).

⁶⁶*Ibid.* at 1116-1117.

⁶⁷*Ibid.* at 1117.

⁶⁸*Ibid.* at 1118.

⁶⁹*Ibid.* at 1119.

⁷⁰*Ibid.* at 1120.

⁷¹*Ibid.* at 1120.

⁷²*Ibid.* at 1133.

⁷³*Ibid.* at 1126-1127.

airspace; similar views were expressed by the Representative of Belgium.⁷⁴ It was stated by the Representative of Togo that the Chicago Convention contained "no provision authorizing a State whose airspace has been violated" to destroy the intruder aircraft, and that no motive could justify the "act of deliberate destruction of a civilian passenger aircraft."⁷⁵ A similar opinion was expressed by the Representative of Singapore who believed that the action of the Soviet Union was "contrary to international law generally, and to the Chicago Convention...in particular."⁷⁶ The Representative of Ecuador, in line with these views, also stated that the action of the Soviet Union was an infringement of the "basic principles of human co-existence and a violation of the civil aviation conventions to which the Soviet Union is a party."⁷⁷ A number of other representatives condemned the shooting down of the Korean aircraft as contrary to international law.

For their part, the Soviet Representatives quoted a report dated 2 September 1983 from the Soviet News Agency, TASS, which stated that an unidentified aircraft had "rudely violated the Soviet State border and intruded deep into the Soviet Union's airspace". The Agency also reported that interceptor aircraft had tried repeatedly to establish contacts with the aircraft using generally accepted signals and to take it to the nearest airfield but that the intruder ignored these attempts. Later, "the intruder plane left the limits of Soviet airspace and continued its flight towards the sea of Japan. For about ten minutes it was within the observation zone of radio location means, after which it would be observed no more." The TASS report stated that the intrusion was pre-planned with a view to intelligence gathering.⁷⁸ The Soviet Representatives also referred to recent, systematic violations of Soviet borders by U.S. aircraft.⁷⁹ They stated that the

⁷⁴*Ibid.* at 1129.

⁷⁵*Ibid.*

⁷⁶*Ibid.* at 1132.

⁷⁷*Ibid.* at 1133.

⁷⁸*Ibid.* at 1115-1116.

⁷⁹*Ibid.* at 1126.

intruder had entered Soviet airspace in an "area where a most important base of the strategic nuclear forces of the USSR is located"⁸⁰ and that the Soviet pilots could not know that the Korean aircraft was civilian, since it "was flying without navigation lights, at the height of the night, in conditions of bad visibility and not answering the signals."⁸¹ Although the Soviet Union tried to justify the shoot-down as "in keeping with the law on the State border of the USSR",⁸² the thrust of its statements made clear that it too, did not believe that the shooting down of a clearly identifiable civilian aerial intruder which did not pose a security threat, to be in accord with international law.

A draft resolution⁸³ sponsored by seventeen States received nine votes in favour,

⁸⁰*Ibid.* at 1127.

⁸¹*Ibid.* at 1128.

⁸²*Ibid.*

⁸³*Ibid.* at 1148; Report of the Security Council, 16 June 1983 - 15 June 1984, UN G.A.O.R., 39th Sess., Supp. No. 2 at 18, UN Doc. A39/2 (1984). The draft resolution (S/15966/Rev. 1) reads:

"The Security Council

...

Gravely disturbed that a civil airliner of the Korean Air Lines on an international flight was shot down by Soviet military aircraft, with the loss of all 269 people on board,

Reaffirming the rules of international law that prohibit acts of violence which pose a threat to the safety of international civil aviation,

...

Stressing the need for a full and adequate explanation of the facts of the incident based upon impartial investigation,

1. Deeply deplores the destruction of the Korean airliner and the tragic loss of civilian life therein;
2. Declares that such use of armed force against international civil aviation is incompatible with the norms governing international behaviour and elementary considerations of humanity;
3. Urges all States to comply with the aims and objectives of the Chicago Convention...;
4. Welcomes the decision to convene an urgent meeting of the Council of [ICAO];
- ...
6. Invites the Secretary-General, making use of such expert advice as he deems necessary and in consultation with the appropriate international bodies, to conduct a full investigation into the circumstances of the tragedy;

two against with four abstentions "and was not adopted, owing to a negative vote of a permanent member of the Council".⁸⁴

The Council of ICAO considered this matter on 15 and 16 September 1983. A number of views on the legality of such action were expressed,⁸⁵ after which the Council adopted a resolution in which it recognized that:

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

and reaffirmed "the principle that States, when intercepting civil aircraft should not use weapons against them."⁸⁶ The Secretary General was directed to institute an investigation to determine the facts and technical aspects related to the flight and destruction of the aircraft. Upon consideration of the report of the Secretary General, the Council on 6 March 1984 adopted another resolution⁸⁷ in which it reaffirmed that, whatever the circumstances which may have caused the aircraft to stray off course, such use of armed force constitutes a violation of international law, and condemned the use of armed force which resulted in the shoot-down of the airliner.

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7. Further invites the Secretary General to report his findings to the Security Council within fourteen days;
 8. Calls upon all States to lend their fullest co-operation to the Secretary-General in order to facilitate his investigation..."

It is interesting that the sponsors seem to have preferred a UN, as opposed to an ICAO investigation. Further it should be noted that the fourteen-day time frame for carrying out a "full" investigation and reporting to the Security Council displayed a serious lack of appreciation of the political and technical complexities involved in such an investigation.

⁸⁴Report of the Security Council, 16 June 1983 - 15 June 1984, *ibid*.

⁸⁵A more detailed examination of the opinions of States expressed at the ICAO Council sessions and a session of its Assembly which considered this incident can be found at *infra*, Ch. III 1 c).

⁸⁶ICAO Doc. 9416, *supra*, note 12 at 59-60.

⁸⁷ICAO Doc. 9441-C/1081, C-Min. 111/1-18: *Council - 111th Session, Minutes with Subject Index* at 106.

b) Judicial and Arbitral Decisions

There has been no judicial or arbitral decision on the merits in any case dealing with the use of force against aerial intruders, military or civil. However, there have been some cases not involving aerial intruders which have influenced the law in this regard. The first of these cases concerned the shooting of a Mexican girl by an American officer, who fired upon a raft which had crossed the Rio Grande from Mexico, illegally entered the United States, and was about to commence its return journey. The US-Mexican General Claims Commission in 1926 held that human life may not be taken either for prevention or for repression, unless an extreme necessity exist, and that:

"to consider shooting on the border by armed officials...justified, a combination of four requirements would seem to be necessary:

- (a) the act of firing, always dangerous in itself, should not be indulged in unless the delinquency is sufficiently well-stated;
- (b) it should not be indulged in unless the importance of preventing or repressing the delinquency by firing is in reasonable proportion to the danger arising from it to the lives of the culprits and other persons in their neighbourhood;
- (c) it should not be indulged in whenever other practical ways of preventing or repressing the delinquency might be available;
- (d) it should be done with sufficient precaution not to create unnecessary danger, unless it be the official's intention to hit, wound or kill."

Further, the Commission could "not endorse the conception that a use of firearms with distressing results is sufficiently excused by the fact that there exist prohibitive law, that enforcement of these laws is necessary, and that the men who are instructed to enforce them are furnished with firearms."⁸⁸

⁸⁸*Garcia and Garza case*, 4 R.I.A.A. 119 at 119-123; (1927) 21 A.J.I.L. 581 at 581-584.

In this case, which bears strong similarities to a situation involving use of force against civil aerial intruders, the Commission did not rule out the use of force in all circumstances but did set out strict standards before such use of force could be justified, these standards repeating the rules of necessity and proportionality elaborated in the *Caroline* case, although the latter was concerned with a claim of self-defence as opposed to mere termination of a trespass.

In the trailblazing *Island of Palmas* case (Netherlands v. United States, 1928), the Arbitrator, while defining the scope of territorial sovereignty, added that each territorial sovereign had as a corollary a duty to protect within its territory the rights of other States, including the rights which each State may claim for its nationals in foreign territory. In a most-often quoted sentence, he asserted that, "Territorial sovereignty cannot limit itself to its negative side, i.e. to excluding the activities of other States; for it serves to divide between nations the space upon which human activities are employed, in order to assure them at all points the minimum of protection of which international law is the guardian."⁸⁹ Consequently, each State must protect in its territory the international legal rights of other States.

In the *Naulilaa* case (Portugal v. Germany, 1928), the Arbitral Tribunal held that acts of reprisal (as distinguished from other acts of self-help or self-defence) must be in accord with common human experience and the rules of good faith, applicable in the relations between two States. As to the test of proportionality, the Tribunal expressed the view that a reprisal out of all proportion to the act justifying it would be excessive and therefore illegal. On the facts of the case, the Tribunal did find that there had been evident disproportion between the incident and the acts of reprisal which followed it.⁹⁰

The *I'm Alone* case (Canada v. United States, 1933-1935) concerned a British vessel which was ordered to heave to by United States coastguard cutters, on suspicion of smuggling alcohol, at a point, according to the U.S., when she was ten miles from the U.S. coast, but within a twelve-mile limit established by United States revenue laws. She

⁸⁹*Supra*, Ch. I, note 7 at 839.

⁹⁰1 R.I.A.A. 1011 at 1026-1028.

fled, was pursued, still refused to heave to, and was sunk with loss of life. The United States and Great Britain had concluded a treaty whereby the latter agreed not to object to the boarding of private British vessels outside the limits of the United States' territorial sea. The Joint Commission decided that "the United States might consistently with the Convention, use necessary and reasonable force" to board, search, seize and bring the vessel into port, and that "if sinking should occur incidentally, as a result of the exercise of necessary and reasonable force for such purposes, the pursuing vessel might be entirely blameless". The Commissioners found that in this case the sinking was not justified by anything in the treaty or by a principle of international law.⁹¹

The United Kingdom Delegation to the 25th Session (Extraordinary) of the ICAO Assembly stated that this case and those decided by the U.S.-Mexico Claims Commission in the 1920's, "demonstrate most clearly that it is wrongful under international law to kill foreign nationals even if they deliberately trespass into your territory or violate your law. The only significant difference between these cases and intrusion by civil aircraft is that the numbers of human lives at risk if force is used against a civil aircraft like a wide-bodied jet are likely to run into hundreds."⁹²

Finally, the *Corfu Channel* case provided a formulation which has been frequently invoked by States and international organizations when dealing with the use of force against civil aerial intruders. In that case, Albania failed to warn British warships of the existence of a minefield in its territorial waters, resulting in severe damage to two British destroyers and loss of life. The I.C.J. stated:

"The obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of imminent danger to which the minefield exposed them. Such obligations are based...on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; ...and every State's obligation not to allow

⁹¹III R.I.A.A. 1609 at 1617; and (1935) 29 A.J.I.L. 326 at 330.

⁹²ICAO Doc. 9437, *supra*, note 13 at 29.

knowingly its territory to be used for acts contrary to the rights of other States."⁹³

Municipal legal systems also regulate the use of force against intruders. A prominent scholar describes the English common law as allowing a trespasser to be ejected "by force, but only by moderate force, not amounting to death or serious bodily harm."⁹⁴

The following principles can be extracted from the foregoing review of the case law:

- 1) States must ensure in their territory the protection of the legal rights of other States and their nationals;
- 2) elementary considerations of humanity demand that a warning be given to foreigners of special dangers in one's territory; and
- 3) while the use of force against intruders or trespassers is not prohibited outright, the exercise of such force must be reasonable and necessary, or to put it more precisely, force must not be used except after all other practical means of preventing the intrusion have been exhausted, and even then should only be proportionate to the danger created, or threat posed, by the trespass.⁹⁵

⁹³*Supra*, note 57 at 22.

⁹⁴G. Williams, "Assault and Words" 1957 *Criminal Law Review* 219 at 220.

⁹⁵For a discussion of proportionality in a situation not involving the use of armed force, see the *Case Concerning the Air Service Agreement of 27 March 1946 Between the United States and France* (United States v. France), XVIII R.I.A.A. 415 at 443-444.

3. CONCLUSION

Based on the relevant treaty provisions, customary international law and judicial and arbitral decisions, the following principles may be said to have been applicable to the use of force against civil aerial intruders prior to the adoption of Article 3 *bis* in 1984:

1. The discretion of the subjacent State in dealing with civil aerial intruders was limited by governing rules of international law; use of force was allowed but only in exceptional circumstances.
2. In all cases of intrusion, unless there was an imminent threat to its security, the subjacent State was obliged make all reasonable efforts to identify the intruder.
3. Aircraft identified as civil in character, which appeared to have intruded because of necessity, mistake, distress or *force majeure* was to be treated leniently and afforded all reasonable measures of assistance.
4. In all cases of an intrusion by a manifestly civil aircraft, the territorial sovereign was entitled to request the intruder to land or to change course; such order was to be obeyed unless the aircraft was unable to do so.
5. In attempting to control the intruder, the territorial sovereign must not cause an unreasonable degree of danger to the aircraft and its occupants.⁹⁶
6. A primary remedy for the subjacent State was to make appropriate diplomatic representation regarding the intrusion to the State of nationality of the aircraft.
7. In case the civil intruder did not pose or appear to pose an immediate threat to the security of the subjacent State, force was not to be used against it even if it disobeyed orders of the territorial sovereign.

⁹⁶Lissitzyn, *supra*, Ch. I, note 22 at 586.

8. In the rare case of an intruder identified as a civil aircraft which nevertheless acted or appeared to act in a manner inimical to the security of the subjacent State, force was not to be used unless it was necessary and proportionate. The requirement of necessity was satisfied if the aircraft disobeyed the instructions to change course or to land and, if possible, was warned by shots or tracers before being attacked. Even if no other practical means to end the intrusion existed, the subjacent State could only use force which was proportionate to the danger to its security arising from the intrusion.⁹⁷
9. In all its actions in relation to a civil aerial intruder, the subjacent State must be guided by considerations of humanity.

Even States which have shot down civil aircraft have not denied that at least these minimum standards apply. Indeed, the survey of State practice shows that explanations

⁹⁷Hassan, *supra*, Ch. I, note 22 at 581, giving his opinion that the destruction of an aircraft is only justified under the doctrine of self-defence (similar to the position of the United Kingdom in the *Aerial Incident of 27 July 1955*), propounded the following "controlling legal principle":

"...*prima facie*, a passenger airliner, whether trespassing intentionally or not, should not be considered to pose a military threat to a territorial sovereign sufficient to justify the plane's destruction. A mere refusal to land after being ordered to do so is not a valid basis for use of force by the subjacent sovereign. Actual hostility committed, or about to be committed, by the trespassing plane is the only basis which can justify the subjacent state in using force against the plane. While normally a passenger airliner should not be considered a threat to a territorial sovereign, in an isolated case, given today's technology, a subjacent state may be justified in treating an apparently civilian aircraft as a security risk. Because this threat would only be true in the exceptional case, a heavy burden rests on the territorial sovereign to substantiate such an allegation before acting in self-defence."

Later, at 587, he states that:

"Under the doctrine of self-defence, force is only to be used against the aircraft of other nations when national security risks of the subjacent state are of an urgent nature. Therefore, unless the subjacent state can show the intruding plane's mission was hostile or aggressive, it has no right under customary international law to down a civilian passenger plane."

are often that the aircraft had not been identified as civilian, or that it was, or was reasonably believed to be, on a military mission posing a threat to State security, and had not responded to warnings. Considering the number of intrusions which take place, it is clear that these standards are in the main accepted by all States, and the rarity of shootdowns is the exception which proves the rule.⁹⁸

⁹⁸In the *Nicaragua* case, *supra*, note 25 para. 186, the I.C.J. stated:

"It is not to be expected that in the practice of States the application of the rules in question should have been perfect, in the sense that States should have refrained, with complete consistency, from the use of force or from intervention in each other's internal affairs. The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule. In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way *prima facie* incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule."

CHAPTER III

CONSIDERATION BY ICAO OF INCIDENTS INVOLVING THE USE OF FORCE AGAINST CIVIL AERIAL INTRUDERS

1. SPECIFIC INCIDENTS

During the past half century, ICAO has dealt with four specific incidents involving the use of force against civil aerial intruders. Additionally, there was one case which though not involving an intrusion, nevertheless resulted in the use of fatal force against the aircraft, and ICAO's consideration of this case serves as a useful complement to, and comparison with, those involving intrusions. In four of these five incidents, ICAO carried out an investigation into the factual circumstances. The four incidents related to an intrusion will first be examined in chronological order, followed by the one not so related.

a) El Al Constellation (Israel-Bulgaria, 1955)

Following the shutdown of the El Al airliner by Bulgaria on 21 August 1955,¹ Israel requested that an item on the question of the safety of commercial aircraft flying in the vicinity of, or inadvertently crossing, international frontiers be placed before the UN General Assembly. The General Assembly adopted on 14 December 1955 Resolution 927 in which, *inter alia*, it called the attention of the appropriate international organizations to the Resolution and to the Assembly's debate on the matter.²

¹For the report of the Israeli Commission of Inquiry, see *supra*, Ch. II, note 51.

²*Question of the Safety of commercial aircraft flying in the vicinity of, or inadvertently crossing, international frontiers*, GA Res. 927, UN G.A.O.R., 10th Sess., Supp. No. 19, p. 14, UN Doc. A/3116 (1955), which reads:

"The General Assembly,

The Resolution was communicated to ICAO and considered by its Council³ on 10 May 1956, on the basis of a paper (C-WP/2153) presented by the Secretary General. C-WP/2153 stated that incidents of the kind involved legal aspects as well as technical ones. In relation to legal aspects, it noted that these:

"...arise from the fact that national laws of several States specify, in respect of aircraft which have not obtained air traffic control clearance, or have deviated from corridors, or have entered a prohibited area, that the aircraft would be intercepted and shot down without warning, or 'may be fired upon', or 'will be subject to danger' or will be subject to 'sanction in an attempt to bring them to the real course'. Also, the assertion has been made by some Governments that it is contrary to international law for a State to shoot down a civil, unarmed aircraft under any circumstances, (there being no question of repelling an attack), while, on the other hand, this principle has been denied by some States."⁴

In relation to technical aspects, C-WP/2153 stated that there appeared to be a need for the development and acceptance of codes of signals, especially from aircraft to aircraft, as an examination of some previous incidents indicated that the signals given by intercepting aircraft to foreign aerial intruders had not been understood by the latter. C-WP/2153 foresaw the possibility of the development of new SARPs or the preparation of a new convention on the subject. The Council decided⁵ that in the first instance, the problem should be studied by the ICAO Secretariat; when these studies were sufficiently

Mindful of incidents involving attacks on civil aircraft innocently deviating from fixed plans in the vicinity of, or across, international frontiers,

Noting that such incidents cause loss of human life and affect relations between States, and that the problem is therefore a matter of general international concern,

1. *Calls upon* all States to take the necessary measures to avoid such incidents;
2. *Invites* the attention of the appropriate international organizations to the present resolution and to the debate on the matter held in the General Assembly at its tenth session."

³The Council is a permanent governing body responsible to the sovereign body, the Assembly, and is currently composed of thirty-three member States. Its functions are spelt out in Articles 54 and 55 of the Chicago Convention (*supra*, Ch. I, note 1).

⁴C-WP/2153 para. 5.

⁵ICAO Doc. 7740-C/895: *Action of the Council - 28th Session* at 8-9.

advanced, they should be examined by the Air Navigation Commission (ANC)⁶ and possibly by the Legal Committee.⁷

The Tenth Session of the Assembly considered whether to include this subject in the Work Programme of the Legal Committee but satisfied itself on 28 June 1956 merely to note that the Secretariat studies would be referred to the technical bodies and possibly also to the Legal Committee.⁸

The ANC reported back to the Council in C-WP/2376. The Commission dealt first with an examination of the various national procedures for signalling, and considered that most of these, if not already out of date, would shortly become so, with the introduction of faster and higher flying aircraft. It recognized that standard signals were desirable but agreed that practical difficulties existed in devising acceptable procedures. It concluded that at the time, efforts "would be better directed towards ensuring that aircraft do not violate restricted airspace, rather than in evolving procedures on the action to be taken after they have done so."⁹ As a consequence, the Commission reached the following conclusions:

- "1) that for the time being it seems unlikely that any simple and reliable system of signalling for world-wide use in the case where an aircraft has entered or is about to enter restricted airspace, can be devised;
- 2) that since any system so far suggested might cause confusion and even danger, no attempt should be made, at this time, to introduce standard procedures, although it is recognized that the introduction on a national basis of such self-evident signals as may be applicable to inform a violating aircraft of the action it should

⁶The Commission is a body of technical experts, established by the Chicago Convention, and tasked, *inter alia*, with recommending to the Council modifications to the Annexes and to otherwise advise the Council on information useful for the advancement of air navigation.

⁷The Legal Committee is the premier legal body of the Organization, constituted by the Assembly in 1947, and responsible to the Council; it is composed of representatives of Member States of ICAO.

⁸ICAO Doc. 7712, A10-LE: *Assembly - Tenth Session, Legal Commission, Final Report and Minutes* at 21-25.

⁹C-WP/2376 para. 5.

take, even if such signals introduce an element of danger, is preferable to resorting to more extreme measures;

...

- 4) the Commission further considers that States' efforts should be directed towards ensuring that aircraft do not infringe restricted airspace and that a policy of installing navigation aids to achieve this may be more fruitful than attempting to implement signalling procedures."¹⁰

The Commission recognized that the measures proposed did not offer a solution to the problem, but only alleviated some aspects of it. In accepting the conclusions of the ANC on 1 April 1957, the Council drew attention to a suggestion:

"that consideration might be given to the possibility of establishing a procedure by which airlines would give advance notification of flights in the vicinity of restricted airspace to States controlling such airspace, when these are not States that would automatically be informed through the filing of the flight plan."¹¹

The ANC considered this idea but informed the Council that it was without merit and that it (the ANC) was "not in a position to offer a technical solution to the problem other than the alleviation of some of its aspects" as outlined in C-WP/2376.¹²

In considering C-WP/2376, the Council had also decided that a paper on the legal aspects of the problem raised by incidents of the kind mentioned in the UN General Assembly Resolution should be prepared. In compliance therewith, the Secretary General presented C-WP/2609 which examined the practice of States, relevant provisions in the Chicago Convention, and national legislation on the subject. The Secretary General concluded that there was scope and need for developing international rules on the subject. The object would be "to ensure the safety of civil aircraft flying in the vicinity of, or inadvertently crossing, international frontiers, including early clearance, without undue

¹⁰*ibid.* para. 6.

¹¹ICAO Doc. 7818-C/901: *Action of the Council - 30th Session at 24.*

¹²C-WP/2552 para. 4. This was noted by the Council on 11 December 1957 (ICAO Doc. 7857-C/904: *Action of the Council - 32nd Session at 25*).

detention, of aircraft, crew and passengers, particularly in cases where an aircraft crossed a frontier or entered a prohibited area innocently...".¹³ C-WP/2609 highlighted the following aspects as deserving consideration:

- 1) The desirability of extending the scope of the rules beyond what was indicated by the title of the UN Resolution, to include "situations where the aircraft is operated in the vicinity of the frontier of a State without having crossed that frontier into such State, or has, without authorization, crossed such frontier, or has, while authorized...to operate into such State, crossed the frontier at a point other than the designated one, deviated from specified air routes or corridors or flown over a prohibited or restricted area."
- 2) The procedure for identification and interception of an approaching aircraft by the authorities of the State which it enters or is about to enter; the procedure could specify that the intercepted aircraft should not take retaliatory or evasive actions.
- 3) Agreement of States that force will not be resorted to merely because aerial sovereignty has been violated; self-defense would be a different matter.
- 4) Whether Article 25 of the Chicago Convention meant that a contracting State was obliged to allow an aircraft in distress to enter its territory, and the matter of whether an aircraft apparently in distress in fact has hostile intentions.
- 5) Treatment of the aircraft, crew and passengers after landing.
- 6) The practicability of establishing "a forum (composed of persons having the nationality of the territorial State, the State of the aircraft's registry and a disinterested third State) for ascertaining the facts pertaining to the aerial intrusion and related matters and for recommending any compensatory or remedial measures."¹⁴

The paper concluded by recommending that the Council request the Legal Committee to study the subject with a view to the development of international rules. When the Council considered the paper in March 1958, a proposal by the Representative of Mexico that the

¹³C-WP/2609 para. 14.

¹⁴*Ibid.* paras. 15-23.

legal aspects of the subject should be referred to the Legal Committee was defeated by nine votes to eight.¹⁵

Instead, the Council requested the ANC to put on its work programme the technical questions raised in C-WP/2609 and any others that it considered relevant to the problem of assuring the safety of civil aircraft flying in the vicinity of, or inadvertently crossing, international frontiers. The ANC examined the matter and once again in November 1958 informed the Council that it had no further proposals and reaffirmed its view that at the time, it still appeared that the best solution lay in an improvement of air navigation facilities so as to ensure that the chances of infringement of restricted airspace was remote.¹⁶

The shoot-down of the El Al airliner did not result in an ICAO investigation of the factual circumstances nor in an ICAO expression of its opinion concerning the specific incident. However, ICAO was forced to consider the question of standardized, global international rules (as opposed to application within regional contexts) intended to enhance the safety of civil aerial intruders. While these early efforts did not yield immediate apparent results, they were the first steps leading to the eventual adoption of Article 3 *bis* on the use of weapons against civil aircraft in flight; in the technical field, by means of a State letter dated 12 September 1966, the Council was able to recommend to all "contracting States the desirability of avoiding the interception of civil aircraft and using interception procedures as a last resort" and to invite States, in such cases of last resort, to use only specified procedures and visual signals.¹⁷

¹⁵ICAO Doc. 7985-C/908: *Action of the Council - 33rd Session* at 15-16.

¹⁶C-WP/2789 para. 3.

¹⁷ICAO Doc. 8610-C/966: *Action of the Council - 58th Session* at 5-6; SL AN 13/16-66/129.

b) Libyan Arab Airlines (Libya-Israel 1973)

On 21 February 1973, a Libyan Arab Boeing 727 airliner was on a flight from Tripoli to Benghazi and on to Cairo when, on the latter leg, it deviated from its flight path probably because of an error in navigation; it entered Israeli-occupied Sinai, flew over a prohibited military area and was shot down by Israeli fighters, killing 110 of the 113 persons on board.¹⁸ The leader of the intercepting pilots stated that the interceptors had complied with Israeli procedures and signals for interception. The Israeli procedures and signals were in accord with ICAO recommended procedures and signals. The leader further claimed that as there was no compliance with his signals, he fired tracers across the path of the Boeing 727, again to no avail. The interceptors then fired at a wing tip of the Libyan aircraft and later at a wingroot area, with the intention of forcing the aircraft to land. In attempting a forced landing, the aircraft crashed.¹⁹ The testimony of survivors seemed to show that the interceptors did attempt to warn the airliner (perhaps not in accord with ICAO procedures), but their signals appear not to have been seen or understood by the latter's flight crew.

It should be noted that the aircraft was shot down twelve minutes after entering the Sinai area. The interception and use of force occurred in daylight.²⁰ At about the time of the interception, the El Al airliner had turned towards the general direction of Cairo.²¹ It was shot just before it reached the Egyptian border and at a time when it was descending.

At the 19th Session (Extraordinary) of the ICAO Assembly which had been convened from 27 February to 2 March 1973 for other purposes, the shooting down was

¹⁸*Supra*, Ch. I, note 30; *supra*, Ch. II, note 59; and accompanying texts.

¹⁹C-WP/5764, Attachment at 21.

²⁰*Ibid.* at 1.

²¹*Ibid.* at 25-26.

condemned by most speakers. A majority also called for an impartial investigation of the incident, to be carried out by ICAO.

The Delegation of Egypt stated that the Libyan aircraft had not been warned and that this was a "heinous crime [which] violated all humanitarian principles";²² it stated further that "Israel had violated the fundamental legal norms and standards of international civil aviation which did not permit the use of armed force against a foreign civil aircraft clearly identified as such".²³ The Delegation of Lebanon also believed that the Israeli action constituted a violation "of the most elementary considerations of humanity".²⁴

A number of delegations expressed variously the opinion that there had been a violation of the rules of the Organization,²⁵ of the Chicago Convention,²⁶ of the Chicago Convention and SARPs,²⁷ or other basic instruments of ICAO,²⁸ and of international rules²⁹ or international conduct.³⁰ Those of Tunisia,³¹ Malaysia³² and Qatar³³ stated that under the Chicago Convention, States had an obligation to render

²²ICAO Doc. 9061, *supra*, Ch. II, note 13 at 31.

²³*Ibid.* at 55.

²⁴*Ibid.* at 35.

²⁵Guinea, *ibid.* at 29.

²⁶Lebanon, *ibid.* at 35.

²⁷Senegal, *ibid.* at 40.

²⁸Mali, *ibid.* at 45.

²⁹Senegal, *ibid.* at 40.

³⁰Romania, *ibid.* at 36.

³¹*Ibid.* at 34.

³²*Ibid.* at 41.

³³*Ibid.* at 47.

assistance to aircraft in distress; that of Syria³⁴ placed such an obligation in accordance with the rules of international law and under humanitarian considerations. The Delegation of Tunisia also reminded the Assembly that Israel had, in its Memorial to the I.C.J. in the 1955 El Al incident, stated that:

"no rule of law, and not the most stringent interpretation of any provision of the Chicago Convention or of the rules of general international law to which it gives expression, permits such a degree of violence".³⁵

The Yugoslav Delegation expressed the view that the "shooting down of a civil aircraft represented a grave violation of international law and of the principles of the Organization"³⁶ and further, that the "rules of international law and the norms of humanity...prescribed that civilian aircraft should never be fired upon, in any circumstances whatever".³⁷ The Delegation of Kenya stated that "civil aircraft were never admissible targets, whatever justification might be given";³⁸ Ghana similarly believed that the "deliberate shooting down of a civil aircraft...was inexcusable";³⁹ and France "condemned this recourse to force against a civil aircraft".⁴⁰ The Canadian view was that the "shooting down of an unarmed civilian airliner...could only be deeply deplored by reasonable people everywhere."⁴¹

In Israel's defence, its Delegation stated that its Prime Minister had expressed her deep sorrow over the incident, and that the Israeli Government "had declared its

³⁴*Ibid.* at 42.

³⁵*Ibid.* at 34; and see the *Aerial Incident of 27 July 1955*, *supra*, Ch. II, note 11 at 85.

³⁶*Ibid.* at 21.

³⁷*Ibid.* at 39-40.

³⁸*Ibid.* at 39.

³⁹*Ibid.* at 48.

⁴⁰*Ibid.* at 36.

⁴¹*Ibid.* at 57.

readiness to make *ex gratia* payments to the families of the victims and to the survivors".

The interceptors had identified the aircraft as belonging to Libyan Airways:

"and for seven minutes flew around it, signalling to it in a clear and correct manner, with internationally agreed signs, to follow them so as to land...Since the Boeing aircraft did not comply with these instructions, suspicions grew concerning its mission. At this point, demonstratively and in full view of the crew, warning shots were fired...but the Libyan plane ignored them. The assumption therefore was that the plane had entered the area on a hostile mission....

At this stage it was accordingly decided that the aircraft must be compelled to land by firing upon it...

The incident resulted from a series of errors and omissions on the part of the Libyan aircraft and the Egyptian control system, which had led the Israeli air defence system to assume that the aircraft had penetrated a closed military zone in Sinai on a hostile mission. On the basis of that assumption...the operational decision had been taken to compel the aircraft to land."

It further stated that the incident had not occurred in a vacuum, but had to be viewed against the background of the situation in the region, where there had been a wave of acts of terror against Israel and its citizens, and that there had been public reports that "Arab terrorists" were planning to crash a civilian aeroplane laden with explosives on Tel Aviv or some other town in Israel. It quoted the Chief of the General Staff of the Israeli Defence Forces as saying that had these forces known at the time that this was a civilian, passenger-carrying aircraft, they would not have used force to make it land.⁴²

The Assembly proceeded to adopt Resolution A19-1 by 105 votes to 1 (Israel) with 2 abstentions:

"THE ASSEMBLY,

HAVING CONSIDERED the item concerning the Libyan civil aircraft shot down on 21 February 1973 by Israeli fighters over the occupied Egyptian territory of Sinai,

⁴²*Ibid.* at 49-54.

CONDEMNING the Israeli action which resulted in the loss of 106 innocent lives,

CONVINCED that this action affects and jeopardizes the safety of international civil aviation and therefore emphasizing the urgency of undertaking an immediate investigation of the said action,

- (1) DIRECTS the Council to instruct the Secretary General to institute an investigation in order to undertake fact findings and to report to the Council...;
- (2) CALLS UPON all parties involved to co-operate fully in the investigation.⁴³

Several delegations, although voting for the Resolution as a whole, expressed discomfort over the fact there was a condemnation of the Israeli action before the ICAO fact-finding investigation had been completed and considered.

Prior to and during the Assembly, requests were received from Libya, Egypt, Lebanon and Saudi Arabia for a neutral body to investigate the facts of the incident.⁴⁴ The Council considered these requests, together with Assembly Resolution A19-1, on 5 March 1973.⁴⁵ There was general consensus that the investigation should be a technical inquiry undertaken by a group of experts drawn entirely from the ICAO Secretariat if possible. There was, however, less agreement on the legal basis for a Council decision to institute such an investigation, it being noted that this was the first investigation of its kind to be undertaken by ICAO. Some representatives believed that a proper legal framework would include both Resolution A19-1 and Article 55(e) of the Chicago Convention.⁴⁶ Others thought that Article 54(b) of the Convention under which

⁴³*Supra*, Ch. II, note 60.

⁴⁴C-WP/5734, Attachments.

⁴⁵ICAO Doc. 9079-C/1013: *Action of the Council - 78th Session* at 11-13.

⁴⁶Article 55(e) provides that the Council may:

"Investigate, at the request of any contracting State, any situation which may appear to present avoidable obstacles to the development of international air navigation; and,

the Council is obliged to carry out directions of the Assembly, was a sufficient basis. After some discussion, the Representative of the United States proposed that the Council, in accordance with Article 54 (b), follow the directions of the Assembly in Resolution A19-1: this suggestion was accepted by 25 votes to none, with two abstentions. One of those who abstained, the Representative of France, had reservations because he correctly believed that there might be future investigations where Article 54(b) could not be applied.

The report of the Secretary General's investigating team, made up of members of the Secretariat, was presented to the Council as an Attachment to C-WP/5764 and considered on 4 June 1973, together with a draft resolution presented by various States in C-WP/5792.⁴⁷

Several representatives stated that the report proved that there was no justification for the shooting-down of the airliner and called for a condemnation of the Israeli action. The Representative of Egypt stated that ICAO procedures and signals were not followed by the interceptors,⁴⁸ and that the Israeli action "was a flagrant violation of principles enshrined in the Chicago Convention and other international instruments".⁴⁹ Similarly, the Representative of Lebanon said that "Israel did not respect or observe the principles of the Chicago Convention and the elementary principles of international law",⁵⁰ while the Representative of Czechoslovakia saw in the Israeli action "a violation of all the basic principles of the Chicago Convention".⁵¹ The Representative of Senegal concluded "that international laws and conventions were not held in the same respect by all members of

after such investigation, issue such reports as may appear to it desirable."

⁴⁷For the Council's discussion and decision, see ICAO Doc. 9073-C/1011, C-Min. 79/1-14: *Council - Seventy-Ninth Session, Minutes with Subject Index* at 26-64.

⁴⁸*Ibid.* at 33.

⁴⁹*Ibid.* at 49.

⁵⁰*Ibid.* at 51.

⁵¹*Ibid.* at 57.

ICAO".⁵² The Representative of the People's Republic of the Congo expressed the view that firing upon a civil aircraft constituted a crime against humanity.⁵³ The Representative of Spain found it "completely unacceptable that errors in navigation or in the control should be punished by the demolition of an aircraft and the death of its passengers and crew."⁵⁴ Equally blunt was the Representative of the United States: "there was no justification for the use of lethal force against aircraft employed in international civil aviation", although in this instance she saw the existence of contributory factors.⁵⁵

The Observer of Israel⁵⁶ urged the Council to concentrate on ways to prevent future tragic aerial incidents rather than let the deliberations degenerate into political harangues. In his Government's view, there existed a number of "cumulative factors lending suspicion as to the intentions of the aircraft." These were given as follows:

- a) "The aircraft was a vast distance from any route of Libyan airways";
- b) There had been intelligence information that "Arab terrorist groups" were planning to crash a hijacked aircraft onto downtown Tel Aviv;
- c) "Arab terrorists openly supported by Libya had made a practice of directing their nefarious activities to civilian aircraft and civil aviation and the fact that [the Libyan airliner] was outwardly a civilian aircraft could in the circumstances by no means indicate friendly intentions";
- d) The aircraft bore the markings of Libya, whose President a few weeks earlier had stated that the war must be transferred to Israeli

⁵²*Ibid.* at 52.

⁵³*Ibid.* at 57.

⁵⁴*Ibid.* at 53.

⁵⁵*Ibid.* at 63.

⁵⁶The summary below is of his intervention (*ibid.* at 38-47).

soil, and that there was a need for a political decision by Arab States to launch an attack on Israel;

- e) The aircraft "passed unchallenged through Egyptian Air Defence, claimed by some to include the heaviest concentration of ground to air missiles the world has known"; and
- f) The aircraft was headed towards sensitive military installations.

Only when the Libyan aircraft failed to respond to the interception procedures was a decision made to force it to land. The Observer believed that the report confirmed the following: that there "was extreme incompetence and negligence by Libyan and Egyptian authorities"; that the aircraft's crew made serious navigational errors; that the aircraft flew over the Israeli defence area of Bir Gafgafa; that it lowered its airspeed over Bir Gafgafa; that "Israel used AIP Israel procedures and signals for interception" which were observed by the Libyan aircraft's flight crew but were not complied with; and that the "aircraft descended for a forced landing under power".

The United States proposed a number of amendments to the draft resolution in C-WP/5792, all but one of which were rejected. As a result of its consideration of the matter, the Council adopted the following resolution by 27 votes to none with two abstentions (Nicaragua and the United States):

"THE COUNCIL,

RECALLING that the United Nations Security Council in its Resolution 262 in 1969 condemned Israel for its premeditated action against Beirut Civil Airport which resulted in the destruction of thirteen commercial and civil aircraft, and recalling that the Assembly of ICAO in its Resolution A19-1 condemned the Israeli action which resulted in the loss of 108 innocent lives and directed the Council to instruct the Secretary General to institute an investigation and report to the Council;

CONVINCED that such actions constitute a serious danger against the safety of international civil aviation;

RECOGNIZING that such attitude is a flagrant violation of the principles enshrined in the Chicago Convention;

HAVING CONSIDERED the report of the investigation team...and finding from it no justification for the shooting down of the Libyan civil aircraft;

- (1) STRONGLY CONDEMNNS the Israeli action which resulted in the destruction of the Libyan civil aircraft and the loss of 108 innocent lives;
- (2) URGES Israel to comply with the aims and objectives of the Chicago Convention.⁵⁷

During the discussion, a number of representatives favoured the Council asking the ANC to study the question of interception of civil aircraft, and indeed, one of the amendments put forward by the United States would have included in the Resolution such an instruction to the ANC.⁵⁸ It was rejected on the information of the President of the Council that the Secretariat had already prepared a paper suggesting a generally worded instruction to the ANC.⁵⁹

C-WP/5774, presented by the Secretary General and considered by the Council on 6 June 1973, gave a brief chronology of ICAO's work in the area of interception of civil aircraft, and suggested that it was the responsibility of the Organization, within its capabilities, to remove the need for interception of civil aircraft or to reduce to a minimum the risks resulting from interception, and to that end, invited the Council to request the ANC to, *inter alia*, develop relevant draft material for circulation to States for comment.⁶⁰

During the Council's consideration, the Representative of Belgium proposed that a letter be sent to contracting States immediately, reminding them of the letter of 12 September 1966 and:

"urging them not to have recourse to interception and, if it became necessary as a last resort, to limit it to the identification of the aircraft and

⁵⁷*Ibid.* at 29-30; and ICAO Doc. 9097, *supra*, Ch. II, note 61 at 33.

⁵⁸*Ibid.* at 59.

⁵⁹*Ibid.* at 61.

⁶⁰C-WP/5774 paras. 2.2 and 5.

to action intended to get the aircraft out of dangerous or prohibited areas or to assist the crew....⁶¹

The above was communicated to member States by State Letter AN 13/16-73/118 dated 29 June 1973, which also informed them that the Council had decided to urge contracting States:

- "- to limit the interception of civil aircraft to those instances where it is essential for ensuring the safe flight of the aircraft;
- to ensure that, in the exceptional case where the intercepted aircraft will be required to land in the territory overflown, the designated aerodrome is suitable for the safe landing of the aircraft type concerned;
- to refrain from the use of arms in all cases of interception of civil aircraft."

Later that year, the 20th Session (Extraordinary) of the ICAO Assembly met in Rome from 28 August to 21 September to consider problems relating to unlawful interference with aircraft and had before it a proposal to include in the Chicago Convention an article by which contracting States would undertake to refrain from the use or threat of force against civil aircraft of another State.⁶² The proposed amendment failed to be adopted because it did not obtain the votes of two-thirds of the Assembly as required by Article 94(a) of the Chicago Convention⁶³ and the matter was not pursued further until the shoot-down of KAL 007.

⁶¹ICAO Doc. 9097, *supra*, Ch. II, note 61 at 10.

⁶²See *infra*, Ch. IV.

⁶³ICAO Doc. 9087, A20-Res. P-Min.: *Assembly - Twentieth Session (Extraordinary), Resolutions and Plenary Minutes* at 137-141.

c) Korean Airlines (South Korea - USSR, 1983)

On 1 September 1983, the Minister of Foreign Affairs of the Republic of Korea informed the President of the ICAO Council that a Korean Airlines Boeing 747 passenger airliner (Flight KE 007) bound for Seoul was missing near Sakhalin Island (USSR) on 31 August 1983, after it had taken off from Anchorage, Alaska. The Minister requested assistance in ensuring the safety of the passengers, crew and aircraft.⁶⁴ The President immediately sent a telex to the Minister of Civil Aviation of the USSR, stating that press reports indicated a possible landing of the aircraft in Soviet territory and that "we are confident that your authorities are rendering every possible assistance to passengers, crew and aircraft."⁶⁵

In light of the developing knowledge that the aircraft had been shot down, on 2 September 1983 the Republic of Korea requested that an Extraordinary Session of the ICAO Council be convened on 15 September 1983.⁶⁶

On 7 September 1983, the Representative of the USSR on the Council forwarded to the President of the Council a statement of 6 September 1983 by the Soviet Government in which, *inter alia*, it admitted that "the interceptor-fighter plane of the anti-aircraft defences fulfilled the order of the command post to stop the flight."⁶⁷

On 10 September 1983, the USSR Representative sent to the President of the Council a letter from the Chairman of the USSR Commission for ICAO which provided more detail about the incident.⁶⁸ It stated that the headquarters of the anti-aircraft

⁶⁴Memorandum dated 2 September 1983 from President of the Council to Representatives on the Council, Attachment 1.

⁶⁵*Ibid.*, Attachment 2.

⁶⁶Second Memorandum dated 2 September 1983 from President of the Council to Representatives on the Council, Attachment.

⁶⁷Memorandum dated 8 September 1983 from President of the Council to Representatives on the Council, Attachment.

⁶⁸Memorandum dated 12 September 1983 from President of the Council to Representatives on the Council, Attachment.

defences in the area had, after analyzing the actions of the intruder aircraft, concluded that it was a reconnaissance aeroplane; the interceptor pilots "could not be aware that it was a civil aircraft". In fact, the flight had been a "premeditated, pre-planned operation in a strategically important area," which was a flagrant violation of the principles in the Preamble and Article 4 of the Chicago Convention.⁶⁹ Finally, the Chairman of the USSR Commission informed that the USSR was, in accordance with Article 26 of the Chicago Convention,⁷⁰ carrying out an investigation into the "circumstances of the accident" and that ICAO would be informed of the results upon its completion.

i) The 1983 Investigation

The Extraordinary Session of the Council was held on 15 and 16 September 1983, soon after the Security Council's consideration of the matter. In opening the Session, the President of the Council stated that:

"It falls clearly to ICAO...to focus its attention on gaining a full and complete technical understanding of how this tragic event occurred and to examine every element in ICAO's existing technical provisions for promoting the safety of air navigation in order that similar events never occur in the future."⁷¹

This was to prove an underlying theme in many of the interventions made. What follows below is a summary of some of the statements made in the Council.

The Observer from the Republic of Korea stated that the Soviet fighters had made no attempt to follow the provisions of Annex 2, rejected the claim that the aircraft had been on an espionage mission and requested that the USSR apologize, pay compensation,

⁶⁹The Preamble refers to the abuse of international civil aviation while Article 4 provides that each "contracting State agrees not to use civil aviation for any purpose inconsistent with the aims of this Convention".

⁷⁰Article 26 requires the State of occurrence to institute an inquiry into the circumstances of an accident to an aircraft involving death or serious injury.

⁷¹ICAO Doc. 9416, *supra*, Ch. II, note 12 at 4.

punish those responsible and guarantee the prevention of a recurrence of such an incident.⁷²

The Representative of Canada demanded an impartial investigation into all relevant circumstances surrounding the destruction of the aircraft, on the basis of Article 55(e) of the Chicago Convention. Secondly, the ANC should examine whether all relevant provisions of the Chicago Convention and its Annexes were being fully implemented by contracting States and whether these provisions were adequate.⁷³

Most other representatives also called for an investigation by the Secretary General into the facts surrounding the shoot-down, and for re-examination and further development of relevant ICAO technical provisions.

The French Representative believed that an investigation, based on Article 55(e), should be carried out. France further made two proposals, one in the legal, and the other in the technical, field. In the legal field, it proposed that the Council:

"include in its Work Programme and examine with the highest priority the question of an amendment to the [Chicago Convention] involving an undertaking to abstain from recourse to the use of force against civil aircraft subject to the provisions of the Charter of the United Nations and to convene, before the end of January 1984, an Extraordinary Session of the Assembly to examine and adopt that amendment."⁷⁴

In the technical field, France presented two working papers. In C-WP/7695 it requested the ANC to undertake a number of tasks and presented a draft resolution in C-WP/7698 by which the Council would instruct the ANC to undertake certain tasks in line with the proposals in C-WP/7695.⁷⁵

The Japanese Representative was of the view that "the shooting down of an unarmed civilian aircraft constitutes a violation not only of humanitarian principles but

⁷²*Ibid.* at 4-7.

⁷³*Ibid.* at 7-9.

⁷⁴C-WP/7694 and Addendum 1 thereto.

⁷⁵The French explanation of its position and proposals are found in ICAO Doc. 9416, *supra*, Ch. II, note 12 at 9-12.

also of the rules of international law." He believed that the Council should strongly urge the USSR to "admit and accept full responsibilities including compensation". As a preventive measure, States should comply with the rules and SARPs in the Annexes, including those on signals between intercepting and intercepted aircraft, and the one providing that intercepting aircraft should refrain from the use of weapons. Japan proposed that the ANC study a number of specified technical matters with a view to amendment of the Annexes. Finally, Japan considered that it might be necessary to amend the Chicago Convention or to conclude a new agreement aimed at preventing a recurrence of such an incident: such an amendment or agreement could, for example, prohibit armed attack against civil aircraft.⁷⁶

The Representative of Germany stated that "the shooting down of a civilian aircraft under any circumstances whatsoever represents an inhuman act and a clear violation of international law and the principles of the international civil aviation community," and that the Council should "explicitly condemn and declare unlawful the use of weapons by military aircraft intercepting civil aircraft under any circumstances."⁷⁷

The Representative of Egypt stated that the focus should be on two main constitutional principles:

- 1) ensuring the safety of international civil aviation; and
- 2) "the inviolability of territorial airspace with due respect for international frontiers, prohibited and restricted areas established by different States."

ICAO was urged to develop a legal system relating to interception of civil aircraft to ensure that when a State exercised its sovereign right to order an aircraft to land, "such right shall be exercised with (*sic*) the necessary limits required for its security, so as not to endanger the safety of civil aircraft...."⁷⁸

⁷⁶*Ibid.* at 12-16.

⁷⁷*Ibid.* at 16-17.

⁷⁸*Ibid.* at 20-21.

The United States' Representative requested the Council to initiate an investigation, condemn those responsible, and reaffirm that such use of force against civil aircraft was prohibited. It requested the USSR to "offer a formal apology, provide full and complete information regarding this incident, ...make (*sic*) appropriate compensation, and give credible guarantees to refrain from similar action in the future." He described the actions of the USSR as an irresponsible violation of international law, and believed that the ANC should "study ways to facilitate co-ordination between civil and military aircraft and their respective air traffic control systems." Interception of civil aircraft should be in conformity with the obligation of States in Article 3(d) of the Chicago Convention that they will have due regard for the safety of navigation of civil aircraft when issuing regulations for their military aircraft. The United States Representative stated that:

"The international community has rejected deadly assault on a civil airliner by a military aircraft in peacetime as totally unacceptable. It violates not only the basic principles set forth in the Convention, but also the fundamental norms of international law enshrined in the Charter of the United Nations and established firmly in the practice of the civilized world."

In his view, the actions of the USSR went beyond the rights contemplated in Article 9 of the Chicago Convention and was contrary to the obligation under Article 25 to assist aircraft in distress.⁷⁹

The Representative of India raised a number of questions which he believed needed to be answered. He was therefore of the opinion "that a full investigation into the facts of the incident, in accordance with established ICAO procedures", was necessary, and that "until all the facts are in, judgement must necessarily be suspended."⁸⁰ Interestingly, in the Libyan Airlines incident, India had co-sponsored a resolution which condemned the Israeli action and was adopted by the ICAO Assembly before the Secretary General's investigation into that incident.

⁷⁹*Ibid.* at 22-28.

⁸⁰*Ibid.* at 34-35.

The Jamaican Representative believed that the destruction of the aircraft was an inhuman act and a grave violation of international law.⁸¹

The Representatives of the Soviet Union provided certain information relating to the intrusion and the actions of the Boeing, which they claimed led the Air Defence Command of the region to conclude that the Korean aircraft was engaged in intelligence gathering. There had been a "blatant violation of the sovereignty of the Soviet Union", a violation of Article 9(c) of the Chicago Convention, and specific rules in Annex 2. They believed that the air traffic services and air defence agencies of the United States could not have failed to detect the deviation of the aircraft from its route, yet failed to take any corrective action. Japan was also culpable in this regard. A Commission of the USSR was conducting an inquiry in compliance with the Chicago Convention, Annex 13 (*Aircraft Accident and Incident Investigation*) and USSR legislation. Until the Commission had completed its work and presented its report to ICAO, there would be no foundation for a continued examination of this matter in ICAO and for Council action. The Representatives proposed that examination of the matter by the Council be deferred until then.⁸²

Following the general debate, the Council considered C-WP/7696 containing a draft resolution presented by certain Western States, C-WP/7697 containing a draft resolution presented by the USSR, and C-WP's 7694 (with Addendum No. 1), 7695 and 7698 presented by France. The President of the Council considered the draft resolutions in C-WP/7696 and C-WP/7697 as alternate proposals and asked the Council to consider first C-WP/7696, being the first one to be presented.⁸³ The draft resolution in C-WP/7696 was adopted by 26 votes in favour, 2 against (USSR and Czechoslovakia) and 3 abstentions (India, Algeria, China) and reads as follows:

⁸¹*Ibid.* at 37-38.

⁸²*Ibid.* at 38-42.

⁸³*Ibid.* at 49.

"THE COUNCIL

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

...

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

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

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

...

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

- (1) DIRECTS the Secretary General to institute an investigation to determine the facts and technical aspects relating to the flight and destruction of the aircraft and to provide ... a complete report during the 110th Session of the Council,**
- (2) URGES all parties to co-operate fully in the investigation,**
- (3) FURTHER DIRECTS the Secretary General to urgently report to the Council on the status of adherence to, and implementation of, the provisions of the Chicago Convention, its Annexes and other related documents as they bear upon this incident,**

- (4) **DIRECTS** the Air Navigation Commission urgently:
- (a) to review the provisions of the Convention, its Annexes and other related documents and consider possible amendments to prevent a recurrence of such a tragic incident;
 - (b) to examine ways to improve the co-ordination of communication systems between military and civil aircraft and air traffic control services and to improve procedures in cases involving the identification and interception of civil aircraft;....⁸⁴

The alternative proposal of the USSR was consequently not considered.

The Council then considered C-WP/7694 and Addendum No. 1 in which France proposed the holding of an Extraordinary Session of the Assembly to consider adopting an amendment to the Chicago Convention. The proposal was accepted by 26 votes to 2, with two abstentions and with a modification to require the convening of the Session before the end of the first quarter of 1984.⁸⁵

Finally, the Council considered the draft resolution presented by France in C-WP/7698 which was based on its proposal in C-WP/7695; a resolution requesting the ANC to perform certain specific technical tasks was adopted by 6 votes to 4 with 17 abstentions.⁸⁶

⁸⁴*Ibid.* at 59.

⁸⁵*Ibid.* at 55.

⁸⁶*Ibid.* at 61. The Resolution reads:

"THE COUNCIL

...

HAVING noted C-WP/7695 submitted by France on 15 September 1983;

1. **DECIDES** to instruct the Air Navigation Commission to undertake without delay the following technical tasks:
 - a) - review of the conditions of implementation of the Standards contained in paragraph 2.13 of Annex 11 to the Chicago Convention and proposals for possible recommendations concerning the co-ordination between military authorities and air traffic services;
 - b) - review of all the provisions contained in Attachment A to Annex 2 to the Chicago Convention concerning the interception of civil

Coincidentally, the 24th Session of the ICAO Assembly met soon afterwards, from 20 September to 7 October 1983. The incident remained highly topical.

Working Papers were presented by a number of States. France presented the text of its proposed draft amendment to the Chicago Convention.⁵⁷ Austria and the Soviet Union also presented proposals for amending the Chicago Convention.⁵⁸ Canada proposed that ICAO consider the adoption of a Convention on the Interception of Civil Aircraft.⁵⁹ Switzerland, in A24-WP/75, stated that:

"Whatever the circumstances of the incident, the fact of using a military aircraft to shoot down a civil airliner is an inadmissible act, particularly

aircraft with a view to examining the feasibility of their incorporation as Standards in the body of Annex 2, particularly as far as paragraph 2.3 f) of this Attachment is concerned which recommends the frequency 121.5 MHz as the one with which interceptor aircraft should be equipped;

- c) - review of the conditions of implementation of the Standards contained in paragraph 3.3.1.1.2.1 d) of Annex 2 to the Chicago Convention and proposals for possible recommendations to be made on the basis of this text, particularly as regards the submission of flight plans when civil aircraft may need to fly over areas close to zones or routes to which reference is made in that paragraph;
- d) - study of new provisions which could be included in Attachment A to Annex 2 or in any other relevant text and which would make it possible to achieve the harmonization of procedures for the interception of civil aircraft as well as introduce further precautions for the conduct of interceptions..."

The reasons for the relative lack of positive support for this Resolution may be found in statements by the Representatives of Jamaica, Denmark and Australia. The Jamaican Representative believed that the French draft resolution "detailed action the Council had agreed to...in the [first] resolution just adopted and considered that the [ANC] would take all these points into consideration," and that the details in the proposal might be interpreted as restricting the scope of the first Resolution (*ibid.* at 57). The Representatives of the latter two States "considered that the Commission should have the broadest possible mandate to study and re-organize the regulatory documents, and stated that in highlighting particular points there was a danger of restricting the action of the Commission" (*ibid.* at 57).

⁵⁷Information Paper No. 1 related to A24-WP/49.

⁵⁸A24-WP/56 and A24-WP/65 respectively.

⁵⁹A24-WP/85. See also the discussion below, *infra*, Ch. IV 3).

in time of peace. It is evidently a measure out of all proportion to the infraction that the Korean Boeing may have committed."⁹⁰

Egypt reiterated its statement made at the Extraordinary Session of the Council and additionally made comments on the other proposals submitted to the Assembly.⁹¹ Twenty-three States (six more added their names later) proposed a draft resolution by which the Assembly would endorse the resolutions and decisions of the Extraordinary Session of the Council and would urge all Member States to co-operate fully in their implementation.⁹²

In their general statements in the Plenary, a large number of delegations deplored the Soviet action and expressed support for the Council Resolutions and decisions, placing particular importance on the necessity for an impartial investigation and for the review and development of technical and legal provisions to prevent the recurrence of a similar tragedy. A few Eastern European States, on the other hand, emphasized the fact that the Boeing had violated Soviet airspace and the need to prevent such violations of sovereignty, as opposed to a restriction on the actions of the territorial sovereign if such an intrusion did occur.

The Canadian Delegation described the shoot-down "as a transgression from the basic concepts of humanity". It recognized a balance between sovereignty and safety: every State had the right to protect its airspace, but no State had the right to destroy a civilian airliner.⁹³ The Japanese Delegation repeated that "the shooting down of an unarmed and defenseless civil aircraft constitutes, whatever the reasons, a violation of humanitarian principles and of international law" and requested a condemnation of the Soviet action.⁹⁴ New Zealand's Delegation espoused the view that what was at issue was

⁹⁰A24-WP/75 para. 2.

⁹¹A24-WP/88.

⁹²A24-WP/77 and Addendum.

⁹³ICAO Doc. 9415, A24-Min. P/1-15: *Assembly - 24th Session, Plenary Meetings, Minutes at 7-9.*

⁹⁴*Ibid.* at 16-17.

not the principle of territorial sovereignty over national airspace, but rather "the outrageous means used to enforce that principle on this occasion"; it believed that the Soviet Union should not be re-elected to the Council.⁹⁵ The Delegation of Panama condemned "those who shoot down defenceless aircraft on peaceful flights"⁹⁶ while the Papua New Guinea Delegation regarded the shoot-down as "a blatant disregard for the principles of International Law".⁹⁷

The Delegation of the Republic of Korea was of the view that:

"The use of armed force against civilian planes is unjustified, inexcusable and impermissible under any circumstances. It cannot be condoned for whatever reasons. This is an elementary rule of international law, and a highest dictate of conscience."⁹⁸

It rejected the charge that the aircraft had been engaged in espionage. The Sierra Leone Delegation deplored the attack, and considered the Soviet action as "high-handed and uncivil";⁹⁹ Singapore believed the action to be contrary to international law generally and to the Chicago Convention.¹⁰⁰

The Philippines' Delegation felt that the "penalty imposed [on the Boeing] was grossly and unjustifiably disproportionate to the alleged offense and exacted upon innocent people."¹⁰¹ The United Kingdom's Delegation was of the opinion that when an aerial intrusion occurred, the responsibility of States under the Chicago Convention to ensure the safety of civil aviation, and common humanity, demanded not the shooting down of such aircraft but the provision of appropriate assistance to get the aircraft safely

⁹⁵*Ibid.* at 25.

⁹⁶*Ibid.* at 32.

⁹⁷*Ibid.*

⁹⁸*Ibid.* at 40.

⁹⁹*Ibid.* at 43.

¹⁰⁰*Ibid.* at 44.

¹⁰¹*Ibid.* at 74.

back on course.¹⁰² The United States' Delegation used moderate language in calling for a codification of the rule of law declaring that military attack against civil aircraft was unlawful, and for improvements in the technical regulations.¹⁰³

The Soviet statement was to a large extent similar to that made at the Extraordinary Session of the Council: the aircraft had violated Soviet airspace, "visiting important Soviet strategic installations"; exhaustive efforts to establish contact with it were ignored by the Boeing crew; the aircraft was engaged in an intelligence operation; and the Soviet Union was in the process of carrying out an investigation the result of which would be communicated to ICAO.¹⁰⁴ The Delegation of Bulgaria expressed concern "over the absence of effective means of preventing the violation of the sovereignty of a country's airspace by civil aircraft and the inadequacy of measures that exclude their destruction"; it believed that States "should take concrete measures to prevent civil aircraft from violating the sovereignty of any country and ensure strict compliance with the recommendations of ICAO" and that there should be new provisions in Annex 2 "with a view to preventing the violation of States' airspace and permitting action to be taken that would exclude the destruction of aircraft."¹⁰⁵

Similarly, Czechoslovakia spoke of the need to:

"ensure that...States strictly comply with Articles 1, 3, 4 and 6 of the Chicago Convention which deal with questions of sovereignty over the airspace above States' territories, the rules and conditions of flights and clearance requirements, as well as the use (*sic*) of civil aviation."¹⁰⁶

Thereafter, the draft resolution was approved without change by 65 votes to 10 with 26 abstentions.¹⁰⁷ Resolution A24-5 reads:

¹⁰²*Ibid.* at 124.

¹⁰³*Ibid.* at 128-129.

¹⁰⁴*Ibid.* at 52-56.

¹⁰⁵*Ibid.* at 70-71.

¹⁰⁶*Ibid.* at 103.

¹⁰⁷*Ibid.* at 167.

"THE ASSEMBLY

HAVING CONSIDERED the report ... on the Extraordinary Session of the Council ...,

ENDORSES the Resolutions adopted and decisions taken at that Session, and

URGES all Member States to co-operate fully in their implementation."¹⁰⁸

Furthermore, it was agreed that the material contained in the papers presented by France, the USSR, Switzerland, Canada and Egypt would be referred to the Council for further consideration.¹⁰⁹

When the Secretary General presented to the Council on 20 October 1983 an interim report on the progress of the investigation¹¹⁰ as required by the first Council Resolution of 16 September 1983, he advised that whereas the Republic of Korea, Japan and the United States were contributing significantly to the team's work, the USSR had not indicated a willingness to comply with the ICAO investigation, referring instead to the investigation being conducted by its State Commission.¹¹¹

The Secretary General's final report was presented to the Council as an Attachment to C-WP/7764 and was considered on 12 and 13 December 1983 during its 110th Session. Also attached as Appendix F was a preliminary report provided by the Soviet Union on the progress of its own investigation. In its Summary and Conclusions, the Secretary General's report indicated that:

"Soon after its departure from Anchorage, KE007 began deviating to the right (north) of its assigned ... route This deviation resulted in a progressively ever greater lateral displacement to the right of its planned

¹⁰⁸ICAO Doc. 9414, A24-Res.: *Assembly - 24th Session, Resolutions Adopted by the Assembly and Index to Documentation* at 22.

¹⁰⁹A24-WP/105 read in conjunction with ICAO Doc. 9415, *supra*, note 93 at 167.

¹¹⁰C-WP/7710.

¹¹¹ICAO Doc. 9427-C/1078, C-Min. 110/1-20: *Council - 110th Session, Minutes with Subject Index* at 14.

route which, ultimately, resulted in its penetration of adjacent high seas airspace in flight information regions (FIRs) operated by the ... (USSR), as well as of sovereign USSR airspace overlying portions of the Kamchatka Peninsula and Sakhalin Island and their surrounding territorial waters.

No evidence was found during the investigation to indicate that the flight crew of KE007 was, at any time, aware of the flight's deviation from its planned route...

At about 1820 hours when it was in the vicinity of Sakhalin Island, USSR, the flight was intercepted by military aircraft operated by the USSR. At 1827 hours, the aircraft was hit by at least one of two air-to-air missiles fired from one of the USSR interceptor aircraft whose pilot had been directed by his ground command and control unit to terminate the flight of KE007.

As a direct result of the missile attack, KE007 crashed and sank into the Sea of Japan southwest of Sakhalin Island...."

The report stated that due to the absence or unavailability of certain information or sources of information, including the cockpit voice recorder (CVR), the flight data recorder (FDR), and a record of communications emanating from the ground control intercept units, "the investigation effort was compelled to proceed on the basis of limited hard evidence and facts, circumstantial evidence, assumptions and calculations". It considered several possible reasons for the deviation of the aircraft, and discounted the hypothesis that it had been on an intelligence gathering mission. Instead, it favoured two possible explanations:

- 1) The "crew inadvertently flew virtually the entire flight on a constant magnetic heading (in the 'heading mode') due to its unawareness of the fact that 'heading' had been selected as the mode of navigation rather than the 'inertial navigation system' (INS)."
- 2) An "undetected 10 degree longitudinal error was made in inserting the 'present position' co-ordinates of the Anchorage gate position into one or more of the INS units....".

The Secretary General's report concluded by giving his findings on the interception and associated identification, signalling and communications, as follows:

- "1) Interceptions of KE007 were attempted by USSR military interceptor aircraft, over Kamchatka Peninsula and in the vicinity of Sakhalin Island.
- 2) The USSR authorities assumed that KE007 was an "intelligence" aircraft and, therefore, they did not make exhaustive efforts to identify the aircraft through in-flight visual observations.
- ...
- 4) ICAO was not provided any radar recordings, recorded communications or transcripts associated with the first intercept attempt or for the ground-to-interceptor portion of the second attempt, therefore, it was not possible to fully assess the comprehensiveness or otherwise of the application of intercept procedures, signalling and communications.
- 5) In the absence of any indication that the flight crew of KE007 was aware of the two interception attempts, it was concluded that they were not."

In the covering working paper, the Secretary General reported that the USSR Government had advised him "that they could not accept a visit from the ICAO...team because such a visit would be contrary to the national legislation of the USSR; furthermore, it believed that an investigation by an ICAO team was not foreseen in either Article 26 of the Chicago Convention or in Annex 13 thereto."¹¹² In his oral presentation of the report to the Council, he emphasized that:

"The final report was not as comprehensive as it might have been, as numerous elements were missing.... It was possible that some elements might become available in the future, in which case he would present a supplement to this report."¹¹³

The Representative of the Soviet Union stated that Soviet legislation did not permit an investigation to be conducted on Soviet territory by anyone except Soviet authorities. Nevertheless, the Soviet Union had provided some preliminary information and would continue to do so; certain requests for information by the Secretary General

¹¹²C-WP/7764 para. 2.4.

¹¹³ICAO Doc. 9427, *supra*, note 111 at 148.

were "being considered". The Representative stated that the interceptors had twice tried to establish contact with the Boeing on the emergency radio frequency 121.5 MHz.¹¹⁴

Most representatives deplored the lack of co-operation from the USSR; many commented on the fact that the Secretary General's report did not support the theory that the aircraft had been involved in an intelligence-gathering mission. The Representative of Nigeria, noting that the report was incomplete and that a supplement would be issued if further information became available, proposed that the Council defer discussion of the report until the next (111th) Session.¹¹⁵ This proposal received wide support although the reasons for deferral differed: some States had not had sufficient time to analyse the report, while others would prefer a delay in taking action in the hope that further information would become available.

The Representative of the United Kingdom noted many "glaring inconsistencies" between the "so-called" facts as stated in the Soviet interim report and the facts in the Secretary General's report. He expressed the view that the report should be "as near technically and factually correct as possible" before it was endorsed by the Council, and "proposed that the Council refer C-WP/7764 to the [ANC] for a review of all technical aspects, in order to have the benefit of their expert views when the Council considered the report in detail during its next session";¹¹⁶ this suggestion was also supported.

The Representative of Colombia proposed a resolution for adoption¹¹⁷ which, after refinement, was adopted on 13 December 1983 by 29 votes to none, with two abstentions, as follows:

"THE COUNCIL

RECALLING its resolution of 16 September 1983,

¹¹⁴*Ibid.* at 155-156.

¹¹⁵*Ibid.* at 151.

¹¹⁶*Ibid.* at 158-159.

¹¹⁷*Ibid.* at 166-167.

1. **EXHORTS** all the parties involved in the investigation ... to co-operate fully in furnishing to ICAO, without reservation, all the information at their disposal as soon as possible.
2. **DECIDES**
 - (a) to defer detailed consideration of the report until the 111th Session;
 - (b) to refer the report to the [ANC] for technical review in the light of the ongoing study of the appropriate annexes and related documents, ...¹¹⁸

Consequent to the Resolutions adopted on 16 September 1983 by the Council, the ANC presented in C-WP/7770 its review of ICAO provisions and material relevant to the identification and interception of civil aircraft, and its tentative conclusions in this regard. In particular, it examined existing provisions in Annex 11 (*Air Traffic Services*) on co-ordination between military authorities and air traffic services; the presentation of flight plans in designated areas to facilitate civil/military co-ordination and the avoidance of interception; and the possible upgrading of provisions in Attachment A to Annex 2 into Standards in the Annex.¹¹⁹ The ANC concluded that:

- "a) The current provisions and special recommendations are adequate and, if properly implemented and applied by all concerned, are capable of providing the necessary safety protection for civil aircraft.
- b) Certain current provisions may require strengthening, i.e. upgrading to Standards, by which States are obliged to notify the Organization of any differences...
- c) A number of the provisions could be explained more clearly by improved text in order that they be more easily understood, or existing procedures could be prescribed in more detail to assist in their application.

¹¹⁸*Ibid.* at 170-172.

¹¹⁹C-WP/7770; and *ibid.* at 174.

- d) The preparation of a field manual containing extracts of all the provisions contained in the various Annexes and PANS [*Procedures for Air Navigation Services*] documents would further facilitate their implementation and application.¹²⁰

The ANC then highlighted a number of areas of potential improvement and various matters relating to implementation by States of ICAO regulatory material, stressing that these conclusions were necessarily tentative pending the Secretary General's reports on the KAL incident and on the status of adherence to, and implementation of, the relevant provisions of the Chicago Convention, its Annexes and other related material (as requested by the Council in its first Resolution of 16 September 1983).

In its decision dated 14 December 1983, the Council:

- 1) requested the ANC to review its conclusions in the light of the Secretary General's report on the KE007 incident; and
- 2) "requested the Secretary General to give urgent attention to the preparation of a manual or circular containing extracts of all provisions contained in the various Annexes and PANS documents and relevant to the subject of interception, in order to facilitate their implementation and application...."¹²¹

The last request to the Secretary General led to the development and publication in 1984 of a *Manual concerning Interception of Civil Aircraft*.¹²² Also on 14 December 1983, the Council had for consideration C-WP/7768 in which the Secretary General responded to Operative Clause 3 of the first Resolution adopted by the Council on 16 September 1983: he had been directed to "report to the Council on the status of adherence to, and implementation of, the provisions of the Chicago Convention, its Annexes and other related documents as they bear upon this incident". A questionnaire had been sent to States and by 14 December 1983, 47 States had responded. The majority of States responding indicated that they were adhering to, or had implemented, the relevant provisions and recommendations in the various Annexes and in the *Procedures*

¹²⁰C-WP/7770 para. 3.1.1.

¹²¹ICAO Doc. 9427, *supra*, note 111 at 178.

¹²²ICAO Doc. 9433-AN/926.

for Air Navigation Services - Rules of the Air and Air Traffic Services (PANS-RAC);¹²³ a minority of States indicated differences from, or non-compliance with, some of the provisions.¹²⁴ The Council referred the Secretary General's paper to the ANC for study in light of its decision earlier that day.¹²⁵

In accordance with the second operative clause of the Council's Resolution of 13 December 1983, the ANC in early 1984 concluded its technical review of the Secretary General's report and presented its conclusions to the 111th Session of the Council.¹²⁶

When the Council considered the Secretary General's report and the technical review by the ANC on 29 February and 2 and 5 March 1984,¹²⁷ the main protagonists

¹²³ICAO Doc. 4444 - RAC/501.

¹²⁴C-WP/7768 para. 3.1.1. read together with ICAO Doc. 9427, *supra*, note 111 at 178.

¹²⁵ICAO Doc. 9427, *ibid.*

¹²⁶C-WP/7809. The Commission recognized that the investigation team was unable to obtain all the information it needed and had been forced to make certain assumptions; the USSR still did not wish to receive the team. The ANC found some differences between the preliminary information provided by the USSR and other information given to the team. It made a number of comments on specific aspects of the Secretary General's report, *inter alia*: there was no evidence of any attempt by the USSR to identify the aircraft through primary surveillance radars; there was no evidence that the crew of the Boeing was aware of its deviation; Anchorage and Tokyo Area Control Centres (ACCs) were not aware of any lateral deviations and took no action to provide navigational assistance; it could not be determined whether the USSR intercept control units made all possible efforts to secure identification of the intruding aircraft; there was "insufficient information to determine whether all the special recommendations... in Annex 2, Attachment A regarding interception manoeuvres, visual identification, navigational guidance, visual signals and radio communication were applied by the intercepting aircraft"; the information available suggested that the Boeing's crew was not aware of the interceptions reported by the USSR; and there was no record of "any calls on 121.5 MHz having been heard by any civil or military ground unit or other aircraft". The ANC "highlighted" that it "was unable to substantiate that the aircraft's diversion (*sic*)...was the result of deliberate action by the flight crew" and that it was unable to establish the exact cause for the deviation. It did not attempt "to offer any firm conclusions regarding the various aspects of the incident, because the information presented...was incomplete and some of the information received by ICAO had differences which could not be cleared up." The Commission "found it difficult to validate and endorse" the conclusions in the Secretary General's report regarding the possible reasons for the deviation, "because any one of them contained some points which could not be explained satisfactorily." Furthermore, the ANC stated that it found no reasons to modify its earlier tentative conclusions on the adequacy of the then-existing ICAO provisions and Special Recommendations, their application, and areas of potential improvements, but that it was nevertheless continuing its work in this area.

¹²⁷ICAO Doc. 9441, *supra*, Ch. II, note 87 at 17-105.

repeated their earlier views of the facts and the law relating to the incident. The Secretary General informed that no new material had been received. The Soviet Union criticised the Secretary General's report as being incomplete, biased, one-sided, with some of its conclusions being unsubstantiated by the facts, and invalid from a legal point of view; the ANC's review was also deemed to be biased, and was "profoundly disappointing". Western States, on the other hand, saw justification in the Secretary General's report and the ANC review for their view of the facts relating to the incident and were generally supportive of the two documents.

The Council then considered draft resolutions presented by the United States (C-WP/7814) and the USSR (C-WP/7815). The Representative of Nigeria was of the opinion that certain information was still missing and that the Council was basically in the same position it had been in September 1983. He proposed that consideration of the two draft resolutions be deferred until the 112th Session of the Council by which time "more information and the Final Report of the Soviet Union might be available and the Secretary General be able to present the Council with a comprehensive technical report."¹²⁸ This suggestion was supported by a number of representatives. Others felt, however, that Council action should not be delayed further, the United States' Representative pointing out that:

"...the Soviet Union had six months to respond to the Secretary General's request for verifiable information relevant to the shooting..., and that for six months the Soviet Union had refused to comply with the two resolutions already passed by the Council. ...The United States was therefore not hopeful that any delay in Council action would result in the Soviet submission of required evidence, and did not believe that the Council should delay its conclusions on the matter on the basis of an unwarranted hope of receiving verifiable information from the Soviet Union."¹²⁹

¹²⁸*Ibid.* at 83.

¹²⁹*Ibid.* at 84. The Representative of Australia stated:

"It was not known what information the Soviet Union had nor when it would be made available, but it was [his] conjecture that had that information been supportive of the Soviet position it would by now have been made available" (*ibid.* at 93).

The position of the Soviet Union was that the Secretary General's report: "does not contain sufficient or reliable factual data or substantiated conclusions. That being so, the report cannot serve as a basis for a decision to be taken by the Council on the substance of the matter treated therein."¹³⁰

He also wanted to know "how it is possible to invite the Council to take a decision on the basis of mere assumptions without waiting for the investigations to be completed. This can only be called legal nihilism and constitutes a completely improper approach."¹³¹ This differed from the Soviet Union's position in the El Al incident when it urged the Assembly to condemn that shutdown even before the ICAO investigation had been undertaken.¹³²

After a minor amendment, the draft resolution proposed by the United States was adopted on 6 March 1984 by 20 votes in favour, two against with nine abstentions. The text reads as follows:

"THE COUNCIL,

...

- 2) HAVING CONSIDERED the report of the investigation by the Secretary General and the subsequent technical review by the Air Navigation Commission;
- 3) RECOGNIZING that, although this investigation was unable, because of lack of necessary data, to determine conclusively the precise cause for the serious deviation of some 500 kilometers from its flight plan route by the Korean aircraft into the airspace above the territory under the sovereignty of the Soviet Union, no evidence was found to indicate that the deviation was premeditated or that the crew was at any time aware of the flight's deviation;
- 4) REAFFIRMING that, whatever the circumstances which, according to the Secretary General's report, may have caused the aircraft to stray off its flight plan route, such use of armed force

¹³⁰*Ibid.* at 94.

¹³¹*Ibid.* at 102.

¹³²ICAO Doc. 9061, *supra*, Ch. II, note 13 at 38.

constitutes a violation of international law, and invokes generally recognized legal consequences;

- 5) **RECOGNIZING** that such use of armed force is a grave threat to the safety of international civil aviation, and is incompatible with the norms governing international behaviour and with the rules, Standards and Recommended Practices enshrined in the Chicago Convention and its Annexes and with elementary considerations of humanity;

...

- 1) **CONDEMNS** the use of armed force which resulted in the destruction of the Korean airliner and the tragic loss of 269 lives;
- 2) **DEEPLY DEPLORES** the Soviet failure to cooperate in the search and rescue efforts of other involved States and the Soviet failure to cooperate with the ICAO investigation of the incident by refusing to accept the visit of the investigation team appointed by the Secretary General and by failing so far to provide the Secretary General with information relevant to the investigation;
- 3) **URGES** all Contracting States to cooperate fully in the work of examining and adopting an amendment to the Chicago Convention at the 25th Session (Extraordinary) of the ICAO Assembly and in the improvement of measures for preventing a recurrence of this type of tragedy."¹³³

Thereupon, the Soviet Union did not ask for a vote on its own draft resolution.¹³⁴

Thus concluded ICAO's consideration of the shoot-down of the Korean Boeing aircraft following the 1983 investigation.

¹³³ICAO Doc. 9441, *supra*, Ch. II, note 87 at 106.

¹³⁴*Ibid.* at 104.

ii) The 1993 Investigation

The matter lay dormant for almost a decade but obviously retained the interest of the world community. With political changes occurring in the Soviet Union which ultimately led to its break-up, the time was deemed ripe by all concerned to attempt to settle outstanding issues and clarify the remaining facts related to the incident. To this end, the Governments of the new Russian Federation, Japan, the United States and the Republic of Korea met in Moscow on 8 and 9 December 1992 and adopted a resolution which they communicated to ICAO and requested it to "take expeditious action" to fulfill its (the Resolution's) provisions. The Resolution stated that the four Governments:

"...taking into consideration the need for an early, independent and neutral investigation...and recognizing that...(ICAO), as an unbiased, internationally-respected Organization, is the most acceptable Organization to conduct such an investigation, especially because in 1983 ICAO conducted an investigation to determine the facts and technical aspects..., have agreed to request that ICAO complete the KAL-007 investigation. The four Governments will do their utmost to facilitate the investigation, and, if they consider it necessary, fully participate in all its aspects....

The Governments...agree to turn over all materials relating to the incidents, including the originals of the CVR and DFDR (digital flight data recorder) magnetic tapes to ICAO...."¹³⁵

This request was considered by the Council on 18 December 1992 and was expressly supported by most speakers. Many welcomed the spirit of co-operation which now manifested itself, and in particular thanked the Government of the Russian Federation for making available new information.¹³⁶ The Council then:

- 1) "decided to complete the fact-finding investigation which ICAO initiated in 1983;" and

¹³⁵Memorandum PRES AK/333 dated 14 December 1992 from President of the Council to Representatives on the Council, Attachments.

¹³⁶ICAO Doc. 9607-C/1108, C-Min. 137/1-16: *Council - 137th Session, Summary Minutes with Subject Index* at 125-132.

- 2) instructed the Secretary General to a) request all parties concerned to co-operate fully in turning over to ICAO all relevant materials including originals of the CVR and DFDR; and b) undertake the investigation on an urgent basis.¹³⁷

By memorandum dated 28 January 1993, the Secretary General informed Representatives on the Council that the Russian Federation had handed over the original CVR and DFDR tapes. Later, in an interim report, he informed that the team had visited the States concerned and listed additional information which had been provided, which included (from the Russian Federation) "the original tape and transcripts of recorded communications of the combat control officer(s) with the interceptor pilots" and the "original tape and transcripts of recorded communications between ground command posts".¹³⁸

The Secretary General presented his completed report during the 139th Session of the Council in the Appendix to C-WP/9781. Among the main conclusions were the following:

- 1) That "KE 007 turned to a magnetic heading of about 245° which it reached three minutes after lift-off and then maintained until the attack". The maintenance of this constant magnetic heading and resulting track deviation was due to certain crew failures, and not to any aircraft system malfunction. There were no indications that the crew deliberately maintained this heading.
- 2) "The flight crew did not implement the proper navigation procedures to ensure the aircraft remained on its assigned track throughout the flight" and the failure to detect the deviation for over five hours "indicated a lack of situational awareness and flight deck co-ordination on the part of the crew".
- 3) The deviation resulted in the aircraft "penetrating USSR sovereign airspace over Kamchatka Peninsula and Sakhalin Island and the surrounding territorial waters".
- 4) The proximity of a United States intelligence aircraft (RC-135) and KE 007 northeast of Kamchatka "resulted in confusion and the

¹³⁷*ibid.* at 131.

¹³⁸C-WP/9742 para. 4.5.2.

assumption by the USSR that the aircraft proceeding towards the USSR was an RC-135".

- 5) USSR military aircraft unsuccessfully attempted to intercept KE 007 over Kamchatka.
- 6) "The time factor became paramount in USSR command centres as the intruder aircraft was about to coast out of Sakhalin Island."
- 7) "Exhaustive efforts to identify the...aircraft were not made, although apparently some doubt remained regarding its identity." Over Sakhalin, USSR military aircraft intercepted the Boeing but in doing so did not comply with the ICAO SARPs for interception of civil aircraft. The flight crew of KE 007 was not aware of the presence of the interceptors before or at the time of the attack.
- 8) "The USSR air defence command assumed KE 007 was a US RC-135 reconnaissance aircraft before they ordered its destruction; "[i]t was not possible to determine the position of KE 007 at the time of the missile attack in relation to USSR sovereign airspace".¹³⁹

The new information thus confirmed the first of the scenarios postulated by the Secretary General for the deviation in his 1983 report, which scenarios, incidentally, the ANC in 1984 found "difficult to validate and endorse" because "any one of them contained some points which could not be explained satisfactorily."¹⁴⁰

When the Council finally closed the chapter on this incident on 14 June 1993, many representatives thanked the States directly involved for their co-operation.¹⁴¹ The Observer of the Republic of Korea, perhaps with an eye on the potential liability of the airline for its contribution to the disaster, believed that the investigation team was "too conclusive" in stating that the deviation was due to human error,¹⁴² and believed that

¹³⁹C-WP/9781, App., Section 3.

¹⁴⁰*Supra*, note 126.

¹⁴¹ICAO Doc. 9615-C/1110, C-Min. 139/1-17: *Council - 139th Session, Summary Minutes with Subject Index* at 67-77.

¹⁴²*ibid.* at 67-68.

the "Council must once again make it clear to the world that, while reaffirming the principle of prohibition of the use of arms against civil aircraft, it unreservedly condemns the destruction of a civilian aircraft simply because it strayed into the airspace of another country."¹⁴³ The Representative of the Russian Federation, on the other hand, did not agree that exhaustive efforts had not been made to identify the intruder; on the contrary,

"all available measures were taken during the interception to identify the aeroplane and with regard to its affiliation there were no doubts that it was a military intruder plane. It is only for this reason that the rules applied to the aeroplane were not the international rules for the interception of civil aircraft, but rather the rules for the interception of military aircraft as determined by the USSR military command."¹⁴⁴

The gist of this intervention seems to be an admission of the fact that the Boeing had been mistakenly identified as a military aircraft.

The United Kingdom, supported by other States, suggested that since the Council was not a tribunal seeking to reach a judgment on the facts, "the Council should not seek to endorse the conclusions and recommendations in the report; thus avoiding difficulties such a decision could create".¹⁴⁵ A number of States also saw elements in the report which could be studied by the ANC to further enhance aviation safety, and the need to appeal to States to ratify Article 3 *bis*.¹⁴⁶

The President of the Council's summary of the discussion was generally acceptable and it formed the basis for a draft resolution which, after amendment, was unanimously adopted on 14 June 1993, as follows:

"The Council of the International Civil Aviation Organization

...

Having considered the Report of the completion of the fact-finding investigation instituted by the Secretary General...;

¹⁴³*Ibid.* at 69.

¹⁴⁴*Ibid.* at 70-71.

¹⁴⁵*Ibid.* at 72.

¹⁴⁶*Ibid.*

Recalling that the 25th Session (Extraordinary) of the Assembly in 1984 unanimously recognized the duty of States to refrain from the use of weapons against civil aircraft in flight;

...

2. **Expresses** appreciation for the full co-operation extended to the fact-finding mission by the authorities of all States concerned;

...

4. **Requests** the [ANC], in its continuing review of the technical Annexes to the Chicago Convention, to take into account the new facts...;

5. **Appeals** again urgently to all Contracting States that have not yet done so to ratify, as soon as possible, ... Article 3 *bis* ..., which affirms the fundamental principle of general international law that States must refrain from resorting to the use of weapons against civil aircraft;

6. **Urges** States to take all necessary measures to safeguard the safety of air navigation of civil aircraft, in compliance with the relevant rules, Standards and Recommended Practices enshrined in the Chicago Convention and its Annexes;

7. **Decides** that the fact-finding investigation has been completed....¹⁴⁷

d) U.S.-registered Civil Aircraft (USA - Cuba, 1996)

The last ICAO investigation involving an aerial intrusion concerned the shooting-down on 24 February 1996 of two United States registered private (general aviation) civil aircraft by Cuban military aircraft, resulting in the loss of four lives.

News reports indicated that Cuban military aircraft had shot down two aircraft piloted by members of "Brothers to the Rescue", a group of volunteer pilots, mostly Cuban exiles, whose stated objective was to fly over the Florida Straits seeking rafters

¹⁴⁷*Ibid.* at 77.

fleeing from Cuba. It was reported that a third aircraft flown by the leader of the group, managed to return safely to the United States. While the fact of the shoot-downs was undisputed, a major point of contention became the location of the lethal attack. The United States claimed that the aircraft had been over international waters at the moment of shoot-down, while Cuba asserted that they had been inside Cuban airspace, over its territorial seas.¹⁴⁸ This factor was to remain one of the most controversial aspects of the entire incident.

The President of the ICAO Council, having been informed by the Government of the United States of the shoot-downs, wrote to the Government of Cuba on 26 February 1996 expressing his deep concern and requesting "authoritative information on this matter".¹⁴⁹

On 27 February, the United States requested the ICAO Council to consider the matter.¹⁵⁰ Also on 27 February 1996, the UN Security Council issued the following statement through its President:

"The Security Council strongly deplores the shooting down by the Cuban air force of two civil aircraft on 24 February 1996...

The Security Council recalls that according to international law, as reflected in Article 3 *bis* ..., States must refrain from the use of weapons against civil aircraft in flight and must not endanger the lives of persons on board and the safety of aircraft. States are obliged to respect international law and human rights norms in all circumstances.

The Security Council requests that [ICAO] investigate this incident in its entirety and calls on the Governments concerned to cooperate fully with

¹⁴⁸E.g., see IFALPA International Civil Aviation Executive News Service, 27 February 1996 at 2.

¹⁴⁹Memorandum PRES AK/497 dated 26 February 1996 from President of the Council to Representatives on the Council, Attachment.

¹⁵⁰Memorandum PRES AK/498 dated 27 February 1996 from President of the Council to Representatives on the Council, Attachment.

this investigation. The Council requests that [ICAO] report its findings to the Council as soon as possible...."¹⁵¹

On the same date, Cuba sent certain communications to the President of the ICAO Council. The first gave a chronology of violations of Cuban airspace by aircraft coming from the United States, with indication of notification to the latter by means of various diplomatic notes; it listed nine separate incidents in the preceding two years. The second was a Note from the Foreign Ministry of Cuba, providing information on the circumstances surrounding the shoot-downs: it stated that "two Cessna pirate aeroplanes" were shot down while once again violating Cuban territorial airspace; that intrusions had occurred countless times despite repeated warnings that they would not be tolerated; that the United States had been kept informed of the violations; that "gangs of Cuban origin based in Miami" were implicated in the intrusions; and that:

"Therefore, after exhausting the warnings and after having adopted an extremely cautious attitude towards the repeated statements and actions of an aggressive nature by the terrorist groups of Cuban origin...in Florida, the Cuban Government decided to halt the continuation of the flights of aircraft transgressing the sovereignty of Cuba and jeopardizing the lives of Cuban citizens."

Another Note from the Foreign Ministry was largely devoted to a claim that the shoot-downs occurred in Cuban territorial airspace and not over international waters.¹⁵²

On 28 February 1996, the Ministry of Foreign Affairs of Cuba wrote to the Secretary General of ICAO referring to an "increasing number of violations of Cuban airspace by civil aircraft registered and based...in the United States" over the preceding twenty months. The Ministry stated that the violations disregarded Cuban sovereignty and posed a danger to air navigation in the area. Cuba had reported these violations to the United States, but the latter had failed to take "effective measures to prevent these acts being carried out and continued". It was these circumstances which led to the incident

¹⁵¹UN Doc. S/PRST/1996/9, attached to Memorandum PRES AK/499 dated 27 February 1996 from President of the Council to Representatives on the Council.

¹⁵²These communications from Cuba are attached to Memorandum PRES AK/500 dated 28 February 1996 from President of the Council to Representatives on the Council.

of 24 February. The Government of Cuba invited ICAO to carry out "an exhaustive investigation into the violations, repeated over the years, of Cuban airspace by aircraft coming from the United States...including the incidents of 24 February. This investigation will have to take complete account of all the aspects which have brought about these regrettable events."¹⁵³ Cuba thus wanted an ICAO investigation which would not focus narrowly on the facts relating to this particular incident, but would consider the antecedent violations and the wider political context in which the incident had occurred.

The Council considered the requests on 6 March 1996. In his opening statement, the Representative of the United States reminded the Council of the content of Article 3 *bis*, specifically, the duty of each State to "refrain from resorting to the use of weapons against civil aircraft in flight." The Representative referred to the shoot-down of two aircraft "being operated by a Cuban exile group called Brothers to the Rescue" as a "wanton disregard for international law and the standards established by this body". He claimed that no warnings were given to the two aircraft: there were no efforts to make radio contact, no efforts to approach or signal the victim aircraft to land, and no warning shots fired. He believed that the "atrocities were not a failure of the international standards which ICAO has championed" but rather, "the failure of the Cuban Government to follow international law and ICAO standards". He stated that three unarmed civil aircraft had left Florida: the lead aircraft penetrated Cuban airspace and withdrew, but the other two which were shot down had not entered Cuban territorial airspace. However, it did not matter whether the aircraft were in Cuban airspace or over international waters: even "under the facts alleged by the Cuban Government, the Cuban action is a blatant violation of international law". Firing "on unarmed, known civil aircraft can never be justified". It was true that Cuba had requested United States' "cooperation in addressing alleged violations of Cuban airspace"; the United States "was pursuing the legal process

¹⁵³Memorandum PRES AK/501 dated 28 February 1996 from President of the Council to Representatives on the Council, Attachment.

that has to be followed in such situations". International law required that the Cuban Government pay appropriate compensation to the families."¹⁵⁴

The Chief Delegate of Cuba stated that:

"Cuba has been a victim of violations of its sovereignty and territorial integrity for many years which involve the use of aircraft coming from United States territory, in violation of the standards of international law, and particularly articles 1, 2 and 4 of the Chicago Convention."¹⁵⁵

More particularly,

"For several years, light aircraft registered in the United States and operated by ... 'Brothers to the Rescue' have ... on numerous occasions ... penetrated Cuban territory without prior authorization for purposes which are clearly illegal and incompatible with the letter and spirit of the Chicago Convention. Although the actual objective of their missions was always to undermine Cuban sovereignty and engage in subversion, at the beginning they claimed to be involved in supposed rescue operations..."¹⁵⁶

The Chief Delegate claimed that during the preceding "20 months, these aircraft coming from the territory of the United States have violated Cuban airspace 25 times. In every case, each violation has been officially reported to the authorities of that country", but the "protests and warnings fell on deaf ears".¹⁵⁷ He informed the Council that in this instance, the intruder aircraft were intercepted and warned to withdraw from Cuban territorial airspace; two of the aircraft ignored the warnings, with regrettable consequences. The third left Cuban airspace and returned to the United States, evidence of the restraint and moderation shown by the Cuban fighter pilots.¹⁵⁸ The Government of Cuba also had doubts about the civilian status of the victim aircraft, stating that

¹⁵⁴ICAO Doc. 9676-C/1118, C-Min. 147/1-16: *Council - 147th Session, Summary Minutes with Subject Index* at 68-71.

¹⁵⁵*Ibid.* at 72.

¹⁵⁶*Ibid.*

¹⁵⁷*Ibid.* at 72-73.

¹⁵⁸*Ibid.* at 74.

"neither in the Chicago Convention nor in international or United States legal doctrine, nor in practice, is it recognized that activities like those carried out by this group correspond to the concept of civil aviation."¹⁵⁹ Finally, the Chief Delegate reminded the Council that Article 3 *bis* obliged every civil aircraft to comply with orders of the subjacent State and required "the State of origin of the aircraft to ensure compliance with such an order and to punish offenders severely"; further, paragraph (d) of Article 3 *bis* was also applicable.¹⁶⁰

In the general debate in the Council,¹⁶¹ most representatives deplored the action taken by Cuba, and drew attention to the provision in Article 3 *bis* obliging States to refrain from the use of weapons against civil aircraft. The Representative of Nigeria believed that the use of force against unarmed civil aircraft could not be justified under any circumstances.¹⁶² The Japanese position was that "the shooting-down of civil aircraft flying over the high seas is inadmissible in international law" and that "[n]o matter what reason exists, it is unforgivable to shoot at unarmed and innocent civilian planes"; even if an aircraft was in the territorial airspace of a foreign State, "all alternative measures should have been exhausted such as forced landing or change of route and others."¹⁶³ The United Kingdom's Representative was categorical: "The principle is simple. Weapons must not be used against aircraft engaged in international civil aviation."¹⁶⁴ The Representative of El Salvador shared a similar view in stating that "the use of weapons against civil aircraft is inadmissible, regardless of any reasons

¹⁵⁹*Ibid.* at 76.

¹⁶⁰*Ibid.* at 77. Paragraph (d) of Article 3 *bis* reads:

"Each contracting State shall take appropriate measures to prohibit the deliberate use of any civil aircraft registered in that State or operated by an operator who has his principal place of business or permanent residence in that State for any purpose inconsistent with the aims of this Convention..."

¹⁶¹*Ibid.* at 79-92.

¹⁶²*Ibid.* at 79.

¹⁶³*Ibid.* at 81.

¹⁶⁴*Ibid.* at 88.

there may be to justify it."¹⁶⁵ The Canadian Representative stated that the "act was an excessive and inappropriate use of force which violated internationally accepted rules of intercepting civil aircraft."¹⁶⁶ Some States specifically drew attention to the need to follow the provisions of Annex 2, especially those on interception.

Many States also pointed out that there was an obligation to refrain from violating the sovereignty of States; a few States placed emphasis on the obligation in Article 4 of the Chicago Convention not to use civil aviation for any purpose inconsistent with the aims of the Convention.

All States favoured an ICAO investigation into the facts; many felt that its scope should be guided by the words of the Security Council i.e. an investigation into the incident in its entirety.

Following the general debate, the Representative of the United States proposed the adoption of a resolution it presented in C-WP/10392 *Revised*. Cuba also put forward its own draft resolution in an Attachment to C-WP/10395. Three representatives "wondered" if it would be appropriate to adopt a resolution at this stage, before the investigation was completed.¹⁶⁷ The Representative of Nigeria recalled that in July 1988, when considering the Iran Air incident, the Council had approved a summary statement offered by the President as its decision, and he believed that a similar course of action should be taken.¹⁶⁸

The President of the Council provided clarifications "on three possible formats for Council action - i.e. by resolution, by decision or by conclusion - which were all binding from the point of view of their implementation". He reminded the Council that in September 1983, "it had adopted a resolution requesting the Secretary General to undertake an investigation and requesting the ANC to proceed with a complete

¹⁶⁵*Ibid.* at 90.

¹⁶⁶*Ibid.* at 88.

¹⁶⁷*Ibid.* at 96.

¹⁶⁸*Ibid.*

examination of [the relevant] ICAO regulations.... As regards the incident of 1988...the Council had accepted a statement made by its President as its decision, adopting a resolution only when it had received the report of the investigation. The Organization did not have a policy regarding this matter, which was left to the judgement of the Council."¹⁶⁹

Upon the President's suggestion, "the Council directed its attention to the text of the draft resolution proposed by the United States..., and agreed on a number of modifications..."; it was agreed that the President would present a draft text for the Council's action.¹⁷⁰ On 6 March 1996, the Council considered the text presented by the President, and after some amendments, adopted by consensus the following Resolution:

THE COUNCIL

HAVING CONSIDERED that two US-registered private civil aircraft were destroyed on 24 February 1996 by Cuban military aircraft;

...

RECOGNIZING that the United Nations Security Council in a Presidential Statement of 27 February 1996, has strongly deplored the shooting down by the Cuban air force of two civil aircraft on 24 February 1996;

STRONGLY DEPLORING the shooting down by the Cuban air force of two civil aircraft on 24 February 1996, which has resulted in the death of four persons;

...

RECOGNIZING that the use of weapons against civil aircraft in flight is incompatible with elementary considerations of humanity and the norms governing international behaviour and with the rules and Standards and Recommended Practices enshrined in the Chicago Convention and its Annexes;

REAFFIRMING the principle that States must refrain from the use of weapons against civil aircraft in flight and that, when intercepting civil

¹⁶⁹*Ibid.*

¹⁷⁰*Ibid.* at 97.

aircraft, the lives of persons on board and the safety of the aircraft must not be endangered;

1. **DIRECTS** the Secretary General to immediately initiate an investigation of the incident in its entirety to determine all relevant facts and technical aspects in accordance with the United Nations Security Council Presidential Statement and to report to the ICAO Council within 60 days of the adoption of this Resolution, ...;

...

3. **RESOLVES** that the Council will immediately transmit the Secretary General's report with comments, if any, to the United Nations Security Council;...¹⁷¹

The Chief Delegate of Cuba pointed out that in the Cuban draft resolution which had not been considered, "it had been highlighted that the civilian nature of the downed aircraft was an assumption", and that in earlier incidents which had been considered by the Council, there had been no doubt that the victim aircraft belonged to recognized international airlines; this was not the case in this instance.¹⁷²

The Secretary General subsequently presented his final report on the investigation.¹⁷³ In his conclusions, the Secretary General stated:

- "3.1 The authorities in Cuba notified the authorities in the United States of multiple violations of Cuban territorial airspace, which took place on seven specific dates from 15 May 1994 to 4 April 1995, by aircraft operating out of the United States, and repeatedly demanded that the United States adopt measures to put an end to these violations.

¹⁷¹*Ibid.* at 102-103. Following the adoption of the Resolution, Cuba requested the insertion of a clause which would reaffirm the need to respect the provisions of Article 3 *bis*. The President responded that:

"...Article 3 *bis* was not a new element to the Convention in the sense that it was adding a right; it was simply a recognition of customary international law which was implemented ... regardless of whether Article 3 *bis* was in force. [He] did not think that the resolution should reaffirm an Article which was, in itself, an affirmation of the humanitarian principles already covered in the text" (*ibid.* at 103).

¹⁷²*Ibid.* at 104.

¹⁷³C-WP/10441 and Corrigendum No. 1, App. B. See also Information Paper No. 1 related to C-WP/10441.

- 3.2 At least one aircraft, N2506, [piloted by the President of the 'Brothers to the Rescue', Basulto] overflew the city of Havana at low altitude on 13 July 1995, and released some leaflets and religious medals...
- 3.3 In a public statement issued on 14 July 1995, the government of Cuba declared its firm determination to take all the necessary steps to prevent provocative actions and warned that any aircraft intruding into Cuban territorial airspace may be shot down.
- ...
- 3.7 The Brothers to the Rescue was a volunteer group of pilots, based in Miami, Florida, United States, formed to search for, and assist, Cuban rafters fleeing the island. There was evidence to indicate that some members of the group sought to influence the political situation in Cuba.
- ...
- 3.11 N2456S, N5485S and N2506 [the United States' registered aircraft] deviated from the route given in their VFR flight plans; they were flying within the MUD-8 and MUD-9 danger areas within Havana FIR, promulgated as being active on 24 February 1996.
- 3.12 At 15:21 hours on 24 February 1996, N2456S was destroyed by an air-to-air missile fired by a Cuban MiG-29 military aircraft.
- 3.13 At 15:27 hours on 24 February 1996, N5485S was destroyed by an air-to-air missile fired by a Cuban MiG-29 military aircraft.
- 3.14 There were significant differences between the Cuban military radio communications recordings provided by Cuba and by the United States. Several transmissions in the recording provided by the United States could not be found in the recording provided by Cuba, all of which related to vessels in the area of shoot-down. The differences could not be explained as the result of simultaneous transmissions recorded differently by different stations, nor could they be explained as the result of technical difficulties in the recording.
- 3.15 There were significant differences between the radar data provided by Cuba and by the United States, which could not be reconciled.

- 3.16 The recorded positions and track of the *Majesty of the Seas*, the observations by its crew and passengers, the position of the *Tri-Liner* relative to the *Majesty of the Seas*, and the resulting estimated locations of the shoot-downs were considered to be the most reliable position estimates. [The *Majesty* and the *Tri-Liner* were vessels in the vicinity of the shoot-down].
- 3.17 No corroborative evidence of the position of the *Majesty of the Seas* was obtained. With this qualification and based on the recorded positions of the *Majesty of the Seas*, N2456S was shot down approximately...9 NM outside Cuban territorial airspace and N5485S was shot down approximately...10 NM outside Cuban territorial airspace.
- 3.18 Means other than interception were available to Cuba, such as radio communication, but had not been utilized. This conflicted with the ICAO principle that interception of civil aircraft should be undertaken only as a last resort.
- 3.19 During the interceptions, no attempt was made to direct N2456S and N5485S beyond the boundaries of national airspace, guide them away from a prohibited, restricted or danger area or instruct them to effect a landing at a designated aerodrome.
- 3.20 In executing the interception, the standard procedures for manoeuvring and signals by the military interceptor aircraft, in accordance with ICAO provisions and as published in AIP Cuba, were not followed...¹⁷⁴

When the Council considered the report on 26 and 27 June 1996, the Representative of the United States asserted that "Cuba had flagrantly violated international law and the fundamental principles of protecting human life that were deeply rooted in that law" and requested the Council "to formally condemn, in the strongest terms possible, these heinous acts". The Representative reviewed the Secretary General's report, which he described as containing "a full, objective and accurate account of what had occurred", stressing that the unarmed civil aircraft had been destroyed in international airspace and had not posed a threat to anyone. Further, they had been positively identified as civil aircraft before being attacked. There had been no attempt to

¹⁷⁴C-WP/10441 and Corrigendum No. 1, App. B at 90-91.

contact the aircraft, to direct them away or to land at a suitable airfield, or "to follow the procedures for intercept manoeuvring or signalling as published by ICAO;¹⁷⁵ he believed that the steps taken by the Cuban government had not followed ICAO interception procedures which were included in Cuba's AIP. Finally, he repeated the assertion made on 6 March 1996 that "whether the planes had been in international airspace or in the airspace of another country, the rules of ICAO regarding the use of force still applied."¹⁷⁶

The Chief Delegate of Cuba alluded to a number of matters which he believed affected the impartiality and credibility of the report, on one occasion referring to United States' representatives as "co-authors" of the report; in his view, there was a "distortion of data and the omission of evidence."¹⁷⁷ He once again questioned the civilian status of the aircraft and expressed the view that:

"The taking of measures to prevent the use of a State's territory to violate the airspace of another State was an obligation, certainly under Article 3 *bis* but even without that Article. It was an obligation in the Charter of the United Nations and it appeared throughout international law as well as in all the standards of conduct followed by States."¹⁷⁸

In the general debate¹⁷⁹ many representatives stated the need for ICAO to confine itself to the aeronautical or technical aspects of the incident, leaving political issues to be considered by the Security Council. Nearly all representatives stressed that Article 3 *bis* and customary international law required States to refrain from the use of weapons against civil aircraft in flight, and also stated that when intercepting civil aircraft, the procedures in Annex 2 should be complied with; many expressly pointed out that Cuba had failed to follow these ICAO rules regarding interception.

¹⁷⁵ICAO Doc. 9681-C/1119, C-Min. 148/1-21: *Council - 148th Session, Summary Minutes with Subject Index* at 160-161.

¹⁷⁶*Ibid.* at 198.

¹⁷⁷*Ibid.* at 162-170.

¹⁷⁸*Ibid.* at 200.

¹⁷⁹*Ibid.* at 177-201.

Many representatives also paid particular attention to the need to take into account the provisions of Articles 1 and 4 of the Chicago Convention when considering this incident. For example, the Mexican Representative believed it to be "advisable to reaffirm the principle of States' complete and exclusive sovereignty over the airspace above their territory and the correlative obligation not to use or permit the use of civil aviation for any purpose inconsistent with the conventions on this matter",¹⁸⁰ while the Chinese Representative stated that, "no one could deny that they [the victim aircraft] were operated for purposes completely inconsistent with the aims of the Chicago Convention".¹⁸¹ The Representative of Senegal was of the opinion that "one had also to ask questions about the nature of the aircraft shot down, in view of the use to which they had been put, and wonder whether that use was not contrary to the aims of the Chicago Convention, and whether there was not a misuse of international civil aviation".¹⁸²

However, clear differences of opinion and emphasis emerged in respect of several aspects of the incident. Some representatives focused on the finding that there had been prior violations of Cuban airspace by aircraft registered in the United States, as well as what they perceived to be an inadequate effort by the United States to prevent such intrusions. Others did not speak on this issue or believed that previous violations or perceived U.S. inaction did not justify the shootdowns.¹⁸³

¹⁸⁰*Ibid.* at 187.

¹⁸¹*Ibid.* at 183.

¹⁸²*Ibid.* at 195. See also the interventions of the Representatives of Argentina (*ibid.* at 186), Nigeria (*ibid.* at 178), India (*ibid.* at 181), Angola (*ibid.* at 184), Russian Federation (*ibid.* at 188), Australia (*ibid.* at 192) and Egypt (*ibid.* at 192).

¹⁸³While the Representative of Canada expressed regret "that the United States had not fully implemented in a timely manner the ICAO guidelines which held countries responsible for enforcing the respect for civil aviation rules on aircraft registered in their jurisdiction", she "reiterated...that the shooting down by Cuba of two unarmed aircraft had been an excessive and unjustifiable use of force which violated the rule of customary international law and internationally accepted ICAO procedures for intercepting aircraft" (*ibid.* at 186-187). The United Kingdom's Representative shared a similar opinion: even taking into account previous incursions into Cuban airspace "and whether or not the State of Registration could have acted more quickly in ensuring that U.S.-registered aircraft

A few representatives expressed doubts that the victim aircraft were in fact civilian.¹⁸⁴ Most other representatives, however, either did not question, or explicitly accepted, that the aircraft were civilian.

A number of representatives echoed the views of the Cuban Delegation that the report of the Secretary General was not balanced and that some of its conclusions were debatable; in particular, concern was expressed that the evidence was not sufficient to support the conclusion that the aircraft had been shot in international airspace.¹⁸⁵ Other representatives, however, believed that the investigation had been carried out in a

did not carry out any activities inconsistent with the aims of Chicago Convention", the "extreme response of shooting down two small general aviation aircraft was entirely out of line with the conduct expected of any State..." (*ibid.* at 190). Japan's position was "that no matter where civil aircraft were in flight, even within the territorial airspace of another country, and no matter what reason existed, it was unforgivable to shoot down unarmed civil aircraft in light of the basic principles of humanity and the fundamental norms of international law (*ibid.* at 191). See also the interventions of the Representatives of Italy (*ibid.* at 191), Brazil (*ibid.* at 192), and Kenya (*ibid.* at 193).

¹⁸⁴See the comments of the Representatives of India (*ibid.* at 182), China (*ibid.* at 183), Angola (*ibid.* at 184), and Senegal (*ibid.* at 195).

¹⁸⁵The Representative of Nigeria was left with "the impression that the conclusions were not balanced" (*ibid.* at 180) while that of India stated "that the report had attempted some conclusions which involved rejection of some evidence and acceptance of some evidence" (*ibid.* at 182). It was also the opinion of the Chinese Representative that "the report was not balanced" (*ibid.* at 183). The Representative of Angola believed that the conclusions "did not reflect a balanced, impartial and in-depth analysis of the problem in its entirety" (*ibid.* at 185). The Representative of the Russian Federation stated that "many conclusions in the report were debatable since there was insufficient substantiation for them" (*ibid.* at 188). The Representative of Australia saw "some deficiencies" in the report (*ibid.* at 192) while that of El Salvador stated that the report had "various discrepancies and omissions which allowed for different types of inconclusive inferences" (*ibid.* at 192).

With respect to the location of the shoot-downs, the Representative of Nigeria wondered whether "if an impartial judge of a court of law were presented with the findings and analysis", it would reach the same conclusion, and believed that the investigation team should have "admitted that it was not possible to determine the location...on the basis of available information" (*ibid.* at 180); the Representative of the Russian Federation stressed that the report indicated that "there was no collaborative evidence of the position of the 'seagoing vessel'" (*ibid.* at 188).

In the light of the statements casting doubt on the credibility of the investigation team and the report, the President of the Council found it necessary at the conclusion of the Council's consideration, to state that the investigation had been carried out by a team comprised of international civil servants who, "by definition, by action and by function, served the interests of the international community as a whole and in so doing were guided by the principles of morality, integrity, objectivity, and impartiality". He expressed his full confidence in the team (*ibid.* at 226).

professional manner, and that the report was well-balanced; some saw no reason to doubt the conclusions concerning the location of the shoot-downs.¹⁸⁶

Following the general debate, the United States presented in C-WP/10457 a proposal for a Council resolution; Cuba presented its own proposal (C-WP/10458 and Corrigendum) for a Council decision. Representatives made a number of suggestions to be included in the final Council action, whether this be in the form of a decision or a resolution; a majority favoured the latter form.¹⁸⁷ The President of the Council then prepared a draft resolution which took into account the views expressed. This was circulated to, and further reviewed and amended by, representatives, following which the Council adopted by consensus on 27 June 1996 the following resolution:

"THE COUNCIL

RECALLING that two US-registered private civil aircraft were destroyed on 24 February 1996 by Cuban military aircraft;

...

HAVING CONSIDERED the report of the Secretary General ...;

RECALLING the principle that every State has complete and exclusive sovereignty over the airspace above its territory, and that the territory of a State shall be deemed to be the land areas and territorial waters adjacent thereto;

¹⁸⁶The Representative of Bolivia stated that the investigation had been professional, that evidence concerning the shoot-down locations was "based on third-party witness" and that he had "no doubt that the aeroplanes had been shot down over international waters" (*ibid.* at 186). The comments of the Representative of the United Kingdom were equally unambiguous: "the Secretary General had conducted a balanced, straightforward investigation, and...his team had set down the facts as they had been made available without showing favour to either side." He "understood why the conclusions should draw particular attention to the position...of the...*Majesty*..., since the crew of a Norwegian ship could be expected to be a neutral observer...". Regarding the locations of the shoot-downs, he believed that this did have a bearing on whether Cuban sovereignty was an issue, but even so, "this would not provide sufficient reason for resorting to armed force against unarmed civilian registered aircraft" (*ibid.* at 189-190). The Japanese Representative, too, believed that location was irrelevant in the context of use of armed force against civil aircraft (*ibid.* at 191). The Swiss Representative stated the "team had done what the Council had asked it to do" (*ibid.* at 193).

¹⁸⁷*Ibid.* at 211-216.

RECALLING ALSO that States, in the exercise of their authority under Articles 1 and 2 of the *Convention on International Civil Aviation*, shall be guided by the principles, rules, standards and recommended practices laid down in the Convention and its Annexes, including the rules relating to the interception of civil aircraft, and the principle, recognized under customary international law, concerning the non-use of weapons against such aircraft in flight;

1. **NOTES** the report of the investigation instituted by the Secretary General;
2. **REAFFIRMS** the principle that States must refrain from the use of weapons against civil aircraft in flight and that, when intercepting civil aircraft, the lives of persons on board and the safety of the aircraft must not be endangered;
3. **REAFFIRMS** the principle that each Contracting State shall take appropriate measures to prohibit the deliberate use of any civil aircraft registered in that State or operated by an operator who has his principal place of business or permanent residence in that State for any purpose inconsistent with the aims of the *Convention on International Civil Aviation*;
4. **REAFFIRMS** its condemnation of the use of weapons against civil aircraft in flight as being incompatible with elementary considerations of humanity, the rules of customary international law as codified in Article 3 *bis* of the *Convention on International Civil Aviation*, and the Standards and Recommended Practices set out in the Annexes to the Convention;
- ...
6. **RESOLVES** to transmit the Secretary General's report to the United Nations Security Council;
7. **INSTRUCTS** the [ANC] to study the safety-related aspects of the report of the investigation with regard to the adequacy of standards and recommended practices and other rules relating to interception of civil aircraft, and to report...on any measures it considers necessary so as to prevent the recurrence of a similar tragic event;
- ...

9. REQUESTS all Contracting States to report at any time to the Council any infraction of the above-mentioned rules contained in the *Convention on International Civil Aviation*;
10. URGES all States which have not yet done so to ratify as soon as possible Article 3 *bis* ..., and to comply with all the provisions of this Article pending its entry into force.¹⁸⁸

Pursuant to Operative Clause 3 of its Resolution of 6 March 1996, the Council decided to transmit the Resolution as representing its collective views to the Security Council; the minutes of the Council's consideration would be available to the Security Council if needed by that body.¹⁸⁹

¹⁸⁸*Ibid.* at 223-225.

¹⁸⁹*Ibid.* at 223. A United States' draft resolution was adopted by the Security Council on 26 July 1996 and reads as follows:

"The Security Council

Recalling the statement made by its President on 27 February 1996...strongly deploring the shooting down by the Cuban Air Force of two civil aircraft on 24 February 1996, ... and requesting ... (ICAO) to investigate this incident in its entirety and to report its findings to the Security Council,

Noting the resolution adopted by the Council of ICAO on 6 March 1996...,

Commending ICAO for its examination of this incident and *welcoming* the resolution adopted by the Council of ICAO on 27 June 1996...,

Welcoming also the report of the Secretary-General of ICAO regarding the shooting down of civil aircraft N2456S and N5485S by Cuban MIG-29 military aircraft, and *noting* in particular the conclusions of the report,

Recalling the principle that every State has complete and exclusive sovereignty over the airspace above its territory, ... and *noting* in this connection that States shall be guided by the principles, rules, standards and recommended practices laid down in the Convention on International Civil Aviation of 7 December 1944 and its annexes (the Chicago Convention) including the rules relating to the interception of civil aircraft, and the principle, recognized under customary international law, concerning the non-use of weapons against such aircraft in flight,

1. *Endorses* the conclusions of the ICAO report and the resolution adopted by the Council of ICAO on 27 June 1996;

2. *Notes* that the unlawful shooting down by the Cuban Air Force of two civil aircraft on 24 February 1996 violated the principle that States must refrain from the use of weapons against civil aircraft in flight and that, when intercepting civil aircraft, the lives of persons on board and the safety of the aircraft must not be endangered;

...

4. *Calls* on all parties to acknowledge and comply with international civil aviation law and related internationally agreed procedures, including the rules and standards and recommended practices set out in the Chicago

The following year, the ANC reported to the Council pursuant to Resolving Clause 7 of the Resolution, that "ICAO SARPs and other rules relating to interception continue to be adequate, as they provide the necessary protection in respect to the safety of civil aircraft if properly implemented and applied by all concerned."¹⁹⁰

Three points which were raised during the ICAO Council's consideration of this incident deserve further comment: the allegation that the victim aircraft were not civil aircraft; the relevance of Article 4 of the Chicago Convention to this case; and the obligations of the U.S. to prevent the unauthorized intrusions into Cuban airspace.

The Chicago Convention is applicable by virtue of Article 3(a) to civil aircraft only, and not to state aircraft. No definitions are provided of either civil or state aircraft, but Article 3(b) provides that aircraft used in military, customs, and police services shall be deemed to be State aircraft. From the time of the adoption of the Paris Convention of 1919, experts have devoted considerable time and energy in attempting a clear distinction between public or state aircraft on the one hand and, on the other hand, civil

-
- Convention;
5. *Reaffirms* the principle that each State shall take appropriate measures to prohibit the deliberate use of any civil aircraft registered in that State or operated by an operator who has his principal place of business or permanent residence in that State for any purpose inconsistent with the aims of the Chicago Convention;
 6. *Condemns* the use of weapons against civil aircraft in flight as being incompatible with elementary considerations of humanity, the rules of customary international law as codified in article 3 *bis* of the Chicago Convention, and the standards and recommended practices set out in the annexes of the Convention and *calls upon* Cuba to join other States in complying with their obligations under these provisions;
 7. *Urges* all States which have not yet done so to ratify as soon as possible the Protocol adding article 3 *bis* to the Chicago Convention, and to comply with all the provisions of the article pending the entry into force of the Protocol;..." (S/RES/1067 (1996), *supra*, Ch. II, note 33).

¹⁹⁰C-WP/10563 para. 4.1.

or private aircraft.¹⁹¹ Professor Cooper, Chairman of the drafting Committee for Article 3 of the Chicago Convention, wrote in 1949 that:

"...the Chicago Convention is purposely less definite than some of its predecessors. The language used was understood to be vague but was considered a more practical solution than any of the several attempts which had been made in the past to define such classes as, for example, military aircraft. The determining factor...is whether a particular aircraft is, at a particular time, actually used in one of the three special types of services. If so, it is a 'state aircraft'. Otherwise, it is a 'civil aircraft'."¹⁹²

In 1993, the Legal Bureau of ICAO presented to the Council a comprehensive study on the subject of the distinction between civil and state aircraft (C-WP/9835). It followed the opinion of Professor Cooper in considering that "the usage of the aircraft in question is the determining criterion, and not, by themselves, other factors such as aircraft registration and markings, call sign used, ownership (public or private), type of operator (private/state), except insofar as these criteria go towards showing the type of usage."¹⁹³ To assist in the determination of when aircraft could be considered as being used in military, customs and police services, the Legal Bureau advocated an examination of all the circumstances surrounding the flight, and taking into account a number of listed factors.

In 1997, following a request from Cuba, the Legal Bureau revisited this issue and may have adopted a change of emphasis. Recalling that the position had been taken in C-WP/9835 that usage was the determining criterion and not, by themselves, other factors, C-WP/10588 "submitted that in the vast majority of cases, the predominant and primary criterion and the strongest evidence is the aircraft registration." The paper states further that only in cases where the usage manifestly differs from the type of registration

¹⁹¹For a review of some of the earlier attempts, see J.C. Cooper, *The Right to Fly* (New York: Henry Holt, 1947) at 90-96.

¹⁹²*Explorations, supra*, Ch. I, note 2 at 242.

¹⁹³C-WP/9835, Attachment para. 1.3.

should a determination be made by taking into account all the circumstances surrounding the flight to determine usage.¹⁹⁴

It is clear in the incident under discussion that the aircraft were not used in the military, customs or police services of the United States. Further, the whole question was in a sense pre-empted by the Security Council which, in its Presidential Statement of 27 February 1996, categorized the aircraft as civil aircraft. Similarly, the ICAO Council in its Resolution of 6 March 1996, referred to the aircraft as private civil aircraft.

Indeed, the Cuban position is self-contradictory. While it claimed that the victim aircraft were not civilian aircraft under the Chicago Convention, the mere fact that it requested ICAO to investigate the incident is in itself an admission that the shoot-downs involved civil aircraft, as otherwise ICAO would have no competence to carry out the investigation or to consider the matter at all.¹⁹⁵ Documentation provided by Cuba in support of its case were in regard to civil aircraft: these included extracts from the Cuban AIP on interception procedures for civil aircraft; of the Chicago Convention and Annex 2 thereto; of relevant Cuban laws and regulations; and of relevant United States' laws and regulations.¹⁹⁶

As to Article 4 of the Chicago Convention, it is submitted that it is irrelevant to a consideration of this incident. The drafting history clearly indicates that the "intent was to prevent the use of civil aviation for purposes which might create a threat to the security of other nations" and "do not offer any solution to the problem where an aircraft is used for criminal purposes or other unlawful purposes, not associated with threats to

¹⁹⁴C-WP/10588 para. 6.2.

¹⁹⁵The President of the Council put the matter clearly: it was not appropriate for the investigation, "which was fact-finding in nature, to offer views about the legal status of the aircraft"; if the Council had been of the opinion that the aircraft were state aircraft, the Council should have declined to carry out the investigation (ICAO Doc. 9681, *supra*, note 175 at 202).

¹⁹⁶See Information Paper No. 1 related to C-WP/10441 at 132-143.

the general security."¹⁹⁷ Further, the Article "refers only to the obligations of States and to the acts of States"¹⁹⁸ and even if the activities of the victim aircraft were a threat to the security of Cuba, Article 4 would be inapplicable unless these acts could be imputed to the Government of the United States. In other words, the obligation lies on the State itself not to use civil aviation in the manner specified; Article 4 does not regulate the activities of individuals which are not attributable to the State.

As to the obligations of the U.S. to prevent the intrusions, Article 3 *bis*, although not yet in force and not ratified by either Cuba or the U.S. and therefore not governing this specific incident, in paragraph d) requires the State of registry to take appropriate measures to prohibit the deliberate use of aircraft of its nationality for any purpose inconsistent with the aims of the Chicago Convention. The word "prohibit" indicates that the existence of adequate legislation would be enough to discharge this obligation. No one questioned that the U.S. legislative framework was sufficient to enable it to discharge this duty.

In the *Trail Smelter* case (U.S. v. Canada, 138 and 1941) the Arbitral Tribunal quoted with approval a proposition that "a State owes at all times a duty to protect other States against injurious acts by individuals from within its jurisdiction" and later stated that:

"no State has the right to use or permit the use of its territory in such a manner as to cause injury...in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence."¹⁹⁹

¹⁹⁷C-WP/10588 para. 3.3. See also, C-WP/8217 paras. 3.1 and 3.2; and M. Milde, "Interception of Civil Aircraft vs. Misuse of Civil Aviation (Background of Amendment 27 to Annex 2)" (1986) XI A.A.S.L. 105 at 122-123.

¹⁹⁸C-WP/8217 para. 3.1. The Delegate of Cuba at the 25th Session (Extraordinary) of the ICAO Assembly in 1984 stated:

"Article 4 only established the obligation of the Contracting States not to use civil aviation themselves for these inconsistent purposes. It said nothing with regard to the case of nationals of a State acting criminally on its account or apparently on its account" (ICAO Doc. 9438, A25-Ex.: *Assembly - 25th Session (Extraordinary), Executive Committee, Report, Minutes and Documents* at 62).

¹⁹⁹III R.I.A.A. 1905 at 1963-1965.

And in the *Corfu Channel* case, the World Court referred to "every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States."²⁰⁰

Although both these cases can easily be distinguished on the facts from a case involving aerial violations of sovereignty, a general principle can nevertheless be deduced which entails a duty on the State of registry or the State of the operator not to knowingly allow its territory to be used for acts contrary to the rights of other States, in particular where the injury to the other State is of "serious consequence". It then becomes a question of appreciation of all the relevant facts to determine whether the U.S. took all reasonable action to discharge this responsibility *vis-a-vis* Cuba.

The Secretary General's report²⁰¹ indicates that the U.S. did not respond to three Diplomatic Notes from Cuba sent in 1994 and early 1995 advising of intrusions of U.S. aircraft. Apparently, no action was taken by the U.S. in consequence thereof. However, the U.S. Department of State issued public statements and announcements on 7 July and 8 and 29 August 1995 on the dangers of unauthorized entry into Cuban airspace; and the FAA issued a NOTAM on 28 August 1995. From August 1995 onwards, the two States seemed to have enjoyed a frequent and co-operative exchange of correspondence and in fact, in two instances the U.S. advised Cuba of plans of U.S.-based flotillas intending to approach Cuban territorial waters possibly accompanied by private aircraft.

Following Basulto's overflight of Havana on 13 July 1995, the FAA addressed a letter of investigation to him dated 3 August 1995 and, on 31 August 1995 issued a "Notice of Proposed Certificate Action" proposing to suspend his pilot's licence for 120 days.

On 21 September 1995, he requested an informal conference (a step in the U.S. enforcement process) which was never held. On 5 October 1995, the U.S. informed Cuba that it was charging Basulto with the violation of certain U.S. aviation regulations,

²⁰⁰*Supra*, Ch. II, note 93 and accompanying text.

²⁰¹See C-WP/10441, App. B paras. 2.1.1.1-2.1.3.7 and 2.7.1-2.7.14.

and requested Cuba to provide any relevant evidence. Cuba provided such evidence on 3 November 1995, but it did not reach the FAA until 1 December 1995, and had to be translated into English, a process not completed until early February.

The answer whether the U.S. fulfilled its international responsibilities depends on one's judgement as to whether the U.S. acted as swiftly as it should have, or did as much as it could reasonably be expected to do.

After the shoot-downs, on 29 February 1996 the FAA issued an "Emergency Cease and Desist Order and Notice of Enforcement Policy" which categorically ordered U.S. airmen who had conducted unauthorized operations within Cuban territorial airspace to cease and desist this unlawful activity and advised of enforcement action if related Federal Aviation Regulations were violated. On 16 May 1996, the FAA issued an "Emergency Order of Revocation" of Basulto's licence.

If the U.S. was in any way culpable in this regard, an interesting question is whether this was a situation which the Security Council could have categorized (ignoring for the moment the possibility of a U.S. veto) as a threat to international peace and security.²⁰² Following the bombing of Pan Am 103 over Lockerbie in 1988, the UN Security Council, acting under Chapter VII of the UN Charter, determined in Resolution 748²⁰³ that the continued failure of Libya to comply with an earlier Resolution (731)²⁰⁴ (which urged Libya, *inter alia*, to surrender for trial to the United Kingdom or the U.S. two suspects in the bombing), constituted a threat to international peace and security; the Security Council imposed various sanctions on Libya.²⁰⁵

²⁰²The same question could arise whether individual acts of shutdown of civil aerial intruders, though not of a continuing nature so as to require adjustment to maintain international peace and security, could nevertheless also be classified as such a threat.

²⁰³S/RES/748, UN S.C.O.R., 47th year, p. 52, UN Doc. S/INF/48 (1993).

²⁰⁴*Ibid.* at 51.

²⁰⁵For a related discussion on these resolutions and on their legal effect, see: *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, Provisional Measures, [1992] I.C.J. Rep. 114; and A. Vishesh, "The Lockerbie Case and The New World Order" (1992) XVII:II A.A.S.L. 519.

e) **Iran Air (Iran - USA, 1988)**

The only other investigation by ICAO of a shoot-down of a civil aircraft did not result from a perceived or real intrusion into foreign airspace and preceded the 24 February 1996 incident. During a period of conflict between Iran and Iraq, the United States positioned naval vessels in the Persian Gulf apparently to protect neutral shipping. On 3 July 1988, an Iran Air Airbus A300 (IR 655) on a scheduled passenger-carrying flight from Bandar-Abbas (Iran) to Dubai (U.A.R.) was downed by the *U.S.S. Vincennes*, resulting in the death of all 290 persons on board the Airbus.

On the same day, Iranian authorities informed the President of the ICAO Council of the incident. The next day, Iran requested that the matter be tabled in the Council urgently, with a view to convening an Extraordinary Session of the Assembly.²⁰⁶ An Extraordinary Session of the Council met on 13 and 14 July 1988. The papers presented gave a strong indication that warning signals of a potential disaster of this nature had been obvious for some time.

In C-WP/8644 Addendum No. 1, Iran stated that the "history of unlawful restrictions imposed in the airspace of the Persian Gulf and Sea of Oman by the United States navy goes back to 22 January 1984 when a special notice was disseminated by Washington Notam Office".²⁰⁷ Iran thereafter informed ICAO, IATA and certain regional States that it regarded the NOTAM (Notice to Airmen) as "a clear violation of international law and common practices regarding the freedom of flying over the high seas" and "a flagrant infringement of principles laid down in the Chicago Convention".²⁰⁸ Iran further stated that a meeting held in Montreal in 1984 (MID/3

²⁰⁶The relevant correspondence is found in Memorandum PRES AK/165 dated 4 July 1988 from President of the Council to Representatives on the Council, Attachments 1-4.

²⁰⁷Para. 1. The Notice, reproduced in C-WP/8644, Addendum No. 1, Attachment A, warned that U.S. naval forces in the Persian Gulf were taking additional defensive measures against terrorist threats and that under certain defined circumstances, aircraft "may be held at risk by U.S. defensive measures."

²⁰⁸C-WP/8644, Addendum No. 1, Attachment A.

RAN) had considered the matter and in particular, "it was agreed that States should make, as a matter of urgency a review of any restrictions that they have imposed in the airspace above the high seas with a view to eliminating them."²⁰⁹

In C-WP/8644 itself, Iran reported that on 26 May 1987, Iran Air 635 on Route 59 (along which IR 655 was flying when downed) was contacted by Bahrain ATC and requested to monitor 121.5 MHz; on that frequency, the U.S. navy requested "the aircraft to divert from the standard international civil aviation route". Iran notified the President of the Council who replied that it "is the policy of the Organization to make sure that international air navigation along the established ATS routes is in no way jeopardized in any part of the world."²¹⁰ On 1 August 1987, Iran informed the President that:

"threatening the safety of Iranian civil [aircraft] over territorial waters and high seas in Persian Gulf area are repeated several times by U.S. naval forces. These violations and breach of international rules and obligations have created chaotic and dangerous situation...".²¹¹

The substance of these two communications were repeated to the President by letter of 12 August 1987.²¹²

Iran also reported in C-WP/8644 that on 13 July 1987, two Iran Air aircraft on Route G53 "received warnings from U.S. warship...to divert from their designated international route."

On 14 September 1987, Iran notified the President of an "unlawful NOTAM" issued by the Washington NOTAM Office. Iran complained to the President that the

²⁰⁹C-WP/8644, Addendum No. 1 para. 3.

²¹⁰C-WP/8644, Attachment 3.

²¹¹C-WP/8644, Attachment 4.

²¹²C-WP/8644, Attachment 6.

NOTAM was a violation of ICAO provisions and international law and requested his immediate action.²¹³

In light of the potential for catastrophe, the President of the Council wrote on 18 November 1987 to States, "providers of air navigation services within the...Flight Information Regions (FIR) and on international air routes in the Gulf area", including Iran (but not the United States), inviting their attention to "Assembly Resolution A26-8, Appendix P concerning co-ordination of civil and military air traffic."²¹⁴ The President warned that the current situation in the Gulf and Gulf of Oman had "created difficulties in the co-ordination of civil air traffic and military air and sea activities resulting in a hazardous situation for aircraft operating in that area." He stated that several States and an international organization had issued "NOTAMs or navigation warnings or other communications unilaterally relating to operations in the Gulf and Gulf of Oman area", which were inconsistent with ICAO Assembly Resolution A26-8, Appendix P. He reminded States of Standards in Annex 11 relating to cooperation between air traffic services and military authorities, and concluded by urging them to review their activities in the area of civil-military co-ordination.

Attached to the letter was a copy of Assembly Resolution A26-8, Appendix P, in which the Assembly resolved, *inter alia*, that:

²¹³C-WP/8644, Attachment 7. The NOTAM, as quoted by Iran in Attachment 7, reads:
"...In response to the recent attack on the USS Stark and the continuing threat in the region U.S. naval vessels operating within the Persian Gulf Strait of Hormuz Gulf of Oman and the Arabian Sea north of 20 degrees north are taking additional defensive precautions. Aircraft operating in these areas should maintain a listening watch on 121.5 MHz VHF or 243.0 MHz VHF. Unidentified aircraft whose intentions are unclear or who are approaching U.S. naval vessels will be contacted on these frequencies and requested to identify themselves and state their intentions...
...[Aircraft] may be requested to remain well clear of U.S. vessels. Failure to respond to requests for identification and intentions or to warnings and operating in a threatening manner could place the aircraft...at risk by U.S. defensive measures... This notice is published solely to advise that measures in self-defense are being exercised by U.S. naval forces in this region. The measures will be implemented in a manner that does not unduly interfere with the freedom of navigation or overflight".

²¹⁴C-WP/8643, App. B.

"the common use by civil and military aviation of airspace and of certain facilities and services shall be arranged so as to ensure the safety, regularity and efficiency of international civil air traffic."²¹⁵

An Associated Practice in the same Appendix provided that when States established regulations and procedures to govern the operation of their state aircraft over the high seas, "the State concerned should co-ordinate the matter with all States responsible for the provision of air traffic services over the high seas in the area in question."

Also attached to the President's letter was a list of "Items for Consideration in Improving Civil-Military Co-ordination in the Gulf-Gulf of Oman Area". One of these items was:

"The possibility of requiring the warnings given by military control units to civil aircraft on frequency 121.5 MHz to be more specific as regards track and altitude information of the flight concerned so as to reduce confusion and uncertainty in the cockpit."²¹⁶

Finally, the President included extracts from Annex 11 on "Co-ordination between military authorities and air traffic services" and "Co-ordination of activities potentially hazardous to civil aircraft".²¹⁷

In C-WP/8645, Iran stated that the "major parts of the debris and noticeable number of bodies" from the IR 655 shootdown were found in "the internal waters of ...Iran as well as within ATS route AMBER 59."²¹⁸

In opening the Extraordinary Session of the Council (13-14 July 1988), its President said that the "fundamental principle that States must refrain from resorting to the use of weapons against civil aircraft must be respected by each State." He further stated that the task of the Council was to collect all information to reach a technical understanding of the events which led to the tragedy. In his view, there was a need to

²¹⁵*Ibid.* Attachment A. See also ICAO Doc. 9495, A26-Res.: *Assembly - 26th Session, Resolutions Adopted by the Assembly and Index to Documentation* at 63-64.

²¹⁶C-WP/8643, App. B, Attachment B.

²¹⁷*Ibid.*, Attachment C.

²¹⁸C-WP/8645 para. 7.

"explore every element" of relevant ICAO regulations, guidance material and procedures which would prevent the repetition of a similar tragedy.²¹⁹

In his remarks, the Observer from Iran referred to the "atrocious act of use of force against a civilian aircraft". He stated that U.S. officials had asserted that the airliner had posed a threat to the *Vincennes*, that it had been descending towards the ship with increasing speed, that it had been off course and had been transmitting military or military and civilian signals. The Observer stated, however, that the airliner had been "ascending steadily towards its final cruising level within the international ATS route and it was sending signals in an approved civilian radar procedure". The Observer believed that "use of force against civil aircraft cannot be justified under any circumstances and is a flagrant violation of international law", a "violation of the United Nations Charter as well as the elementary concepts of humanity". In cases involving the shooting down of civil aircraft, two justifications had been advanced: mistake and self-defence. In nearly all those cases, members of the Council including the U.S. had rejected such justification, and Iran believed the U.S. was now estopped from doing so. Iran requested, *inter alia*, the condemnation of the United States and the "formation of an *ad hoc* commission to conduct an investigation of the various legal, technical and other aspects of the shooting down".²²⁰

The United States' Representative informed the Council that his country was prepared to pay compensation on a *ex gratia* basis, i.e. not on the basis of any legal liability or obligation. The U.S. had already initiated its own investigation of the incident, and it intended to share with ICAO as much information as possible, consistent "with the need to safeguard information relating to sensitive military matters". He stated that it was essential for ICAO to institute measures to prevent similar incidents.²²¹

²¹⁹ICAO Doc. 9541-C/1106, C-Min. EXTRAORDINARY (1988)/1 and 2: Council - Extraordinary Session (Montreal, 13 and 14 July 1988), Minutes at 3-4.

²²⁰*Ibid.* at 4-8.

²²¹*Ibid.* at 8-9.

The Representative then provided information on the general background to the incident. He said that the incident had taken place in the context of the war between Iran and Iraq, a war which continued despite UN Security Council Resolution 598 which called for an immediate ceasefire and withdrawal of forces to internationally recognized boundaries, and which Iran had ignored; innocent ships had been attacked and civil aircraft had to alter their courses to avoid confrontations. He reminded the Council that in September 1987, the U.S. had issued a NOTAM which emphasized "the critical importance and method of aircraft identification". Furthermore, U.S. naval forces had on numerous occasions issued warnings to civil aircraft to alter their courses; not all such aircraft had heeded the warnings and, in particular, "some Iranian aircraft have continued to fly into and over hostile zones despite repeated warnings."²²²

On the specific situation facing the *Vincennes*, the Representative stated that the ship was in international waters, outside an Iranian exclusion zone. U.S. forces were on "heightened alert because of the possibility of an Iranian attack" on 4 July, U.S. Independence Day. On 2 July, Iranian fighter "aircraft approached another U.S. cruiser and were warned away". On the morning of 3 July, a *Vincennes*' helicopter was fired upon when investigating reports that Iranian boats were following a vessel of the Federal Republic of Germany. The *Vincennes* and another U.S. vessel approached these Iranian boats and a fight ensued: this took place before, during and after the IR 655 shootdown. At the same time, *Vincennes*' radar showed an aircraft near the Bandar-Abbas joint military civilian airfield, "heading directly to the *Vincennes*". Iranian F-14 fighter aircraft were known to be based at that airfield. The Representative told the Council that "[d]espite repeated efforts by the *Vincennes* to establish contact with the aircraft", it did not respond to the voice transmissions on the International Air Distress and Military Air Distress frequencies. Electronic Identification Friend or Foe (IFF) interrogation indicated both Mode II and Mode III: Mode II was associated with military aircraft, which were also capable of responding with Mode III. The *Vincennes*' Captain thus believed that he

²²²*ibid.* at 9-10.

might soon come under attack by an Iranian military aircraft sent to assist the gunboats, but he nevertheless avoided immediate air defensive action, and:

"sought to confirm the identity of the plane which was observed to alter a normal climb and begin descending while heading rapidly toward him. Repeatedly, he asked the plane to identify itself and turn away. Repeatedly, each time he was met with silence, only to have the radar show the plane moving ever closer. Ultimately, as the risk of imminent danger reached an extreme point and while still under attack by Iranian gunboats, the captain felt compelled to take action to protect his men and his vessel from what then appeared to be an air attack.... From the time the captain first considered the approaching aircraft to be hostile, he only had...4 minutes, to reconcile the menacing trend the Iranians had exhibited over the past twenty-four hours. He waited until the very last minute to defend his ship...."²²³

The Representative sought to place a certain degree of responsibility on the Iranian authorities by stating that they must have known, or ought to have known, that there was an on-going sea battle, "and they should have taken steps to prevent the plane from flying into an area where fighting was in progress".²²⁴

He believed that the Organization should conduct a fact-finding investigation, and that it should "consider soon whether new steps can be taken which would help the situation relating to aviation safety in the Persian Gulf"; the Representative offered a number of specific "examples of areas that may have some immediate practical application". Finally, he suggested that ICAO review its documents to determine the status of their implementation "and the need for possible improvements".²²⁵

In the general debate which followed,²²⁶ other Council Members expressed varying degrees of shock, concern, dismay and consternation over the events which had taken place. Nearly all explicitly supported the idea of an investigation under the aegis of ICAO to ascertain the facts and technical aspects related to the flight and destruction

²²³*ibid.* at 11.

²²⁴*ibid.* at 12.

²²⁵*ibid.* at 12-13.

²²⁶*ibid.* at 15-47.

of IR 655. Many also expressed the opinion that ICAO should review the content and implementation of its technical provisions, especially in the area of co-ordination between civil and military authorities, to see where improvements could be made to prevent the recurrence of a similar tragedy; some States also advanced the idea that ICAO should consider a re-routing of civil aircraft in the area to avoid potential conflict.

Several representatives urged the Council to restrict its discussions to the technical aspects of the discussion, leaving political matters to be considered by the UN.²²⁷ Nevertheless, this did not deter representatives from voicing opinions about the conflict in the Persian Gulf, especially as it was thought that the tragedy was closely linked to the conflict.²²⁸ Indeed, following some of these interventions, the President of the

²²⁷E.g., the Representative of Egypt stressed that "this Organization is a technical one" (*ibid.* at 19), a view similar to that expressed by the Representative of Saudi Arabia (*ibid.* at 22). The Canadian Representative stated that the ICAO Council should focus on the technical aspects, leaving the Security Council to "address the issue in its broadest political context" (*ibid.* at 19). Likewise, the Representative of Japan believed that the incident was "closely related with the political conflicts of the Persian Gulf, but action by ICAO should be confined to the technical aspects of the incident" (*ibid.* at 26). The Representative of Nigeria urged the Council to confine the deliberations to the purely aeronautical aspects of the problem as "[p]olitical considerations rightly belong to the forum of the United Nations" (*ibid.* at 34). See also the interventions of the Representatives of France (*ibid.* at 32-33), Senegal (*ibid.* at 43) and Spain (*ibid.* at 45).

²²⁸The Representative of Nigeria, having urged the Council to limit itself to the aeronautical aspects, believed that the United States should withdraw its naval vessels from the Persian Gulf or at least to suspend its military activities, and Iran should suspend its attack on neutral shipment. He stated that:

"the restoration of peace...and the cessation of hostilities between Iran and Iraq are a *sine qua non* for the safety of international civil aviation...in that region. The tragedy we are discussing today is a direct consequence of the war between Iran and Iraq."

He appealed to the parties involved in the conflict to have "a responsive stance towards ICAO and UN Resolutions" (*ibid.* at 35). The Representative of Czechoslovakia was of the view that the shooting down was "the direct consequence of the continuous escalation of the present tension in the Persian Gulf area, in which the...United States participates to a great extent by its active military presence there" (*ibid.* at 15). The Egyptian Representative stated that the incident was a by-product of the war between Iran and Iraq, urged all concerned "to work towards ending this conflict" and appealed for acceptance of Security Council Resolution 598 (*ibid.* at 18). The Brazilian Representative urged maximum restraint on the part of all in the Gulf Region, in accordance with Security Council Resolution 598 (*ibid.* at 21). The Representative of Saudi Arabia stated that the war constituted a continuous threat to civil aviation (*ibid.* at 22); the Mexican Representative urged all States involved to reduce their military presence in the region, and called upon parties to the conflict to cease hostilities immediately in accordance with Resolution 598 (*ibid.* at 23); the Representative of

Council felt it necessary to "appeal that the...Council's deliberations be restricted to the technical aspects surrounding the destruction" of the aircraft.²²⁹

Czechoslovakia "strongly condemned" the action of the U.S. which it described as a "gross violation of the fundamental principles of international law and also of the Chicago Convention".²³⁰ The Representative of Pakistan reminded the Council of Article 3 *bis* and urged its ratification and implementation.²³¹ Several other States similarly urged ratification of Article 3 *bis*. It was stated by the Representative of Mexico that it was "imperative to put an end to the use of weapons against civil aviation", that "[u]nconditional compliance with the postulates [and SARPs] in the Chicago Convention and its Annexes must be guaranteed", and that "recourse to violence is inconsistent with the standards of international conduct and with the most fundamental humanitarian considerations."²³² India deplored the shooting down, its position being that the "use of military force against civilian targets is unjustified".²³³ The Representative of Kenya considered that "civil aircraft should be immune from being attacked with weapons, in accordance with Article 3 *bis*, to which, although it is not yet in force, all States are morally bound". He would support any resolution the Council might adopt, deploring the tragedy; this was consistent with Council action in the past.²³⁴ Indonesia called for the

Indonesia spoke of the need to intensify efforts to bring an end to the war (*ibid.* at 25); the Soviet Union's Representative believed that the tragedy "was a direct consequence of the actions taken by the U.S....aimed at intensifying their military presence in the...Persian Gulf" and that it confirmed "the fact that the American navy should immediately withdraw" (*ibid.* at 27). Additionally, see the interventions of the Representatives of Cuba (*ibid.* at 30), Peru (*ibid.* at 32), Venezuela (*ibid.* at 41), Argentina (*ibid.* at 44) and China (*ibid.* at 46).

²²⁹*Ibid.* at 40.

²³⁰*Ibid.* at 15.

²³¹*Ibid.* at 18.

²³²*Ibid.* at 22-23.

²³³*Ibid.* at 23.

²³⁴*Ibid.* at 24.

"strict adherence by all States to the relevant...conventions and agreements",²³⁵ while the Japanese Representative thought it "important that the present rules of the Convention and related documents be fully complied with by all...States."²³⁶ The Soviet Union's Representative described the destruction of IR 655 as a "barbaric" act, and "as a serious international offence for which the United States...bears full responsibility."²³⁷ Cuba's position was that the destruction was a "repugnant event" and it would welcome the "adoption of a resolution condemning this unacceptable act".²³⁸ The Peruvian Representative believed that the 25th Session (Extraordinary) of the Assembly which adopted Article 3 *bis* demonstrated "the existence of a political will on the part of Contracting States [to the Chicago Convention] enabling all of them to recognize that they must abstain from resorting to the use of weapons against civil aircraft in flight", a statement of principle reaffirming the essential purpose of ICAO.²³⁹

Nigeria had a clear position: it was opposed to the use of weapons against civil aircraft. For Nigeria, the use of force against civil aircraft could not be justified under any circumstances. The inherent right of self-defence, recognized in Article 51 of the UN Charter, was confined within strict limits: "the action taken must involve 'nothing unreasonable or excessive' since the act justified by the necessity of self-defence must be limited by that necessity and kept clearly within it."²⁴⁰

Venezuela deplored "the fact that fundamental principles of the... Organization, contained in the Chicago Convention...and...its Annexes, should be so gravely threatened."²⁴¹ The Panamanian Representative stated that, as a matter of principle, it

²³⁵*Ibid.* at 25.

²³⁶*Ibid.* at 26.

²³⁷*Ibid.* at 26-27.

²³⁸*Ibid.* at 29-30.

²³⁹*Ibid.* at 31.

²⁴⁰*Ibid.* at 34-35.

²⁴¹*Ibid.* at 41.

rejected the use of weapons against civil aircraft."²⁴² The Senegalese Representative "vehemently" deplored "all the circumstances leading to the sacrifice of 290 innocent lives".²⁴³ Italy also deplored the destruction of IR 655.²⁴⁴

Following this debate, the President made a summary, the substance of which obtained widespread support, but there were differences of opinion regarding the format it should take. The Representative of Mexico suggested to have "the text reproduced as a statement of the President supported by a consensus of the Council". However, the Representatives of the Republic of Czechoslovakia, the USSR, Kenya and Cuba:

"felt that to issue the text merely as a statement from the chair would be inconsistent with past practices in the handling of decisions of the Council relating to tragic incidents of a similar nature and expressed a preference for its distribution in the form of a resolution or, alternatively, as a statement of the President, approved by the consensus of the Council as its decision...."²⁴⁵

The Representatives of Pakistan and China also preferred a form of decision which was consistent with past practice, although the latter could agree with the proposal by Mexico; Japan favoured a decision rather than a resolution.²⁴⁶ After a further exchange of views, the President noted that "regardless of the form of presentation of the text, its implementation would be the same".²⁴⁷ Thereupon, the Council on 14 July 1988 approved by consensus as its decision, the following statement by the President:

"1) The Council duly considered the request by...Iran concerning the shooting down, on 3 July 1988, of Iran Air Airbus A300 on flight IR655;

...

²⁴²*Ibid.* at 42.

²⁴³*Ibid.* at 43.

²⁴⁴*Ibid.* at 45.

²⁴⁵*Ibid.* at 49.

²⁴⁶*Ibid.*

²⁴⁷*Ibid.* at 50.

- 4) the Council deplored the use of weapons against a civil aircraft;
 - 5) the Council reaffirmed the fundamental principle that States must refrain from resorting to the use of weapons against civil aircraft; it also appealed to all States which have not yet done so to ratify, as soon as possible, the Protocol introducing Article 3 bis into the Convention on International Civil Aviation; it also strongly urged all States to refrain from any action which might jeopardize the safety of civil aviation in the area;
 - 6) the Council directed the Secretary General to institute an immediate fact-finding investigation to determine all relevant facts and technical aspects of the chain of events relating to the flight and destruction of the aircraft;
- ...
- 9) the Council directed the President of the Council and the Secretary General:
 - (a) to continue their efforts with all States concerned for the earliest possible establishment of suitable arrangements for the proper co-ordination of civil flight operations and military activities within the area so as to fully safeguard the safety of civil air navigation;
 - (b) to take all necessary measures, in co-operation with the States concerned, to improve the routing arrangements in the area so as to facilitate safe operation of civil air traffic;
 - (c) to undertake immediately all necessary studies for the improvement of the Standards and Recommended Practices to prevent the recurrence of such a tragic incident;....²⁴⁸

The Council considered the Secretary General's report contained in an Appendix to C-WP/8708, on 5 and 7 December 1988. The Secretary General found that the Iranian

²⁴⁸*ibid.* at 47-48 and 50. On 20 July 1988, the UN Security Council expressed its "deep regret at the downing of an Iranian civil aircraft by a missile fired from a United States warship", welcomed the ICAO decision to institute an investigation, and urged all parties to the Chicago Convention "to observe to the fullest extent, in all circumstances, the international rules and practices concerning the safety of civil aviation, in particular those of the annexes to that Convention, in order to prevent the recurrence of incidents of the same nature" (S/RES/616, UN S.C.O.R., 43rd year, p. 17, UN Doc. S/INF/44 (1989)).

airliner followed A59, remained well within its limits and had a normal climb profile. No electronic emissions from the aircraft, other than SSR responses, were detected by the U.S. vessels. U.S. warships were not equipped to monitor civil ATC frequencies for flight identification purposes. Four challenges were transmitted to an unidentified aircraft (IR 655) on 121.5 MHz, but there was no response, indicating that the members of the flight crew of IR 655 were either not monitoring 121.5 MHz or did not realize their flight as the one being challenged. The contents of the challenges varied from one transmission to the next, and it was "uncertain whether the flight crew would have been able to rapidly and reliably identify their flight as the subject of these challenges". There were certain factors which led to the initial and continued assessment by the *Vincennes* that IR 655 was a hostile aircraft. There was no co-ordination between U.S. warships and the relevant civil ATS (air traffic services) units.²⁴⁹

²⁴⁹C-WP/8708, App. at 23-25. These findings and causes were summarized by the Secretary General thus:

- 3.1.6 On 3 July 1988 no "red alert" status was in effect and the ATC units at Tehran and Bandar Abbas were unaware of any activities at sea.
- ...
- 3.1.8 The flight crew [of IR 655] had correctly selected SSR mode A code 6760. SSR mode C (automatic pressure altitude transmission) was functioning.
- 3.1.9 After take-off the aircraft climbed straight ahead enroute and the climb profile was normal. It followed airway A59 and remained well within its lateral limits....
- 3.1.10 The aircraft weather radar was probably not operated during the flight nor would normal procedures have required its operation in the prevailing weather conditions. The radio altimeters were probably functioning throughout the flight.
- 3.1.11 No electronic emissions from the aircraft, other than SSR responses, were detected by United States warships.
- ...
- 3.1.13 Apart from the capability to communicate on the emergency frequency 121.5 MHz, United States warships were not equipped to monitor civil ATC frequencies for flight identification purposes.
- ...
- 3.1.15 Four challenges addressed to an unidentified aircraft (IR655) were transmitted by United States warships on frequency 121.5 MHz (three from USS *Vincennes* and one from USS *Sides*).
- 3.1.16 There was no response to the four challenges made on 121.5 MHz, either by radio or by a change of course. This indicated that the flight crew of IR655 either was not monitoring 121.5 MHz in the early stages of flight,

-
- or did not identify their flight as being challenged.
- 3.1.17 The aircraft was not equipped to receive communications on the military air distress frequency 243 MHz.
- 3.1.18 The civil ATS route structure and major airports in the Gulf area were displayed on AEGIS large screen displays in the Combat Information Centre [of the *Vincennes*] ... However, the absence of altitude information on the large screen displays did not allow ready assessment of flight profiles in three dimensions.
- 3.1.19 Information on civil flight schedules was available in the Combat Information Centre of USS *Vincennes*. However, in the form presented, it was of extremely limited value for the determination of estimated time of overflight of individual aircraft. Flight plan information and flight progress data, including information on assigned SSR mode A codes, were not available to assist in flight identification.
- 3.1.20 There was no co-ordination between United States warships and the civil ATS units responsible for the provision of air traffic services within the various flight information regions in the Gulf area.
- ...
- 3.1.22 The contents of the challenges and warnings issued to IR655 on 121.5 MHz varied from one transmission to the next. It is uncertain whether the flight crew would have been able to rapidly and reliably identify their flight as the subject of these challenges and warnings.... Bearing and range information to the warship was of little relevance to the pilot. Position information in geographical co-ordinates was not a practical method to establish identification. The SSR mode A code displayed by IR655 could have been immediately recognizable to the flight crew, but was given only in the final challenge.
- 3.1.23 The initial assessment by USS *Vincennes* that the radar contact (IR655) may have been hostile, was based on:
- a) the fact that the flight had taken off from a joint civil/military aerodrome;
 - b) the availability of intelligence information on Iranian F-14 deployment to Bandar Abbas and the expectation of hostile activity;
 - c) the possibility of Iranian use of air support in the surface engagements with United States warships;
 - d) the association of the radar contact with an unrelated IFF mode 2 response; and
 - e) the appearance of an unidentified radar contact that could not be related to a scheduled time of departure of a civil flight.
- 3.1.24 The continued assessment as a hostile military aircraft by USS *Vincennes* and the failure to identify it as a civil flight were based on the following:
- a) the radar contact had already been identified and labelled as an F-14;
 - b) the lack of response from the contact to the challenges and warnings on frequencies 121.5 MHz and 243 MHz;
 - c) no detection of civil weather radar and radio altimeter emissions from the contact;

The Secretary General proposed that:

"In areas where military activities potentially hazardous to civil flight operations of aircraft take place, optimum functioning of civil/military co-ordination should be pursued. When such military activities involve States not responsible for the provision of air traffic services in the area concerned, civil/military co-ordination will need to include such States."²⁵⁰

To this end, the Secretary General listed eight separate safety recommendations.

In presenting the Secretary General's report, the leader of the investigation team highlighted several aspects. He stated that:

"important facts came to light regarding the broader background which contributed significantly to the event. These concern mainly the lack of adequate aeronautical information from the USA for dissemination to the international civil aviation community in accordance with applicable ICAO procedures, the absence of adequate co-ordination by certain military units operating in the Gulf area with the civil units responsible for the provision of the air traffic services in the airspace concerned, and the use of the emergency frequency 121.5 MHz to challenge flights in an operationally inadequate manner."²⁵¹

-
- d) reports by some personnel on USS Vincennes of changes in flight profile (descent and acceleration) which gave the appearance of manoeuvring into an attack profile; and
 - e) the radar contact was tracked straight towards USS Montgomery and USS Vincennes on a course slightly diverging from the centreline of airway A59.
- 3.1.25 Reports of changes in flight profile from climb to descent and acceleration were heard in the Combat Information Centre of USS Vincennes, as recalled by a number of crew members...
- 3.1.26 USS Vincennes AEGIS system contained and displayed correctly the IFF mode and code, and the altitude and speed information of the contact (IR655). The AEGIS system recorded a flight profile consistent with a normal climb profile of an Airbus A300.
- 3.2 Causes
- 3.2.1 The aircraft was perceived as a military aircraft with hostile intentions and was destroyed by two surface-to-air missiles."

²⁵⁰*Ibid.* at 26.

²⁵¹C-Min. 125/12 at 7.

The Observer from Iran expressed the hope that unlike the Extraordinary Session held on 13 and 14 July 1988, the Council would now take decisive action. He believed that the shooting down "proved that the United States, contrary to its strong positions...in previous cases, in practice attaches no importance to international law and order". The Observer also sought to allocate some degree of blame to ICAO, stating that previous "acts of violence had been reported to ICAO for the purpose of taking effective actions aiming at their removal, but...lack of sufficient actions...aggravated the dangerous situation leading to the...disaster.... It would not have happened had the ICAO Council been alert and decisive enough to take prompt measures for the elimination of hazardous situations brought about by the United States' illegal military activities in the region...." He saw support in the geographical co-ordinates given in the report for his assertion that the *Vincennes*, at the time of the shoot-down, was in Iranian territorial waters; at that moment, the Airbus was also within Iranian airspace. The Observer noted that previous instances of attacks against civil aircraft had been condemned by international bodies. He called for similar condemnation in this case, and for an "explicit recognition of the responsibilities of the United States...and ...for ...compensation for moral and financial damages". He concluded that any State engaged in the use of force against civil aircraft should not be left unaccountable for its action.²⁵²

The Representative of the United States reminded the Council that a copy of the U.S. investigation report had been provided to ICAO and reproduced as Attachment E to C-WP/8708. He believed the Secretary General's report "on first review to be technically accurate and largely consistent with my own government's investigation". However, it would be inappropriate at this stage for the Council to review the report, which should be referred to the ANC. The ANC would concentrate, in particular, on recommendations to prevent a recurrence.²⁵³

²⁵²*Ibid.* at 7-11.

²⁵³*Ibid.* at 12-13.

In the Council's general debate,²⁵⁴ a small number of representatives questioned the objectivity of the Secretary General's report and pointed out perceived deficiencies. However, an overwhelming majority of representatives who spoke on the issue had a positive impression of the report.

Some representatives deplored the incident and, in particular, the use of weapons against civil aircraft. Those of Czechoslovakia,²⁵⁵ Cuba,²⁵⁶ and China²⁵⁷ wanted a condemnation of the "act". The Representative of Senegal condemned the "circumstances" which gave rise to the destruction of the aircraft.²⁵⁸ The Representative of Panama condemned "the use of force and the use of weapons against civil aircraft",²⁵⁹ whilst the USSR wanted a "condemnation of the facts of the use of force".²⁶⁰

A few States, including Iran, called for compensation to be paid. The Representative of the United States reminded the Council that the President of the U.S. had announced a willingness to provide compensation, on an *ex gratia* basis.²⁶¹ The Observer from Iran said that this meant that the U.S. was not accepting "legal liability".²⁶² However, the United Kingdom cautioned that it was not "the responsibility

²⁵⁴C-Mins. 125/12, 125/13 and 125/14.

²⁵⁵C-Min. 125/12 at 16.

²⁵⁶*Ibid.* at 17.

²⁵⁷*Ibid.* at 28.

²⁵⁸C-Min. 125/13 at 8.

²⁵⁹*Ibid.* at 7.

²⁶⁰*Ibid.* at 18.

²⁶¹*Ibid.* at 5.

²⁶²*Ibid.* at 13.

of this Council to seek to apportion personal blame" and that the Council had "simply no status in the awarding of compensation".²⁶³

Unlike the incident involving the two U.S. aircraft shot down by Cuban military fighters, location of the Airbus at the moment of shoot-down in relation to Iranian sovereign airspace did not engender much discussion. Only the Representatives of Czechoslovakia, Cuba and the USSR spoke on this issue: they found the report flawed insofar as it did not make an express statement as to location in relation to Iranian sovereign airspace; the USSR stressed that the fact that the shoot-down occurred within Iran's sovereign airspace was most important.²⁶⁴ It should be noted that Appendix A of the report did provide co-ordinates for IR 655 at the point of missile impact.

As to the law governing this issue, a number of opinions were expressed. The Czechoslovak Representative stated that at the Extraordinary Session of the Council, he had condemned the act "as a ruthless and unforgivable violation of the very well known principles of international law"; he had also condemned "very strongly the use of weapons against...civil aircraft."²⁶⁵ The Representative of Cuba also thought the shoot-down to be "a flagrant violation of international law".²⁶⁶ The USSR Representative believed that the United States had violated both established international norms including those found in the Chicago Convention, and technical procedures related to flight safety.²⁶⁷ The Representative of the Federal Republic of Germany stated his government's "vigorous support...of the fundamental principle that States should not use weapons against civil aircraft and should refrain from any measures which might endanger international civil aviation."²⁶⁸ France also wished to reiterate "in the

²⁶³*Ibid.* at 12.

²⁶⁴C-Min. 125/12 at 19.

²⁶⁵*Ibid.* at 16.

²⁶⁶*Ibid.* at 17.

²⁶⁷*Ibid.* at 19.

²⁶⁸*Ibid.* at 25.

strongest terms that States must refrain from any action which might jeopardize the safety of civil aviation, and particularly from resorting to the use of weapons".²⁶⁹ The Chinese Representative stated:

"[I]t is the...obligation of...States to...observe the rules laid down in the Chicago Convention and its Annexes and to take all necessary measures to ensure the safety of flight...."²⁷⁰

The Representative of Japan urged States to refrain from using weapons against civil aircraft,²⁷¹ while that of Brazil was "repulsed against (*sic*) the use of weapons against civil aviation".²⁷² The Representative of India felt that the "use of military force against civilian targets is clearly unjustified", and more particularly, that "States must refrain from the use of military weapons against civilian aircraft".²⁷³ Mexico's position was that the use of weapons against civil aircraft was a violation of Article 3 *bis*, and that "the use of violence against civil aviation" was "inconsistent with standards of international conduct and with the most elementary considerations of humanity."²⁷⁴

With a view to the prevention of a recurrence of a similar tragedy, the representatives were unanimous in agreeing to refer the Secretary General's report to the ANC for study. It was expected that the ANC would, if necessary, make suggestions for the improvement of SARPs in the area of co-ordination between military authorities and civilian air traffic control units, particularly in regards to communications.

It was the timing and form of the Council's substantive action on this issue which generated the most controversy. Some representatives preferred to defer such action until the ANC had reported to Council. The rationale most often given was that the report raised a number of highly technical questions which required further analysis by the ANC

²⁶⁹*Ibid.* at 26.

²⁷⁰*Ibid.* at 28.

²⁷¹*Ibid.* at 27.

²⁷²C-Min. 125/13 at 6.

²⁷³*Ibid.* at 13.

²⁷⁴*Ibid.* at 16.

before the Council would be in a position to act. For example, the Representative of Nigeria supported this course of action since "a resolution of this nature must...be all-embracing in the sense that it should cover all the various aspects..., including technical considerations",²⁷⁵ while the Representative of the Federal Republic of Germany believed that a Council resolution should reflect all aspects of the incident, including a full technical evaluation of the findings.²⁷⁶ Although these two Representatives foresaw eventual Council action taking the form of a resolution, most others in this group did not express at this stage a clear preference for the form of the ultimate Council action.

On the other hand, some representatives and the Observer from Iran wanted the Council to immediately pronounce itself on the issue at hand, leaving aside further action to be taken after the ANC had analysed the Secretary General's report.²⁷⁷ Some of

²⁷⁵C-Min. 125/12 at 21.

²⁷⁶*Ibid.* at 25.

²⁷⁷Of the group which expressed a preference for immediate Council action (beyond mere referral of the report to the ANC), the Representative of Senegal justified his position thus:

"[T]he elements contained in the report...are convincing and substantial enough to allow the Council to reach a decision. [T]his report...allows the Council to assume its responsibilities, if it so desires.... In order for this Organization to merit the continued respect and confidence of its...member States, the Council should maintain vigorous consistency and continuity in its decisions relating to identical matters."

He also pleaded that the Council action should do "justice to our Organization's reputation for seriousness, competence and impartiality" (C-Min. 125/13 at 8). The Observer from Iran likewise believed that the Secretary General's report constituted a clear and sufficient document for the Council's consideration and determination, and that a decision should not be deferred by referral to the ANC (C-Min. 125/12 at 18). The Representative of the USSR also believed that the Council had "all necessary and sufficient facts to adopt the corresponding resolution without delay". He continued:

"I wish...to remind my colleagues,...of the resolutions, not just one, of the meetings of the Extraordinary Session of the Council in 1983, in March 1984 and consideration at the Extraordinary Assembly....[I]f we do not, in an extremely objective manner and on the basis of available facts, assess the fact of the use of weapons against a civil aircraft, then the Soviet Government will raise the question of convening an Extraordinary Assembly on this fact and I shall be forced to set forth the motives of my State to the...press so that this will receive widespread openness (*glasnost*)" (C-Min. 125/13 at 18).

The Representative of Czechoslovakia expressed himself similarly:

"[T]he Council has enough objective facts and evidence, even much more than it had in the past when it considered similar tragic incidents, to approach and address this tragic event and to take the policy action today.... We do not think [that the ANC], after further deliberations, will bring to the attention of the Council more objective

these representatives would prefer the Council action to be in the form of a resolution. Other representatives in this group were non-committal as to their choice of the form of Council action.²⁷⁸

The President of the Council summarized the main elements arising out of the discussion, assuring representatives that acceptance of the summary would not preclude detailed consideration of the matter after the ANC had reported to the Council.²⁷⁹ The content of the summary was found to be generally acceptable, but the form of its adoption remained under discussion.²⁸⁰ Following consultations among representatives, the Council adopted as its decision the summary made by the President.²⁸¹ The decision, adopted on 7 December 1988, is reproduced immediately below:

"THE COUNCIL:

1. Recalled its decision of 14 July 1988 adopted at its Extraordinary Session concerning the shooting down, on 3 July 1988, of Iran Airbus A300 on flight IR655;
2. Received the report of the fact-finding investigation...;
- ...
5. Urged all States to take all necessary action for the safety of navigation of civil aircraft, particularly by assuring effective co-ordination of civil and military activities;

facts or information for a policy decision..." (C-Min. 125/13 at 18).

²⁷⁸E.g., India would "support any positive technical steps by the Council on the basis of the investigative report" (C-Min. 125/13 at 13); and Senegal would "support any action which the Council may deem incumbent upon it to take on this occasion" (*supra*, at 8).

²⁷⁹*Ibid.* at 19-20.

²⁸⁰The Representative of Kenya stated that he had expected the text of the summary: "to be presented in the usual format of a summary of Decision...and was surprised to see it in the form of a draft resolution....[T]he fact that it was now formally proposed as a resolution..., he would need time for consultation with his administration" (C-Min. 125/14 at 5-6).

²⁸¹*Ibid.* at 6.

6. Reaffirmed again the fundamental principle of general international law that States must refrain from resorting to the use of weapons against civil aircraft;
7. Appealed urgently to all States which have not yet done so to ratify, as soon as possible, ... Article 3 *bis* ...;
8. Instructed the ANC to study the safety recommendations contained in the report of the fact-finding investigation and to report to the 126th Session of the Council on any measures it considers necessary so as to prevent the recurrence of a similar tragic event;
9. Directed the Air Navigation Commission to examine, upon their completion, the results of the studies undertaken under paragraph 9(c) of the Council decision of 14 July 1988;....²⁸²

The President of the Council and the Secretary General reported to the Council in C-WP/8718 on action taken further to paragraph 9 (a) and (b) of the Council decision of 14 July 1988,²⁸³ namely, that they:

- a) continue their efforts for the establishment of suitable arrangements for the proper co-ordination of civil flight operations and military activities in the area; and
- b) take all necessary measures to improve routing arrangements in the area.

²⁸²*Ibid.* at 7.

²⁸³*Supra*, note 248 and accompanying text.

They informed the Council of two informal meetings of relevant States in the area (not including the U.S.) and international organizations, held in October 1988.²⁸⁴ The Council, in its decision of 15 December 1988:

- "c) emphasized the importance of correct application by all States concerned of the provisions of Annex 11, paragraph 2.14 concerning co-ordination between military authorities and air traffic services, the provisions of Annex 11, paragraph 2.1.5, particularly paragraphs 2.15.1.1 and 2.15.3 concerning co-ordination of activities potentially hazardous to civil aircraft, and the provisions of Annex 15, paragraph 3.1, particularly 3.1.1.1 regarding promulgation of information;
- d) directed the President and the Secretary General to secure the agreement of the States concerned with regard to the correct application of the provisions mentioned in c) above in relation to potentially hazardous activities in the Gulf area; and
- e) urged all States concerned to co-operate fully in completing the necessary arrangements concerning routing and civil/military co-ordination in the area so as to ensure the safety of civil aviation."²⁸⁵

²⁸⁴For the discussions and outcome of these meetings, see C-WP/8718 paras. 2.2.1-2.3.7. The first meeting, *inter alia*, "recalled ICAO provisions governing civil/military co-ordination and noted that, in so far as the States represented at the meeting were concerned, current practices with their own military units complied with, and in some cases exceeded, the requirements specified by ICAO." With regard to the military activities of other States in the airspace over the high seas of the Gulf area, the meeting "felt it necessary that such other States...be associated with the process of establishing the suitable arrangements for the co-ordination of civil flight operations and military activities". It also "emphasized the sole authority of the States responsible for the provision of air traffic services over the high seas in accordance with relevant ICAO provisions and with the air navigation plan of ICAO", including the responsibility to promulgate "information regarding activities potentially hazardous to civil aircraft operations". The States represented at the meeting "affirmed that such information received through appropriate channels would be disseminated to all concerned in accordance with the procedures laid down by ICAO."

The second meeting examined another NOTAM issued by the U.S. in 1988, namely KD22NZ 056/88, and expressed its belief that the NOTAM contravened ICAO SARPs, it being pointed out that "the promulgation of aeronautical information was the responsibility of the appropriate ATS authority of the States which provide services in the FIRs concerned, including the airspace extending over the high seas"; the meeting requested the Council to take appropriate measures to secure the withdrawal of the NOTAM.

²⁸⁵C-Min. 125/19 at 4-5.

It will be recalled that the Council on 14 July 1988 had also requested the President of the Council and the Secretary General to undertake the necessary studies for the improvement of SARPs so as to prevent the recurrence of an incident such as the IR 655 shoot-down;²⁸⁶ in its decision of 7 December 1988, the Council had directed the ANC to examine the result of these studies.²⁸⁷ Also on 7 December 1988, the Council had instructed the ANC to study the safety recommendations contained in the Secretary General's report of the fact-finding investigation.²⁸⁸

The Commission reported on these matters in C-WP/8803. It examined the SARPs pertinent to military activities potentially hazardous to civil aircraft and concluded that:

"the current ICAO provisions are adequate in relation to military activities which are potentially hazardous to civil aircraft and, if properly implemented and applied by all concerned, are capable of providing the necessary safety protection for civil aircraft."²⁸⁹

Apart from suggesting the upgrading of one Recommended Practice to a Standard, the Commission saw no need to amend the SARPs, although it identified a number of elements which it felt merited consideration in the context of guidance material.²⁹⁰

In relation to the safety recommendations in the Secretary General's report of the investigation, the ANC considered that their intent "can usefully be amplified and reflected in guidance material."²⁹¹

When the Council considered C-WP/8803 on 13, 15 and 17 March 1989, the Iranian Observer expressed the hope that the Council would now adopt a "final, wise and reputable decision". He stated that the international community expected "that acts of

²⁸⁶*Supra*, note 248 and accompanying text.

²⁸⁷*Supra*, note 282 and accompanying text.

²⁸⁸*Ibid.*

²⁸⁹C-WP/8803 para. 2.8.1.

²⁹⁰*Ibid.* paras. 2.8.2 and 2.8.3.

²⁹¹*Ibid.* para. 3.2.

violence, irrespective of who or which country the perpetrator might be, will not be left unaccounted". He called for "condemnation of the shooting down"; an "explicit recognition of a crime of international character relating to the breach of international law and of the legal duties of a Contracting State to ICAO" and a recognition of the responsibilities of the United States, "including effecting compensation for moral and financial damages."²⁹²

The Representative of the United States expressed the "profound regret" of his Government "for the accidental shooting". He stated that his Government had been guided by several fundamental approaches: to investigate fully the facts, to publish the results of that investigation, and to take steps to prevent similar incidents in the future. In relation to the latter, his government had "pursued vigorously the objective of improved military/civilian co-ordination".²⁹³

Most representatives stressed the necessity for Council action to focus on the need to prevent recurrence of a similar tragedy. A large majority believed that the time had come for the Council to adopt a final decision in the form of a resolution.²⁹⁴

²⁹²C-Min. 126/18 at 5-7. Iran had made a similar request when the Council first considered the Secretary-General report (*supra*, note 252 and accompanying text).

²⁹³C-Min. 126/18 at 7-10.

²⁹⁴E.g., the Representative of Czechoslovakia stated that it was time for the Council to take a "policy decision in the same way and manner the Council had adopted similar decisions several times already in the past"; a resolution should be adopted condemning the act of destruction of IR 655 (*ibid.* at 11-12). Cuba wanted a condemnation of the use of weapons against civil aircraft, and in particular, the destruction of IR 655 (*ibid.* at 17). The USSR called for a resolution which would note that IR 655 had been shot down by the U.S. navy, and would "condemn the use of weapons by armed forces against a civil aircraft" (*ibid.* at 21-24). For the Federal Republic of Germany, the resolution should address the ratification of Article 3 *bis* and implementation of civil/military co-ordination (*ibid.* at 24). The Pakistani Representative believed that the resolution should affirm the "abhorrence of the use of force" and "the requirement for due compensation" (*ibid.* at 25). Canada would support a resolution "that would urge States to take all necessary action for the safety of navigation, particularly by issuing effective co-ordination (*sic*) of civil and military activities and the proper identification of civil aircraft" (*ibid.* at 31).

The Representative of the Federal Republic of Germany,²⁹⁵ supported by some other States, proposed the establishment of a drafting group to prepare a suitable text. On the other hand, the Representative of the United Kingdom suggested that the President hold informal discussions with Council members with a view to drafting a text "which would meet consensus approval".²⁹⁶ This last proposal was accepted by the Council.²⁹⁷

When the Council considered this matter at its next meeting on 15 March 1989, the President reported that:

"he had made a slow rate of progress in his consultations regarding the possible formulation of a resolution...which could be accepted by consensus...The various elements he had gathered so far from the...discussions he had would not permit the formulation of a resolution to meet that mandate. However, he would pursue his consultations...If it were not possible for him...[to present an acceptable text], any Representative could propose a resolution."²⁹⁸

The Observer from Iran, obviously disappointed, stated that:

"the mandate of the Chicago Convention bestowed upon the ICAO Council made it imperative that this body adopt a serious position vis-a-vis serious events. The records of the proceedings...regrettably showed that it had not taken a serious stand commensurate with the grave act of the shooting down...[T]he aviation world expected it to uphold the objectives of the Chicago Convention...[T]he only way the Council could fulfil its duties was by condemning the act by the United States of shooting down a passenger aircraft...."²⁹⁹

²⁹⁵*Ibid.* at 24.

²⁹⁶*Ibid.* at 27.

²⁹⁷*Ibid.* at 33.

²⁹⁸C-Min. 126/19 at 3.

²⁹⁹*Ibid.*

At the next meeting of the Council on 17 March 1989, the President was still unable to present a consensus text. Nine States³⁰⁰ presented a draft resolution. The Observer from Iran was dissatisfied with the draft resolution, stating that if adopted in its present form, the resolution "would neither fulfil the aims and objectives of the Organization, nor satisfy...the expectations and demands of the Government of...Iran and the bereaved families..."³⁰¹ The Representatives of USSR and Czechoslovakia proposed that the sixth clause of the draft be amended to read:

"CONDEMNNS the use of armed force against civil aviation, including the act which resulted in the tragic destruction of an Iran Air airliner and the loss of 290 lives, while noting the accidental sequence of events and errors in the identification of the aircraft."³⁰²

The United Kingdom Representative, who had introduced the draft resolution on behalf of the co-sponsors, stated the wording of the sixth clause "represented the fundamental differences of opinion among Council Representatives which had therefore prevented the President from presenting a consensus text". He stated further that since:

"mistakes had been acknowledged, responsibility had been accepted and action had been taken to ensure that such a tragic event did not recur, the co-sponsors...wondered whether it would be a reasonable technical judgement to express condemnation of an accident. Recognizing that ICAO was a technical body, and, as such, should not make political judgements - such judgements being rightly the responsibility of the United Nations - the co-sponsors believed that in its technical judgement of this incident, ICAO should take into account all the circumstances surrounding it. They did not think that condemnation was appropriate to these particular circumstances..."³⁰³

³⁰⁰C-WP/8821 and Addendum, read together with C-Min. 126/20 at 3. These States were: Canada, France, the Federal Republic of Germany, Italy, Japan, Spain, Switzerland, the United Kingdom and Australia.

³⁰¹C-Min 126/20 at 4.

³⁰²*ibid.* at 4-5.

³⁰³*ibid.* at 6.

The United States' Representative expressed his Government's strong opposition to the proposed amendment.³⁰⁴

After further unsuccessful consultations, the proposed amendment was put to a vote and rejected. The co-sponsors of the resolution then made some changes to the fifth and sixth clauses; the change to the fifth clause was generally acceptable, but the USSR, Czechoslovakia, Cuba and China recorded reservations regarding the suggested amendment to the sixth clause. As amended, the draft resolution in C-WP/8821 was approved on 17 March 1989 with the recorded positions of these States.³⁰⁵

The text reads as follows:

"THE COUNCIL...

Having considered the report of the fact-finding investigation instituted by the Secretary General...and the subsequent study by the Air Navigation Commission of the safety recommendations presented in that report;

³⁰⁴He was of the opinion that:

"...a far greater risk to ICAO credibility would be for it to demonstrate its inability, or perhaps worse, its unwillingness to accept that one incident might differ from another....For ICAO to say that all uses of force against civil aircraft in flight deserved equal condemnation, without due regard to the particular facts and circumstances surrounding individual cases would,... accord less significance to the word 'condemnation'."

He stated that representatives had recognized that the downing had been accidental, resulting from a mistake in identifying IR 655; no representative had argued "with the fact" that the Captain of the *Vincennes* "had been acting in self-defense against what he had perceived to be a military attack". The facts of this incident were "far different from any other incident that had been presented previously to the Council"; his country "had created a new precedent in the degree to which it had co-operated with the Organization"; and his Government had offered *ex-gratia* compensation. He believed that "it would be unconscionable for the ICAO Council to impose its greatest censure 'condemnation'" (*ibid.* at 6-7).

The Representative of Kenya had a different viewpoint: he noted that the Council "when considering a similar incident in the past had 'condemned' that act". To be "consistent with that decision and so as to act in accordance with its mandate and not to be influenced by political considerations, the Council should take a similar decision..." If the Council failed to do so, "the Organization stood to lose its credibility" (*ibid.* at 8). The Representative of China also believed that ICAO should represent the interests of all member States, and not those of just particular States; the Organization should have a consistent policy in dealing with matters such as that being considered (*ibid.* at 9).

³⁰⁵*Ibid.* at 10.

...

Recalling that the 25th Session (Extraordinary) of the Assembly in 1984 unanimously recognized the duty of States to refrain from the use of weapons against civil aircraft in flight;

Reaffirming its policy to condemn the use of weapons against civil aircraft in flight without prejudice to the provisions of the Charter of the United Nations;

Deeply deplores the tragic incident which occurred as a consequence of events and errors in identification of the aircraft which resulted in the accidental destruction of an Iran Air airliner and the loss of 290 lives;

...

Notes the report of the fact-finding investigation instituted by the Secretary General and endorses the conclusions of the Air Navigation Commission on the safety recommendations contained therein;

Urges States to take all necessary measures to safeguard the safety of air navigation, particularly by assuring effective co-ordination of civil and military activities and the proper identification of civil aircraft.³⁰⁶

Thus ended the Council's consideration of the shooting down of IR 655.

2. EVALUATION

a) Legal Basis for Investigations

ICAO has not shown any reluctance in carrying out investigations with the usual stated objective of determining the facts and technical aspects relating to the flight and destruction of the aircraft which has been shot down. In each case, the Council acted in response to a request from an ICAO Member State or States. The Council has never

³⁰⁶*Ibid.* at 11.

undertaken an investigation on its own initiative, although arguably it has the legal authority to do so.³⁰⁷

The legal basis for the Council to carry out (through the Secretary General) such an investigation has not generated much discussion except in the very first case, namely, the Libyan Arab Airlines Boeing 727 in 1973, when it was decided by the Council that Article 54(b) of the Convention provided a sufficient legal basis;³⁰⁸ in the Korean Airlines 1983 incident, the Council seemed to have relied on Article 55(e) of the Convention. In subsequent investigations, the basis for Council action was hardly raised, although it seems to have been assumed that Article 55(e) was the governing provision.

b) Non-Endorsement by Council of Reports

One unusual aspect of the investigations carried out so far is the fact that the Council has not expressly endorsed or approved any of the reports presented by the Secretary General, and in some cases, has declined to do so.

In accordance with Article 52 of the Chicago Convention, decisions of the Council require approval of a majority of members. In none of the incidents investigated by the Secretary General did the Council in the accompanying resolutions or decisions explicitly endorse the Secretary General's report; in no case does the discussion reveal that a majority of members was so inclined.³⁰⁹

³⁰⁷In accordance Article 55(c) of the Chicago Convention, the Council may conduct research into all aspects of air transport and air navigation which are of international importance; under paragraph (d), it is entitled to study any matters affecting the organization and operation of international air transport.

³⁰⁸*Supra*, notes 45-46 and accompanying texts.

³⁰⁹ICAO Doc. 7321/7: *The ICAO Publications Regulations* in Articles II and III define ICAO publications as including documents embodying resolutions, decisions and recommendations formally adopted by the Assembly or the Council, working papers and Council minutes; Article VI(2) states that if "the text constitutes an official opinion or act of the Organization, i.e. one that has received the final approval of the body ultimately responsible under the Convention, this will be indicated." See G.N. Tompkins, Jr. & A.J. Harakas, "ICAO and Accident Investigation - Lessons to be Learned from the Korean Air Lines 007 Investigation" (1994) XIX:II A.A.S.L. 375 at 386-387.

When considering the report of the first two investigations, (Libyan Airlines 1973 and Korean Air Lines 1983 investigation), the Council did not address the question whether it should or should not approve the reports, and the corresponding resolutions are silent on this matter. For these two reports, one can argue either way: that the actions of the Council constituted their implicit acceptance, or that the lack of an explicit acceptance means that the Council did not so approve them, although the latter position seems formally the more correct one, since there is no indication that these reports received the final approval of the body ultimately responsible under the Chicago Convention, i.e. the Council.³¹⁰

A clear trend subsequently emerged. In the Council Resolution of 17 March 1989 concerning IR 655, the Council merely noted "the report of the fact-finding investigation instituted by the Secretary General". It, however, explicitly endorsed the conclusions of the ANC on the safety recommendations contained therein.³¹¹

During consideration of the report on the second (1993) investigation into the KAL 007 incident, some States were of the opinion that the Council should not seek to endorse the conclusions and recommendations in the report, in order to avoid difficulties such a decision could create.³¹² The Resolution adopted on 14 June 1993 did not express the Council's endorsement of the report.³¹³

Again, in the U.S. civil aircraft incident, the Council in its 27 June 1996 Resolution elected to note the report, and resolved "to transmit the Secretary General's

³¹⁰It is true that in the Libyan airliner incident, one could argue that it was the Secretary General, and not the Council, who was requested to carry out the investigation, and that there was therefore no need for the Council to approve the report. However, nothing in the Chicago Convention authorizes the Secretary General to carry out such investigations and to issue reports of this nature in his own name, but rather on behalf of the Council, or the Assembly. Further, the directive from the Assembly was for the Council to instruct the Secretary General to do carry out the investigation and to report to the Council; it seems obvious that the Assembly intended ultimate responsibility to lie with the Council.

³¹¹*Supra*, note 306 and accompanying text.

³¹²*Supra*, note 145 and accompanying text.

³¹³*Ibid.* note 147 and accompanying text.

report to the United Nations Security Council".³¹⁴ Interestingly, the UN Security Council in its Resolution of 26 July 1996 referred on one occasion to the report as "the ICAO report" and more courageously than the ICAO Council, endorsed the conclusions of the report.³¹⁵

The non-approval by the Council of the reports of the Secretary General has led two commentators to state, in specific reference to the 1983 KAL 007 investigation report, that "it does not constitute an official report of ICAO"³¹⁶ and that "it is misleading to even characterize the Report of the Secretary General as the 1983 ICAO Report".³¹⁷

It is therefore at least arguable that in the Libyan Arab Airlines incident, the Council, insofar as it is deemed not to have approved the report, failed to fulfil its duty under Article 54(b) of the Chicago Convention to "[c]arry out the directions of the Assembly"; the same may be said for the its Article 55(e) function in respect of the 1983 KAL 007 investigation. The situation is clearer for the other investigations: by consciously not adopting the Secretary General's reports, those reports never became Council's reports, and it cannot be said that pursuant to Article 55(e), it was the Council which investigated the incidents and issued the reports.

While the Council was free to delegate the carrying out of these investigations to the Secretary General (and in the Libyan airliner incident was directed to so delegate), the ultimate responsibility under the Chicago Convention for these reports lay with the Council. It is interesting and telling that the Council refers to these reports as the Secretary General's reports, and never as the Council's reports, when the task of investigation falls squarely on the Council in accordance with the Chicago Convention; that Convention does not *per se* provide a legal basis for the Secretary General's reports

³¹⁴*Supra*, note 188 and accompanying text.

³¹⁵*Supra*, note 189.

³¹⁶Tompkins & Harakas, *supra*, note 309 at 387.

³¹⁷*Ibid.* n. 33.

into these investigations. In this sense therefore, one can argue that perhaps the 1973 and 1983 reports, and certainly the subsequent reports, does not have a proper legal basis and are not official ICAO reports.

c) Failure to Take the Initiative

One striking thing, with hindsight, is the number of opportunities presented to, and not taken by, the Organization (or rather its member States) to adopt legal and technical measures to prevent such tragedies.

As detailed in Chapter II above, the phenomenon of the use of force against civil aircraft was well known before 1955. In 1956, following the El Al Constellation incident, the Assembly refused to include this subject in the Work Programme of ICAO's Legal Committee.³¹⁸ The Secretary General subsequently advised the Council that there was scope and need for developing international rules on the subject, but in March 1958, the Council inexplicably decided that the legal aspects of this subject did not deserve referral to the Legal Committee.³¹⁹

Again, following the Libyan Arab Airlines incident in 1973, the 20th Session (Extraordinary) of the ICAO Assembly (Rome, 28 August - 21 September 1973), rejected a proposed amendment to the Chicago Convention by which Contracting States would undertake "not to interfere by force or threat of force with an aircraft of another State".³²⁰

Only a decade later, after the KAL 007 incident, the legal aspects of this subject became of highest priority for the Organization, and it continues to be so.

³¹⁸*Supra*, note 8 and accompanying text.

³¹⁹*Supra*, notes 13-15 and accompanying texts.

³²⁰*Supra*, notes 62-63 and accompanying texts.

On the technical side, in 1956 the Secretary General advised the Council that there appeared to be a need for the development and acceptance of codes of signals in the area of interception, and he foresaw the possibility of the development of new SARPs or a new convention on the subject. While the ANC considered that most, if not all, national procedures for signalling were out of date or would shortly become so, and that standard signals were desirable, it nevertheless concluded that practical difficulties existed in devising acceptable procedures; for the time being, it seemed unlikely that any simple and reliable system for signalling for world-wide use in the case where an aircraft entered or was about to enter restricted airspace, could be devised; that since any system so far suggested might cause confusion and even danger, no attempt should be made, at that time, to introduce standard (world-wide) procedures, although it recognized that the introduction of signals on a national basis was preferable to resorting to extreme measures. The ANC twice re-confirmed these conclusions.³²¹ Yet, a few years later, the Council was able to recommend to all member States of ICAO specific procedures and visual signals to be used in connection with interception,³²² and in February 1975 included for the first time, provisions on interception in Annex 2.

To give ICAO credit, after each of the incidents mentioned above, it examined the technical implications and sought to make improvements where it thought necessary. Also, after being warned, prior to the IR 655 incident, of the hazards to civil aviation in the Persian Gulf, ICAO took numerous steps in an effort to avert the danger, keeping in mind the limitation that it has no authority over military activities. Likewise, prior to the adoption of Article 3 *bis*, it also subsequent to each incident re-considered the adequacy of its existing legal framework. That action was delayed was not due to organizational or procedural shortcomings of the Organization, but rather to a lack of appreciation of the problem (or perhaps of requisite expertise) among ICAO member States and the ANC.

³²¹*Supra*, notes 9-12 and 16 and accompanying texts.

³²²*Supra*, note 17 and accompanying text.

d) Machinery for Ascertainment of Facts

It has been suggested that ICAO should set up some form of institutionalized machinery to investigate the facts relating to aerial intrusions and the use of force against civil aircraft.

Following the El Al Constellation incident in 1955 and the referral to ICAO of UN General Assembly Resolution 927,³²³ the ICAO Council considered C-WP/2609 which posed the question:

"whether it would be practicable to provide machinery for the establishment of a forum (composed of persons having the nationality of the territorial States, the State of the aircraft's registry and a disinterested third State) for ascertaining the facts pertaining to the aerial intrusion and related matters and for recommending any compensatory or remedial measures."³²⁴

During the Extraordinary Session of the Council held in September 1983 following the KAL 007 shutdown, the Representative of Japan called for the establishment of:

"new rules that in case of an incident involving military aircraft and civil aircraft, the ICAO shall send a fact-finding mission and that the State in which the incident occurs shall accept ICAO's investigation team and participation therein of observers from the States concerned."³²⁵

Earlier, during the 1973 Assembly's consideration of the El Al incident, the Delegation of Canada stated that:

"it was precisely because of incidents like this one that Canada had been advocating for some time the establishment of independent fact-finding machinery under ICAO auspices to investigate and determine fault rapidly in incidents in which States contributed to threats to the safety of civil aviation."³²⁶

³²³*Supra*, note 2 and accompanying text.

³²⁴*Supra*, note 14 and accompanying text.

³²⁵ICAO Doc. 9416, *supra*, Ch. II, note 12 at 15.

³²⁶ICAO Doc. 9061, *supra*, Ch. II, note 13 at 58. Between 1971 and 1973, a number of proposals were made at various ICAO meetings for the creation of fact-finding bodies or Commissions of Experts in connection with the broader question of acts of unlawful interference with civil aircraft. E.g., in 1971, Canada and the United States made to an ICAO Legal Sub-Committee a joint proposal

History has shown that in cases of aerial intrusion leading to a shoot-down, it is rare for the facts to be agreed upon between the principal protagonists. In particular, questions often arise as to whether there had in fact been a violation of territorial airspace and the degree, if any, to which the intruder had been warned before being shot. Further, many cases occur in areas or situations of international political tension, and the principal parties are not likely to agree on the facts. In some cases also, there had also been

for the establishment of a "Commission" to determine breaches of certain aviation security conventional provisions (LC/SC CR WD/2; and LC/SC CR - Report paras. 6, 8-39 and Apps. D and E). See also a proposed modification of the Canada-US text (LC/SC CR (1972) - Report, App. L); and discussion thereon in another Sub-Committee (LC/SC CR (1972)-Report, paras. 29-52.2); ICAO Doc. 9050-LC/169-2 *Legal Committee, 20th Session [Special] (1973) Vol. II, Documents, Annex 4* and ICAO CAS Doc. No. 4 (proposal by Denmark, Finland, Norway, and Sweden to the 20th Session of the Legal Committee and a 1973 International Conference on Air Law); A20-WP/4 (proposal by France, Switzerland and the United Kingdom to the 20th Session (Extraordinary) of the Assembly, 1973); A20-WP/5 (proposal by the Kingdom of the Netherlands); A-20/WP/6 and ICAO CAS Doc. No. 8 (proposal by the United States); A20-WP/8 and ICAO CAS Doc. No. 12 (proposal by Belgium), ICAO CAS Doc. No. 6 (proposal of Sweden); ICAO CAS Doc. No. 9 (proposal by Denmark); ICAO CAS Doc. No. 10 (proposal of Norway); ICAO CAS Doc. No. 20 (proposal of Austria); and CAS-SRC/10 paras. 1-5 for a summary of decisions related to the various proposals presented to the 1973 International Conference on Air Law. None of these proposals gained acceptance. For a discussion of the proposals and the work of the various ICAO meetings which considered them, see G.F. Fitzgerald, "Concerted Action Against States Found in Default of their International Obligations in Respect of Unlawful Interference with International Civil Aviation" (1972) 10 C.Y.I.L. 261; G.F. Fitzgerald, "Recent Proposals for Concerted Action Against States in Respect of Unlawful Interference with International Civil Aviation" (1974) 40 J.A.L.C. 161; and S.J. Gertler, "Amendments to the Chicago Convention: Lessons from Proposals that Failed" (1974) 40 J.A.L.C. 225 at 250-255.

At a Sub-Committee on the preparation of a draft Instrument on the Interception of Civil Aircraft (2 September - 5 October 1984), Argentina proposed the elaboration of an international convention under which the Council might be asked by interested States to undertake an investigation into occurrences of interception. If an investigation was carried out by States (as opposed to the Council), the Council would have the right to approve or disapprove the report and conclusions. In any case, the Council would have the power to make recommendations on specified sanctions and "may declare whether the State responsible must pay the corresponding indemnity" where there has been damage to persons or property (LC/SC-ICA-WP/12, Attachment).

In the broader context of the settlement of disputes, the UN General Assembly on 18 December 1967 adopted a resolution in which it re-affirmed the importance of impartial fact-finding for the settlement and prevention of disputes and, *inter alia*, invited "Member States to take into consideration, in choosing means for the peaceful settlement of disputes, the possibility of entrusting the ascertainment of facts, where it appears appropriate, to competent international organizations and bodies...." (*Question of methods of fact-finding*, GA Res. 2329, UN G.A.O.R., 22nd Sess., Supp. No. 16, p. 84, UN Doc. A/6716 (1968)). For a historical overview of fact-finding, see W.I. Shore, *Fact-Finding in the Maintenance of International Peace* (New York: Oceana, 1970).

allegations of antecedent violations of the airspace of the subjacent State. Thus, the establishment of machinery for impartial fact-finding at first glance appears desirable in this context.

The question is whether such an institutionalized machinery, whether established under ICAO auspices or not, would add much value to the existing system. As pointed out above, ICAO has not hesitated to set up an independent fact-finding investigation whenever a State has requested such an investigation. The possibility exists today for member States, in the words of Article 54(n) of the Chicago Convention, to refer any matter to the Council. Member States do not have to await a catastrophic incident to request the assistance of the Council in the form of a fact-finding investigation: for example, it would have been possible for Cuba to have asked before shooting down the two aircraft, for an investigation into the prior violations of its airspace, and indeed, in its Resolution of 27 June 1996, the Council requested that all contracting States report to it at any time any infraction of the Chicago Convention rules.³²⁷ It is submitted that until the Council exhibits an unwillingness to carry out this function, there is no need to set up another machinery within, or outside of, ICAO.

While there has been criticism, albeit muted, concerning the lack of enthusiasm by the Council in the performance of its dispute settlement functions under Article 84 of the Chicago Convention,³²⁸ the same has so far in general not been true of its

³²⁷*Supra*, note 188 and accompanying text.

³²⁸Article 84 reads in part:

If any disagreement between two or more contracting States relating to the interpretation or application of this Convention and its Annexes cannot be settled by negotiation, it shall, on the application of any State concerned in the disagreement, be decided by the Council...."

See T. Buergenthal, *Law-Making in the International Civil Aviation Organization* (Syracuse, New York: Syracuse University Press, 1969) at 123-124; M. Milde, "Dispute Settlement in the Framework of the International Civil Aviation Organization (ICAO)" (1980) 1 *Schriften zum Luft-und Weltraumrecht* 87 at 90-91; and E. Sochor, *The Politics of International Aviation* (Hampshire, United Kingdom: Macmillan, 1991) at 110.

investigative role in the use of force against civil aerial intruders;³²⁹ the actions of the Council once a report has been issued is a separate matter.

There is one area of fact-finding which might prove of benefit. In 1995, the Council established a Safety Oversight Programme whereby ICAO teams carry out safety oversight assessments relating to Annex 1 (personnel licensing) Annex 6 (operation of aircraft) and Annex 8 (airworthiness) to identify national deficiencies and to suggest corrective action. While the current programme is based on requests from States (i.e. it is voluntary in nature), there are proposals before the Assembly to make it mandatory, i.e. an audit to be undertaken upon the initiative of ICAO. Consideration is also being given to an expansion of this programme to other safety-related technical fields and to aviation security. So far, it has not been suggested to have also an audit of State regulatory provisions and practices relating to the interception provisions in Annex 2 and other ICAO documents aimed at reducing the incident of use of force against civil aerial intruders or civil aircraft generally. It is submitted that such an audit by ICAO of State regulations and practices would be a useful component in the combat against the use of force targeted at civil aerial intruders.

e) Political Aspects of the Consideration by ICAO of the Aerial Incidents

In their consideration of the use of force against civil aircraft, it is very often stated by delegates to the Assembly or representatives on the Council that ICAO should concentrate on the aeronautical or technical issues associated herewith and should leave political matters to be dealt with by the UN. Implicit in this approach is that the aeronautical or technical issues could be easily divorced from underlying political considerations. While the intent behind this philosophy is laudable, it is obvious that this distinction between aeronautical and technical matters on the one hand, and political

³²⁹But see Tompkins & Harakas, *supra*, note 309.

issues on the other, cannot be maintained in practice, and the debates and decisions of the various ICAO bodies bear convincing testimony to this fact.³³⁰

In a penetrating analysis of the politics which has shaped the evolution of ICAO and is reflected in its decisions, Eugene Sochor, an ex-staff member of ICAO, has expressed the opinion that:

"While ICAO's founding fathers did not conceive of commercial aviation as an area of international life much subject to the vagaries of international politics and regional conflicts, political issues have in fact encroached on its activities from the very first day the Organization became a full-fledged member of the United Nations system. If ICAO was spared much of the acrimony that reverberated through the works and debates of the General Assembly and the Security Council, several confrontations and other incidents have nevertheless forced its governing body to deal with issues which often lay beyond the technical mandate and competence of the Organization."³³¹

Sochor offers persuasive arguments that many aspects of ICAO's works are dominated, or at least influenced, by political factors, and concludes that debates in the Council on aircraft shootdowns "and related issues show that the majority of States consider civil

³³⁰Sochor, *supra*, note 328 at 39-40 states that:

"In analyzing the UN system, one must keep in mind that sub-systems are inter-related and that their interaction with political issues cannot be overlooked, even if the political activities of the United Nations are not examined. This is important, according to Mahdi Elmandjra, because one often encounters the simplified theory which establishes clear-cut divisions between political and other activities.

Leon Gordenber states that the myth of the non-political activities of certain agencies derives in part from a narrow definition of politics. If we confine politics in the international realm to conflicts and the use of military force, then everything else can be seen as non-political.... But, as Gordenber points out, if a slightly more sophisticated definition of politics is applied to these organizations so as to include the competing claims and demands of states within a system, then even the narrow technical agencies fall under this political rubric."

³³¹*Ibid.* Introduction at xv. He states further that:

"Conflicts and co-operation are two sides of the same coin and must be studied together, the more so in an agency where conflicts between states appear to be technical in nature but are in fact part of broader political issues. Any illusion that ICAO could deal with these technical problems on their own merit was quickly dispelled when accidental shootdowns of civil aircraft and a growing number of brutal hijackings and criminal attacks against civil aviation came to dominate the agenda of the ICAO Council and its subordinate bodies" (*supra*, at xvii).

aviation as part of international politics with technical questions being inseparable from the political context."³³²

Each of the shutdowns of civil aircraft investigated by ICAO occurred in the context of wider political problems: the Libyan airlines incident at a time of conflict in the Middle East; the KAL 007 shutdown during the Cold War; the IR 655 incident during the Iran-Iraq war and political tensions between Iran and the United States; and the 1996 U.S. civil aircraft incident involved two countries which have been suspicious of each other for decades. When ICAO considered these shutdowns and despite a sometimes conscious attempt to limit the discussion to technical issues, inevitably the discussions referred to, and were coloured by, underlying political factors as evidenced by the interventions quoted earlier in this Chapter. One only has to examine the minutes of the 19th Session of the Assembly and the Council meeting which considered the investigation report concerning the shutdown of the Libyan airliner in 1973, the debates in the Council and in the Assembly on KAL 007, and the Council's discussions on the 1988 and 1996 incidents to conclude that States took the opportunity to express views on matters broader than the purely technical issues at hand. Even decisions on technical matters were influenced by political issues. It could not be otherwise: technical and political issues are not always or easily separable.³³³

Delegates at Assemblies and representatives on the Council do not act in personal capacity but as representatives of States, reflecting the views, positions and competing interests of those States. This is so even in the one situation in which Council representatives are supposed to act in an individual or "judicial" capacity, namely, during

³³²*Ibid.* at xix.

³³³B. Gidwitz, *The Politics of International Air Transport* (Lexington, Massachusetts: Lexington Books, 1980) at 229 claims that:

"A study of ICAO resolutions on unlawful interference shows a consistent pattern of non-Arab Moslem-dominated, third world radical, and communist-led countries failing to support (by voting against or abstaining from) measures unreservedly critical of air terrorism or introducing and backing politicized resolutions on the problem."

the dispute settlement procedure envisaged in Chapter XVIII (which includes Article 84) of the Chicago Convention.³³⁴

A reading of the United States' explanation of the Iran Air incident bears many similarities to the arguments advanced by Israel in the Libyan airliner incident, yet the two responsible parties were treated very differently by ICAO. Both Israel and the United States expressed their sorrow over the incident in which they were respectively involved, described it as an unfortunate error, promised *ex gratia* compensation, urged the Council to focus on taking measures to avoid a repetition of similar tragedies in the future, and facilitated the ICAO investigation. Both States described what they considered to be mitigating circumstances.

In the Libyan airliner incident, the Assembly condemned Israel explicitly by name even before the investigation into the facts had been initiated, much to the concern of the Israeli Delegation. In the words of the Israeli Observer at the later Council meeting:

"The action of my country was condemned - condemnation unparalleled in any international institution, to my knowledge, in that the condemnation was issued before any investigation of the facts. The judge passed sentence and then proceeded to hear witnesses."³³⁵

³³⁴In an attempt to explain why this machinery for the settlement of international aviation disputes is used so infrequently, Burgenthal (*supra*, note 328 at 123-124) states that:

"It may also be that many States doubt that a political body such as the ICAO Council would be able to exercise adjudicatory functions with the requisite judicial impartiality."

Milde (*supra*, note 328 at 90) is of the view that:

"The Council is a policy-making body composed of States, the procedure for the settlement of differences by the Council is not in fact a true international adjudication but rather a qualified international arbitration... conducted by States; their decision may be based on policy (equity) rather than on strictly legal rules...."

A convincing illustration that the Representatives ... do not act in 'an impartial and judicial capacity' may be found, e.g., in the Minutes of the Council meeting held on 29 July 1971, where several Representatives requested a postponement of a vote (re Pakistan v. India) to consult with their respective administrations to obtain instructions."

See also Sochor, *supra*, note 328 at 110.

³³⁵ICAO Doc. 9073, *supra*, note 47 at 38. Even during the Assembly's deliberations, Israel had complained in vain, referring to the draft resolution as one "which first condemned and then professed a desire to look at the facts, thus obviously prejudging and anticipating the outcome of the investigation it called for" (ICAO Doc. 9061, *supra*, Ch. II, note 13 at 51).

In none of the other instances examined above did the Assembly or Council condemn by name the State which shot the aircraft, much less before the investigation was completed.

It is striking to note that some of the States which favoured condemnation of Israel before the investigation was completed, in later incidents argued strongly that no decision should be taken before an investigation was finalized.

When the Council considered the Secretary General's report on 4 June 1973, it went further and "strongly" condemned the Israeli action. For good measure, it included in the Resolution reference to action by Israel against "Beruit Civil Airport", leading the Israeli Observer to note:

"...[M]any eminent jurists had found this attack, which had not cost a single life, a legitimate act of self-defence, it had taken place nearly five years ago, the Council had considered it but taken no decision, and the matter had since remained in suspense. The Security Council...had not referred it to ICAO for study.... Moreover, the incident at Beruit Airport was not on the order of business of this meeting and there were rules to be complied with before it could be added. If it was to be included, he would respectfully request to be given an opportunity to provide all the details and documents that would be necessary before the Council could say...that it was convinced that this action constituted a serious danger to international civil aviation...."³³⁶

When the Council next considered a similar incident in 1983 (KAL 007), it did not this time condemn before instituting the investigation, preferring in a resolution to "deeply" deplore the destruction of the aircraft. After the Secretary General presented his report, the Council elected to defer taking substantive action and referred the report to the ANC. The deferral was understandable since much information was still missing and there was a hope that perhaps this would become available in the meantime. In its Resolution of 6 March 1984, the Council condemned the use of armed force which resulted in the destruction of the aircraft, but not the USSR by name. By the time the 1993 investigation was completed, the political situation had changed and no one wanted

³³⁶ICAO Doc. 9073, *supra*, note 47 at 54. The United States' Representative also favoured deletion of the reference to Beruit Civil Airport, "as the incident had taken place some time ago and was not the subject before the Council today" (*supra*, at 58).

to reopen old wounds: the Council Resolution of 14 June 1993 is therefore mild, merely requesting States to ratify Article 3 *bis* and to take measures to safeguard the safety of air navigation of civil aircraft.

In the Iran Air incident, the Council took a different approach than in the previous cases, especially the Libyan airliner tragedy. Unlike the earlier cases, it did not adopt a resolution requesting the Secretary General to institute the investigation: instead, it approved by consensus, as its decision, a statement by the President which *inter alia*, "deplored the use of weapons against a civil aircraft". The format which the decision should take generated much discussion, with some States expressing a preference for a form in line with past practice.³³⁷ While the President of the Council believed that "regardless of the form of presentation of the text, its implementation would be the same",³³⁸ the emphasis placed on the form by all concerned indicated that in the eyes of representatives, form was perhaps important as implementation, with a resolution generally being regarded as being more solemn and carrying greater weight than a mere decision.

When the Council met in December 1988 to consider the Secretary General's report, Iran again noted that previous instances of attacks against civil aircraft had been condemned by international bodies, and called for similar action in this case.³³⁹ This was to be a forelorn request. The United States believed that ICAO should not review the report at this stage, and that it should be referred to the ANC.³⁴⁰ While representatives agreed that the report should be referred to the ANC, some wanted an immediate substantive decision, believing that the report was complete enough to allow such action.³⁴¹ Others were of the view that the report raised a number of highly

³³⁷*Supra*, notes 245-246 and accompanying texts.

³³⁸*Supra*, note 247 and accompanying text.

³³⁹*Supra*, note 252 and accompanying text.

³⁴⁰*Supra*, note 253 and accompanying text.

³⁴¹*Supra*, note 277 and accompanying text.

technical matters which required further analysis by the ANC before the Council could act.³⁴² Again, the question whether the action of the Council should be substantive, and the format it should take, generated the most controversy. The Council adopted a decision which in substance is not dissimilar to that adopted by the Council on 13 December 1983 in the case of KAL 007 at a similar stage in the proceedings,³⁴³ but it should be noted that in the latter case, the referral to the ANC was in the form of a resolution.

The Council considered the ANC's review in March 1989 and again Iran hoped for a "final, wise and reputable decision"³⁴⁴ Members agreed that on this occasion, the decision should take the form of a resolution, but an attempt by the USSR to insert a clause similar to that included in the 6 March 1984 Resolution (KAL 007) by which the Council would condemn the use of armed force against civil aviation, including the act which destroyed IR 655, failed. In the Resolution adopted on 17 March 1989, the Council did reaffirm its policy to condemn the use of weapons against civil aircraft, and deeply deplored the tragic incident, which it described as having occurred as a consequence of events and errors in identification of the aircraft which resulted in the accidental destruction of the airliner. It did not describe any of the other incidents as having resulted from errors in identification and as being accidental in nature, although a strong case could be made that the same could be said of the Libyan Airlines and KAL 007 incidents.

If, in the words of Sochor, "[c]onsidering the magnitude of the [U.S.] blunder, the ICAO response was surprisingly mild"³⁴⁵ perhaps because at that point in its history, Iran did not have many friends, the tables were turned in the 1996 Cuba-U.S. incident. In a situation where there was no error of identification, where Cuban property

³⁴²*Supra*, notes 275-276 and accompanying texts.

³⁴³*Supra*, notes 282 and 118 and accompanying texts.

³⁴⁴*Supra*, note 292 and accompanying text.

³⁴⁵*Supra*, note 328 at 141.

or citizens were not in apparent immediate danger, and where the ICAO procedures on interception were not followed by Cuba, there was no condemnation of the latter by ICAO. However, before the Council had considered the report of the investigation, in its 6 March 1996 Resolution,³⁴⁶ it deeply deplored the shooting of the two aircraft by the Cuban air force. When it did examine the report on 26 and 27 June 1996, it did not deplore the shooting down nor condemn Cuba. It merely reaffirmed its condemnation of the use of weapons against civil aircraft. In general, the thrust of the interventions made and the text of the Resolutions adopted show little sympathy for the United States. Indeed, in the second Resolution, there was implicit criticism of the victim State, the United States, in that the Council reaffirmed the principle that each contracting State must take appropriate measures to prohibit the deliberate use of civil aircraft registered in that State for any purposes inconsistent with the aims of the Chicago Convention.³⁴⁷

On purely technical grounds, Cuba was as culpable as Israel, the Soviet Union and the United States in the earlier incidents. Yet, one can argue that both Israel and the Soviet Union obtained much less sympathy in ICAO. Again, the difference was due to political considerations. First, it was apparent that many representatives felt that the United States had not done all it could to curtail the less acceptable activities of the "Brothers to the Rescue", some members of which "sought to influence the political situation in Cuba".³⁴⁸ Second, many of the traditional friends of the United States were miffed by certain aspects of the U.S. Cuban Liberty and Democratic Solidarity (Libertad) Act of 1996 (the Helms-Burton Act)³⁴⁹ and perhaps saw the consideration of this

³⁴⁶*Supra*, note 171 and accompanying text.

³⁴⁷*Supra*, note 188 and accompanying text.

³⁴⁸*Supra*, note 174 and accompanying text.

³⁴⁹Reproduced in (1996) 35:2 I.L.M. at 357-378. In particular, Section 302 provides that subject to certain exceptions, any person that traffics in property which was confiscated by the Cuban Government in or after 1959, shall be liable to any United States national who owns the claim to such property. Further, by virtue of Section 401, entry visas to the United States would be denied to any alien who:

a) traffics in confiscated property, a claim to which is owned by a United States national;

incident in the Council as an opportunity to send to the United States an expression of their displeasure.

Each incident presented a different set of factual circumstances. The question of how similarly the Council should treat these incidents, or in other words, how the Council treatment should vary from one incident to another, was brought into sharp focus in its consideration of IR 655. One point of view was that the Council should act in a consistent manner with previous incidents so as "not to be influenced by political considerations".³⁵⁰ The other opinion, expressed by the United States, was that ICAO's credibility would be affected if it was unable or unwilling to "recognize that one incident might differ from another.... For ICAO to say that all uses of force against civil aircraft in flight deserved equal condemnation, without due regard to the particular facts and circumstances surrounding individual cases would...accord less significance to the word 'condemnation'".³⁵¹ It is submitted that the U.S. position is the correct one, as otherwise each incident would engender an automatic, pre-set response from ICAO, with no appreciation of the different facts. However, to so accept a different evaluation of each incident necessarily begs the question as to the factors which go into making the judgement. It is clear from the incidents considered above that wider political issues have influenced ICAO action perhaps even more than technical factors. This is not a criticism

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- b) "is a corporate officer, principal or shareholder with a controlling interest in an entity which has been involved in confiscation of property or trafficking in confiscated property" which is subject to a claim by a US national; or
- c) is a spouse or minor child of a person so excluded from the United States.
- For the Canadian, European Union and Mexican responses thereto, see (1997) 36:1 I.L.M. at 111-154.

³⁵⁰See the intervention of the Representative of Kenya, *supra*, note 304.

³⁵¹*Ibid.*

of the Organization, but a recognition of an existing fact. It is a separate matter for individual opinion whether the Organization has acted in a manner considered fair or objective in its examination of the various shoot-downs, i.e. whether the contents of its decisions are a true reflection of the gravity of the acts in the light of all the circumstances.

CHAPTER IV

ICAO'S CONTRIBUTION TO THE LAW GOVERNING THE USE OF FORCE AGAINST CIVIL AERIAL INTRUDERS

ICAO's major contributions to the law governing the use of force against civil aerial intruders has been the adoption on 10 May 1984 of the *Protocol relating to an Amendment to the Convention on International Civil Aviation* [Article 3 bis]¹ and the cumulative effect on customary international law of its various pronouncements on the subject.

The desirability of ICAO adopting a legal instrument to regulate the law in this area was considered as early as March 1958 following the shooting-down of the El Al Constellation aircraft in 1955 and the referral of UN General Assembly Resolution 927 to ICAO. It will be recalled that the Council of ICAO considered C-WP/2609 in which the Secretary General expressed the opinion that there was both a scope and a need to develop international rules to ensure the safety of civil aircraft flying in the vicinity of, or inadvertently crossing, international frontiers; however, the Council on 26 March 1958 decided not to refer this matter to the Legal Committee.²

Fifteen years later, the 19th Session (Extraordinary) of the ICAO Assembly (27 February to 2 March 1973) discussed, *inter alia*, the downing of the Libyan Boeing 727. The Delegate of Kenya expressed the view that an ICAO investigation into the incident should also cover "the necessity of developing a further convention on unlawful interference, recognizing the inviolability of civil aircraft and the inadmissibility of making them military targets for any reason whatever".³ That Session of the Assembly did not pursue the issue further, but later in the year, the 20th Session (Extraordinary)

¹ICAO Doc. 9436. The text of the Protocol is reproduced in the Annex hereto.

²*Supra*, Ch. III, notes 13-15 and accompanying texts.

³ICAO Doc. 9061, *supra*, Ch. II, note 13 at 39.

of the ICAO Assembly (28 August to 21 September 1973) which met to consider problems relating to unlawful interference with civil aircraft, had a proposal from France, Switzerland and the United Kingdom to amend the Chicago Convention by the inclusion of the following clause:

"Subject to the provisions of the Charter of the United Nations, of this Convention and of any agreement between the States concerned, each Contracting State undertakes not to interfere by force or threat of force with aircraft of another State. Nothing in this Article shall be taken to authorize the use of force or threat of force in any circumstances in breach of the rules of international law."⁴

The proposed amendment, as subsequently modified, failed to be adopted because it did not obtain the votes of two-thirds of the Assembly as required by Article 94(a) of the Chicago Convention.⁵

The reasons behind the rejection of the 1958 and 1973 proposals are not clearly stated by the ICAO bodies concerned, and one can only conclude that despite the tragedies which had preceded them, ICAO member States still did not see the problem as one of sufficient magnitude deserving more explicit legal regulation. This relative indifference changed dramatically with the shooting down of KE 007 and the loss of 269 lives it entailed. That incident triggered the process which led ultimately to the adoption of Article 3 *bis*.

1. ARTICLE 3 BIS

a) **Negotiations Leading to the Adoption of Article 3 *bis***

It will be recalled that when the Council met in Extraordinary Session on 15 and 16 September 1983 to consider the matter of the shooting down of KE 007, France

⁴A20-WP/15. See Fitzgerald, 10 C.Y.I.L., *supra*, Ch. III, note 326 at 197-200 for the consideration of this and related proposals at the 20th Session (Extraordinary) of the Assembly.

⁵ICAO Doc. 9087, *supra*, Ch. III, note 63.

presented C-WP/7694 and Addendum No. 1 in which it proposed that the Council include in its work programme and examine with highest priority the question of an amendment to the Chicago Convention "involving an undertaking to abstain from recourse to the use of force against civil aircraft" subject to the provisions of the UN Charter, and to convene an Extraordinary Session of the Assembly for this purpose. The Council accepted this proposal.⁶

The 24th Session of the ICAO Assembly which met soon afterwards (20 September to 7 October 1983) had draft proposals for amending the Convention from France, Austria and the Soviet Union.⁷

⁶*Supra*, Ch. III, notes 74 and 85 and accompanying texts.

⁷*Supra*, Ch. III, notes 87-88 and accompanying texts. In Information Paper No. 1 related to A24-WP/49, France elaborated on the proposal it had made to the Extraordinary Session of the Council, as follows:

"All Contracting States undertake to abstain from resorting to the use of force against civil aircraft subject to the provisions of the Charter of the United Nations and, in particular, Article 51 thereof concerning the exercise of the right of individual or collective self-defense."

France also proposed that the Assembly apply to the amendment, Article 94 b) of the Chicago Convention by stipulating that any State which did not ratify the amendment within one year after its entry into force shall lose its membership of ICAO. Article 94 b) applies to amendments to the Convention and reads:

"...the Assembly in its resolution recommending adoption may provide that any State which has not ratified within a specified period after the amendment has come into force shall thereupon cease to be a member of the Organization and a party to the Convention."

This last suggestion reflects the importance which France attached to the proposed amendment, as Article 94 b) had never been applied before.

Austria proposed in the Attachment to A24-WP/56 a new Article 9 *bis* as follows:

- "a) If a contracting State is entitled to require the landing of an aircraft and if such landing is not effected, the contracting State concerned may have recourse to appropriate means to enforce its request. It shall then proceed according to the [SARPs]....
- b) Measures taken under a)...shall not endanger the life and safety of the persons abroad the aircraft concerned.
- c) It is an infraction of this Convention if any aircraft refuses to comply with a request for landing made in accordance with a)...or if a contracting State has recourse to means in contradiction (*sic*) with the provisions of this Article in order to enforce such a request.
- d) A contracting State shall be responsible for any damage caused by recourse to means in contradiction (*sic*) with the provisions of this Article. It shall afford adequate compensation to the State concerned."

The Assembly agreed that the material presented by France, Austria and the USSR should be referred to the Council for further consideration.⁸ During its 110th Session, the Council on 14 October 1983 decided to convene the Extraordinary Session of the Assembly on 24 April 1984, for a maximum duration of three weeks.⁹

Later that Session, the Governments of Austria and France, noting that their drafts had the same objective, put forward to the Council a new text in lieu of their earlier separate proposals.¹⁰ In explaining the proposal, the Representative of France stated that while there was no written text specifically concerning the use of force against civil aircraft, there already existed a principle of international law "prohibiting recourse to the use of force in international relations between States contained in Article 2, paragraph 4 of the United Nations Charter."¹¹ Nevertheless, it was "opportune to balance the text with other provisions likely to ensure respect for the principle of sovereignty of States over their airspace," in order to avoid civil aircraft taking advantage of the prohibition

The Soviet Union, in A24-WP/65, made certain suggestions for the "Improvement of the legal standards and technical rules relating to the airspace regime of States and interception of aircraft". In particular, it requested ICAO to focus on "measures to prevent the misuse of civil aviation for purposes incompatible with the [Chicago] Convention...as well as on the development of rules aimed at eliminating cases of violation of the airspace of States." The USSR also believed that there was an urgent need to "reaffirm the respect of all Contracting States for the principle of complete and exclusive sovereignty of a State over the airspace above its territory". It therefore proposed, without providing specific text, that the Preamble and Article 4 of the Chicago Convention be amended. It was of the view that the French proposal could only be discussed in relation:

"with questions dealing with the prevention of the use of civil aircraft for unlawful purposes and the violation of the airspace of States....Otherwise the adoption of the proposal to abstain for resorting to the use of force against civil aircraft under any circumstances would amount to virtually sanctioning the use of international civil aviation for intelligence and other unlawful purposes...."

⁸*Supra*, Ch. III, note 109 and accompanying text.

⁹ICAO Doc. 9427, *supra*, Ch. III, note 111 at 9.

¹⁰C-WP/7748.

¹¹ICAO Doc. 9427, *supra*, Ch. III, note 111 at 55.

against the use of force so as to violate the sovereignty of States or otherwise engage in activities prohibited under Article 4 of the Chicago Convention.¹²

The Observer from Austria believed that "the use of armed force against civil aircraft was prohibited under present international law subject to the relevant provisions of the Charter of the United Nations, in particular, to its Article 51." He described the proposal to amend the Chicago Convention as a refinement of international law.¹³

The Council subsequently considered a draft text of amendment to the Chicago Convention submitted by the United States,¹⁴ and decided on 23 November 1983 to transmit both proposals to the Assembly and to member States of ICAO, without comments or recommendations.¹⁵

The Extraordinary Session of the Assembly met at ICAO Headquarters from 24 April to 10 May 1984.¹⁶ In addition to Austria and France, and the United States, the USSR, Ecuador, the Latin American Civil Aviation Commission (LACAC) and the Republic of Korea also presented proposals for amending the Convention.

The Austrian-French proposal was for a new Article 16 *bis* which would read:

- "(a) Each contracting State undertakes to refrain from resorting to the use of force against aircraft of the other contracting State and, should it intercept one of these aircraft, not to endanger the safety and lives of persons on board. This provision shall not be interpreted as enlarging or diminishing in any way the scope of the Charter of the United Nations and, in particular, of its Article 51 concerning the exercise of the right of individual or collective self-defence.

¹²*Ibid.*

¹³*Ibid.* at 57. The Representative of Canada also believed that "the law of custom had proven the principle that States must in all cases avoid using force against civil aircraft" (*ibid.* at 59).

¹⁴C-WP/7757.

¹⁵ICAO Doc. 9427, *supra*, Ch. III, note 111 at 73.

¹⁶For an excellent description of the various proposals for amending the Chicago Convention presented to the Assembly, and of the negotiation, drafting and adoption of Article 3 *bis*, see G.F. Fitzgerald, "The Use of Force against Civil Aircraft: The Aftermath of the KAL Flight 007 Incident" (1984) C.Y.I.L. 291.

- (b) Each contracting State is entitled to require the landing of an aircraft flying above its territory if the aircraft violates the sovereignty of that State over its airspace or if it is used for purposes inconsistent with the aims of this Convention. To this end the contracting State may resort to any appropriate means, in accordance with the provisions of the international standards, recommended practices and procedures contained in the Annexes to this Convention.
- (c) Each contracting State agrees to establish all necessary provisions in its national laws to make it mandatory for any aircraft registered in that State to comply with an order to land given in conformity with paragraph (b) of this Article, provided that compliance with this order does not endanger the safety of the aircraft."¹⁷

The United States' proposal¹⁸ was very similar, for an agreement of each "contracting State not to use force against civil aviation and, when intercepting a civil aircraft, not to endanger the safety or lives of persons on board, subject to Article 51 and other relevant provisions of the Charter of the United Nations". The United States' draft would also permit a State to require the landing of aircraft, "at some designated airport within its territory" where the aircraft had entered territorial airspace without authority or appeared to be otherwise engaged in activities inconsistent with the Chicago Convention; each State would agree to publish and transmit annually to ICAO its

¹⁷A25-WP/2. In A25-WP/4, France and Austria explained their proposal. They stated that the draft "affirms the prohibition from resorting to the use of force against civil aircraft" while reserving the priority of the UN Charter. They further stated:

"At the present time, there is no specific provision in modern international law which unambiguously prohibits the use of armed force against civil aircraft. ...[I]nternational public opinion would like to see this serious deficiency remedied as soon as possible....

[O]n the other hand, this text is intended to prevent certain civil aircraft, taking advantage of this nevertheless essential provision, violating with impunity the territorial sovereignty of States or carrying out activities contrary to the aims and objectives of the Chicago Convention....This is a refinement of the Convention which will complement...Articles 1 and 4."

The two States believed that violation of any provisions of the proposed text would be an infraction of the Chicago Convention, entailing the application of the dispute settlement procedure thereunder. It would also be an infraction of international law, possibly involving the responsibility of States and allowing for compensation.

¹⁸A25-WP/3.

regulations for interception. There was also a requirement for each contracting State to take "appropriate measures" to ensure that aircraft of its nationality "comply with a proper order to land..., provided that such compliance not (*sic*) endanger the safety of the aircraft or its occupants".

The USSR¹⁹ took a different approach. It would require the State of registry and/or of the operator of an aircraft "or the State from whose territory, to whose territory or through whose territory the aircraft flies" to undertake to ensure that such aircraft did not violate the sovereignty of other States and was not used for purposes inconsistent with the aims of the Chicago Convention. Each contracting State had the right, in accordance with its applicable regulations, to require aerial intruders to land. While each "contracting State in whose airspace a civil intruder aircraft is present, shall refrain from using weapons against such aircraft", this did not "detract from the right of a contracting State to protect its sovereignty or safeguard its security". Air Traffic Control (ATC) units were to inform the aircraft of any deviation from its assigned route and to notify any such deviation to the authorities "in whose direction the deviation is taking place or in whose airspace the aircraft is present". Finally, intruder aircraft were to be required by legislation to "establish communication on the prescribed international emergency frequency and respond to the orders of the [ATC] units of the contracting State in whose airspace it is present and of its intercepting aircraft...."

The Ecuadorian draft²⁰ was along the lines of the Austrian-French and United State's proposals, but it appears that it did not pursue its proposal.²¹

LACAC suggested certain "Basic Principles Related to the Interception of Civil Aircraft".²² It provided for an obligation of "contracting States not to resort to the use of weapons against civil aircraft". However, like the other proposals, each State would

¹⁹A25-WP/6.

²⁰A25-WP/8, and Attachment.

²¹Fitzgerald, *supra*, note 16 at 298.

²²A25-WP/9, and Corrigendum No. 1.

have the "right to intercept and to require the landing at a suitable airport of any aircraft which violates its sovereignty or is used for purposes inconsistent with the aims of the Chicago Convention"; States should incorporate in their domestic legislation provisions making it mandatory for civil aircraft to comply with such an order to land; for this purpose, States should follow ICAO SARPs. Unlike the Austrian-French, U.S. and Ecuadorian proposals, LACAC made no reference to the UN Charter;²³ it is also unclear, under the LACAC draft, which States were obliged to legislate so as to make it mandatory for aircraft to comply with the order to land.

The Republic of Korea²⁴ proposed the insertion of a new preambular paragraph to the Chicago Convention by which States would recognize "that the use of force against innocent lives in the air constitutes a violation of peremptory norms of international law". Under a new Article 3 *bis*, contracting States would reaffirm that they must not use force against civil aircraft and any contracting State which violated this provision would "incur international responsibility". Any member State which violated the new Article 3 *bis* would be subjected to "appropriate measures" by the Assembly, including the suspension of voting power or expulsion from ICAO, "depending on the circumstances of the commission of the offense".

In the words of Fitzgerald, the "development of a single text of an amendment to the Chicago Convention out of these varied proposals, all of which had political connotations, posed a considerable challenge to the Assembly",²⁵ which was attended

²³Fitzgerald, *supra*, note 16 at 298.

²⁴A25-WP/10, Attachment, and Corrigendum No. 1. The Republic of Korea described its proposal as a reaffirmation of existing rules of international law which prohibit the use of force against civil aircraft. It believed that the use of force against civil aircraft violated peremptory norms of international law. Reference to such prohibition merely restated the existing rules, and was "not intended to create any new rules in this regard".

In line with the other drafts, the Republic of Korea further proposed that each contracting State would be entitled to require the aircraft to land if it "violates the sovereignty of that State...or if it is used for any purpose inconsistent with the aims of [the Chicago] Convention", but such "rights of the territorial sovereign must be exercised in such a manner that the safety of the intruding aircraft and...lives on board must not be endangered"; the right to require a landing should not be misused.

²⁵*Supra*, note 16 at 298.

by 106 ICAO member States, one non-member State and eleven international organizations.

In opening the Assembly, its acting President (later elected President) and President of the Council stated:

"There may be some who believe that the prohibition of use of force against civil aircraft is already a firm part of general international law and that there is no need to codify that provision in the body of the Convention....Even in time of war, international law has explicit provisions for the protection of civilians in armed conflict, on the protection of the wounded and shipwrecked and on the protection of the prisoners of war. The International Court of Justice ruled, referring to customary international law, that these fundamentally humanitarian principles are more exacting in time of peace than they are in time of war. There is no doubt that these humanitarian principles concerning the protection of human life are deeply rooted in customary international law. However, the international community believes that 'only written law can remove the uncertainties of the other prime source, customary law; it fills existing gaps in the law and gives precision to abstract general principles, the practical application of which have not previously been settled.' These are the words of the Secretary-General of the United Nations, ... which he used...in this Assembly Hall in September 1982. A written rule of law is far superior to general principles recognized as customary law because frequently the very existence of a customary law or its exact scope and content may remain subject to challenge."²⁶

During Plenary meetings held from 24-26 April 1984, a number of general statements were made, from which it could be discerned that the majority of speakers favoured an amendment to the Chicago Convention. A few States did not speak on this issue or otherwise did not clearly commit themselves to a position. However, a surprisingly large minority made up of mostly socialist States did not see any reason to amend the Convention, one reason often put forward being that the Chicago Convention had served civil aviation well over the preceding forty years and that it offered a balance between the safety of civil aviation and the protection of State sovereignty which should not be disturbed. They believed that the way forward was through the adoption of

²⁶ICAO Doc. 9437, *supra*, Ch. II, note 13 at 19.

amendments to the existing Annexes or a new Annex.²⁷ Some States which preferred not to have an amendment were nevertheless prepared to discuss one if it was the wish of the Assembly to have one.

A large number of States expressed the view that there already existed in international law a prohibition of the use of force against civil aircraft, and that in fact the Assembly would be doing no more than re-affirming the existence of such a rule. These States covered the entire geographical and political spectrum, with the notable exception of Latin American and African States.

Almost the entire United Kingdom statement was devoted to this issue. Its Delegation stated that:

"the development of international law...has made it clear beyond doubt that in time of peace, the use of force against civil aircraft is subject to very severe limitations. But...it is desirable for States to reaffirm, by an express provision in the Chicago Convention, the legal rules concerning the use of force against civil aircraft. We are here to try to codify the relevant international law so that it is made clear...that no State is justified in using force against civil aircraft except in those wholly exceptional circumstances when it can be used in self-defence...."²⁸

The United Kingdom Delegation examined treaty law, the practice of States, arbitral and judicial decisions and national laws, and concluded that:

"Thus, after examining all sources of international law, it is clear that the use of force against a civil aircraft in flight in time of peace is prohibited. The only exception to this rule is when force can be justified as a legitimate exercise of a State's inherent right of self-defence."²⁹

The Delegation of the USSR believed that "the existing provisions of international law...contain a sufficient number of general norms which bind States to ensure the safety of flights". Further, after referring to the proposals of other States to amend the

²⁷See in particular, the statements of the Delegations of the USSR (*ibid.* at 25-27), Bulgaria (*ibid.* at 33-35), China (*ibid.* at 36), Cuba (*ibid.* at 38), Czechoslovakia (*ibid.* at 40-41), Hungary (*ibid.* at 47-48), India (*ibid.* at 50-53), Vietnam (*ibid.* at 72), Syria (*ibid.* at 74-75) and Democratic Yemen (*ibid.* at 82).

²⁸*Ibid.* at 27.

²⁹*Ibid.* at 29.

Convention and identifying therein certain principles such as the "non-use of force against intruder aircraft" and "the right to demand landing", the Delegation stated that "[a]mendments of this sort only specify the existing norms and provide for the actions of States in exercising their rights and commitments under the Chicago Convention."³⁰ Similarly, the Hungarian Delegation saw already in the Chicago Convention "a ban on the use of weapons against civil aircraft where they are genuinely not being utilized for other purposes."³¹ The Delegation of Cyprus referred to the "principles of non-use of force against civil aircraft, the respect of national sovereignty" and "safety" as "peremptory norms of international law".³²

The Delegation of Austria, referring to its joint proposal with France, said that the "amendment reaffirms the prohibition of the use of force against civil aircraft, already prohibited under present international law", and that "the drafting...should unequivocally reflect the fact that we are merely re-stating an existing rule of international law as regards the prohibition of the use of force".³³ The French Delegation also was of the view that the use of force against civil aircraft was already prohibited by "general international law" at the time that the Chicago Convention was drafted in 1944.³⁴

Very few States seem to have denied this view of the law. In light of its submissions to the I.C.J. in the 1955 El Al incident, the Israeli Delegation surprisingly stated that:

"today there exists...a lacuna in the norms of conduct in the sphere of international civil aviation - a lacuna which has rendered somewhat vague and

³⁰*Ibid.* at 25-26.

³¹*Ibid.* at 47.

³²*Ibid.* at 76.

³³*Ibid.* at 31-32.

³⁴*Ibid.* at 43. See also the statements of the Delegations of Australia (*ibid.* at 30), Japan (*ibid.* at 56), the Netherlands (*ibid.* at 59), New Zealand (*ibid.* at 60-62), the Republic of Korea (*ibid.* at 64-65), Canada (*ibid.* at 68-69), Italy (*ibid.* at 73), the United States (*ibid.* at 76), Switzerland (*ibid.* at 78) and the Observer from the International Air Transport Association (IATA) (*ibid.* at 86).

cloudy that vital area dealing in matters of intervention in civil aviation, including the use of force against civil aircraft."³⁵

Less clearly, the Delegation of Algeria spoke of the need to strengthen and improve the Chicago Convention, and to complement and strengthen the standards of international law,³⁶ which can be interpreted to mean that the Assembly was not merely engaged in an exercise of codification.

A vast majority of speakers saw the need to balance the prohibition of the use of force against civil aircraft with provisions to ensure respect for States' sovereignty over their airspace. Many also thought it necessary to balance such a prohibition by taking into account the misuse of civil aviation for purposes incompatible or inconsistent with the aims of the Chicago Convention. For example, the Delegation of Austria, in explaining the joint proposal, stated that it, "in keeping with the inherent balance of the Chicago Convention, also recognizes the necessity to protect the territorial sovereignty of States from violations and activities inconsistent with the aims of the Convention".³⁷ The Delegation of France also saw in the joint proposal "the principle of respecting national sovereignty which is reflected in the right to order any offending aircraft to land."³⁸ The USSR Delegation said that the Assembly:

"should set itself the goal of finding additional means to raise the level of...flight safety and prevent the violation of States' sovereignty by civil aircraft as well as to prevent the illegal use of civil aircraft."³⁹

The Delegation of Cuba saw three principles of "indisputable and universal character", being: (a) respect for States' sovereignty; (b) the principle in Article 4 of the Chicago

³⁵*Ibid.* at 53.

³⁶*Ibid.* at 80.

³⁷*Ibid.* at 32.

³⁸*Ibid.* at 45.

³⁹*Ibid.* at 25.

Convention not to use civil aviation for any purpose inconsistent with the aims of the Convention; and (c) the principle of not using armed force against civil aviation.⁴⁰

Finally, a small number of States indicated that any amendment must expressly refer to the UN Charter, in particular Article 51 thereof related to the inherent right of self-defence. The Austrian Delegation believed that any prohibition of the use of force against civil aircraft should remain subject to the relevant provisions of the Charter and in particular, Article 51,⁴¹ while the French Delegation expressed the opinion that the amendment must respect the principles enshrined in such Charter.⁴² The Delegation of Indonesia stated that the amendment "should not be derogatory to the principle enunciated in Article 51".⁴³ On the other hand, the Delegation of New Zealand wanted to know what Article 51 had to do with civil aviation because, in its view, an aircraft used to mount an armed attack "was simply not engaged in civil aviation and nothing in the Chicago Convention applies to it."⁴⁴

An Executive Committee, open to all participants, initially met from 26 April to 1 May 1984.⁴⁵ A clear majority of speakers now clearly favoured an amendment to the Chicago Convention. Some States still saw no need for such an amendment, but an increasing number of these were proceeding on the basis that there would in fact be an amendment. Nearly all speakers recognized the need for the amendment or other

⁴⁰*Ibid.* at 36-37. See also the statements by the Delegations of Senegal (*ibid.* at 24), Bulgaria (*ibid.* at 33-35), China (*ibid.* at 35-36), Czechoslovakia (*ibid.* at 41), Egypt (*ibid.* at 42), Hungary (*ibid.* at 47-48), India (*ibid.* at 50-53), the Netherlands (*ibid.* at 59), Poland (*ibid.* at 63), Republic of Korea (*ibid.* at 65), Canada (*ibid.* at 69), Belgium (*ibid.* at 71), Vietnam (*ibid.* at 72), Syria (*ibid.* at 74-75), Cyprus (*ibid.* at 76-77), Algeria (*ibid.* at 81), Democratic Yemen (*ibid.* at 84) and the International Federation of Air Line Pilots' Associations (IFALPA) (*ibid.* at 88).

⁴¹*Ibid.* at 31.

⁴²*Ibid.* at 45.

⁴³*Ibid.* at 48. See also the intervention by the Delegation of Belgium (*ibid.* at 71).

⁴⁴*Ibid.* at 60.

⁴⁵The statements made during these first eight meetings can be found in ICAO Doc. 9438, *supra*, Ch. III, note 198 at 7-96.

document to include a prohibition of the use of force against civil aircraft, as well as provisions to ensure respect for the sovereignty of a State over its airspace. A large number of member States also believed it necessary to protect States from activities inconsistent with the aims of the Convention.

No less than 27 speakers expressly or by implication put forward the view that there already existed in international law a prohibition of the use of force against civil aircraft.⁴⁶ There was only one speaker who took a different view.⁴⁷

Again a division emerged with respect to the inclusion of a reference to the UN Charter or to Article 51 thereof, with opinions split fairly evenly. Proponents offered no, or no particularly convincing, arguments for its inclusion.⁴⁸ A few of those who favoured such a reference would nevertheless accept not making any reference on the basis that Article 103 of the Charter gave it precedence over any international agreement, and that the right of self-defence could also not be modified by any other text: in this

⁴⁶E.g., the USSR Delegation stated that the existing rules of international law fixed the principle of safety of international flights and that of respect of full and exclusive sovereignty of States (*ibid.* at 12), and later on referred to a codification of the principle of non-use of force against civil aircraft (*ibid.* at 65). The Delegation of Jamaica said that on the question of the prohibition of the use of force, "the Assembly was essentially attempting to make a statement which was declaratory of international law" and that "any undertaking by States would not be constituted as a new obligation but declaratory of an existing obligation" (*ibid.* at 22). It was stated by the Delegation of the Ivory Coast that the amendment "must reaffirm the internationally recognized principle that there must be no recourse to force against civil aircraft" (*ibid.* at 41). The Delegation of Nigeria believed that the Chicago Convention provided adequate safeguards for the safe development of civil aviation, but it "would be willing to co-operate to work out a meaningful amendment, that would reaffirm existing provisions in the Convention and international law" (*ibid.* at 80). The Delegation of Colombia expressed the opinion that the amendment "recognized the obligation of all States to abstain from the use of force against any civil aircraft" (*ibid.* at 79-80).

⁴⁷The Delegate of Tanzania said that:

"...the non-use of force as such was not regulated in international law. It was not prohibited" (*ibid.* at 89).

⁴⁸E.g., the Austrian Delegation considered it appropriate to include a reference to the Charter "because of the overriding importance of that basic instrument governing international relations and, in particular, its fundamental principles regarding the non-use of force and the inherent right to self-defence" (*ibid.* at 94), while that of Greece believed that reference "to Article 51 would ensure the greatest degree of respect for the concept of self-defence and the limits imposed thereon" (*ibid.* at 57). The Delegation of Italy stated that "the general principles contained in the...Charter could not be but reaffirmed" (*ibid.* at 51).

sense, reference to the Charter or to Article 51 would be superfluous.⁴⁹ A few were in favour of a general reference to the Charter but not to Article 51, without providing justification for this approach.⁵⁰ Others, stating similarly that the Charter prevailed over other agreements, did not, *a priori*, see a need to refer to it.⁵¹ Some had more substantive objections, namely, that the Charter and Article 51 in particular was unduly restrictive or was not applicable *per se* to the matter under consideration. The Delegation of the USSR believed the reference to Article 51 to be unjustified, since:

"It substantially reduced the possibilities of States in ensuring that their sovereignty was not violated and civil aviation was not used for illegal purposes. It was commonly known that Article 51... spoke of an armed attack, i.e. aggression, and the ensuing right of States to self-defense. Thus States would have no right to arrest the illegal use of civil aviation in any cases but aggression."⁵²

Ghana objected on a different basis:

"Article 51...became applicable only if the civil aircraft were seen to be armed and ready to attack....[A]n armed civil aircraft ready for an attack ceased to be a civil aircraft. It became a military aircraft which was not covered by the Chicago Convention....Any amendment...must, therefore, be independent of allusions to Article 51...."⁵³

There was general agreement that each State was entitled under certain circumstances to require the landing of foreign aircraft flying above its territory; that in the interception of such aircraft, the subjacent State must not endanger the safety of the

⁴⁹See the interventions of the Delegations of France (*ibid.* at 8) and the United States (*ibid.* at 44).

⁵⁰See the statements of the Delegations of Egypt (*ibid.* at 42), Guatemala (*ibid.* at 49) and Saudi Arabia (*ibid.* at 72).

⁵¹The Delegation of Syria "saw no justification for referring to the UN Charter, because any instrument that was inconsistent with it was not applicable" (*ibid.* at 52), and that of Chile propounded the view that it was unnecessary to refer to Article 51 "since the UN Charter had precedence over any other international text" (*ibid.* at 56). See also the intervention of the Delegation of Switzerland (*ibid.* at 61).

⁵²*Ibid.* at 15. See also the statement of Vietnam (*ibid.* at 71).

⁵³*Ibid.* at 78. Similarly, Mali saw the reference to Article 51 as inappropriate "as this Article related to cases of armed aggression against a State" (*ibid.* at 88).

aircraft or the lives of those on board; that each ICAO member State should publish its regulations relating to interception and transmit these to ICAO; and that each State should ensure that aircraft carrying its nationality mark comply with an order to land, provided that such compliance did not endanger the aircraft.

Many delegations which favoured an amendment to the Chicago Convention believed that the Austrian-French draft could be used as a working document in the preparation of such amendment, with the LACAC document and the U.S. draft also eliciting positive comments. To this end, a number of amendments were proposed in relation to the Austrian-French draft.

A large number of delegations believed that the amendment should reflect the fact that it was declaratory of an existing rule of international law as regards the prohibition of the use of force against civil aircraft; it was therefore suggested that in the first line of paragraph (a) of the Austrian-French text, the word "undertakes" should be replaced by "recognizes", to read: "Each contracting State recognizes...."

The Delegation of Jamaica, commenting on the phrase "use of force", stated that:

"any interception must necessarily involve an element of interference and, therefore, the concept of the use of force, which must not be so construed as to deny the legitimacy of interception in appropriate cases. He considered that suggestions made confined the use of force to the use of armed force, and queried whether that would be appropriate....ICAO, in developing provisions on interception of aircraft, found it useful to use the term 'weapons'. In Annex 2..., the language used was 'intercepting aircraft should refrain from the use of weapons in all cases of interception of civil aircraft'."⁵⁴

⁵⁴*Ibid.* at 22.

The USSR, in its draft proposal, had referred to the use of "weapons".⁵⁵ Some other delegations preferred to use the phrase "armed force", in recognizing also that an order to land or an interception could be interpreted as a use of force.⁵⁶

As to the aircraft which were to be the subject of the amendment, the Austrian-French draft merely referred to "aircraft of the other contracting State". There was general agreement to delete the reference to "other contracting State" on the basis that the protection should be granted not only to civil aircraft of other ICAO member States, but also extended to aircraft registered in non-contracting States.⁵⁷ There was a proposal from Jamaica to qualify "aircraft" by referring to "aircraft engaged in civil aviation";⁵⁸ this suggestion obtained some support.⁵⁹ However, some other States did not like the proposal, Kenya fearing that adoption of such wording would provide a loop-hole for some States to attack civil aircraft, by claiming that it was not engaged in civil

⁵⁵*Supra*, note 19 and accompanying text. In the Executive Committee, the Delegation explained the rationale behind using this term thus:

"...[I]nterception almost always involved the use of force... Obviously, it was out of humane consideration that force was used in interception to make an intruder leave...without having to resort to other measures which could pose a threat to human life. In other words, force could be used in the interest of ensuring flight safety....[The threat to human life] only arose with the use not of force but of weapons" (*ibid.* at 65).

⁵⁶E.g., those of Portugal (ICAO Doc. 9438, *supra*, Ch. III, note 198 at 83), Mali (*supra* at 88) and Ethiopia (*supra* at 89).

⁵⁷E.g., see the statements of the Delegations of Austria (*ibid.* at 94), the United States (*ibid.* at 44), Japan (*ibid.* at 27), Finland (*ibid.* at 42) and Chile (*ibid.* at 56).

⁵⁸The Delegation provided the following explanation for its suggestion:

"It might not be enough to indicate that force was not to be used against civil aircraft. Civil aircraft might be used for military or other aggressive purposes and to that extent would be disqualified from its true description of a civil aircraft. Nevertheless an aircraft registered...as a civil aircraft would therefore *a priori* be regarded as a civil aircraft and must be engaged in civil aviation....If the aircraft was used for any purpose inconsistent with the aims of the Convention, it would not be engaged in civil aviation" (*ibid.* at 23).

⁵⁹See the statements of the Delegations of Denmark (*ibid.* at 33), New Zealand (*ibid.* at 38), Finland (*ibid.* at 42), and Portugal (*ibid.* at 83).

aviation,⁶⁰ while the Delegation of Australia believed that "it would enable a State to attack a civil aircraft on the grounds, however slight or subjective, that the aircraft was not used wholly for civil aviation purposes."⁶¹ Most States preferred the simple expression, "civil aircraft". The United States, in its draft, had suggested the words "civil aviation" to "provide protection to other elements of civil aviation such as ground facilities as well as civil aircraft",⁶² but this proposal did not obtain support.

With respect to the second sentence of paragraph (a) of the Austrian-French text, the Delegation of Japan suggested that the words "the scope of the Charter of the United Nations" be replaced by "'the rights and obligations of States under the Charter of the United Nations' because the issue in question in this particular context (i.e. recourse to legitimate self-defence) was not 'the scope' of the ... Charter but 'the rights and obligations of States provided' in the...Charter."⁶³

It will be recalled that under the first sentence of paragraph (b) of the Austrian-French proposal, each contracting State was entitled to require a landing "if the aircraft violates the sovereignty of that State...or if it is used for purposes inconsistent with the aims of this Convention."⁶⁴ In accordance with the United States' draft, the subjacent State could require landing where the aircraft had entered foreign territorial airspace without authority or otherwise appeared to be engaged in activities inconsistent with the aims of the Chicago Convention. In the view of the United States, the phrase "violations of sovereignty" was ambiguous and possibly too subjective a ground to require landing.⁶⁵ Some States expressly supported the United States' wording of the first ground

⁶⁰*Ibid.* at 35.

⁶¹*Ibid.* at 37. See also the statements by the Delegations of France (*ibid.* at 39), the United States (*ibid.* at 44), Greece (*ibid.* at 57) and Singapore (*ibid.* at 85).

⁶²*Ibid.* at 44.

⁶³*Ibid.* at 27; see also A25-WP/12 at 2.

⁶⁴*Supra*, note 17 and accompanying text.

⁶⁵ICAO Doc. 9438, *supra*, Ch. III, note 198 at 44.

to require landing, in lieu of the phrase "violations of sovereignty".⁶⁶ The United Kingdom believed that before the subjacent State might require an aircraft to land, "it must have reasonable grounds for believing that the aircraft was in fact an intruder, or was in fact being used for a purpose inconsistent with the aims of the Convention."⁶⁷

As to the second sentence of paragraph (b) of the Austrian-French proposal, by which the requirement to land would be in accordance with Chicago Convention Annex provisions, certain problems were foreseen early on. Austria noted that:

"[m]ention of annexes had caused difficulties for some States which had pointed out this would be the first provision in the Convention to establish a link with its annexes.... However, it might be more conducive to the task of the Assembly....not to make any direct connection between [the Convention] and its annexes. The co-authors would be prepared to replace the reference to annexes by a cross-reference to paragraph (a) which would spell out clearly that the means used when requiring an aircraft to land would be limited by prohibition of the use of force."⁶⁸

Several other States favoured the deletion of the references to the Annexes and would prefer mention of paragraph (a) relating to the prohibition of the use of force against civil aircraft and the obligation not to endanger the safety of the aircraft and the lives of its occupants when intercepting such aircraft.⁶⁹

Paragraph (c) of the Austrian-French text made it obligatory on each contracting State "to establish all necessary provisions in its national laws" to make it mandatory for aircraft of its nationality to comply with an order to land. The United States' draft simply required each contracting State to take "appropriate measures" to ensure such compliance. The Japanese Delegation preferred the formulation of the United States, going so far as to say that by "making national legislation mandatory, his Delegation

⁶⁶See the interventions of the Delegations of Japan (*ibid.* at 28), Malawi (*ibid.* at 33), the United Kingdom (*ibid.* at 34) and Tunisia (*ibid.* at 59-60).

⁶⁷*Ibid.* at 34.

⁶⁸*Ibid.* at 9.

⁶⁹E.g. see the statements of the Delegations of the United States (*ibid.* at 12), Republic of Korea (*ibid.* at 20) and Canada (*ibid.* at 31).

would encounter difficulties in accepting the entire amendment" and that, "for the purpose of assuring compliance with the order to land, enacting a legislation was not necessarily an indispensable condition for every country."⁷⁰ On the other hand, the Delegation of Malawi "believed that if a State required its own national aircraft to follow certain orders of other States, then those provisions ought to be incorporated in its national laws or regulations."⁷¹ The Delegation of Australia spoke of "an obligation on each Contracting State to adopt national legislation or other appropriate measures".⁷² A few delegations believed that the obligation should rest not only on the State of registry, but also on the State of the operator.⁷³

Finally, a number of States indicated that they wished to see included a provision whereby the State of registry and other States would ensure that civil aircraft did not act in any manner inconsistent with the aims of the Chicago Convention.⁷⁴ The Delegation of Cuba in fact suggested a new provision, to read:

⁷⁰*Ibid.* at 28.

⁷¹*Ibid.* at 33.

⁷²*Ibid.* at 37.

⁷³The Delegation of Canada stated:

"...[I]n view of the increasing frequency with which aircraft were registered in one State to (*sic*) operators located in another State, the obligation to comply with the request to land should be extended to the State in which the operator has his principal headquarters" (*ibid.* at 31).

See also the statements of the Delegations of Australia (*ibid.* at 37), Israel (*ibid.* at 55) and Portugal (*ibid.* at 83).

⁷⁴The Soviet draft would require the State of registry, the State of the operator, or the State from whose territory, to whose territory or through whose territory the aircraft was flying, to ensure that such aircraft did not violate the sovereignty of other States and were not used for any purposes inconsistent with the aims of the Chicago Convention (*supra*, note 19 and accompanying text). The Delegation of Poland spoke of:

"an obligation of all Contracting States to collaborate with the aim of preventing violations, misuses and other consequences, and in particular of ensuring that civil aircraft would not violate the sovereignty of other States and would not be used for illegal purposes or those inconsistent with the aims of the Convention" (*ibid.* at 74).

"Each Contracting State agrees to adopt all necessary provisions in its national laws to prevent civil aircraft on its register from being used by their operators for acts inconsistent with the aims of this Convention."⁷⁵

The Delegation was:

"concerned that such unlawful activities were not prosecuted from the point of origin and instead had to be prosecuted by the victim States, imposing on the latter an extremely heavy economic burden or involving the inability or absolute impossibility of preventing such acts through lack of resources."⁷⁶

Following the expression of these views, the Chairman of the Committee summarized the main points.⁷⁷ The Committee then established a Working Group of 23 delegations with the task of drafting the text of an amendment taking into account the documentation submitted, general statements and proposals and views expressed, as well as the Chairman's summary.⁷⁸ It was understood that these terms of reference did not prejudice the final form and content of whatever instrument the Assembly might decide on.⁷⁹

At a meeting of the Executive Committee on 8 May 1984, the Working Group presented its report in A25-WP/15 REVISED. The Group put forward three paragraphs on which it had been able to agree. In accordance with paragraph (a), contracting States recognized "that every State must refrain from resorting to the use of weapons against civil aircraft in flight and that in case of interception, the lives of persons on board and the safety of the aircraft must not be endangered"; reference was made to the Charter of the United Nations, but not to Article 51. Paragraph (b) concerned the right of the subjacent State to require the landing of aircraft or the giving of other instructions.

⁷⁵ICAO Doc. 9438, *supra*, Ch. III, note 198 at 62.

⁷⁶*Ibid.*

⁷⁷*Ibid.* at 96-97; also reproduced in A25-WP/14.

⁷⁸ICAO Doc. 9438, *supra*, Ch. III, note 198 at 103.

⁷⁹*Ibid.* at 106-107.

Paragraph (c) obligated each contracting State to legislate so as to make compliance by its civil aircraft with such order or instruction mandatory, under pain of severe penalties. A proposal to the Working Group by the Polish Delegation for the inclusion in the amendment of the following paragraph (d):

"The States undertake to take appropriate measures with the aim of preventing violations by civil aircraft of the air sovereignty of other States, correcting possible unauthorized deviations of such aircraft and discouraging the use of civil aviation for illegal purposes inconsistent with the aims of the Convention,"⁸⁰

was not accepted.

In presenting the Group's report, its Chairman explained that it was felt that the Convention "required an amendment containing a statement of a declaratory nature which would reaffirm that States should refrain from using weapons against civil aircraft" and that reference should be made to the Charter of the United Nations; the amendment was to be placed immediately after Article 3. He stressed that the amendment was a package deal, and that a draft resolution attached to A25-WP/15 was also part of the package.⁸¹

There was general support for paragraphs (a), (b) and (c) as proposed, although some minor suggestions for amendment were put forward, none of which were carried. In the main, the discussion thereafter focussed on the desirability or not of including paragraph (d) as part of the amendment. Although a majority of States did not want the proposed paragraph (d), there was a substantial minority who spoke strongly in favour of its inclusion.

Various arguments were raised in opposition: that the paragraph was superfluous in that it merely reflected what was already in Article 4 and other provisions of the Convention;⁸² and that it would upset the balance (between the principles of non-use of force or weapons against civil aircraft and the protection of sovereignty) achieved in

⁸⁰A25-WP/15 at 2; and Fitzgerald, *supra*, note 16 at 302.

⁸¹ICAO Doc. 9438, *supra*, Ch. III, note 198 at 110-111.

⁸²E.g., see the interventions of the Delegations of Burundi (*ibid.* at 127), Spain (*ibid.* at 128), United States (*ibid.* at 130), Switzerland (*ibid.* at 134), Zaire (*ibid.* at 137), United Kingdom (*ibid.* at 139), Togo (*ibid.* at 146) and Mexico (*ibid.* at 149).

paragraphs (a), (b) and (c) of the Working Group's draft.⁸³ There were other more substantive objections: the Delegation of Senegal felt that "any proposed addition which would lead to an undertaking of States to prevent any technical or human error leading to a deviation from the route would not be acceptable".⁸⁴ The Delegation of Spain "wondered whether States would be able to take the measures called for in (d)".⁸⁵ The Delegation of the United Kingdom stated that the Polish proposal:

"contained an important ambiguity in that it could be read as implying that a State could take appropriate measures against the aircraft of another State without the safeguarding umbrella of paragraph (a). In other words (d) could be interpreted as envisaging the possible use of force against civil aircraft.

...[H]is Delegation also did not understand what the proposal meant in practical terms. As one element, it envisaged a clear legal obligation being placed on individual States to take appropriate measures to prevent violations of airspace or deviations from the flight path. The United Kingdom and many other countries had spent enormous sums of money on air traffic control, communications, radar, weather forecasting, etc., and the airlines already faced heavy costs for equipment and facilities. Nevertheless, aircraft still frequently went off course, and the best technical facilities in the world could still not guarantee that deviations or violations would never happen."⁸⁶

Perhaps underlying the objections was the fear that a State which shot down an aircraft "could seek to exculpate itself by alleging that the state of registry or the state of the

⁸³E.g., see the statements of the Delegations of France (*ibid.* at 118-119), Colombia (*ibid.* at 122), the Philippines (*ibid.* at 124), Spain (*ibid.* at 128), Italy (*ibid.* at 128), the United States (*ibid.* at 130), Brazil (*ibid.* at 134), Switzerland (*ibid.* at 134) and Singapore (*ibid.* at 134).

⁸⁴*Ibid.* at 126.

⁸⁵*Ibid.* at 128.

⁸⁶*Ibid.* at 138. The Delegation of Canada saw that the text "also seemed to be introducing responsibility of any State or States, including States other than the State of Registry or of the operator, which could be perceived as having been in a position to correct deviations irrespective of whether or not this was technically possible and could have been reasonably expected" (*ibid.* at 140). The Delegation of Togo believed that the adoption of the Polish proposal "would give States the right, and even the duty to use armed force against any civil aircraft which, deliberately or not, had entered their airspace, and it would thus diminish or completely nullify the legal effects of [paragraphs (a), (b) and (c) of the Working Group's text]" and that further, "it would be impossible to uphold the provision contained in (d)" (*ibid.* at 146).

operator, as the case may be, had breached their obligations by not preventing the intrusion" (emphasis added).⁸⁷

Some of those who wished to see the Polish proposal added cited the need to establish or enhance the balance between the principles of non-use of weapons against civil aircraft and respect for State sovereignty.⁸⁸ The Delegation of Poland believed that such a provision was essential to "balance the absolute immunity" granted to civil aircraft under paragraph (a).⁸⁹ The Delegation of Bulgaria spoke of the "necessity of measures which each country had to take to avoid or eliminate unintentional violation" and stressed "the importance of taking...practical steps in preventing violation of the airspace of another sovereign State."⁹⁰ The Delegation of Czechoslovakia stated that the first premise for safe passage of civil aircraft was its observance of designated routes; adoption of the Polish draft would restrict the possibility of violation of airspace and "would forestall the use of civil aviation for illegal purposes inconsistent with the aims of the Chicago Convention".⁹¹ The Delegation of Cuba, which had earlier proposed a text with the same general intent, although more narrowly worded,⁹² saw the Polish proposal as a means of "forestalling" interception.⁹³ The Delegation of the USSR also had the opinion that appropriate preventive measures could avoid violations of sovereignty and other unlawful activities by civil aircraft; if there were no violations, there would be no need to correct them or to carry out interceptions. Further, it was

⁸⁷Fitzgerald, *supra*, note 16 at 303.

⁸⁸E.g., see the statements made by the Delegations of Democratic Yemen (ICAO Doc. 9438, *supra*, Ch. III, note 198 at 118), Syria (*supra* at 121), Hungary (*supra* at 122) and Ethiopia (*supra* at 140).

⁸⁹*Ibid.* at 114.

⁹⁰*Ibid.* at 120.

⁹¹*Ibid.* at 124.

⁹²*Supra*, note 75 and accompanying text.

⁹³ICAO Doc. 9438, *supra*, Ch. III, note 198 at 129.

necessary to obtain a firm obligation of States to prevent illegal acts such as the spraying of poisonous substances and the illegal carriage of narcotics, etc.⁹⁴

Soon after the Working Group presented its report, the Delegation of Ghana suggested a re-draft of paragraph (d) proposed by Poland, stating that "the root cause of the recourse to the use of weapons against civil was the misuse of civil aviation" and that it was only after all States had "undertaken to effectively prohibit the misuse of civil aviation that they could proceed to take steps to prohibit the use of weapons against civil aircraft".⁹⁵ However, the ensuing debate concentrated on the Polish text of paragraph (d), and it was only after it became clear that there was a real possibility that the Assembly would not be able to formulate a text of an amendment which would obtain the support of two-thirds of ICAO member States attending necessary for its adoption,⁹⁶ and equally importantly, which would be widely ratified, that the meeting saw the Ghanian proposal as a possible compromise. The Delegation presented a modified version later that day, to read as follows:

"Each contracting State undertakes to prohibit the deliberate use of civil aviation by civil aircraft registered in that State or operated by anybody having the principal place of business or residence in that State, for any purpose inconsistent with the aims of this Convention. This provision shall not be interpreted as modifying in any way the obligation of all Contracting States set out in paragraphs (a), (b) and (c) of this Article."⁹⁷

Thereupon, Poland withdrew its proposal in favour of the Ghanian draft.⁹⁸

⁹⁴*Ibid.* at 132-133.

⁹⁵*Ibid.* at 120.

⁹⁶Article 94(a) of the Chicago Convention (*supra*, Introduction, note 1) provides that any proposed amendment to the Convention must be approved by a two-thirds vote of the Assembly and shall come into force upon ratification of at least two-thirds of the contracting States.

⁹⁷ICAO Doc. 9438, *supra*, Ch. III, note 198 at 141. See also A25-WP/18.

⁹⁸ICAO Doc. 9438, *ibid.* at 147.

After informal consultations by the Chairman of the Executive Committee, a text of paragraph (d) based on the Ghanian proposal (as amended) was unanimously agreed by the Executive Committee, on the morning of the very last day of the Assembly.⁹⁹

The Executive Committee also agreed on the text of a resolution co-sponsored by 52 States, later adopted as Resolution A25-3.¹⁰⁰

The Plenary, on the afternoon of 10 May 1984, proceeded to unanimously adopt the text of Article 3 *bis*¹⁰¹ and the aforementioned Resolution.¹⁰²

b) Analysis of Content of Article 3 *bis*

The text of Article 3 *bis* reads:

- "(a) The contracting States recognize that every State must refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of aircraft must not be endangered. This provision shall not be interpreted as modifying in any way the rights and obligations of States set forth in the Charter of the United Nations.

- (b) The contracting States recognize that every State, in the exercise of its sovereignty, is entitled to require the landing at some designated airport of a civil aircraft flying above its territory without authority or if there are reasonable grounds to conclude

⁹⁹*Ibid.* at 154-155.

¹⁰⁰*Ibid.* at 158. It called upon ICAO Member States, to, *inter alia*:

- a) co-operate in improving co-ordination between military and civil communications systems and ATC agencies so as to enhance the safety of civil aircraft during the identification and interception phases;
- b) seek to harmonize procedures for interception of civil aircraft; and
- c) seek adherence to uniform navigational and flight operational procedures by flight crew of civil aircraft.

(ICAO Doc. 9437, *supra*, Ch. II, note 13 at 15; and ICAO Doc. 9662: *Assembly Resolutions in Force (as of 4 October 1995)* at I-7).

¹⁰¹ICAO Doc. 9437, *ibid.* at 95.

¹⁰²*Ibid.* at 103.

that it is being used for any purpose inconsistent with the aims of this Convention; it may also give such aircraft any other instructions to put an end to such violations. For this purpose, the contracting States may resort to any appropriate means consistent with relevant rules of international law, including the relevant provisions of this Convention, specifically paragraph (a) of this Article. Each contracting State agrees to publish its regulations in force regarding the interception of civil aircraft.

- (c) Every civil aircraft shall comply with an order given in conformity with paragraph (b) of this Article. To this end each contracting State shall establish all necessary provisions in its national laws or regulations to make such compliance mandatory for any civil aircraft registered in that State or operated by an operator who has his principal place of business or permanent resident in that State. Each contracting State shall make any violation of such applicable laws or regulations punishable by severe penalties and shall submit the case to its competent authorities in accordance with its laws or regulations.
- (d) Each contracting State shall take appropriate measures to prohibit the deliberate use of any civil aircraft registered in that State or operated by an operator who has his principal place of business or permanent residence in that State for any purpose inconsistent with the aims of this Convention. This provision shall not affect paragraph (a) or derogate from paragraphs (b) and (c) of this Article.¹⁰³

The *Vienna Convention on the Law of Treaties* is the most authoritative text governing the interpretation of treaties.¹⁰⁴ Article 31 stipulates that a treaty (including an amendment to a treaty) "shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". Article 32 allows for recourse to "supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of Article 31,

¹⁰³ICAO Doc. 9436, *supra*, note 1.

¹⁰⁴Opened for signature at Vienna on 23 May 1969, 1155 U.N.T.S. 331; 1974 A.T.S. 2; 1980 C.T.S. 37; 1971 N.Z.T.S. 4; 1980 U.K.T.S. 58; (1969) 8 I.L.M. 679 [hereinafter "Vienna Convention"].

or to determine the meaning when the interpretation according to Article 31" leaves the meaning "ambiguous or obscure" or "leads to a result which is manifestly absurd or unreasonable". Article 31(3)(a) and (b) allows account to be taken of any subsequent agreement or practice of States parties to a treaty as an aid to its interpretation.

i) Paragraph (a)

As to the *first sentence of paragraph (a)* of Article 3 *bis* namely, that:

"The contracting States recognize that every State must refrain from resorting to the use of weapons against civil aircraft in flight and that in case of interception, the lives of persons on board and the safety of aircraft must not be endangered.",

the French-Austrian draft had used the words "*undertakes* to refrain from resorting to the use of force against aircraft of the other contracting State..." The word "*recognize*" was used instead of "*undertakes*" to show that the obligation to refrain is declaratory of customary international law, in much the same way as the word is used in Article 1 of the Chicago Convention to show that the Article is a reflection of the customary law principle of the sovereignty of every State over its airspace. The same philosophy underlies the words "*every State*", namely, to indicate that the obligation rests not only on States which are party to Article 3 *bis*, but on all States.

This was also the reason for the non-usage of the words "of other contracting State" in the Austrian-French text since the protection is to be extended not only to aircraft of other States party to Article 3 *bis* or members of ICAO but to aircraft of all States. Some commentators have interpreted such deletion as rendering Article 3 *bis* applicable not only to foreign aircraft, but also to aircraft of one's own nationality.¹⁰⁵

¹⁰⁵Professor Cheng states:

"But one unexpected result of this deletion is that Article 3 *bis* is now applicable not only to all foreign registered aircraft, but also aircraft of a State's own registration. Such a provision, one which involves no foreign or international element, is most unusual in international agreements.... It has been suggested that this very unusualness would preclude the article from being interpreted as being applicable also to national aircraft. Such an interpretation is not tenable..." (Cheng, *supra*, Ch. I, note 31 at 63).

See also Majid, *supra*, Ch. II, note 31 at 222.

This is an unsustainable argument. The correct interpretation is that put forward by Professor Milde:

"The protection...is reserved to '*foreign*' aircraft and does not include aircraft of the State's own registration.... After discussions in the Executive Committee, the reference to aircraft 'of the other contracting State' was dropped for the specific reason that the protection was to be recognized as mandatory with respect of aircraft, whether belonging to contracting or non-contracting States. At no stage of the deliberations and drafting did the Assembly...contemplate regulation of the status of an aircraft in relation to the State of its own registration; such regulation would have exceeded the scope of the Convention which deal with *international* civil aviation. Again, the purpose of the Convention...is to establish conventional rules of conduct in the mutual relations of sovereign States but not to govern matters of their exclusive domestic jurisdiction. Consequently, Article 3 *bis* will not apply to the treatment of aircraft by the States of their registration..." (emphasis supplied)¹⁰⁶

As to the phrase "*must refrain* from resorting to the use of weapons", the 7th Edition of Annex 2 which was in effect at the time of the adoption of Article 3 *bis* contained in its Attachment A, a provision to the effect that "Intercepting aircraft should refrain from the use of weapons in all cases of interception of civil aircraft". The Austrian-French text used the words "undertakes to refrain"; the United States' draft referred to an agreement not to use force; the proposal of the USSR used the words "shall refrain", while the Ecuadorian draft used "agrees to refrain". The LACAC draft referred to an obligation not to resort to the use of armed force.

The use of the word "refrain" had its genesis in Annex 2 and the drafts of Austria-France, the USSR, as well as that of Ecuador. Professor Cheng states:

"Comparing the words 'abstain' and 'refrain', the *Webster's International Dictionary* states:

'REFRAIN is not so emphatic as abstain.... Indeed, to refrain from an action means its voluntary non-performance...'

He therefore concludes that it appeared "possible that, even when Article 3 *bis* has been brought into force, on account of the relative mildness of the injunction merely to

¹⁰⁶Milde, *supra*, Ch. III, note 197 at 126.

'refrain' ..., States would consider themselves entitled...to exercise at least the same discretion as they now enjoy under Annex 2."¹⁰⁷

On the other hand, that distinction between "refrain" and "abstain" is not carried in *The New Lexicon Webster's Encyclopedic Dictionary of the English Language*, which defines "refrain" as "to abstain from doing something".¹⁰⁸ This leads to a typically obscure or ambiguous meaning to which the Vienna Convention allows recourse to the *travaux préparatoires*. In their explanation of the first sentence of their draft, the French and Austrian governments stated that it "affirms the prohibition from resorting to the use of force against civil aircraft."¹⁰⁹ What is also clear is that the vast majority of delegations at the Assembly believed they were expressing in the first sentence a rule of customary international law prohibiting the use of force against civil aircraft, subject only to the right of self-defence referred to in the second sentence.

In the interpretation of a treaty, the Vienna Convention allows account to be taken of any subsequent agreement or practice of the parties regarding such interpretation. It is possible to discern also in the subsequent pronouncements of States when considering the Iran Air (1988) and U.S. Civil Aircraft (1996) incidents, as well as the 1993 KAL 007 ICAO investigation report, the view that the first sentence of Article 3 *bis* constitutes a ban on the use of weapons against civil aircraft.¹¹⁰

¹⁰⁷*Supra*, Ch. I, note 31 at 61-62. In support of this conclusion, he compares the clause to the stronger language used later in the sentence ("must not be endangered"), and also refers to the Soviet draft amendment according to which contracting States "shall refrain from using weapons against such [civil intruder] aircraft" but this provision "shall in no way detract from the right of a contracting State to protect its sovereignty or safeguard its security"; Professor Cheng believes that the USSR saw nothing contradictory or incompatible between these two provisions (*supra*).

¹⁰⁸Canadian Ed. (New York: Lexicon, 1988) at 838.

¹⁰⁹*Supra*, note 17; and *supra*, note 33-34 and accompanying texts.

¹¹⁰See in particular, the Resolution of 27 June 1996 where the ICAO Council "REAFFIRMS its condemnation of the use of weapons against civil aircraft as being incompatible with...the rules of customary international law as codified in Article 3 *bis* (*supra*, Ch. III, note 188 and accompanying text). See also the related Security Council Resolution of 26 July 1996 which condemned "the use of weapons against civil aircraft in flight as being incompatible with...the rules of customary international law as codified in Article 3 *bis*" (*supra*, Ch. III, note 189).

It should be noted also that the word "refrain" is immediately preceded by the mandatory "must". Further, the last part of the sentence lays a firm obligation on States not to endanger the lives of persons on board and the safety of the aircraft in case of interception: it would be illogical to interpret the first sentence as permitting the use of weapons in *some* situations, while in *all* cases laying an obligation not to endanger persons on board or the aircraft, since it is difficult to visualize circumstances where the use of weapons would not create such a danger, even when used as a warning. Indeed, Attachment A to the current (Ninth) Edition (1990) of Annex 2 specifically discourages the use of tracer bullets on the basis that such use is hazardous.

While recognizing that the meaning of the word "refrain" is ambiguous in the context of Article 3 *bis*, it seems on balance that the proper meaning to be attributed is one of a firm obligation on States not to use weapons against civil aircraft in flight with the only exception being in circumstances giving rise to self-defence under the UN Charter.¹¹¹

As to the word "*weapons*", the Austrian-French, United States', Ecuadorian and South Korean proposals all referred to the "use of force" or used similar wording. The LACAC draft originally referred to "armed force" but this was later changed to "weapons". The USSR's text from the beginning used the word "weapons". However, it was the Jamaican Delegation which first articulated the reason why "use of weapons" was preferable. It noted that Annex 2 used the word "weapons", and that further, "any interception must necessarily involve an element of interference and, therefore, the concept of the use of force, which must not be construed as to deny the legitimacy of interception in appropriate cases."¹¹² The USSR also believed that "interception almost always involved the use of force" and that it was "out of humane consideration that force was used in interception".¹¹³ The Australian Delegation interpreted the word "weapons"

¹¹¹Richard believes that Article 3 *bis* contemplates an "absolute character to the ban on the use of weapons" (*supra*, Ch. I, note 22 at 154).

¹¹²*Supra*, note 54 and accompanying text.

¹¹³*Supra*, note 55.

"in the broadest possible terms to include any devices that could be used to destroy civil aircraft."¹¹⁴ It would seem therefore, that reasonable and proportionate force not including the use of weapons, is permitted in cases of interception.

In relation to the term "*civil aircraft*", it will be recalled that the Chicago Convention is applicable to civil aircraft only, and not to state aircraft; Article 3(b) thereof provides that aircraft used in military, customs and police services shall be deemed to be state aircraft. It is generally agreed that "the usage of the aircraft in question is the determining criterion, and not, by themselves, other factors such as aircraft registration and markings, call sign used, ownership (public or private), type of operator (private/public), except insofar as these criteria go towards showing type of usage."¹¹⁵ The Assembly decided not to refer to "aircraft engaged in civil aviation".¹¹⁶ The word "civil" is, in any event, by virtue of Article 3 of the Chicago Convention, superfluous, and is in fact not often used elsewhere in the text of the Convention. Therefore, the protection offered by Article 3 *bis* is to aircraft of foreign States, not being used in military, customs or police services. "Aircraft" is defined in various ICAO Annexes as "Any machine that can derive support in the atmosphere from the reactions of the air other than reactions of the air against the earth's surface": this would include balloons but not hovercraft.

The term "*in flight*" was not much discussed. This qualification was not specifically used in any of the draft amendments presented to the Assembly. Professor Cheng states that the inclusion seems to have been "designed to exclude cases such as the storming of hijacked aircraft at Mogadishu and Tehran airports."¹¹⁷ Other ICAO

¹¹⁴ICAO Doc. 9438, *supra*, Ch. III, note 198 at 149.

¹¹⁵*Supra*, Ch. III, notes 191-193 and accompanying texts.

¹¹⁶*Supra*, notes 58-61 and accompanying texts.

¹¹⁷Cheng, *supra*, Ch. I, note 31 at 64.

documents do not have a consistent interpretation of "in flight".¹¹⁸ The Vice-Chairman of the Working Group offered some clarification as to what was intended, stating that the term "had been used in the ordinary Oxford dictionary sense of the act or manner of flying through the air".¹¹⁹ In the absence of any other explanation, therefore, Article 3 *bis* only covers aircraft which are airborne. The qualification of "in flight" may well lead, in the words of Professor Cheng, to "some rather strange situations". In a slight modification of an example he gives, if a foreign helicopter is used to rescue a convict from prison:

"while the officers of the law may use weapons on the convict, on the helicopter and on the rescuers while the aircraft is on the ground, they must...immediately refrain from doing so,"¹²⁰

once the helicopter is in the air.

The last part of the first sentence, namely, that "*in case of interception, the lives of persons on board and the safety of aircraft must not be endangered*" is, in the main, clear enough and problem-free. It is an explicit indication that Article 3 *bis* does not forbid interceptions, merely that in such cases, weapons must not be used and in any event, the safety of the aircraft and the lives of those on board must not be placed in

¹¹⁸The *Convention on Offences and Certain Other Acts Committed on Board Aircraft*, signed at Tokyo on 14 September 1963, 704 U.N.T.S. 219; ICAO Doc. 8364; 1970 A.T.S. 14; 1970 C.T.S. 5; 1969 U.K.T.S. 126; T.I.A.S. 6768, (1963) 2 I.L.M. 1042 [hereinafter "Tokyo Convention"] in Article 1(3) defines "in flight" as "from the moment when power is applied for the purpose of take-off until the moment when the landing run ends"; an almost identical definition is contained in Article 1(2) of the *Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface*, signed at Rome on 7 October 1952, 310 U.N.T.S. 181; ICAO Doc. 7364 [hereinafter "Rome Convention"]. The *Convention for the Suppression of Unlawful Seizure of Aircraft*, signed at The Hague on 16 December 1970, 860 U.N.T.S. 105; ICAO Doc. 8920; 1972 A.T.S. 16; 1972 C.T.S. 23; 1972 U.K.T.S. 39; T.I.A.S. 7192; (1971) 10 I.L.M. 133 [hereinafter "Hague Convention"] and the *Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation*, signed at Montreal on 23 September 1971, 974 U.N.T.S. 177; ICAO Doc. 8966; 1973 A.T.S. 24; 1973 C.T.S. 6; 1974 U.K.T.S. 10; T.I.A.S. 7570; (1971) 10 I.L.M. 1151 [hereinafter "Montreal Convention"] in Articles 3 and 2 respectively, give a broader definition, namely, from the moment when all the aircraft's external doors are closed following embarkation until the moment when any such door is opened for disembarkation.

¹¹⁹ICAO Doc. 9438, *supra*, Ch. III, note 198 at 152.

¹²⁰Cheng, *supra*, Ch. I, note 31 at 66.

danger. Professor Cheng makes an interesting comment that as worded, the obligation not to endanger the safety of aircraft and the lives of those on board seem to apply only to cases of interception, and he believes that States should be under such an obligation at all times, and not only when intercepting aircraft.¹²¹ It is however clear from the *travaux préparatoires* that States did indeed intend the primary result to be the protection of such aircraft and persons on board, whether or not an interception is being carried out. The correct interpretation seems to be that they wanted to stress *in particular* that interceptions must not endanger the aircraft and such persons, since the first part of the sentence already banned the use of weapons against such aircraft. The clause was never intended to imply that absent an interception, States are free to endanger such aircraft and their occupants.

The *second sentence* of paragraph (a), with its reference to the rights and obligations set forth in the Charter of the United Nations, was originally proposed in the Austria-France, United States and Ecuador drafts. Both the Austrian-French and United States' drafts made specific mention of Article 51, which relates to the right of self-defence. Although the express reference to Article 51 was not maintained, the discussions make clear that the intent is to provide in this second sentence the one exception to the prohibition of the use of force against civil aircraft, namely in the case of self-defence as foreseen in Article 51. Some delegations were of the opinion that reference to the Charter or to Article 51 was too restrictive or was not applicable to the situations being considered.¹²² As indicated above, some commentators also share the correct view that the right of self-defence under the Charter does not apply *per se* in the case of the use of force against civil aerial intruders.¹²³

¹²¹*Ibid.* at 67.

¹²²*Supra*, notes 52-53 and accompanying texts.

¹²³*Supra*, Ch. II, notes 30-31 and accompanying texts.

ii) Paragraph (b)

In the *first sentence* of paragraph (b), the words "*recognize*" and "*every State*" were used to indicate that the right to require landing already existed in international law, and that this provision is a mere codification thereof.

On the matter of the airport for landing, the text uses the word "*designated*". One interpretation could be that this implies prior identification of the airport or airports, although it is difficult to see how this could be, bearing in mind that it is not possible to determine in advance some pertinent factors such the location of the civil aircraft, its runway requirements, mechanical condition, and prevailing weather conditions. A better interpretation is that the designated airport is any airport so indicated to the civil aircraft, at the point of, or during, the interception process.

The United States', USSR's and Ecuador's drafts all referred to a requirement to land at a designated airport, while the LACAC proposal was for a "suitable airport".¹²⁴ In connection with interception, the 7th Edition of Annex 2, Attachment A, used the term "designated aerodrome...suitable for the safe landing of the aircraft type concerned", and the Assembly retained the word "designated". However, this must also be read as being one suitable for the landing, as otherwise the lives of persons on board would be endangered and the safety of the aircraft compromised.¹²⁵

Paragraph (b) recognizes two *grounds for the territorial sovereign to require a landing or to give other instructions to put an end to the violation*:

- i) when the aircraft is flying above its territory without authority; or

¹²⁴The Delegation of Switzerland supported the LACAC view that the landing must be at "an appropriate aerodrome" (ICAO Doc. 9438, *supra*, Ch. III, note 198 at 61). Similarly, the Delegation of Ecuador could accept either an "appropriate" or "suitable" designated airport, "because a designated airport might not be suitable for a particular aircraft" (*supra* at 116), and that of Peru wanted the landing "at an airport having appropriate characteristics" (*supra* at 135). However, the Delegation of Saudi Arabia felt that the expression "'suitable airport' raised questions regarding the authority and power to decide on the suitability of the airport for this type of aircraft and who would be liable for the consequences" (*supra* at 71).

¹²⁵The Ecuador draft amendment makes this point clearly (*supra*, note 20).

- ii) if there are reasonable grounds to conclude that the aircraft is being used for any purpose inconsistent with the aims of the Chicago Convention.

At the 24th Session of the Assembly in 1983, the Soviet Union stated that the French proposal for an amendment could only be discussed in relation "with questions dealing with the prevention of the use of civil aircraft for unlawful purposes and the violation of the airspace of States".¹²⁶ Austria and France paid heed, because in their proposal to the 25th Session (Extraordinary) of the Assembly, they included an entitlement of the subjacent State to require a landing if the aircraft violated its sovereignty or if it was used for purposes inconsistent with the aims of the Convention.¹²⁷

With respect to the *first ground*, some States preferred the term, "flying above its territory without authority", essentially as suggested by the United States, whose Delegation felt that the phrase "violations of sovereignty" was ambiguous and possibly too subjective.¹²⁸ Notwithstanding, the difference in meaning between the two phrases is not apparent, unless it could be argued that sovereignty may be violated even when an aircraft is flying over foreign territory with authorization (e.g. when it performs certain illegal activities) and that the ground adopted in the text is therefore narrower, or that it is more amenable to objective determination.¹²⁹ It should be noted that the requirement for the subjacent State to have reasonable grounds (to conclude) in order to require a landing or to give instructions apply only in relation to purposes inconsistent

¹²⁶*Supra*, note 7.

¹²⁷*Supra*, note 17 and accompanying text.

¹²⁸*Supra*, note 65-66 and accompanying texts.

¹²⁹This seems to have been the view of the Delegation of Finland, which expressed the opinion that the phrase "violate the sovereignty of that State" covered the substantive point that interception procedures must be possible not only in cases of unauthorized entry into the airspace, but also in cases where an aircraft was operating against the respective regulations within the airspace of a State, i.e., deviating from the route, flying over prohibited zones, etc." (ICAO Doc. 9438, *supra*, Ch. III, note 198 at 42). On the other hand, the Delegate of Israel believed that neither basis for requiring a landing would cover a "deviation from a flight path within the airspace of a State" (*supra* at 55).

with the aims of the Convention, and not in the case of flight above territory without authorization. The reason for the difference in treatment is not known and may simply have been a drafting error which was overlooked, as the Delegation of the United Kingdom which had made the original suggestion wished that the subjacent State should have such reasonable grounds in both cases.¹³⁰ The meaning of the first ground did not generate much discussion at the Assembly.

The *second ground*, i.e. an aircraft being used for any purpose inconsistent with the aims of the Chicago Convention, is more problematic. The phrase borrows from the language of Article 4 of the Convention.¹³¹

The "aims" of the Convention are not clearly spelled out anywhere. Reference may be made to the Preamble of the Convention which refers to the abuse of international civil aviation, and to Article 44 which sets out the "aims and objectives" of the Organization. If Article 44 is interpreted to encompass the "aims" of the Convention as referred to in Article 3 *bis*, then a State would be entitled to require a landing or to give other instructions in the oddest of circumstances.¹³² Application of Article 44 in such situations would lead to manifestly absurd results. In any event, Article 44 does not set out the aims of the Convention, but rather those of the Organization.

In a situation of this nature, it is necessary to examine the *travaux préparatoires* of the Chicago Conference which show that the phrase in Article 4 essentially mean "threats to general security" and that under this Article, States agree not to use civil aviation as a means to threaten the security of other States. Article 4 refers only to the

¹³⁰*Supra*, note 67 and accompanying text.

¹³¹*Supra*, Ch. III, note 69.

¹³²See Cheng, *supra*, Ch. I, note 31 at 68; and Majid, *supra*, Ch. II, note 31 at 222. This would be the case, for example, of an aircraft belonging to an airline which is deemed to have failed to "insure the safe and orderly growth of international civil aviation throughout the world" or failed "to encourage the arts of aircraft design and operation for peaceful purposes" or has caused economic waste by unreasonable competition, etc. It is obvious that it was never the intention of the drafters of Article 3 *bis* to subject an aircraft to a landing or other instructions under those circumstances.

obligations of States and acts of States, not to those of individual airlines or aircraft.¹³³ Therefore, Article 4 also does not provide an answer to the meaning of the phrase in Article 3 *bis*.

However, during the 25th Session of the Assembly, it seems "that the intention was to cover activities of foreign civil aircraft ...not only contrary to the 'aims' of the Convention [whatever these may be], but also contrary to the law and public order of the overflown State."¹³⁴ The Delegation of Cuba defined "acts inconsistent with the aims of this Convention" as:

"Acts of aggression, infiltration or espionage, involving discharge of harmful substances or pathogenic agents; transport of contraband or prohibited traffic using the airspace of another State, even with destination to a third State or with any other purpose inconsistent with the aims of the Convention."¹³⁵

The Delegation of Peru similarly described "activities incompatible with the provisions of the Chicago Convention" as including:

"spraying of areas with bacteriological contaminants, the transport of drugs, contraband, gun running, the illegal transport of persons and such other acts that could not be included within the precepts of the fundamental Charter of ICAO or any of its Annexes."¹³⁶

No exhaustive definition or categorisation of activities inconsistent with the aims of the Convention was given, but it appears that many common crimes were deemed to be encompassed. It is also arguable that activities inconsistent with the aims of the Convention could include the first ground i.e. "flying over its territory without authority" (violations of sovereignty), since the principle of the sovereignty of a State over its

¹³³*Supra*, Ch. III, notes 197-198 and accompanying texts.

¹³⁴See C-WP/10588 para. 4.2. See also C-WP/8217 para. 6.1; and Milde, *supra*, Ch. III, note 197 at 125.

¹³⁵ICAO Doc. 9438, *supra*, Ch. III, note 198 at 62.

¹³⁶*Ibid.* at 84. The USSR Delegation referred to "the spraying of poisonous substances, the illegal carriage of narcotics, smuggling, the conveyance of mercenaries and various precious items, the theft of natural resources of various countries and so forth" (*ibid.* at 133), and "intelligence gathering, contraband [and] secret transportation of mercenaries" (*ibid.* at 66).

airspace is a cornerstone of the Convention. Delegations which referred to Article 4 of the Convention seemed to believe that it covered the wider range of activities now being considered as contrary to the aims of the Convention under Article 3 *bis*; indeed, with few exceptions, they were unsure about the intent of the drafters of the Chicago Convention. One of those exceptions was the Delegation of Cuba,¹³⁷ which urged that Article 4 be given "a new interpretation in the light of the further development of civil aviation and its misuse."¹³⁸

The result is two consecutive articles in the Chicago Convention using the phrase "for any purpose inconsistent with the aims of this Convention" but with the Article 3 *bis* provision having a much broader meaning. However, it is possible that the phrase in Article 4 of the Chicago Convention can now, in the light of the subsequent agreement and practice of its parties as reflected in the Article 3 *bis* negotiation and adoption,¹³⁹ be regarded as having the same meaning as in Article 3 *bis*.

According to this interpretation therefore, a State would have a broad, undefined discretion in requiring a landing or in giving other instructions particularly under the second ground, in which case it is subject only to the requirement that it must have reasonable grounds to conclude that there is a usage inconsistent with the aims of the Chicago Convention.¹⁴⁰

¹³⁷*Supra*, Ch. III, note 198.

¹³⁸ICAO Doc. 9438, *supra*, Ch. III, note 198 at 101. Indeed, at the next regular Session of the Assembly in 1986, Cuba and Peru jointly presented a paper (A26-WP/102) in which they state that: "The 'deliberate use for inconsistent purposes' contemplated in paragraph d) of Article 3 *bis* is very different from the 'misuse' referred to in Article 4.... That paragraph, in fact, was included in response to the need to provide for measures by States against occurrences of a contemporary nature."

¹³⁹See the Vienna Convention, *supra*, note 104 and accompanying text.

¹⁴⁰Even with this broad definition of "purposes inconsistent with the aims of this Convention", or perhaps because this meaning was not subscribed to by all delegations, or in view of the lack of concrete expression given to the phrase, the Delegation of Norway believed that "paragraph (b) in no way exhausted the enumeration of situations in which a State could require an overflying aircraft to land" (ICAO Doc. 9438, *supra*, Ch. III, note 198 at 149).

Not only can the territorial sovereign require a landing of the aircraft, it can also give any other instructions to put an end to such violations. The draft amendments presented to the Assembly referred only to a requirement to land, but this additional possibility provides more flexibility to States, since a landing may not be necessary in all circumstances. For example, it may suffice to guide an offending aircraft away from territory or prohibited zones, or back onto an assigned air corridor, providing always that the lives of persons of board and the safety of the aircraft are not placed in jeopardy.

Some commentators have examined the *relationship of Article 3 bis to the Tokyo Convention*.¹⁴¹ That Convention in Article 3 (3) does not exclude any criminal jurisdiction exercised in accordance with national law, but according to Article 4, a party which is not the State of registry "may not interfere with an aircraft in flight in order to exercise its criminal jurisdiction over an offence committed on board except in the following cases:

- a) the offence has effect on the territory of such State;
- b) the offence has been committed by or against a national or permanent resident of such State;
- c) the offence is against the security of such State;
- d) the offence consists of a breach of any rules or regulations relating to the flight or manoeuvre of aircraft in force in such State;
- e) the exercise of jurisdiction is necessary to ensure the observance of any obligation of such State under a multilateral agreement."

Professor Milde states that this constitutes an important clarification to Article 3 *bis*, in particular, with respect to the second basis for requiring a landing. He expresses the opinion that any of the grounds listed in Article 4 of the Tokyo Convention gives the State the right to "interfere", which he believes includes the right to require a landing or to give other instructions.¹⁴² In view of the broad definition given to the phrase, "any purpose inconsistent with the aims of this Convention", by the drafters of Article 3 *bis*, it is submitted that this is a proper interpretation.

¹⁴¹Cheng, *supra*, Ch. 1 note 31 at 69-70, on the assumption that the second ground for requiring a landing is not as wide as postulated above, does not offer firm conclusions but nevertheless reaches some interesting results if Article 3 *bis* is deemed to override the Tokyo Convention.

¹⁴²Milde, *supra*, Ch. III, note 197 at 128.

For the purpose of requiring a landing or of giving these other instructions, the *second sentence* of paragraph (b) provides that States "may resort to any appropriate means consistent with the relevant rules of international law, including the relevant provisions of this Convention, specifically paragraph (a) of this Article". The Austrian-French proposal made reference to appropriate means in accordance with the SARPs, while the United States' draft provided for means consistent with the obligation not to use force against civil aircraft and not to endanger the aircraft and its occupants.¹⁴³

In the Executive Committee, and in line with the United States' proposal, it was decided to refer to the obligations in paragraph (a).¹⁴⁴ However, certain reservations were raised in regard to the wording of this sentence. The Delegation of Nigeria stated that the last sentence of paragraph (b) would expose pilots to danger since "it tended to encourage individual States to establish their own interception procedure" and it felt it necessary to have uniform interception procedures "to eliminate confusion which the establishment of different procedures by States would create in the minds of pilots".¹⁴⁵ Although the Delegation made its comments in relation to the last sentence of paragraph (b), it is submitted that it more properly applies to the second sentence. The Delegation of Ethiopia believed that the expression "any appropriate means" should be clarified because otherwise, "States involved in such incidents might attempt to justify any extreme action they had taken as being appropriate and consistent with the relevant rules of international law".¹⁴⁶

¹⁴³*Supra*, note 17 and accompanying text; and *supra*, note 18.

¹⁴⁴*Supra*, notes 68-69 and accompanying texts.

¹⁴⁵ICAO Doc. 9438, *supra*, Ch. III, note 198 at 113. Similar views were expressed by the Delegations of Greece which believed that this provision "seemed to stress the right of States to regulate individually as they wished and in different ways the very delicate question of interception, which their Delegation feared might lead to disastrous consequences" (*supra* at 148), and Ireland, which stated that "the regulations governing interception should be the same for all countries because it could be very dangerous if different standards were applied" (*supra* at 150).

¹⁴⁶*Ibid.* at 140. The Delegation of the Federal Republic of Germany thought that inclusion of the reference to international law might cause problems because it could "give rise to subjective interpretation as to what rules were relevant and what were irrelevant" (*ibid.* at 115).

What seems clear is that the reference to relevant rules of international law was intended to encompass more than the provisions of the Chicago Convention and paragraph (a) of Article 3 *bis*. With imprecise language, Article 3 *bis* leaves unanswered what these additional rules could be. Perhaps the intent was to refer to relevant SARPs without doing so expressly. Professor Milde is of this opinion:

"Any act of interception or other enforcement measure not involving the use of weapons against civil aircraft in flight is legitimate and acceptable. Any interception procedures consistent with the applicable [SARPs] ... would be 'consistent with relevant rules of international law'."¹⁴⁷

To his first sentence must be added the additional qualification that such act or measure must also not endanger the aircraft or its occupants.

In addition to the SARPs, it seems that customary international law recognizes a requirement to warn aircraft by means of shots or tracers, which the latest edition of Annex 2 discourages.

Whatever these "relevant rules of international law" may be, the "appropriate means" must be consistent with the obligation not to use weapons against civil aircraft in flight and, in cases of interception, not to endanger the aircraft and its occupants, subject only to the exercise of the right of self-defence under Article 51 of the United Nations Charter.

With regard to the *last sentence* and the agreement of each contracting State to publish its regulations regarding interception, delegations believed that it was essential that flight crew have knowledge of such regulations so as to enhance safety. The draft of the United States also required a notification of differences between such regulations and "ICAO's recommended interception procedures". Annex 2 Standards on interception constitute, by virtue of Article 12 of the Chicago Convention and a Council decision of 15 April 1948, "Rules of the Air" to which States may not file differences in their application over the high seas.¹⁴⁸ More relevantly in the case of aerial intrusions, States may, however, file differences between these Standards in their application over national

¹⁴⁷Milde, *supra*, Ch. III, note 197 at 127.

¹⁴⁸*Ibid.* at 105-106; and see the "Foreword" to Annex 2.

territory. Material contained in Attachment A to Annex 2, headed "Interception of Civil Aircraft", is for guidance only, does not constitute Standards, and States are not required to file any differences. The 7th Edition of the Annex applicable in 1984 does not, but the latest edition does, invite States to notify such differences in relation to the Special Recommendations contained in Attachment A. The United States' draft, insofar as it required States to file any difference between their regulations and practices and ICAO procedures (which go beyond Standards and include Recommended Practices and the Special Recommendations in Attachment A) constituted additional obligations not provided for under the Chicago Convention.

Although the U.S. proposal was not accepted by the Assembly, States are nevertheless obliged under Article 38 of the Chicago Convention to file with ICAO any differences between their regulations and practices and the Standards in Annex 2, although not necessarily the material in Attachment A. No difference may be filed to the Standards in their application over the high seas.

iii) Paragraph (c)

Paragraph (c) requires every civil aircraft to comply with an order given in a conformity with paragraph (b) (to land or other instructions to put an end to the violation).

Each contracting State must have "all necessary provisions in its national laws to make such compliance mandatory for civil aircraft of its nationality and those operated by an operator who has his principal place of business or permanent residence in that State."

Paragraph (c) of the Austrian-French text required each State to establish all necessary provisions in its *national laws* to make it obligatory for aircraft on its registry to comply with an order to land; the draft of the United States stated the need for the State to take *appropriate measures to ensure* such compliance. The Delegation of Japan had strong reservations about the reference to national laws and would prefer the United

States' wording.¹⁴⁹ In the end, it was decided to refer to necessary provisions in national laws or regulations. Hence, a State discharges its obligation under the second sentence of paragraph (c) by having in place adequate legislation; it does not in addition or in lieu thereof have to take "appropriate measures to ensure" such compliance.

An "operator" is defined in Annex 6 (*Operations of Aircraft*) as an entity engaged in or offering to engage in aircraft operation. This does not much advance our understanding, and one could perhaps instead describe an operator as the natural or juridical person which, in the words of the United Kingdom 1982 Civil Aviation Act, has the management of the aircraft.¹⁵⁰

The meaning of the phrase "*principal place of business or permanent residence*" was not discussed in the Executive Committee or Plenary Meetings. It appears to have been borrowed from the 6 October 1980 *Protocol Relating to an Amendment to the Convention on International Civil Aviation* [Article 83 bis] on the transfer of certain safety-related functions from the State of registry to the State of the operator, and which refers to "an operator who has his principal place of business or, if he has no such place of business, his permanent residence in another contracting State...."¹⁵¹ Two Conventions adopted earlier under ICAO auspices also used similar phraseology.¹⁵²

The concept of permanent residence is usually one attached to a natural, as opposed to a juridical, person and is determined according to national laws; in practice, most operators will be legal persons, save for a few cases of general aviation. It is questionable whether the State of incorporation of a legal person is to be deemed to be its permanent residence. The principal place of business of a person is also one to be

¹⁴⁹*Supra*, note 70 and accompanying text.

¹⁵⁰Civil Aviation Act (London: HMSO, 1982) The Rome Convention (*supra*, note 118) defines in Article 2 an operator as "the person who was making use of the aircraft at the time the damage was caused, provided that if control of the navigation of the aircraft was retained by the person from whom the right to make use of the aircraft was derived...that person shall be considered to be the operator."

¹⁵¹ICAO Doc. 9318, at para. (a). The State of the operator is defined in those terms in Annex 6.

¹⁵²The Hague and Montreal Conventions in Articles 4 and 5 respectively (*supra*, note 118).

determined according to national law, through an examination of the facts of each case and comparing the various places of business so that the main one is identified. Domestic case law supports the view that the principal place of business of an operator is the place where its executive and main administrative functions are located, in other words, its centre of corporate activities.¹⁵³ Article 83 *bis* provides a priority in determining the relevant State of the operator, namely, where he has his principal place of business, and only failing the existence of such a place is the State of the operator, that where he has his permanent residence. Article 3 *bis* does not establish such a priority: it is the principal place of business *or* permanent residence. It is conceivable for an operator to have his principal place of business in one State and his permanent residence in another. On balance, Article 3 *bis* would seem to put the obligation on both States, in addition to the State of registry.

It is clear that delegations recognized the increasingly common transnational transfer of operational bases of aircraft, especially in the cases of lease or charter, and sought to cast as widely as possible the States which must make compliance mandatory or take action in case of non-compliance.¹⁵⁴

In theory, an aircraft may be subjected to the laws of one State or as many as three different States, making such compliance mandatory, *viz.*, the State of registry, the State of the operator's principal place of business, or the State of the operator's permanent residence.

As to the *last sentence* of paragraph (c), it should be noted that the draft amendments presented to the Assembly did not contain a similar provision and it appeared for the first time in the text prepared by the Working Group.

The reference to "*severe penalties*" is derived from the Hague and Montreal Conventions,¹⁵⁵ which provide for each contracting State to make the offence(s)

¹⁵³E.g., see the United States' case of *Wood v. United Airlines Inc.*, 8 Avi. 17,500 (1963).

¹⁵⁴*Supra*, note 73 and accompanying text.

¹⁵⁵*Supra*, note 118.

(covered by each Convention respectively) punishable by "severe penalties". Neither these Conventions nor Article 3 *bis* gives a definition of "severe penalties". The Delegation of Syria wanted a more specific indication to be given of the meaning.¹⁵⁶ Some delegations preferred "appropriate" penalties.¹⁵⁷ The Vice-Chairman of the Working Group offered the following clarification:

"The fact was that 'severe penalties' did not indicate any degree of severity. It would therefore be within the competence of the Contracting State, in its national laws, to provide for the penalty having regard to the degree of severity of the infraction.... '[S]evere penalties', for example, could take the form of the revocation of the licence of a pilot...or any other appropriate penalties.... '[S]evere penalties' would enable the contracting State to deal with all situations...."¹⁵⁸

Notwithstanding the qualification "severe", it therefore appears that utmost latitude was intended to be given to States in the determination of penalties.

The clause "*and shall submit the case to its competent authorities in accordance with its laws or regulations*" also seems to be derived from Articles 7 of the Hague and Montreal Conventions according to which parties are obliged, where an offender is found in their territory, either to extradite him or to "submit the case to its competent authorities for the purpose of prosecution". Presumably, under Article 3 *bis*, the submission is for the purpose of investigation and judicial proceedings where warranted.

¹⁵⁶ICAO Doc. 9438, *supra*, Ch. III, note 198 at 121.

¹⁵⁷E.g., see the statements of the Delegations of the Federal Republic of Germany (*ibid.* at 115), Kenya (*ibid.* at 125), Ethiopia (*ibid.* at 140) and Romania (*ibid.* at 147).

¹⁵⁸*Ibid.* at 152. After adoption of the amendment by the Assembly, the Delegation of the United States expressed its view that:

"the penalties imposed might be administrative in nature and should be appropriate to the circumstances of the situation, including the nature of the action by the civil aircraft, whether or not the order to land was actually communicated and understood, the condition of the aircraft for landing, and the safety of the landing site" (ICAO Doc. 9437, *supra*, Ch. II, note 13 at 98).

A similar opinion was expressed by the Delegation of the Federal Republic of Germany, namely: "that the formula 'punishable by severe penalties' must be interpreted as giving way to both penal and mere administrative measures such as the suspension of licenses or registrations" (ICAO Doc. 9437, *supra*, Ch. II, note 13 at 97).

iv) Paragraph (d)

Paragraph (d) was included so as to lessen the frequency of usage of civil aircraft for purposes inconsistent with the aims of the Chicago Convention. It will be recalled that the original Polish draft would oblige States to take appropriate measures to prevent violations by aircraft of the sovereignty of other States, to correct unauthorized deviations and to discourage the use of civil aviation for purposes inconsistent with the aims of the Convention. This proposal was not acceptable to the Assembly because States felt that this would be an impossible task to discharge, and further, it was feared that the paragraph could allow a State to shoot, or use weapons against, an aircraft if it could be alleged that another State had not prevented the intrusion.¹⁵⁹

As drafted, only one of the grounds for requiring landing or the giving of other instructions under paragraph (b) is encompassed in paragraph (c), viz., the usage for purposes inconsistent with the aims of the Convention. At first sight, the States identified in paragraph (d) are not bound thereunder to take appropriate measures to prohibit deliberate unauthorized entry into the airspace of other States, but it seems that such entry would also be a usage inconsistent with the aims of the Convention.

The word "prohibit" is different from "prevent" and the obligation is satisfied if adequate laws and regulations exist. Further, only deliberate and non-accidental usages are contemplated. As in the case of paragraph (c), States with aircraft on their registry, and those with aircraft operators (either on the basis of principal place of business or permanent residence) must ensure that the necessary legislation is promulgated, and an aircraft may find itself subjected to the laws of one or more States in this regard.

The *last sentence* of paragraph (d) ("This provision shall not affect paragraph (a) or derogate from paragraphs (b) and (c)") was intended to ensure that this paragraph did not constitute an exception to the other paragraphs and in particular, the primary obligation under paragraph (a).

¹⁵⁹*Supra*, notes 80 and 82-87 and accompanying texts.

c) **Article 3 bis and Customary International Law**

Pursuant to Article 94(a) of the Chicago Convention, Article 3 *bis* requires ratification by 102 States for entry into force. As of 15 August 1998, it had obtained 100 ratifications and is expected to come into force within the following few months. Pending its entry into force, the use of weapons against civil aerial intruders will continue to be governed by existing general principles of international law. Even after its entry into force, such principles will apply between non-parties to the Protocol, between parties and non-parties, and even possibly between parties.¹⁶⁰

During the negotiations leading to the adoption of the Protocol, delegates believed that they were engaged in an exercise of codifying the existing principles of international law in relation to the use of force or weapons against civil aircraft. Statements made in the Assembly immediately after the adoption also show that delegates believed that they had succeeded in this task with the adoption of Article 3 *bis*.

¹⁶⁰The I.C.J. in the *Nicaragua* case (*supra*, Ch. II, note 25, paras. 172-177) made the following observations:

"The fact that the above-mentioned principles...have been codified or embodied in multilateral conventions does not mean that they cease to exist and to apply as principles of customary law, even as regards countries that are parties to such conventions.

...On a number of points, the areas governed by the two sources of law [treaty and customary] do not exactly overlap, and the substantive rules in which they are framed are not identical in content. But in addition, even if a treaty norm and a customary norm...were to have exactly the same content, this would not be a reason for the Court to take the view that the operation of the treaty process must necessarily deprive the customary law of its separate applicability.

...[E]ven if the customary norm and the treaty norm were to have exactly the same content, this would not be a reason for the Court to hold that the incorporation of the customary norm into treaty-law must deprive the customary norm of its applicability as distinct from that of the treaty norm."

It has been generally accepted that unless a rule is one of *jus cogens*, parties may contract out of it through a treaty which governs their mutual relations. Difficulties with the Court's ruling may also arise when the content of the two sources is different, and parties to a dispute rely on the different sources in support of their respective positions; unless precedence is given to one form (i.e. treaty), it would be difficult to determine which set of rules would govern in a particular context.

With one exception,¹⁶¹ no State clearly expressed a view that there was not already in existence a rule of international law prohibiting the use of force or weapons against civil aircraft. No State voted against the amendment, which was unanimously adopted. Even States which did not initially want an amendment did not take this position because they believed that such a rule did not exist; indeed, many thought that it was precisely because such a rule already existed that an amendment setting it out was unnecessary. Even conceding that the amendment was a package, no State made a statement saying that it had voted for the package while reserving its position regarding the legal principles established therein concerning the use of weapons against civil aircraft.

The review carried out in Chapter II of international law before the adoption of Article 3 *bis* led to the conclusion that use of force against civil aircraft was permissible but in exceptional circumstances, namely, that if the intruder did not pose or appear to pose a threat to the security of the subjacent State, force was not to be used against it even if it disobeyed orders; and that, in any event, even if the intruder acted or appeared to act in a manner inimical to the security of the subjacent State, force was not to be used unless it was necessary and proportionate.

The result of the analysis of the negotiations leading to the adoption of Article 3 *bis*, and of the textual content, shows that it is intended to ban the use of weapons against civil aircraft, though not the use of force. Actions of the territorial sovereign, whether classified as an interception or not, are not to cause any danger to the aircraft or its occupants. This prohibition is subject to one exception only: the inherent right of self-defence of the subjacent State in case of armed attack against it, articulated in the UN Charter.

Does Article 3 *bis* in its prohibition of the use of weapons against civil aircraft subject only to the right of self-defence under Article 51 of the UN Charter codify the principles of customary law governing this area in 1984?

¹⁶¹Tanzania, *supra*, note 47.

A former Director of ICAO's Legal Bureau, Professor Milde, believes so. In 1985, he advised the Council:

"that Article 3 *bis* was declaratory of existing customary international law and recognized (did not create) an obligation not to use weapons against civil aircraft; the underlying principle of general international law had its independent existence separate from the written (codified) text of Article 3 *bis* (a)...."¹⁶²

Professor Milde further states that:

"The drafting history...supports the conclusion that Article 3 *bis* is declaratory of the existing general international law with respect to the following elements:

- (a) obligation of States to refrain from resorting to the use of weapons against civil aircraft in flight;
- (b) obligation, in case of interception, not to endanger the lives of persons on board and the safety of aircraft;
- (c) right of States to require landing [in accordance with Article 3 *bis* (b)]."¹⁶³

Judge Guillaume seems to believe that the entire Article 3 *bis* is a reflection of existing international law. In 1984, writing particularly about paragraph (a), he stated:

"The rule stated is thus not a new rule of law.

The new amendment represents substantial progress in law. By unanimously adopting it, the international aviation community has recognized the existence of a prior rule binding on all parties and prohibiting the use of weapons against civil aircraft in flight...[I]t has clearly stated the pre-existence of the basic rule concerning the non-utilization of weapons."¹⁶⁴

Majid, on the basis that "any forcible action endangering the lives of passengers on board aircraft engaged in civil...aviation has been impermissible in international law

¹⁶²Milde, *supra*, Ch. III, note 197 at 113; ICAO Doc. 9467-C/1089, C-Min. 115/1-19: *Council - 115th Session, Minutes with Summary Index* at 154.

¹⁶³Milde, *ibid.* at 125.

¹⁶⁴Guillaume, *supra*, Ch. I, note 31 at 34.

(if not before) since the enactment of the U.N. Charter",¹⁶⁵ and that "State [p]ractice and pronouncements...disclose that since 1945 the use of force against an unarmed aircraft has been impermissible under customary international law, other than in legitimate self-defence",¹⁶⁶ is of the view that:

"Art. 3 *bis*...fails to reflect, with exactitude and comprehensivity, the vigour and application of custom forbidding the use of force against civil aircraft."¹⁶⁷

He concludes that:

"Since the customary rule of international law forbidding the use of force against civil aircraft is firmly established and has a wider scope than Art. 3 *bis*, it will prevail in this area over the treaty amendment. Until a requisite amount of State practice negatives the existence of this custom, or it is replaced by another customary rule, this situation will remain unaltered."¹⁶⁸

If Professor Milde believes that the main principles in paragraphs (a) and (b) of Article 3 *bis* are declaratory of existing (1984) general international law, and Majid that it is less strict than customary international law in its protection of foreign civil aircraft, Richard, writing in 1984 expressed the opinion "that while existing law and practice give paramount importance to the safety of civil aviation, they may not confer the absolute character to the ban on the use of weapons against civil aviation that is contemplated in

¹⁶⁵*Supra*, Ch. II, note 31 at 194.

¹⁶⁶*Ibid.* at 206. He also states that:

"The generality, uniformity and extensivity of acceptance of the principle against the use of force (including that against unarmed aircraft of a belligerent State), other than in exercise of a legitimate self-defense, has doubtlessly become a rule of customary international law since, at least, 1945.... Indeed, this customary rule is so comprehensively acknowledged by the community of States as a whole that it may safely be regarded a peremptory norm of international law, '*ius cogens*'" (*ibid.* at 220).

¹⁶⁷*Ibid.* at 221. Referring to a lack of clarity as to the meaning of the phrases "purposes inconsistent with the aims of this Convention" and "any appropriate means" in paragraph (b), and to certain other phrases, he believes that "these textual anomalies of Article 3 *bis*...are going to confuse, rather than clarify, the customary rule..." (*ibid.* at 221-222).

¹⁶⁸*Ibid.* at 223.

Article 3 *bis*".¹⁶⁹ She correctly points out that the "criteria for the lawful use of weapons against civil aircraft in flight under customary law severely restrict the right to fire on intruding aircraft but do not deny it absolutely."¹⁷⁰

The three different opinions highlighted above shows the difficulty in identifying the precise degree to which Article 3 *bis* codified the principles of international law existing in 1984, and is a result of both the usually imprecise nature of customary international law (and the main reason for the attempt at codification) as well as the ambiguities in the wording of Article 3 *bis* which are only partially resolved by examining the *travaux préparatoires*.

The framework of the law regarding the use of force (or weapons) against civil aircraft as stated in Article 3 *bis* is the first sentence read together with the second sentence: the prohibition on the use of weapons and endangerment of aircraft and their occupants is subject to the right of self-defence as set out in Article 51 of the UN Charter. It is this reference to the UN Charter which imposes a stricter obligation on the subjacent State than did the principles of customary international law in 1984.

As seen above, Article 51 only applies in the case of armed attack by one State upon another, and the Charter is inapplicable in the context of use of force against civil aerial intruders.¹⁷¹ Aircraft used in a State-sanctioned armed attack would by definition no longer be classified as civil aircraft and would fall outside the scope of the Chicago Convention and Article 3 *bis*.¹⁷² The reference to Article 51 of the Charter, if taken literally, is meaningless and would not provide any exception to the prohibition contained in the first sentence of paragraph (a), rendering it absolute in nature.¹⁷³ In 1984 (and

¹⁶⁹Richard, *supra*, Ch. I, note 22 at 154.

¹⁷⁰*Ibid.* at 156.

¹⁷¹*Supra*, Ch. II, notes 26-31 and accompanying texts.

¹⁷²See *ibid.*; and *supra*, notes 44 and 53 and accompanying texts.

¹⁷³See the discussion above on the meaning of the words "must refrain" (*supra*, notes 107-111 and accompanying texts).

even today), customary international law did provide for the possibility of use of force against civil aircraft when important security interests were threatened, appropriate instructions and warnings had been given and ignored, and the requirement of proportionality was met. Importantly, the customary international law permitted the possibility of the use of force, even lethal, in circumstances where activities of the aircraft were not sanctioned by a State (i.e. private in nature) and where an armed attack had not taken place, provided nevertheless that important security interests were threatened.

For example, if a pilot privately decides to take for sale photographs of important military installations in a foreign State, and is given appropriate warnings and ignores them, he may properly be attacked under the customary international law. It is also arguable that customary international law would sanction the use of weapons against a civil aircraft if a private citizen deliberately violates the sovereignty of a foreign State for purposes of inciting or incurring rebellion in that State, and is given and does not obey appropriate warnings and instructions. In both cases, the danger to the State is likely to be proportionate to the gravity of the act of ending the intrusion. In both cases also, a right of self-defence under Article 51 of the Charter would not exist, and Article 3 *bis* therefore would not permit use of force in these circumstances.

In this regard, paragraph (a) of Article 3 *bis* does not coincide with the customary international law before 10 May 1984, in the sense that it seems to lay an obligation not to use weapons in circumstances where the pre-existing law would allow it. The drafters of Article 3 *bis* were concerned with self-defence, and one wonders why the second sentence of paragraph (a) did not simply make the prohibition in the first sentence subject to the "right of self-defence", leaving it open as to the basis of such rights i.e. whether it is Article 51 or customary international law which the I.C.J. in the *Nicaragua* case recognized as continuing to exist alongside Article 51.¹⁷⁴ Perhaps the difference in content between the two sources was not appreciated. Indeed, in the *Nicaragua* case, the I.C.J. was explicit in stating that Article 51 and the customary law of self-defence did

¹⁷⁴*Supra*, Ch. II, note 25.

not overlap exactly, and that the rules did not have the same content.¹⁷⁵ If an intention could be attributed to the Assembly to make the prohibition subject to the right of self-defence generally, then Article 3 *bis* would come closer to the pre-existing law, but an analysis of the *travaux préparatoires* does not permit the drawing of such an inference.

The customary law does not clearly delimit the circumstances under which a State may issue orders to land or other instructions to an overflying foreign aircraft, but States seemed to have that right in a wide variety of circumstances. If an interpretation is given of the words "purposes inconsistent with the aims of this Convention" so as to align the meaning of Article 4 of the Convention as originally intended, then it would be narrow compared to the customary law as reflected in State practice;¹⁷⁶ if the "aims" are those found in Article 44 of said Convention, then it would be too broad when compared to the customary law.¹⁷⁷ However, with the definition intended to be given to the phrase, to cover not only the "aims" of the Convention, whatever these are, but also acts and omissions contrary to the law and public order of the foreign State, including common crimes and breaches of air navigation regulations, it would seem that paragraph (b) is compatible with the general principles of international law existing in 1984.

In Chapter II, one of the principles of customary law identified was that the aircraft must comply with an order to land or to change course unless unable to do so, and this is reflected in the first sentence of Article 3 *bis*, paragraph (c). The specific requirement on the part of the State of registry or the State or States of the operator to have adequate legislation in place to ensure compliance with an order given in conformity with paragraph (b) (i.e. for flight above territory without permission or for purposes inconsistent with the Chicago Convention) had not been the subject of customary

¹⁷⁵*Ibid.*

¹⁷⁶*Supra*, note 133 and accompanying text.

¹⁷⁷*Supra*, note 132 and accompanying text.

international law.¹⁷⁸ Indeed, the concept of transfer of certain responsibilities to the State of the operator was a fairly new development and devoid of extensive State practice in this regard. The same may be said with regard to the obligation to make a breach of such laws punishable by severe penalties and to submit the case to competent authorities. While these two last sentences of Article 3 *bis* paragraph (c) are desirable or even necessary corollaries of the first sentence and did not raise any objection in the Assembly, at the stage of drafting, it could not be said that the text was a codification of pre-existing law.

With respect to paragraph (d), it will be recalled that the original proposal of Poland elicited strong objections.¹⁷⁹ Paragraph (d) was finally agreed as a compromise text.

After the adoption of Article 3 *bis* at the Assembly, the United States' Delegation referred to this paragraph as the "most controversial provision of the amendment". It continued:

"This provision had been most difficult to negotiate and had commanded the least support from members of the Assembly.... In a spirit of compromise, and because of the desirability of achieving consensus on an amendment recognizing the paramount importance of the need to protect and safeguard persons on board civil aircraft, the United States had joined the consensus on the amendment as a whole."¹⁸⁰

¹⁷⁸Article 12 of the Chicago Convention requires the State of registry to take appropriate measures to ensure that aircraft of its nationality, wherever they may be, comply with the rules and regulations relating to the flight and manoeuvre of aircraft there in force. To the extent that an order to land or other instructions given by the subjacent State in accordance with paragraph (b), constitutes part of the rules of that State relating to the flight and manoeuvre of aircraft, than the State of registry would be bound to ensure, whether through legislation or otherwise, such compliance by its aircraft. By virtue of Article 12, each contracting State must also ensure the prosecution of persons violating such regulations. However, these would be treaty obligations, not those arising under customary international law.

¹⁷⁹*Supra*, notes 80 and 82-87 and accompanying texts.

¹⁸⁰ICAO Doc. 9437, *supra*, Ch. II, note 13 at 98.

The Delegation of the Republic of Korea had also "found it difficult to accept some elements of the amendment, namely the addition of new paragraph (d)".¹⁸¹ While these statements would not necessarily operate to prevent such a rule of customary international law from coming into existence if all the other conditions are satisfied,¹⁸² they nevertheless evidence a broad split of opinion in the Assembly on the desirability of paragraph (d).

Writing in 1957, Professor Cheng stated:

"Apart from its duty to protect foreign States from injurious acts emanating from its territory, ... a State incurs no direct responsibility for the acts of private individuals in its territory, [and] has no duty to ensure their compliance with foreign laws...."¹⁸³

However, on the basis of the *Corfu Channel* and *Trail Smelter* cases, States would already be obliged to prohibit the deliberate use of civil aircraft on their registry or operating from their territory to cause injury to another State, the more so "when the case is of serious consequence".¹⁸⁴ To the extent that the use of such aircraft for purposes inconsistent with the aims of the Chicago Convention would cause injury or at least serious injury to another State, then the State of registry or the State of the operator would already be bound by pre-existing customary law to prohibit such activities. Situations where the use of aircraft inconsistent with the aims of the Convention do not result in injury to another State would not be so covered by customary international law.

It is interesting that Professor Milde, in his classification of the elements codified by Article 3 *bis*, did not include paragraph (d).¹⁸⁵

¹⁸¹*Ibid.* at 101.

¹⁸²See *supra*, Ch. II, note 36 and accompanying text.

¹⁸³B. Cheng, "International Law and High Altitude Flights: Balloons, Rockets and Man-Made Satellites" (1957) 6 ICLQ 487 at 499.

¹⁸⁴*Supra*, Ch. III, note 199-200 and accompanying texts.

¹⁸⁵*Supra*, note 163 and accompanying text.

In summary, it seems that paragraph (a) of Article 3 *bis*, with its only exception to the prohibition of the use of weapons against civil aircraft being the limited right of self-defence in accordance with Article 51 of the UN Charter, more severely restricts the circumstances in which the subjacent State may use force against a civil aerial intruder than did the customary law in 1984. Paragraph (b) seems to be compatible with the pre-1984 customary law, as is the first sentence of paragraph (c). However, the last two sentences of paragraph (c) cannot be regarded as a codification of the existing law, and paragraph d) does not seem to have exactly the same content as the customary international law in this respect.

This was the state of customary international law in May 1984, at the time of the adoption of Article 3 *bis*. Customary law is not static and it evolves over time. Fourteen years have elapsed. The IR 655 incident in 1988, the 1993 KAL 007 ICAO investigation, and the U.S.-Cuba incident of 1996, provided the international community with further opportunities to express its views of the law.

On 14 July 1988, the ICAO Council "reaffirmed the fundamental principle that States must refrain from resorting to the use of weapons against civil aircraft",¹⁸⁶ and repeated this statement on 7 December 1988.¹⁸⁷ On 17 March 1989, it recalled "that the 25th Session (Extraordinary) of the Assembly in 1984 unanimously recognized the duty of States to refrain from the use of weapons against civil aircraft in flight" and reaffirmed "its policy to condemn the use of weapons against civil aircraft in flight without prejudice to the provisions of the Charter of the United Nations."¹⁸⁸ In 1993, it stated that Article 3 *bis* reaffirmed "the fundamental principle of general international law that States must refrain from resorting to the use of weapons against civil aircraft".¹⁸⁹ The Security Council in a Presidential Statement of 27 February 1996

¹⁸⁶*Supra*, Ch. III, note 248 and accompanying text.

¹⁸⁷*Supra*, Ch. III, note 282 and accompanying text.

¹⁸⁸*Supra*, Ch. III, note 306 and accompanying text.

¹⁸⁹*Supra*, Ch. III, note 147 and accompanying text.

recalled that according to international law as reflected in Article 3 *bis*, "States must refrain from the use of weapons against civil aircraft in flight and must not endanger the lives of persons on board and the safety of aircraft".¹⁹⁰ On 6 March 1996, the ICAO Council recognized "that the use of weapons against civil aircraft in flight is incompatible with elementary considerations of humanity and the norms governing international behaviour...."¹⁹¹ In its Resolution of 27 June 1996, the Council referred to: "the principle, recognized under customary international law, concerning the non-use of weapons against such aircraft in flight"; reaffirmed the principle in paragraph (d) of Article 3 *bis* and "its condemnation of the use of weapons against civil aircraft in flight as being incompatible with elementary considerations of humanity, [and] the rules of customary international law as codified in Article 3 *bis*".¹⁹² The Security Council, on 26 July 1996, adopted a resolution repeating these June 1996 statements of the ICAO Council.¹⁹³

The cumulative effect of these pronouncements, together with the statements made by States in the ICAO Council when considering these incidents (reproduced in Chapter III above) leads to the conclusion that those elements of Article 3 *bis* which had not yet formed part of customary international law in 1984, may be in the process of crystallising into such rules or may have already done so. It is indicated above that paragraph (b) and the first sentence of paragraph (c) were already part of customary law in 1984.

With respect to paragraph (a), the prohibition against the use of weapons against civil aircraft in flight and the duty not to endanger aircraft and their occupants have been strengthened. It is possible to detect a trend towards an absolute prohibition in this regard, subject only to the right of self-defence of the subjacent State in accordance with

¹⁹⁰*Supra*, Ch. III, note 151 and accompanying text.

¹⁹¹*Supra*, Ch. III, note 171 and accompanying text.

¹⁹²*Supra*, Ch. III, note 188 and accompanying text.

¹⁹³*Supra*, Ch. III, note 189.

Article 51 of the UN Charter, whatever may be the meaning or value of this exception. However, it seems that this virtually absolute prohibition has not yet reached a sufficient degree of maturity where it would supplant the principles of customary law set out in Chapter II above.

2. LEGAL EFFECT OF ICAO RESOLUTIONS AND DECISIONS

When considering the various incidents involving the use of force against civil aircraft, ICAO adopted a number of resolutions and took certain decisions, some of them containing substantive principles aimed at influencing the conduct of States. The legal effect of resolutions and decisions of international organizations have provided a rich ground for debate for writers and have been the subject of several pronouncements by the I.C.J.. Although most of the literature has been on the effects of resolutions or declarations of the UN General Assembly, insofar as the membership of ICAO is almost as universal as that of the UN, conclusions reached in relation thereto are in general also applicable to ICAO resolutions and decisions. The Charter itself in Article 10 provides that the UN General Assembly is empowered to make *recommendations* only.

One common area of agreement among writers and I.C.J. judges is that UN General Assembly resolutions concerned with internal matters, and in the main addressed to subsidiary organs and the Secretariat, are fully binding.¹⁹⁴ Of the other group of resolutions, namely those containing substantive principles and addressed to States, opinions are much more diverse. On the one hand are those who believe that General Assembly resolutions are not binding and have otherwise no legal effect; on the opposite

¹⁹⁴E.g., see D.H.N. Johnson, "The Effect of Resolutions of the General Assembly of the United Nations" (1955-56) XXXII B.Y.I.L. 97 at 121. K. Skubiszewski, "Enactment of Law by International Organizations" (1965-66) XLI B.Y.I.L. 198 at 226 refers to the "internal law" of organizations, which "consists of rules enacted by the organization and concerned with the structure, functioning, or procedure of the organization". See also O. Schachter, "The Evolving International Law of Development" (1976) 15 Columbia Journal of Transnational Law 1; and the Separate Opinions of Judges Klaestad and Lauterpacht in the *South-West Africa-Voting Procedure*, Advisory Opinion, [1955] I.C.J. Rep. 67 at 88 and 115 respectively.

side are those who would give the Assembly an almost legislative power to bind member States.

Most commentators fall somewhere between these two extremes. There seems to be general agreement that these resolutions are not *per se* binding on member States of the UN, although they are not without legal effect. Positions differ, however, on the nature of such effect.¹⁹⁵

Professor Arangio-Ruiz states:

"...General Assembly declarations "produce" - as well as decisions or any other enactments of international organs - all the effects which any piece of joint or several practice of States in their external or internal affairs can produce with regard to any aspect of the international legal intercourse among those States. The people who assemble, make statements, submit oral or written proposals, and eventually participate in the vote by which a resolution is adopted, are envoys of States...It is therefore only normal that their statements, attitudes and acts count...as governmental statements, attitudes and acts, susceptible of evaluation - and in that sense of legal effects in a proper sense -under international law...

There can be no question as to the impact that Assembly resolutions may have on customary law at any one of the latter's conceivable stages. This applies both to the inception, the progress and the perfecting of the *iter* through which a customary rule comes into being (namely to the phase of the rule which precedes its being law) and to the determination or application of the rule or the evidence of the rule's existence (namely to a phase subsequent to the coming into being of the rule)."¹⁹⁶

Johnson, writing in the mid-1950's, expressed it in a different fashion, as follows:

¹⁹⁵For reviews of the various opinions, see e.g., Johnson, *ibid.* at 106-111; Schachter, *ibid.*; G. Arangio-Ruiz, "Normative Role of the General Assembly of the UN" (1972) 197: III *Académie de Droit Internationale - Recueil des Cours* 431 at 434-442; and Bishop, *supra*, Ch. II, note 26 at 241-246.

¹⁹⁶Arangio-Ruiz, *ibid.* at 469-471. Later on, at 478, he expands on this view as follows: "...[R]ecommendations, together with any other elements of United Nations practice, contribute directly to one or the other of the elements of custom....The contribution may consist...in the successful exhortation of some conduct of States. It may also consist in a demonstration - or, more precisely, in contributing to the demonstration - of *opinio juris*. It is in this sense that recommendations, together with the many other components of United Nations practice, are part of that practice of States which brings about the formation of customary law."

"There is also nothing to prevent Members from incurring binding legal obligations by the act of voting for Resolutions in the General Assembly, provided there is a clear intention to be so bound. 'Recommendations' of the General Assembly addressed to Members who have voted against them have, however, a 'legal effect' only in the sense that they may constitute a 'subsidiary means for the determination of rules of law' capable of being used by an international court. They are not in themselves sources of law. Their value, even as means for the determination of rules of international law, depends upon the objectivity surrounding the circumstances in which they were adopted.¹⁹⁷

If Johnson's first sentence is interpreted that mere affirmative voting for a resolution is enough, by itself, to bind a State, it is submitted that such a view is not reflected in the law and practice of States.¹⁹⁸

Professor Friedmann's view is that:

"Without having the character of a treaty,...resolutions of this kind unquestionably are an important link in the continuing process of development and formulation of new principles in international law. In some cases they will...serve as highly authoritative statements of international law in a certain field.

...International law is developing and being nourished through a multitude of channels. While it would be absurd to equate them with formal treaties, it would be equally absurd to deny their importance in the continuing process of the articulation and evolution of international law."¹⁹⁹

The legal status and effect of such resolutions have been discussed many times in the I.C.J.. In the 1955 Advisory Opinion on *South-West Africa - Voting Procedure*, Judge Klaestad expressed the opinion that certain recommendations or decisions of the UN General Assembly would bind South Africa if it voted for such decision, but that there would be no binding legal obligation where it did not so vote. The effect of such a decision (where South Africa has not voted for it), in his view, would be "not of a

¹⁹⁷Johnson, *supra*, note 194 at 121-122.

¹⁹⁸See Arangio-Ruiz, *supra*, note 195 at 486-490; and Skubiszewski, *supra*, note 194 at 220-222. Johnson may have based this view on the Separate Opinion of Judge Klaestad in the *South-West Africa - Voting Procedure*, Advisory Opinion, *supra*, note 194 at 87-88.

¹⁹⁹W.G. Friedmann, *The Changing Structure of International Law* (New York: Columbia University Press, 1964) at 139.

legal nature in the usual sense, but rather of a moral or political character." However, the Government could not simply disregard it; the Government had to consider it in good faith.²⁰⁰ Judge Lauterpacht believed that General Assembly resolutions were recommendatory in nature, and although on occasion "they provide a legal authorization for Members determined to act upon them individually or collectively, they do not create a legal obligation to comply with them" and their legal effect "although not always altogether absent, is more limited and approaching what, when taken in isolation, appears to be no more than a moral obligation". He then qualified this by stating that it was "another thing to give currency to the view that they had no force at all whether legal or other". He stated that:

"A Resolution recommending...a specific course of action creates *some* legal obligation which, however rudimentary, elastic and imperfect, is nevertheless a legal obligation...The State in question, while not bound to accept the recommendation, is bound to give it due consideration in good faith...."²⁰¹

He then attributes to these resolutions an almost binding quality in circumstances where there has been a series of recommendations on the same subject, persistent disregard of which could be an illegality.²⁰² It would perhaps be better to interpret this last conclusion as correct only where the series of recommendations has crystallized into customary rules of law.²⁰³

²⁰⁰*South-West Africa - Voting Procedure*, Advisory Opinion, *supra*, note 194 at 88.

²⁰¹*Ibid.* at 115-119.

²⁰²*Ibid.* at 120. He referred to the discretion of States in respect of resolutions of the General Assembly and continued:

"It is a discretion to be exercised in good faith...This is particularly so in relation to a succession of recommendations, on the same subject and with regard to the same State, solemnly reaffirmed by the General Assembly. Whatever may be the content of the recommendation and whatever may be the nature and the circumstances of the majority by which it has been reached, it is nevertheless a legal act of the principal organ of the United Nations which Members...are under a duty to treat with a degree of respect appropriate to a Resolution of the General Assembly..." (*supra*).

²⁰³This conclusion is implicitly drawn by Johnson, *supra*, note 194 at 117-118.

In the *South-West Africa* cases (Second Phase) (1966) Judge van Wyk stated that resolutions of United Nations organs and agencies "cannot in law create any rules of conduct binding upon Respondent".²⁰⁴ In his Dissenting Opinion, Judge Jessup expressed the opinion, "that since these international bodies lack a true legislative character, their resolutions alone cannot create law".²⁰⁵ However, he stated that:

"the accumulation of expressions of condemnation of apartheid...especially as recorded in the resolutions of the General Assembly...are proof of the pertinent contemporary international community standard. Counsel for the Respondent...agreed that 'the effect of obtaining the agreement of an organization like the United Nations would, for all practical purposes, be the same as obtaining the consent of all the members individually, and that would probably be of decisive practical value', for the United Nations 'represents most of the civilized States of the world'."²⁰⁶

Judge Padilla Nervo, also in a Dissent, believed that the Court "cannot overlook or minimize [the] overriding importance and relevance" of the "numerous and almost unanimous recommendations regarding 'apartheid' and racial discrimination."²⁰⁷

²⁰⁴*Supra*, Ch. II, note 36 at 171.

²⁰⁵*Ibid.* at 432.

²⁰⁶*Ibid.* at 441.

²⁰⁷*Ibid.* at 455. He clarified this importance later on (at 468-469) as follows:

"The question whether or not the Respondent has complied with its obligations...is a sociological fact which has to be measured and interpreted by the current principles, rules and standards generally accepted by the overwhelming majority of States Members of the United Nations, as they were continuously expressed, through a great number of years, in the relevant resolutions and declarations of the General Assembly and other organs of the international community...

The arguments and evidence presented by the Respondent for the purpose of attributing to the numerous resolutions on South West Africa, adopted by the General Assembly during the past 20 years, a political character...do in fact emphasize the duty of the Court to give weight and authority to those resolutions of the General Assembly, as a source of rules and standards of general acceptance by the States Members...

The Court should also recognize those decisions as embodying reasonable and just interpretations of the Charter, from which has evolved international legal norms and/or standards, prohibiting racial discrimination and disregard for human rights and fundamental freedoms."

Judge Tanaka, having examined whether resolutions and declarations of international organizations were a factor "in the customs-generating process...that is to say, as 'evidence of a general practice'", concluded that "the formation of a custom through the medium of international organizations is greatly facilitated and accelerated."²⁰⁸ He continued:

"Of course, we cannot admit that individual resolutions, declarations, judgements, decisions, etc., have a binding force... What is required for customary international law is the repetition of the same practice; accordingly, in this case resolutions, declarations, etc., on the same matter in the same, or diverse organizations must take place repeatedly.

Parallel with such repetition, each resolution, declaration, etc., being considered as the manifestation of the collective will of individual participant States, the will of the international community can certainly be formulated more quickly and more accurately as compared with the traditional method...This collective, cumulative and organic process of custom-generation can be characterized as the middle way between legislation by convention and the traditional process of custom making, and can be seen to have an important role from the viewpoint of the development of international law.

In short, the accumulation of authoritative pronouncements...can be characterized as evidence of the international custom...."²⁰⁹

²⁰⁸*Ibid.* at 291. He explained this conclusion in the following manner:

"According to traditional international law, a general practice is the result of the repetition of individual acts of States constituting consensus in regard to a certain content of a rule of law...The process of the formation of a customary law in this case may be described as individualistic....[T]his process is going to change in adapting itself to changes in the way of international life. The appearance of organizations such as the...United Nations..., replacing an important part of the traditional individualistic method of individual negotiation by the method of 'parliamentary democracy'...is bound to influence the mode of generation of customary international law. A State, instead of pronouncing its view to a few States directly concerned, has the opportunity, through the medium of an organization, to declare its position to all members of the organization and to know immediately their reaction...In former days, practice, repetition and *opinio juris sive necessitatis*, which are the ingredients of customary law might be combined together in a very long and slow process extending over centuries" (*supra*).

²⁰⁹*Ibid.* at 292.

Finally, in the *Nicaragua* case, the I.C.J. referred to the need to be satisfied that there was in customary international law an *opinio juris* (or belief i.e. a psychological element) as to the binding character of certain rules. It stated that:

"This *opinio juris* may, though with all due caution, be deduced from, *inter alia*, the attitude of the Parties and the attitude of States towards certain General Assembly resolutions...The effect of consent to the text of such resolutions cannot be understood as merely that of a 'reiteration or elucidation' of the treaty commitment undertaken in the Charter. On the contrary, it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolutions by themselves."²¹⁰

In summary, it seems that with respect to resolutions containing statements of principles and rules addressed to States, the following can be deduced as a result of the foregoing review.

- 1) While resolutions of the UN General Assembly are not legally binding, they do have certain legal effects;
- 2) States must consider their application in good faith;
- 3) As a manifestation of State practice, they contribute to the formation and elucidation of rules of customary international law, in particular by helping to ascertain the existence of *opinio juris*. Repeated re-affirmation of particular principles in various resolutions is one aspect of promoting the growth of customary law.
- 4) International organizations provide fora for the expeditious collating of evidence of State practice.

The Chicago Convention does not provide for resolutions adopted or decisions taken of the kind being discussed, by the ICAO Assembly or the Council, to be binding upon States. No customary practice has developed to treat such resolutions or decisions as binding on States. Therefore, in accordance with the general principles outlined above, ICAO resolutions and decisions on the use of force against civil aircraft and in particular, the views of the law expressed therein, are not binding on ICAO members, whatever terminology may be used in such resolutions or decisions.

²¹⁰*Nicaragua case, supra*, Ch. II, note 25 para. 188.

With two exceptions, these resolutions were passed and decisions taken by a Council with a very limited membership, which nevertheless through the election of representatives by all ICAO members, may be deemed to represent such members, currently comprising almost the entire world community. In this regard, Council pronouncements may be regarded as almost, if not equally, weighty as those of the Assembly. Several Council resolutions have stressed that States should not use weapons against civil aircraft, that such use of armed force is a violation of international law and elementary considerations of humanity and of the rules, Standards and Recommended practices found in the Chicago Convention and its Annexes. A few also state that when intercepting civil aircraft, the lives of persons on board and the safety of the aircraft must not be endangered. States are bound, whether they voted in favour of any such resolution or not, to consider in good faith these statements of principle by the Council.

By its consideration of the various incidents concerning the use of force against civil aircraft, ICAO has provided member States with fora for the discussion and the elaboration of individual views on the state of the law. The adoption of its resolutions and the taking of its decisions can be viewed either as an expression of the collective will of member States or as a separate and corporate act of the Organization, or both. On occasions when the Security Council could not formally pronounce on the use of force or weapons against civil aerial intruders, due to the exercise of a veto, ICAO, unfettered by such constraints, was able to take action in the form of resolutions and decisions.

Through the statements of States and through such resolutions and decisions, ICAO has provided a rich source of evidence of State practice in this area, and has contributed significantly to the development and reaffirmation of certain elements of the customary international law concerning the use of force against civil aircraft.²¹¹

²¹¹The United Kingdom Delegation, at the 25th Session (Extraordinary) of the ICAO Assembly, stated that the position in international law had "most recently been recognized in the Resolution of the Council of 6 March 1984 which reaffirmed that the use of armed force against civil aircraft is a violation of international law" (ICAO Doc. 9437, *supra*, Ch. II, note 13 at 29).

3. PROPOSALS FOR A CONVENTION ON THE INTERCEPTION OF CIVIL AIRCRAFT

After the shooting down of KAL 007, the 24th Session of the ICAO Assembly met from 20 September to 7 October 1983. On the first day, the Minister of Transport of Canada announced the intention of Canada to present a proposal for a convention on the interception of civil aircraft.²¹² As early as 1958, the Secretary General of ICAO had indicated a need to develop international rules to "ensure the safety of civil aircraft flying in the vicinity of, or inadvertently crossing, international frontiers, including the early clearance, without undue detention, of aircraft crew and passengers."²¹³

On 29 September 1983, the Canadian Delegation presented to the Assembly A24-WP/85, which in its Appendix listed a number of "Suggested elements for discussion and possible inclusion in a draft Convention". The Assembly referred the proposal to the Council.²¹⁴ The Council on 9 December 1983 requested the Chairman of the Legal Committee to establish a Special Subcommittee for consideration of the Item "Preparation of a Draft Instrument on the Interception of Civil Aircraft", "taking into account the results of the work of the Extraordinary Session of the Assembly in April 1984...and to convene the Subcommittee...from 25 September to 5 October 1984".²¹⁵

When the Sub-Committee met, Canada presented a "Draft Instrument on the Interception of Civil Aircraft"²¹⁶ and Argentina a "Preliminary Draft International Convention on the Unification of Rules Relating to the Interception of Civil Aircraft".²¹⁷

²¹²ICAO Doc. 9415, *supra*, Ch. III, note 93 at 7-10.

²¹³C-WP/2609, *supra*, Ch. III, notes 13-14 and accompanying texts.

²¹⁴*Supra*, Ch. III, note 109 and accompanying text.

²¹⁵ICAO Doc. 9427, *supra*, Ch. III, note 111 at 132.

²¹⁶LC/SC-ICA-WP/3, Attachment.

²¹⁷LC/SC-ICA-WP/12, Attachment.

Canada explained that its new draft did not overlap with Article 3 *bis*, and that certain elements which it had proposed in the Assembly were now covered by Article 3 *bis* and were consequently not reflected in the draft.²¹⁸ The Delegation explained that the proposed instrument "did not attempt to enumerate the situations under which interception may be warranted as well as the situations in which a contracting State is entitled to require the landing of a civil aircraft flying above its territory" and did "not attempt to define activities...inconsistent with the aims of the Convention".²¹⁹

The instrument was intended to apply only where there was an international element in the interception of civil aircraft, namely, where the intercepted aircraft was "registered in a State other than the intercepting State" or where it was "registered in the intercepting State but operated by an operator whose principal of business or permanent residence is outside the intercepting State".²²⁰ Intercepting States would be obliged to "take all appropriate measures to determine the identity and destination of an intercepted aircraft"; such measures would include the requesting of assistance from other States, who were to provide to the requesting State the greatest measure of assistance.²²¹

In a case where the intercepted aircraft landed in the intercepting State, that State would have to notify the State of registry, the State of the operator, the States of nationality or permanent residence of persons on board, and the Secretary General of ICAO;²²² the intercepting State would be obliged to "take appropriate measures to protect, and, in particular, to ensure the safety of, the passengers, crew, aircraft and property",²²³ although it would be entitled to detain the aircraft and property for a

²¹⁸LC/SC-ICA-WP/3 paras. 2 and 4; and LC/SC-ICA-Report paras. 8.1 and 9.1.

²¹⁹LC/SC-ICA-WP/3 para. 4.

²²⁰LC/SC-ICA-WP/3 para. 8; draft Article 1.

²²¹Draft Article 3; LC/SC-ICA-WP/3 para. 9.

²²²Draft Article 4; LC/SC-ICA-WP/3 para. 11.

²²³Draft Article 5; LC/SC-ICA-WP/3 para. 10.

reasonable period for inspection.²²⁴ If, subsequent to an inspection, the State would decide to hold an investigation, it would also be able to detain the aircraft and property thereon for a reasonable period.²²⁵

The intercepting State would be obliged to facilitate the safe continuation of the journey of the passengers and crew without undue delay, and "subject to the need to detain the aircraft and property thereon for purposes of inspection or investigation..., shall return, without delay, the aircraft and its property to the persons lawfully entitled to possession".²²⁶ Findings of inspections and investigations would be notified to the States mentioned above; in the case of an investigation, States having a "substantial interest" would also be notified of the findings.²²⁷

Canada also included what it considered a "novel element", namely, situations involving "the landing of the intercepted aircraft in a State other than the intercepting State" i.e. the State of landing. It explained that if the aircraft left the airspace of the intercepting State, with or without its permission, upon its request, "the aircraft *may* be detained in a State of landing for inspection by or on behalf of the intercepting State" (emphasis added); it would be left to the discretion of the State of landing whether to comply with such a request or not.²²⁸ The intercepting State would then notify the State of landing whether it intended to have an inspection.²²⁹ The State of landing would have broadly similar rights and obligations as indicated above for the State of interception in relation to detention for inspection and investigation; notifications; protection of passengers, crew, aircraft and property; and facilitation for safe

²²⁴Draft Article 6.

²²⁵Draft Article 7.

²²⁶Draft Article 8.

²²⁷Draft Article 10.

²²⁸LC/SC-ICA-WP/3 para. 14; draft Article 12(1).

²²⁹Draft Article 12(2).

continuation of journey. It seems that any State could carry out an inspection on behalf of the intercepting State, but only the latter would be entitled to investigate.²³⁰

Although the instrument would enable the State of landing to detain an aircraft upon the request of the intercepting State, it was feared that the State of landing "would be exposed to a risk of claims or proceedings";²³¹ to mitigate such possibilities, draft Article 17 accordingly provided for the intercepting State to indemnify and hold harmless the State of landing.

Finally, disputes between States relating to the application or interpretation of the instruments would be settled in accordance with the provisions of Chapter XVIII of the Chicago Convention.²³² Sanctions against airlines, operators or States violating the Chicago Convention, including Article 3 *bis* when in force, were not otherwise covered.²³³

Several provisions of the Argentine draft, however, did overlap with Article 3 *bis*. In addition, several matters considered during the 25th Session (Extraordinary) of the Assembly but rejected, were included in the Argentine draft. Contracting States were to refrain from resorting to the use of weapons against civil aircraft, and when intercepting such aircraft, would agree to "take the necessary precautions to avoid endangering the safety and lives of persons on board".²³⁴ The States of registry, operator, and those "from whose territory or towards which or over which an aircraft is flown" would "undertake to take all necessary steps to prevent civil aircraft from violating the sovereignty of other contracting States",²³⁵ and the "right of each contracting State to

²³⁰Draft Articles 12-15.

²³¹LC/SC-ICA-WP/3 para. 15.

²³²Draft Article 21.

²³³LC/SC-ICA-Report para. 9.1.

²³⁴Draft Article 1.

²³⁵Draft Article 2.

protect its sovereignty and security, shall not be affected by...this Convention".²³⁶ Further, under draft Article 4, contracting States would agree to take "all possible measures to prevent their civil aircraft from flying in the airspace of another contracting State in violation of Conventions in force, regulations and their annexes approved by the contracting States concerned, and also to prevent civil aircraft from being operated for purposes inconsistent with the use of civil aviation"; a definition of "acts with inconsistent purposes" was also provided.

By virtue of draft Article 5, contracting States would have the right to intercept civil aircraft "in the situation established in the preceding Article", to order them to land immediately "and to exercise inspection rights", in accordance with appropriate methods consistent with ICAO SARPs. In such cases, the intercepted aircraft would be obliged to immediately comply with the order to land, and failure to do so would be considered a "violation of this Convention and of the Chicago Convention".²³⁷

A party in whose airspace the aircraft was flying, having committed an "act of violation" against the airspace of another contracting State, was *obliged*, upon the latter's request, to intercept the aircraft and to order it to land; failure to fulfil such a request would be a violation of the Convention.²³⁸

The State of landing would be obliged to "proceed to [the aircraft's] interdiction and to the detention of its crew", but would have to take all necessary steps to ensure that there was no danger to the crew and other occupants.²³⁹ The State of landing would be obliged to conduct an investigation as soon as possible, with the possible participation of a number of specified States, such investigation to be concluded within 30 days, with the conclusions notified to the ICAO Council which "may either approve

²³⁶Draft Article 3.

²³⁷Draft Article 6.

²³⁸Draft Article 7.

²³⁹Draft Article 8.

them or not", but which would have to communicate its decision to all contracting States.²⁴⁰ The Council would also be authorized to carry out the investigation upon the request of the parties concerned.²⁴¹

Any dispute relating to the "occurrence, or the investigation" between two parties were to be decided in accordance with the dispute settlement procedures in Chapter XVIII of the Chicago Convention. The Council would be able to advise contracting States of specified penalties and sanctions to be applied against States having violated the provisions of the Convention, and to declare payment of an indemnity by the responsible State in case of damage to persons or property.²⁴²

The draft also contained provisions relating to the responsibility of ATC agencies to notify the aircraft and certain States, of any deviations; the frequency and code of communications between ATC agencies and the aircraft; the obligation of States to ensure that aircraft of their nationality obey instructions of ATC agencies and intercepting aircraft; and the taking of measures to avoid unnecessary delay of the aircraft, crew, passengers and cargo.²⁴³

It is beyond the scope of this enquiry to compare the two drafts or to make an analysis of the various provisions. The summary above merely shows that the international community had widely differing views on the content of such an instrument. Suffice it to say that in the main, the Sub-Committee did not examine the substance of these proposals, instead focusing on the need for such an instrument at that stage and the possible impact the development of such an instrument would have on the rate of ratification of Article 3 *bis*.²⁴⁴ As a result of its deliberations, the Sub-Committee:

²⁴⁰Draft Articles 9-11.

²⁴¹Draft Article 21.

²⁴²Draft Articles 12-14.

²⁴³Draft Articles 15 and 17-19.

²⁴⁴See LC/SC-ICA-Report paras. 8.1 - 9.8.8.

"unanimously came to the conclusion that the question of drafting an instrument on the interception of civil aircraft can best be considered only after the entry into force of Article 3 *bis* and in the light of completion of the present work of the Air Navigation Commission and the Council in respect of the review of ICAO Standards, Recommended Practices and guidance material on the subject of the interception of civil aircraft. Subject to the foregoing, the Sub-Committee recommended that in the meantime the Council should consider:

- a) taking appropriate steps to encourage the ratification of Article 3 *bis* by contracting States;
- b) the study by appropriate bodies of ICAO of whether provisions should be developed, either in the form of amendments to the Annexes to the Chicago Convention or in some other form, concerning matters with regard to the aftermath of the landing of an intercepted civil aircraft, such as:
 - notification to States concerned and ICAO;
 - the protection of and assistance to the passengers and crew, and protection of aircraft and property thereon;
 - facilitation of the journey of passengers, crew, aircraft and property;
 - detention, inspection, investigation of the circumstances, and reports."²⁴⁵

The Secretary General reported to the Council on the outcome of the Sub-Committee's meeting in C-WP/7890, informing that the Sub-Committee felt that the preparation of a draft instrument on interception would be inappropriate at that stage since this might delay the ratification and entry into force of Article 3 *bis*, and that the development of such instrument "should only be considered after the entry into force of Article 3 *bis*".²⁴⁶ During the Council's consideration of this matter on 16 November 1984, the Representative of Jamaica prophetically "cautioned that the Council should not assume that Article 3 *bis* would enter into force soon" and that the Council should take "every possible action to ensure safety in the event of interception and after the event as

²⁴⁵*Ibid.* para. 10.2.

²⁴⁶C-WP/7890 para. 2.2.

well as if an aircraft were forced to land".²⁴⁷ The advantage of an independent convention on interception is that the diplomatic conference could decide on any number of ratifications (in excess of one) for entry into force of the instrument, as opposed to Chicago Convention amendments which must obtain ratification by at least two-thirds of the membership of ICAO (in the case of Article 3 *bis*, 102 States), a time-consuming process in the best of circumstances.

The Council, *inter alia*, adopted the recommendations of the Sub-Committee and requested the Secretary General "to prepare a preliminary study to implement these recommendations".²⁴⁸ The study considered whether there was a need to formulate rules relating to the aftermath of the landing of an intercepted aircraft. The Secretary General pointed out that "documented occurrences of interception of civil aircraft are extremely rare; again, the occurrences where an intercepted civil aircraft is in fact requested to land at a designated airport are even more rare".²⁴⁹ Further, the Secretary General believed that there was no "'legal vacuum' with respect to the conduct of States in the aftermath of a landing of an intercepted civil aircraft". Reference was made to the fact that the Tokyo, Hague and Montreal Conventions:

"contain specific obligations to facilitate the continuation of the journey of passengers and crew as soon as practicable as well as to return without delay the aircraft and its cargo to the persons lawfully entitled to possession. Although these three Conventions refer to profoundly different relationships arising out of an unlawful act of an individual, it is nevertheless believed that these obligations have become part of general international law relating to the protection of passengers and crew, return of the aircraft and cargo and facilitation of the resumption of the journey."²⁵⁰

²⁴⁷ICAO Doc. 9453-C/1085, C-Min. 113/1-18: *Council - 113th Session, Minutes with Subject Index* at 41.

²⁴⁸*Ibid.* at 43.

²⁴⁹C-WP/7953 para. 2.2.1 a).

²⁵⁰*Ibid.* para. 2.2.1.d).

Relevant provisions were also to be found in Annex 9 (*Facilitation*).²⁵¹ One possibility for advancement in this area suggested to the Council was a resolution on the subject to be adopted either by the Council or the Assembly, the contents of which could be later incorporated in the *Manual Concerning Interception of Civil Aircraft*.²⁵²

When the Council considered the study, many representatives stressed that nothing should be done which would negatively impact on the ratification of Article 3 *bis*. The Representative of Czechoslovakia "stated that The Hague, Montreal and Tokyo Conventions and the [SARPs]..., especially those in Annex 9, in combination with the new Article 3 *bis*, were fully capable of providing the necessary protection for civil aircraft."²⁵³ On the other hand, the Representative of Canada remain unconvinced that "no new rules should be drafted related to the aftermath of the landing of an intercepted aircraft pending the entry into force of Article 3 *bis*."²⁵⁴ The Council on 25 March 1985:

"recognizing the need to do its utmost to ensure that Article 3 *bis*...enter into force as soon as possible, *agreed* that no new rules should be drafted related to the aftermath of the landing of an intercepted civil aircraft, pending the entry into force of Article 3 *bis*."²⁵⁵

No further action on this matter has been taken by ICAO to this day (15 August 1998).

With the entry into force of Article 3 *bis* imminent, the question which arises is whether an instrument on interception dealing particularly with the obligations of States after a landing of the aircraft, will be considered by ICAO again. In the late 1960s and early 1970s, ICAO was concerned with a series of hijackings where the State in which the aircraft landed apparently acted in connivance with the hijackers in detaining the

²⁵¹*Ibid.*

²⁵²*Ibid.* para. 3 b) ii).

²⁵³ICAO Doc. 9461-C/1087, C-Min. 114/1-19; C-Min. EXTRAORDINARY (1985)/1-2: *Council - 114th Session; Extraordinary Session (Montreal, 22-23 April 1985), Minutes with Subject Index at 141.*

²⁵⁴*Ibid.*

²⁵⁵*Ibid.* at 142.

aircraft, crew and passengers, or at least did not do all that it could have done to secure their prompt release. This resulted in ICAO holding a series of meetings in the early 1970s, including Legal Sub-Committees, Legal Committees, and an Extraordinary Session of the Assembly and a Diplomatic Conference in 1973 in an attempt to regulate this matter. These attempts by ICAO were unsuccessful,²⁵⁶ but the preoccupation by ICAO with States failing to comply with their obligations under the Tokyo, Hague and Montreal Conventions carried over into the 1980s. Currently, interest in this aspect of air navigation no longer seems to have the same priority, and unless a major incident occurs, it is unlikely that States will see the need to pursue work in this area. More specifically, the States of landing other than the intercepting State may be reluctant to become involved in a matter between third parties.²⁵⁷

Further, it may well be contended that little of value could be gained by concluding a new instrument, if one accepts the view propounded by the ICAO Secretary General that this aspect is already part of general international law and is further regulated in Annex 9. Certainly, any new instrument which conflicts with Article 3 *bis* would create a situation where, as among parties to both, the latter (Article 3 *bis*) would prevail by virtue of Articles 82 and 83 of the Chicago Convention according to which States agree that the Convention abrogates all obligations and understandings between them which are inconsistent with its terms, and undertake not to enter into any such obligations and understandings. It should also be noted that the technical aspects of interception are already covered in ICAO Annexes, particularly Annex 2, the provisions of which are binding on States in their application over the high seas.

On the other hand, the obligations of States with respect to interception go beyond the treatment of passengers, crew and the aircraft after landing; States may file a difference to Annex 2 provisions in their application over national territory; where States do not comply with the material in Attachment A to Annex 2, they are not even obliged to file a difference since such material is for guidance only; and any existing customary

²⁵⁶See Fitzgerald, *supra*, Ch. III, note 326.

²⁵⁷Richard, *supra*, Ch. I, note 22 at 159.

international law in this area would be better expressed in written form. For these reasons, there may well be some States which feel that a new convention on interception should be drawn up, complementary to Article 3 *bis*, incorporating for example, some of the elements proposed by Canada. Further, the main ICAO technical provisions on interception could be attached as a separate annex to the new convention. Keeping in mind that such technical material may be subject to frequent changes, the convention could include a procedure whereby future amendments to the annex would be easier to adopt and put into effect than amendments to the body of the convention proper.²⁵⁸

²⁵⁸There is already a precedent for this approach in the latest ICAO convention on aviation security, viz., the *Convention on the Marking of Plastic Explosives for the Purpose of Detection*, done at Montreal on 1 March 1991, ICAO Doc. 9571.

CHAPTER V

ICAO'S TECHNICAL REGULATORY PROVISIONS RELATED TO THE USE OF FORCE AGAINST CIVIL AERIAL INTRUDERS

1. INTERCEPTION OF CIVIL AIRCRAFT

The key technical provisions on interception of civil aircraft are contained in Annex 2 (*Rules of the Air*), although related material are found in other Annexes and ICAO documents. By virtue of Article 12 of the Chicago Convention and Council decisions in 1948 and 1951, the Standards in Annex 2 apply without exception over the high seas; in their application over national territory, States are entitled to file with ICAO differences between their national regulations and practices and such Standards.¹

a) **Background to Current Provisions**

In 1946, the First Middle East Regional Air Navigation Meeting proposed a set of visual signals for use between aircraft in flight for immediate application by member States, pending examination by the ANC and the Interim Council; the Council referred the recommendations to various Provisional ICAO Divisions. One of these Divisions (RAC)² included in its proposals for Rules of the Air, visual signals for use between aircraft in flight, but these were not incorporated into the First Edition of Annex 2 adopted in 1948. Thereafter in 1948, the same Division considered the question again and concluded that there was no need for ICAO SARPs in this area and that the matter should

¹*Supra*, Ch. IV, note 148 and accompanying text.

²Rules of the Air and Air Traffic Services.

continue to be dealt with on a regional basis.³ However, the Division recommended to include in Annex 2 "visual signals to warn aircraft flying in the vicinity of a prohibited or danger area"; this was done by Amendment No. 1 to Annex 2, adopted on 27 November 1951.⁴

Following the El Al incident in 1955, the ICAO Secretary General in 1956 noted the need for codes of signals, particularly from aircraft to aircraft, as some incidents indicated that aerial intruders had not understood the signals given by intercepting aircraft.⁵ However, the ANC in 1957 concluded that it seemed "unlikely that any simple and reliable system for signalling for world-wide use in the case where an aircraft has entered or is about to enter restricted airspace, can be devised" and that no attempt should be made, at that time, to introduce standard procedures;⁶ in 1958, the ANC still had no further proposals in this area.⁷

On 22 June 1966, following certain recommendations of another Limited Middle East Regional Air Navigation Meeting (1965) and suggestions by the ANC, the Council decided "to impress again on Contracting States the desirability of avoiding the interception of civil aircraft and using interception procedures only as a last resort" and to invite States, in cases of interception, to use only specified procedures and visual signals.⁸ The Secretary General accordingly wrote to States on 12 September 1966, conveying the above-mentioned decision and informing them further that:

"The Council recognized that procedures of this sort dealt with practices to be applied by State aircraft, which are not within the purview of the Chicago Convention. It considered, however, that since procedures and signals used in the interception of civil aircraft could have an adverse

³C-WP/4411 paras. 2.1-2.3.

⁴C-WP/5774 para. 1.3.

⁵C-WP/2153 para. 6(1).

⁶C-WP/2376 para. 6 1).

⁷C-WP/2789 para. 3.

⁸ICAO Doc. 8610, *supra*, Ch. III, note 17.

effect on their safety, it was appropriate for ICAO to address States with its recommendations...."⁹

Two days after the Council considered the report of the incident concerning the Libyan airliner shot down by Israel (1973), the Secretary General advised the Council that notwithstanding the above letter, interceptions continued to take place with attendant risks to civil aircraft and their occupants. He invited the Council to request the ANC to develop relevant material for circulation to States.¹⁰ The Council agreed to this suggestion and in addition, another letter dated 29 June 1973 was sent to States reminding them of the 12 September 1966 letter and urging them, *inter alia*, to limit interception of civil aircraft "to those instances where it is essential for the safe flight of the aircraft" and invited them "to refrain from the use of arms in all cases of interception of civil aircraft".¹¹

It was this instruction to the ANC which led for the first time to the inclusion of material on interception in ICAO Annexes, namely, in Annex 2. This new material included Standards on interception and guidance material in a new Attachment A, and was adopted on 4 February 1975;¹² some further amendments were made in 1981 (Amendment 23).

b) Amendment 27 to Annex 2

The Extraordinary Session of the Council which met to consider the shooting down of KAL 007 adopted two Resolutions on 16 September 1983. The first one contained a generally worded instruction to the ANC "to review the provisions of the Chicago Convention, its Annexes and related documents and consider possible

⁹State Letter AN 13/16-66/129 at 2.

¹⁰C-WP/5774 paras. 2.1 and 5 b) 1).

¹¹State Letter AN 13/16-73/118.

¹²C-WP/6114; and ICAO Doc. 9135-C/1024, C-Min. 84/1-13: *Council - 84th Session, Minutes with Subject Index* at 6.

amendments to prevent a recurrence of such a tragic incident" and "to examine ways to improve the coordination of communication systems between military and civil aircraft and air traffic control services and to improve procedures in cases involving the identification and interception of civil aircraft."¹³ The second one, based on a French proposal, was more specific in detailing certain tasks to be undertaken by the ANC, including a "review of all the provisions contained in Attachment A to Annex 2...concerning the interception of civil aircraft with a view to examining the feasibility of their incorporation as Standards in the body of Annex 2" as well as a "study of new provisions which could be included in Attachment A to Annex 2 or in any other relevant text and which would make it possible to achieve the harmonization of procedures for the interception of civil aircraft as well as to introduce further precautions for the conduct of interceptions".¹⁴ In December 1983, the ANC presented a preliminary report on its work, informing the Council that it had been advised that there should be no legal obstacles to proposing the inclusion in Annex 2 or any other Annex of SARPs pertaining to the obligation of States under Article 3 d) of the Chicago Convention,¹⁵ by which contracting States "undertake, when issuing regulations for their State aircraft, that they will have due regard for the safety of navigation of civil aircraft."

In 1984, the ANC through an *Ad Hoc* Working Group on Interception, developed draft amendments to various Annexes (including Annex 2) and other ICAO documents. In the Group, questions were raised "whether the drafting of Standards relating to interception carried out by military aircraft was in fact within the constitutional purview of the Organization,"¹⁶ keeping in mind that the Convention is applicable to civil aircraft only, and not to state aircraft. The ICAO Legal Bureau advised the Group:

"that the purpose of drafting new provisions on interception of civil aircraft did not necessarily mean drafting provisions relating to military

¹³*Supra*, Ch. III, note 84 and accompanying text.

¹⁴*Supra*, Ch. III, note 86.

¹⁵C-WP/7770 para. 3.2.3.

¹⁶Milde, *supra*, Ch. III, note 197 at 109.

aircraft; the real legislative purpose would be to draft provisions pertaining to the safety of international civil aviation which was a legitimate constitutional purpose of the Organization. In the past, the Organization never refrained from adopting decisions and regulations dealing with the safety of international civil aviation even if that meant interfacing or coordination with the operation of state aircraft....While Article 3(d)...was not a source of legislative authority of the ICAO Council, it did not constitute an obstacle to adoption of Standards relating to the safety of civil aviation in the situations of interception."¹⁷

The difference of opinion in the main centred around proposals to upgrade the Special Recommendations in Attachment A of Annex 2 to the status of SARPs in the body of the Annex proper.

The Ad Hoc Group's work was sent to States for comment. A majority of States expressed agreement to the upgrading, but there were several States which expressed strong objections to ICAO adopting SARPs "which were seen to be applicable to state aircraft and to intercept control units".¹⁸ The ANC:

"decided to adopt an approach based on technical and operational considerations and aimed at the widest possible acceptance by States. This decision led to a compromise between the proposals for upgrading of all the material in Attachment A..., as...supported by a majority of States, and the retention of this material without any change in status, as advocated by a minority of States. The result...is a recommendation...for adoption of a number of provisions with the status of Standards for inclusion in a new Appendix B to Annex 2....At the same time the Commission decided to recommend that Attachment A be retained and that the special recommendations...in their improved and amplified form be placed in it. It also identified the need that the status of these special recommendations be defined and strengthened."¹⁹

In the words of Professor Milde:

¹⁷*Ibid.*

¹⁸C-WP/8028 para. 4.4.

¹⁹*Ibid.* para. 4.5.

"In general, the draft produced by the [ANC] in fact disregarded the opinion of the majority of States commenting on the original proposal and went a long way towards meeting the concern of the minority...."²⁰

When the Council considered the matter in 1985, the Representative of the United States advised of his Government's strong objection:

"to the proposed amendment to paragraph 3.8.1 and Appendix B, sections 1 and 2 of Annex 2 which would repeat in the form of Standards certain principles already covered under special recommendations contained in Attachment A....[A]doption of these Standards and Recommended Practices would clearly violate the Chicago Convention by going beyond the legal parameters which it provided. Article 3 a) of the Convention clearly stated that the Convention was applicable only to civil aircraft and not to State aircraft....Since the proposed Standards were contrary to the fundamental provisions of ICAO's charter embodied in Article 3..., their adoption by the Council would be ultra vires, i.e. beyond the legal authority of ICAO and therefore of no legal effect."²¹

A few States, including the USSR,²² shared the same general opinion.

However, a larger number of States supported the ANC proposals. For example, the Representative of Australia believed that Article 3 did not constitute "an obstacle in this case as one of the basic principles of the Convention was the safety of international civil aviation" and that the amendments proposed were consistent with the aims and objectives of the Convention.²³ As for the United Kingdom, although it:

"would not accept the premise that ICAO should be able to regulate the operation of State aircraft generally, they were prepared to accept ICAO Standards relating to the unique circumstance of interception where there was a clear direct and potentially dangerous interaction between State and civil aircraft. They recognized that the legal position was not completely clear and that different views were possible...."²⁴

²⁰Milde, *supra*, Ch. III, note 197 at 112-113.

²¹ICAO Doc. 9479-C/1091, C-Min. 116/1-31: *Council - 116th Session, Minutes with Summary Index* at 32-33.

²²*Ibid.* at 181.

²³*Ibid.* at 33.

²⁴*Ibid.* at 34.

Much of the debate focussed on the wording of a new Standard 3.8.1 proposed by the Commission,²⁵ and the Council reached an impasse. In early 1986, the United Kingdom put forward a new draft of Standard 3.8.1.²⁶ which was still opposed by some States, but which when put to a vote was carried by 13 votes to 5 with 10 abstentions.²⁷ The remainder of the Commission's proposals were examined, modified and adopted on 10 March 1986 by a vote of 22 in favour, 4 opposed and 6 abstentions.²⁸ In the Resolution of Adoption, the Council invited each contracting State to notify ICAO of any differences between its own practices and those specified in the Special Recommendations in Attachment A.²⁹ Thereafter, the United States "continued to hold the view that adoption of the rules on interception as Standards were *ultra vires* and would treat them accordingly".³⁰ In spite of, or perhaps because of this position, the United States has not filed any differences to the relevant provisions on interception in Annex 2 including Attachment A.

Did the Organization act *ultra vires* in adopting Amendment 27? Arguments can be, and were, made both ways. It is true the Convention is applicable to civil aircraft only, and not to state aircraft. Interception rules impact on both, and the position one takes depends on the perspective from which one approaches the subject. One can argue that rules relating to interception apply to enhance the safety of civil aircraft; it can also

²⁵C-WP/8028, App. A at A-5, which read:

"3.8.1 Interception of civil aircraft shall be governed by appropriate regulations and administrative directives issued by Contracting States in compliance with the Convention on International Civil Aviation. In drafting such regulations or administrative directives States shall take into account the provisions in Appendix A, Section 2 and Appendix B, Section 1."

²⁶Discussion Paper No. 2 related to C-WP/8028.

²⁷ICAO Doc. 9484-C/1093, C-Min. 117/1-23: *Council - 117th Session, Minutes with Subject Index* at 26.

²⁸*Ibid.* at 115.

²⁹*Ibid.* at 123.

³⁰*Ibid.* at 115.

be submitted that these rules apply to state aircraft. One formalistic position is that rules on interception are addressed to States and it is left to their discretion how they are to be implemented internally, but in practice, such implementation will necessarily relate to the performance of state aircraft and intercept control units.

What is clear is that since 1966, ICAO has provided guidance material in this area, and since 1975 had incorporated specific provisions on interception into Annex 2. Such provisions included action to be taken by intercepting aircraft. Indeed, the Director of the Legal Bureau reminded the Council that a precedent had been set earlier (in 1975).³¹ Further, those opposing Amendment 27 were happy to have intercept provisions in the form of the Special Recommendations in Attachment A, and one can have much sympathy with the statement by the Representative of the Federal Republic of Germany "that if ICAO was not competent to issue [SARPs] for State aircraft, it might be well to determine whether it was competent to issue special recommendations in this respect."³²

On balance, it would seem that the practice of States through the absence of objection from 1966 to 1984 created or confirmed an interpretation of Article 3 (applying Article 31(3) of the *Vienna Convention*³³) enabling ICAO to adopt provisions on interception of civil aircraft, even where these regulate certain aspects relating to state aircraft.

c) **Current Provisions Relating to Interception**

The vast majority of provisions relating to interception of civil aircraft are to be found in the current (Ninth) Edition of Annex 2.

³¹ICAO Doc. 9479, *supra*, note 21 at 44.

³²*Ibid.* at 47.

³³*Supra*, Ch. IV, note 104 and accompanying text.

The controversial Standard 3.8.1 provides that interception of civil aircraft shall be governed by appropriate regulations and directives issued by States in compliance with the Chicago Convention, particularly Article 3(d), and that accordingly, in drafting such regulations and directives, due regard must be paid to the provisions of Appendix 1, Section 2 and Appendix 2, Section 1. An explanatory Note which does not constitute part of the Standard, provides that it is essential for flight safety that visual signals employed in the event of an interception be correctly employed and understood by both civil and military aircraft. The Note states that the Council, when adopting the visual signals in Appendix 1, urged contracting States to ensure that they be strictly adhered to by their state aircraft. It further explains that as such interceptions are in all cases potentially hazardous, the Council formulated the Special Recommendations in Attachment A which States are urged to comply with in a uniform manner.

Standard 3.8.2 puts an obligation on the pilot-in-command of civil aircraft being intercepted to comply with certain provisions in Appendices 1 and 2 to the Annex. The Appendices contain Standards grouped separately for convenience.

Appendix 1, Section 1 deals with distress and urgency signals to be given by civil aircraft in appropriate circumstances.

Appendix 1, Section 2 sets out "signals initiated by intercepting aircraft" to indicate: that the civil aircraft has been intercepted and should follow the intercepting aircraft; that the civil aircraft may proceed; that it should land at the designated aerodrome. The manner of response of the intercepted aircraft is also set out. Section 2 in addition provides for signals by the intercepted aircraft to show that the designated aerodrome for landing is inadequate; that it cannot comply with the orders of the interceptor; and/or that it is in distress.

Of particular relevance to civil aerial intruders is Section 3 of Appendix 1, which indicates "Visual Signals Used to Warn an Unauthorized Aircraft Flying in, or about to enter a Restricted, Prohibited or Danger Area". This comprises "a series of projectiles discharged from the ground at intervals of 10 seconds, each showing, on bursting, red and green lights or stars".

*Appendix 2, Section 1, deals with "Principles to be observed by States" which include, *inter alia*, the following:*

- "a) interception of civil aircraft will be undertaken only as a last resort;**
- b) if undertaken, an interception will be limited to determining the identity of the aircraft, unless it is necessary to return the aircraft to its planned track, direct it beyond the boundaries of national airspace, guide it away from a prohibited, restricted or danger area or instruct it to land at a designated aerodrome;**
- c) practice interception of civil aircraft will not be undertaken;**
- d) navigational guidance and related information will be given to an intercepted aircraft by radiotelephony, whenever radio contact can be established; and**
- e) in the case where an intercepted civil aircraft is required to land..., the aerodrome designated for the landing is to be suitable for the safe landing of the aircraft type concerned."**

Immediately following is a Note reminding States of the provision in Article 3 *bis* by which States recognize that "every State must refrain from resorting to the use of weapons against civil aircraft in flight." Further Standards in Appendix 2, Section 1 obliges States to publish a standard method established for the manoeuvring of intercepting aircraft, which "shall be designed to avoid any hazard for the intercepted aircraft", and to ensure that provision is made for the use of secondary surveillance radar (SSR), where available, to identify civil aircraft.

Section 2 of Appendix 2 regulates "Action by Intercepted Aircraft". Intercepted aircraft must follow the instructions given by the intercepting aircraft, responding to visual signals in the manner set out in Appendix 1. Intercepted aircraft must attempt to establish radiocommunication with intercepting aircraft or with the appropriate intercept control unit on 121.5 MHz; if no contact is made and if practicable, attempts should be made on 243 MHz. Standards 2.2 and 2.3 deal with a situation where conflicting instructions are given by the intercepting aircraft and other sources.

Under Section 3, if radio contact is made but communication in a common language is not possible, attempts at communication shall be made using phrases and pronunciations specified in an accompanying Table.

As an introduction to *Attachment A* (commonly referred to as "the green pages"), paragraph 1 states:

"...As interceptions of civil aircraft are, in all cases, potentially hazardous, the Council...has formulated the following special recommendations which Contracting States are urged to implement through appropriate regulatory and administrative action. The uniform application by all concerned is considered essential in the interest of safety of civil aircraft and their occupants. For this reason the Council...invited Contracting States to notify ICAO of any differences which may exist between their national regulations or practices and the special recommendations hereunder."

These Special Recommendations include the substance of the relevant Standards on interception found in Appendix 2, and additional elements.

Paragraph 2.2 stipulates that in order to eliminate or reduce the need for interception, all possible efforts should "be made by intercept control units to secure identification of any aircraft which may be a civil aircraft, and to issue necessary instructions or advice to such aircraft, through the appropriate air traffic services units"; further, that areas prohibited to civil flights or those where such flights are not permitted except with special authorization should be clearly promulgated in the AIP, together with an indication of the risk, if any, of interception in case of intrusion into such areas.

To eliminate or reduce hazards inherent in interceptions, paragraph 2.3 provides that all efforts should be "made to ensure co-ordinated actions by the pilots and ground units"; in particular, pilots of intercepting aircraft should "be made aware of the general performance limitations of civil aircraft and of the possibility that intercepted civil aircraft may be in a state of emergency".

Paragraph 3 deals with interception manoeuvres. A standard method should be established by States for the manoeuvring of intercepting aircraft such as to avoid any hazard for the intercepted aircraft; such method "should take into account the performance limitations of civil aircraft, the need to avoid flying in such proximity to the

intercepted aircraft that a collision hazard may be created", and the need to avoid manoeuvres which would form hazardous wake turbulence.

Very specific manoeuvres for visual identification, and for navigational guidance (e.g., relative positions of intercepted and intercepting aircraft) of the intercepted aircraft are described in paragraphs 3.2 and 3.3. respectively.

The actions of an intercepted aircraft to be followed in response to an interception set out in Section 2 of Appendix 2, are repeated. Referring to the visual signals to be used as indicated in Appendix 1, paragraph 6 of Attachment A states that it "is essential that intercepting and intercepted aircraft adhere strictly to those signals...given by the other aircraft, and that the intercepting aircraft pay particular attention to any signals given by the intercepted aircraft to indicate that it is in a state of distress or urgency."

Further provisions are contained on "radiocommunication between the intercept control unit or the intercepting aircraft and the intercepted aircraft" and on "co-ordination between intercept control units and air traffic services units".

Other material relevant to the interception of civil aircraft may be found in Annexes 6, 7, 10, 11 and 15 and in the ICAO *Procedures for Air Navigation Services - Aircraft Operations* (PANS-OPS)³⁴ and the *Procedures for Air Navigation Services - Rules of the Air and Air Traffic Services* (PANS-RAC).³⁵ For convenience, all relevant provisions on interception of civil aircraft are consolidated in the *Manual concerning Interception of Civil Aircraft*.³⁶

³⁴ICAO Doc. 8168-OPS/611. ICAO Procedures for Air Navigation Services "comprise, for the most part, operating practices as well as material considered too detailed for SARPs. PANS often amplify the basic principles in the corresponding SARPs contained in Annexes to assist in the application of those SARPs. To qualify for PANs status, the procedure shall be agreed as suitable for application on a world-wide basis...." (ICAO Doc. 8143-AN/873/3: *Directives to Divisional-type Meetings and Rules of Procedures for their Conduct*, Part II at Article 3).

³⁵ICAO Doc. 4444-RAC/501.

³⁶ICAO Doc. 9433-AN/926.

2. AIR TRAFFIC SERVICES AND CIVIL-MILITARY CO-ORDINATION

Annex 11 (*Air Traffic Services*) contains a number of provisions aimed at the avoidance of the use of force against civil aerial intruders. Many of these provisions relate to interaction with military units.

The Standards in Section 2.16 require air traffic services (ATS) authorities to "establish and maintain close co-operation with military authorities responsible for activities that may affect flights of civil aircraft". Arrangements must be made to permit information relevant to the safe conduct of flights of civil aircraft to be promptly exchanged between ATS units and military units. ATS units must provide appropriate military units with information concerning flights of civil aircraft, and must designate any areas or routes where requirements for flight plans, two-way communications and position reporting apply to all flights, to ensure that all relevant data is "available in appropriate [ATS] units specifically for the purpose of facilitating identification of civil aircraft". Procedures must be established to ensure that ATS units "are notified if a military unit observes that an aircraft which is, or might be, a civil aircraft is approaching, or has entered, any area in which interception might become necessary"; all efforts must be "made to confirm the identity of the aircraft and to provide it with the navigational guidance necessary to avoid the need for interception".

Standard 2.17.1 stipulates that "arrangements for activities potentially hazardous to civil aircraft, whether over the territory of a State or over the high seas, shall be co-ordinated with the appropriate [ATS] authorities". An associated Recommended Practice (2.17.1.1) states that if "the appropriate ATS authority is not that of the State where the organization planning the activities is located, initial co-ordination should be effected through the ATS authority responsible for the airspace over the State where the organization is located". Direct communication between the appropriate ATS authority or unit "and the organization or unit conducting the activities should be provided for use in the event that civil aircraft emergencies or other unforeseen circumstances require

discontinuation of the activities".³⁷ The appropriate ATS authorities are "responsible for initiating the promulgation of information regarding the activities" (Standard 2.17.3). If activities potentially hazardous to civil aircraft take place regularly, special co-ordination committees should be established.³⁸

Section 2.23.1 contains a number of Standards and Notes relating to strayed or unidentified aircraft. In particular, as soon as an ATS unit becomes aware of a strayed aircraft, it must take necessary steps to assist the aircraft. If the aircraft's position is not known, the ATS unit must: attempt to establish communication with the aircraft, try to determine the aircraft's position, inform other ATS units into whose area the aircraft may have strayed or may stray, and inform appropriate military units. If the position of the strayed aircraft is established, the ATS unit must inform the aircraft accordingly, and provide other ATS units and appropriate military units with the relevant information. As soon as an ATS unit "becomes aware of an unidentified aircraft in an area, it shall endeavour to establish [its] identity...whenever this is necessary for the provision of air traffic services or required by the appropriate military authorities"; specified steps to be taken in this regard are indicated. As soon as the identity is established, the military units shall be advised as necessary.

The duties of an ATS unit when it learns of an interception in its area of responsibility are set out in Standard 2.23.2.1. The ATS unit must "attempt to establish two-way communication with the intercepted aircraft on any available frequency, including the emergency frequency 121.5 MHz". It must:

- a) inform the pilot of the intercepted aircraft of the interception;
- b) establish contact with the intercept control unit and provide it with available information on the intercepted aircraft;
- c) "relay messages between the intercepting aircraft or the intercept control unit and the intercepted aircraft, as necessary"; and

³⁷Recommended Practice 2.17.2.1 c).

³⁸Recommended Practice 2.17.4.

- d) "inform ATS units serving adjacent flight information regions [FIRs] if it appears that the aircraft has strayed from such...regions."

Specified duties of an ATS unit if it learns of an interception outside its area of responsibility are listed in Standard 2.23.2.2.

By virtue of Standards 6.2.2.2.1 and 6.2.2.2.2, ATS units are required to possess facilities for communications with appropriate military units; such facilities are described in Standards 6.2.2.3.1, 6.2.2.3.5 and 6.2.2.3.7 and associated Recommended Practices. A requirement is also laid down for communications facilities with certain adjacent FIRs (Standard 6.2.3.1).

The substance of these provisions of Annex 11 are also incorporated in the *Manual Concerning Interception of Civil Aircraft*. More specifically, as a result of the ANC's review of the safety recommendations contained in the report of the fact-finding investigation into the shooting down of IR 655,³⁹ the *Manual Concerning Safety Measures Relating to Military Activities Potentially Hazardous to Civil Aircraft Operations* was published in 1990.⁴⁰ It amplifies SARPs on the subject contained in the various Annexes, in particular the Standards in Sections 2.16 and 2.17 of Annex 11. Additional guidance material has also been incorporated.⁴¹ The stated objective of this Manual "is to promote effective co-ordination so that activity potentially hazardous to civil aircraft operations may be accommodated within agreed airspace."⁴²

In addition, several successive sessions of the Assembly have adopted a resolution dealing, *inter alia*, with co-ordination of civil and military air traffic. The current version is Resolution A31-5, Appendix P, by which the Assembly resolves that "the common use by civil and military aviation of airspace and certain facilities and services shall be arranged so as to ensure the safety, regularity and efficiency of international civil air

³⁹*Supra*, Ch. III, notes 282 and 288-291 and accompanying texts.

⁴⁰ICAO Doc. 9554-AN/932.

⁴¹*Ibid.* Foreword at (iii).

⁴²*Ibid.* para. 1.3.

traffic"; and that "the regulations and procedures established by Contracting States to govern the operation of their state aircraft over the high seas shall ensure that these operations do not compromise the safety, regularity and efficiency of international civil air traffic and that, to the extent practicable, these operations comply with the rules of the air in Annex 2."⁴³

3. RELATIONSHIP WITH CUSTOMARY INTERNATIONAL LAW

At least two commentators claim that ICAO's provisions on interception have become part of customary international law. Hassan states:

"The principle which emerges from an examination of communications between states involved in past incidents of aerial trespass is that regardless of the voluntary or involuntary nature of the intrusion, and apart from whether the subjacent state considers it to be a security threat or not, once a foreign aircraft has been intercepted, it should be asked to land after appropriate warnings. This was the express or implied stand of all the countries which have been involved in past incidents. Despite the fact that the Chicago Convention interception guidelines are not technically binding, similar domestic rules have been followed or acknowledged in past cases of aerial trespass.

International interception procedures have, therefore, by force of widespread acceptance, become a part of customary international law."⁴⁴

Majid believes that:

⁴³ICAO Doc. 9662: *Assembly Resolutions in Force (as of 4 October 1995)* at II-12. An "Associated Practice" in the same Resolution sets out that:

"When establishing the regulations and procedures...the State concerned should coordinate the matter with all States responsible for the provision of air traffic services over the high seas in the area in question."

⁴⁴Hassan, *supra*, Ch. I, note 22 at 583. Later on, he expresses the opinion that:

"In sum, it appears that a customary rule of international law exists which provides that the interception of an intruding passenger airliner may only take place in accordance with the guidelines contained in Annex 2..." (*supra* at 584).

He repeats similar views on another occasion (see Hassan, *supra*, Ch. I, note 6 at 723).

"State practice (e.g. Israel in 1973 and Soviet Union in 1978 and 1983) generally endorses the acceptance of these interception procedures as a part of customary international law and this view has not been contradicted by any State."⁴⁵

On the other side of the coin, Professor Cheng puts his position thus:

"...Annexes to the Chicago Convention do not purport to be declaratory of rules of general international law and, not being really part of the Convention, they do not have the status of being able to do so."⁴⁶

As stated previously, the Annexes are not integral parts of the Chicago Convention and are so designated for convenience only. States which are unable to comply with a Standard may, in accordance with Article 38 of the Chicago Convention, "opt-out" by filing an appropriate difference with ICAO. There is no obligation to file a difference with respect to Recommended Practices or to Special Recommendations, although States are urged to do so. The only exception to this regime lies in the fact that over the high seas, Annex 2 Standards are applicable without exception, and no State may file a difference in this regard; they may so file in relation to the application of Annex 2 Standards over their national territory.

In the *North Sea Continental Shelf* cases, the I.C.J. examined whether certain rules embodied in a treaty had, by dint of subsequent State practice, become part of customary law. The Court stated:

"In so far as this contention is based on the view that Article 6...has had the influence, and has produced the effect described, it clearly involves treating that Article as a norm-creating provision which has constituted the foundation of, or has generated a rule which, while only conventional or contractual in origin, has since passed into the general *corpus* of international law, and is now accepted as such by the *opinio juris* so as to have become binding even for countries which have never, and do not, become parties to the Convention. There is no doubt that this process is a perfectly possible one and does from time to time occur.... At the same time this result is not likely to be regarded as having been attained.

⁴⁵Majid, *supra*, Ch. II, note 31 at 206.

⁴⁶Cheng, *supra*, Ch. I, note 31 at 61.

It would in the first place be necessary that the provision should, at all events potentially, be of a fundamentally norm-creating character such as could be regarded as forming the basis of a general rule of law...[I]n practice, rules of international law can, by agreement, be derogated from in particular cases, or as between particular parties - but this is not normally the subject of any express provision... Finally, the faculty of making reservations [to the treaty rule]..., while it might not of itself prevent the...principle being eventually received as general law, does add considerably to the difficulty of regarding this result as having been brought about (or being potentially possible) on the basis of the Convention.⁴⁷

A fortiori, the same would apply where the rules do not have the same binding quality as treaty provisions.

Since 1966, ICAO has recommended rules on interception and formally incorporated some rules into Annex 2 in 1975. These rules have been accepted by all categories of States and included in their domestic regulations. No State has denied the validity of these rules, whether as Standards or as guidance material in Attachment A.⁴⁸ A review indicates that the only difference filed to a key Annex 2 provision on interception is by the United Kingdom in relation to the use of pyrotechnics to warn unauthorized aircraft flying in, or about to enter a restricted, prohibited or danger area (Appendix 1, Section 3). Indeed, both individually and collectively through the various resolutions adopted by ICAO and considered above, their applicability have been expressly affirmed. In view of this overwhelming evidence of State practice, it would seem at first sight that the ICAO-developed technical provisions relevant to the use of force against civil aerial intruders, whether incorporated in Annex 2 or elsewhere, have acquired the status of customary international law.

On the other hand, application of the criteria pronounced by the I.C.J. in the *North Sea Continental Shelf* cases would appear to deny ICAO Annex provisions that

⁴⁷*Supra*, Ch. II, note 35 paras. 71-72. But see the dissenting Opinions of Judges Lachs and Sorenson in the same case.

⁴⁸The objection raised by some States in relation to Amendment 27 had less to do with the applicability or validity of these rules than with their promulgation by ICAO and their upgrading to Standards.

status. Firstly, the interception provisions are not even an integral part of the Chicago Convention. Secondly, the possibility of filing differences is tantamount to making a reservation to a treaty provision and would mitigate against ascribing to these rules a fundamental norm-creating character. Thirdly, many of the rules are not given the status of Standards, but merely that of Recommended Practices or Special Recommendations for which even the filing of differences is not necessary in case of non-compliance. Fourthly, the relative facility of amending these rules and the consequent change in substantive content strongly suggest that they are not intended to reflect, or subsequently become after adoption, principles of customary international law.

Recognizing that arguments can be made for either case, it is submitted that the result would differ little in practice. Nearly the entire world community, and certainly all the major aviation nations, are party to the Chicago Convention, and bound by the ICAO Standards on interception of civil aircraft and civil/military co-ordination, unless they file a difference which they have not done apart from the one limited exception referred to above. The relevance of the customary law status of the provisions concerning the use of force against civil aerial intruders would lie in instances where the filing of a difference is not strictly required, such as for Recommended Practices and Special Recommendations and even then, States are already urged to file differences. Further, there are the few cases of non-contracting States to the Chicago Convention which would be bound by rules of customary law but not by the Convention and Annexes *per se*. It should be noted that none of these States are major aviation powers and most do not have intercept control units, interceptor aircraft or interception capabilities.

CONCLUSION AND SUMMARY

In accordance with the Chicago Convention and customary international law, every State has complete and exclusive sovereignty over the airspace above its territory, and there is no automatic right of passage of aircraft of one State over the territory of another State. Authorization for aircraft to enter, overfly or land in foreign territory may be granted on a multilateral or bilateral basis. Sometimes a civil aircraft may deliberately or inadvertently enter without permission the airspace of a foreign State or, having obtained such permission, deviate from its assigned route or enter a prohibited or restricted area. Such incidents occur frequently, and on occasion the territorial sovereign will react with force to end the intrusion, sometimes resulting in a large number of fatalities.

As the UN specialized agency tasked to promote the safety of flight in international air navigation, ICAO has concerned itself with this matter from the early days of its existence. In 1984, it adopted an amendment to the Chicago Convention (Article 3 *bis*) to regulate the legal aspects of the use of weapons against civil aircraft in flight. Prior to this amendment, treaty law dealt in an ambiguous manner with the question whether and in what circumstances a subjacent State could use force against an aerial intruder. Customary international law, judicial and arbitral decisions as well as the writings of publicists prior to 1984 indicated that such use of force was allowed but only in exceptional circumstances. In particular, the subjacent State was obliged to make all reasonable efforts to identify the intruder; aircraft identified as civilian which appeared to have intruded inadvertently were to be afforded all reasonable measures of assistance. In all cases of intrusion of a manifestly civil aircraft, the subjacent State was entitled to request the aircraft to land or to change course; such order was to be obeyed unless the aircraft was unable to do so. In attempting to control the intruder, the territorial sovereign must not cause an unreasonable degree of danger to the aircraft and its occupants. The primary remedy for the territorial sovereign was to make appropriate diplomatic representation to the State of nationality of the aircraft. If the aircraft did not

pose or appear to pose an immediate threat to the subjacent State, force was not to be used against it even if it disobeyed the orders given to it. In the rare case of an intruder identified as civilian which nevertheless acted or appeared to act in a manner inimical to the security of the subjacent State, force was not to be used unless it was necessary and proportionate.

During the last half century, ICAO has dealt with four specific incidents involving the shoot-down of civil aerial intruders, namely, those concerning:

- 1) El Al Constellation (Israel-Bulgaria, 1955)
- 2) Libyan Arab Airlines (Libya-Israel, 1973)
- 3) Korean Airlines (South Korea-USSR, 1983)
- 4) U.S.-registered civil aircraft (U.S.A.-Cuba, 1996)

Additionally, ICAO also dealt with the Iran Air (Iran-U.S.A., 1988) incident which, though not involving an aerial intrusion, nevertheless resulted in fatal use of force against the civil aircraft. In the last four cases, ICAO carried out an investigation into the factual circumstances surrounding the shoot-downs.

In its consideration of these five incidents, member States at the ICAO Assembly and representatives on the Council made numerous statements expressing their opinion regarding the law which governs the use of force against civil aircraft. Both the Assembly and the Council adopted a number of resolutions and took certain decisions in this regard. An evaluation of ICAO's consideration of these incidents show that there is a proper legal basis for ICAO to carry out such investigations. However, the official status of the investigation reports is unclear since the Council, as the proper authority to do so, has never explicitly endorsed them. Further, a review of ICAO action indicates that for many years, the Organization failed to be proactive in adopting adequate legal and technical regulatory material. Although there has been calls from many States for an independent machinery to investigate incidents such as the ones being considered, until ICAO exhibits a reluctance to carry out such investigation, other machinery would not have much added value. However, it might be useful for the Organization to perform audits on States to ensure that adequate national regulations and practices exist to govern interceptions and the use of force against civil aircraft. Finally, although there have been frequent claims made in ICAO by States that the consideration of these incidents should

be limited to the technical aspects only, in fact the discussions and conclusions of the Organization have invariably been coloured by political factors.

ICAO's principal contribution to the law governing the use of force against civil aircraft has been the adoption of Article 3 *bis* in 1984, which prohibits the use of weapons against civil aircraft in flight subject only to the provisions of the UN Charter on self-defence. Under Article 3 *bis*, the subjacent State may require overflying foreign aircraft to land in various circumstances, namely, where it is flying above the territory without authority or if there are reasonable grounds to conclude that it is being used for purposes inconsistent with the Chicago Convention. The aircraft is obliged to comply with such order. States are obliged to take appropriate measures to prohibit the deliberate use of civil aircraft of their nationality or operated from their territory for any purpose inconsistent with the aims of the Chicago Convention. Although delegates at the Assembly which adopted the amendment (Article 3 *bis*) believed that they were merely codifying customary international law, in fact a number of elements in the amendment do not reflect such pre-existing law. In particular, the prohibition of the use of force against civil aircraft in the amendment is more restrictive of the discretion of the territorial sovereign than was the customary law in 1984.

While the numerous ICAO resolutions and decisions in regard to the use of force or weapons against civil aircraft are not legally binding on States, their application must be considered in good faith. As a manifestation of State practice, they contribute to the formation and elucidation of rules of customary international law. However, the content of such resolutions and decisions have clearly been influenced by political factors. Similarly, ICAO has provided many opportunities for States to give their individual views on the law governing the use of force against civil aerial intruders; the expression of such views is a valuable source of evidence of the content of customary international law.

Although ICAO considered the possibility of adopting a separate independent convention on interception, there was not much enthusiasm for such an instrument, and the situation has not changed although there may well be advantages in having a more detailed legal regime.

Apart from the adoption of Article 3 *bis*, ICAO's main focus has been on technical regulation to minimize the need for interception and to ensure that when interception takes place, the aircraft and its occupants are exposed to no or minimal danger. Such regulations are found mainly in Annexes 2 and 11 and related documents. Strong arguments could be made that these ICAO rules have evolved into customary international law, but there are equally valid grounds to deny them that effect. Either way, the result would have little practical implication as they are almost universally followed by States.

Each new incident, with its own particular set of circumstances, has led ICAO to review its legal and technical rules relating to the use of force against civil aircraft. If the Organization appeared somewhat oblivious or indifferent in its early days to the extreme gravity of this subject, the same is no longer true. Improvements in this area may lie less in the adoption of new rules and revision of old ones than in the implementation of, and compliance with, such rules by States and flight crew. There will continue to be civil aerial intrusions in the foreseeable future: the most that can be done is to minimize the number and consequences of such incidents.

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ANNEX

Doc 9436

PROTOCOL
RELATING TO AN AMENDMENT TO THE
CONVENTION ON INTERNATIONAL CIVIL AVIATION

[Article 3 *bis*]

Signed at Montreal on 10 May 1984

1984

INTERNATIONAL CIVIL AVIATION ORGANIZATION

PROTOCOL

relating to an amendment to the
Convention on International Civil Aviation

THE ASSEMBLY OF THE INTERNATIONAL CIVIL AVIATION ORGANIZATION

HAVING MET in its Twenty-fifth Session (Extraordinary) at Montreal on 10 May 1984,

HAVING NOTED that international civil aviation can greatly help to create and preserve friendship and understanding among the nations and peoples of the world, yet its abuse can become a threat to general security,

HAVING NOTED that it is desirable to avoid friction and to promote that co-operation between nations and peoples upon which the peace of the world depends,

HAVING NOTED that it is necessary that international civil aviation may be developed in a safe and orderly manner,

HAVING NOTED that in keeping with elementary considerations of humanity the safety and the lives of persons on board civil aircraft must be assured,

HAVING NOTED that in the Convention on International Civil Aviation done at Chicago on the seventh day of December 1944 the contracting States

- recognize that every State has complete and exclusive sovereignty over the airspace above its territory,
- undertake, when issuing regulations for their state aircraft, that they will have due regard for the safety of navigation of civil aircraft, and
- agree not to use civil aviation for any purpose inconsistent with the aims of the Convention,

HAVING NOTED the resolve of the contracting States to take appropriate measures designed to prevent the violation of other States' airspace and the use of civil aviation for purposes inconsistent with the aims of the Convention and to enhance further the safety of international civil aviation,

HAVING NOTED the general desire of contracting States to reaffirm the principle of non-use of weapons against civil aircraft in flight,

1. **DECIDES** that it is desirable therefore to amend the Convention on International Civil Aviation done at Chicago on the seventh day of December 1944,
2. **APPROVES**, in accordance with the provision of Article 94(a) of the Convention aforesaid, the following proposed amendment to the said

Convention:

Insert, after Article 3, a new Article 3 *bis*:

Article 3 *bis

(a) The contracting States recognize that every State must refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of aircraft must not be endangered. This provision shall not be interpreted as modifying in any way the rights and obligations of States set forth in the Charter of the United Nations.

(b) The contracting States recognize that every State, in the exercise of its sovereignty, is entitled to require the landing at some designated airport of a civil aircraft flying above its territory without authority or if there are reasonable grounds to conclude that it is being used for any purpose inconsistent with the aims of this Convention; it may also give such aircraft any other instructions to put an end to such violations. For this purpose, the contracting States may resort to any appropriate means consistent with relevant rules of international law, including the relevant provisions of this Convention, specifically paragraph (a) of this Article. Each contracting State agrees to publish its regulations in force regarding the interception of civil aircraft.

(c) Every civil aircraft shall comply with an order given in conformity with paragraph (b) of this Article. To this end each contracting State shall establish all necessary provisions in its national laws or regulations to make such compliance mandatory for any civil aircraft registered in that State or operated by an operator who has his principal place of business or permanent residence in that State. Each contracting State shall make any violation of such applicable laws or regulations punishable by severe penalties and shall submit the case to its competent authorities in accordance with its laws or regulations.

- (d) Each contracting State shall take appropriate measures to prohibit the deliberate use of any civil aircraft registered in that State or operated by an operator who has his principal place of business or permanent residence in that State for any purpose inconsistent with the aims of this Convention. This provision shall not affect paragraph (a) or derogate from paragraphs (b) and (c) of this Article.",
3. SPECIFIES, pursuant to the provision of the said Article 94(a) of the said Convention, one hundred and two as the number of contracting States upon whose ratification the proposed amendment aforesaid shall come into force, and
4. RESOLVES that the Secretary General of the International Civil Aviation Organization draw up a Protocol, in the English, French, Russian and Spanish languages, each of which shall be of equal authenticity, embodying the proposed amendment above-mentioned and the matter hereinafter appearing:
- a) The Protocol shall be signed by the President of the Assembly and its Secretary General.
 - b) The Protocol shall be open to ratification by any State which has ratified or adhered to the said Convention on International Civil Aviation.
 - c) The instruments of ratification shall be deposited with the International Civil Aviation Organization.
 - d) The Protocol shall come into force in respect of the States which have ratified it on the date on which the one hundred and second instrument of ratification is so deposited.
 - e) The Secretary General shall immediately notify all contracting States of the date of deposit of each ratification of the Protocol.
 - f) The Secretary General shall notify all States parties to the said Convention of the date on which the Protocol comes into force.
 - g) With respect to any contracting State ratifying the Protocol after the date aforesaid, the Protocol shall come into force upon deposit of its instrument of ratification with the International Civil Aviation Organization.

CONSEQUENTLY, pursuant to the aforesaid action of the Assembly,

This Protocol has been drawn up by the Secretary General of the Organization.

IN WITNESS WHEREOF, the President and the Secretary General of the aforesaid Twenty-fifth Session, (Extraordinary) of the Assembly of the International Civil Aviation Organization, being authorized thereto by the Assembly, sign this Protocol.

DONE at Montreal on the 10th day of May of the year one thousand nine hundred and eighty-four, in a single document in the English, French, Russian and Spanish languages, each text being equally authentic. This Protocol shall remain deposited in the archives of the International Civil Organization, and certified copies thereof shall be transmitted by the Secretary General of the Organization to all States parties to the Convention on International Civil Aviation done at Chicago on the seventh day of December 1944.

Assad Kotaite
*President of the 25th Session (Extraordinary) of the Assembly
General*

Yves Lambert
Secretary