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Shooting down Civilian Aircraft: Is There an International Law

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SHOOTING DOWN CIVILIAN AIRCRAFT: IS THERE AN INTERNATIONAL LAW?

BRIAN E. FOONT*

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“For the longest while it was held that nations, like individuals, were subject to preexisting laws. Divine, if you please. Natural, if you like.”¹

PROLOGUE

I SUBMITTED the original “final draft” of this article on January 21, 2000 as my final paper for a course titled “The Law of International Armed Conflict” taught by Prof. (Col.) William K. Lietzau in the graduate program at the Georgetown University Law Center. Given the sparse writings on the subject, Prof. Lietzau commented that I might pursue having it published and following graduation in January 2001, I did just that. Work, falling in love, and other of life’s diversions delayed the effort a bit. Nevertheless, the work continued. I even took a “finalish” copy with me on a flight from Washington, D.C. to New York on September 9, 2001. Two days later the answer to the question I set out to address in that draft seemed all too clear, and, in addition to being diverted to other pressing activities, the subject seemed distasteful to pursue at the time. Recently, however, another of my former Georgetown Law professors, Allan Mendelsohn, urged me to resume the effort and so I have. After the morning of September 11, 2001, it seems that no one doubts that not only are there times when it is permissible to shoot down a civilian aircraft, there are times when it is imperative. The question remains, however, when?

¹ DANIEL PATRICK MOYNIHAN, ON THE LAW OF NATIONS: A HISTORICAL AND PERSONAL ACCOUNT OF THE ROLE OF INTERNATIONAL LAW IN FOREIGN POLICY 9 (1990).

INTRODUCTION

Imagine that an aircraft operating as flight AB123 takes off on a journey requiring a transit across the airspace of Country A. Country A generally allows civilian aircraft to transit its airspace. Nevertheless, Country A's law prohibits flying within fifty miles of its military's headquarters (or, perhaps, its financial center) or on a course that would intercept that restricted area without prior authorization.

The air traffic controllers in Country A soon realize that Flight AB123 is flying on a course that will cut through the restricted airspace. They, therefore, contact Flight AB123 and direct the pilot to adjust course. After some linguistic difficulties, the pilot of the aircraft, which is now inside the restricted area, acknowledges the instruction. The air traffic controllers immediately notice, however, that rather than turning away from the restricted area, the aircraft has turned the correct number of degrees, but in the wrong direction and is now heading to the heart of the restricted area. Country A scrambles two of its fighter jets to intercept it. Moments later the jets are within visual range of Flight AB123, but Country A's air traffic controllers and the pilots of the two jets are unable to establish further communications with it. What options are available to Country A and most importantly, can it fire on Flight AB123? If so, when? This Article analyzes that issue and, using the available post-World War II examples, seeks to determine if there is, in fact, international law on this point. The first section of this Article provides a brief overview of the history of commercial aviation, the relationship of the militaries to that development, as well as the Chicago Convention. The second section addresses the various sources of international law that might provide guidance on the status of the law in this area with particular emphasis on the treaties regarding the law of war, non-consensual sources of international law, President Tito's letter of August 31, 1946, the events that gave rise to it, and its subsequent consequences. The third section reviews the post-World War II incidents involving the shooting down of civilian aircraft engaged in international aviation.² The fourth section reviews what appears to be an anomaly in this area of law under which the general condemna-

² It must be noted that while the four aircraft used in the terrorist attacks of September 11, 2001 were engaged in domestic aviation, how the conclusions reached in this paper might be applied to those aircraft are addressed *infra* at Section VII.

tion of firing on civilian aircraft does not apply to firing on drug traffickers. The fifth section presents an analysis of the post-World War II incidents with a view toward determining if a law on this subject has been established by practice. The sixth section presents proposed criteria for determining when force may be used against aircraft. Finally, this paper concludes with the assertion that while a law on this subject has been approached, it has not yet been established.

I. BACKGROUND

Kites and balloons had been used for military purposes long before the Wright Brothers' first mechanically powered flight in 1903.³ The military application for powered flight was, therefore, a natural extension. At the same time, because the technology was so new and perhaps because the range so limited, the first international efforts at regulation of aviation did not come about until after World War I.⁴ Thus, during the war, each country was left to its own devices to determine how to regulate aircraft, military or otherwise, within its airspace.⁵ In general, the countries in Europe that remained neutral closed their airspace to the aircraft of countries participating in the hostilities.⁶ In many cases they enforced their policies by firing on intruding military aircraft.⁷ While some of the governments issued standing instructions to give warnings to intruding aircraft, the Dutch and the Swiss often opened fire without any warning.⁸ Moreover, the Dutch maintained that while a warning might be given for humanitarian purposes, it was not necessary.⁹ Thus, the issue regarding when a country may fire on the military aircraft of a foreign power with which it is not engaged in hostilities remained unresolved after the war.

³ Smithsonian Nat'l Air & Space Museum, *Milestones of Flight: 1903 Wright Flyer*, <http://www.nasm.si.edu/exhibitions/gall100/wright1903.html> (last visited Nov. 26, 2007). See generally FRED HOWARD, WILBUR AND ORVILLE: A BIOGRAPHY OF THE WRIGHT BROTHERS (1987) (detailing the lives of the Wright Brothers and their accomplishments).

⁴ MAURICE PEARTON, *DIPLOMACY, WAR AND TECHNOLOGY SINCE 1830* 205 (1984) (noting how in early aviation there was little distinction between civil and military aircraft).

⁵ *Id.*

⁶ Oliver J. Lissitzyn, *The Treatment of Aerial Intruders in Recent Practice and International Law*, 47 AM. J. OF INT'L L. 559, 562 (1953).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

The 1919 Paris Convention, which was the first significant international regulatory response to the nascent international aviation industry,¹⁰ concluded with the Convention for the Regulation of Aerial Navigation¹¹ and did not address the issue directly. Even for civil aircraft—as a distinction between military and civilian aircraft had started to form—the Paris Convention included only one provision requiring a pilot to give a signal of distress, specified in an annex to the convention, when he became aware that he was flying over a prohibited area, the boundaries of which each country could determine for its own airspace.¹²

During World War II, neutral countries generally returned to the practice they had adopted during World War I, that is, firing on aircraft from belligerent countries, but generally giving a warning first.¹³ That policy remained relatively firm for the duration of the war.¹⁴

While aircraft were used in World War I, World War II truly demonstrated the overwhelming significance of flight for both military and civilian use. As a consequence, in 1944, an international conference on the regulation of aviation was held in Chicago, Illinois.¹⁵ The result of that effort is the Convention on International Civil Aviation, commonly known as the “Chicago Convention.”¹⁶ The Chicago Convention established the first two of the “Freedoms of the Air:” the right of innocent passage and the right to land for technical purposes without letting off or taking on passengers, such as for refueling.¹⁷ Part II of the Chicago Convention established the International Civil Aviation Organization (ICAO),¹⁸ which evolved into a specialized agency of the United Nations after the United Nations was created on

¹⁰ RICHARD Y. CHUANG, *THE INTERNATIONAL AIR TRANSPORT ASSOCIATION: A CASE STUDY OF A QUASI-GOVERNMENTAL ORGANIZATION* 16 (1972) (noting that 1919 is viewed as the year in which international commercial aviation began).

¹¹ Convention for the Regulation of Aerial Navigation art. 15, Oct. 13, 1919, 11 L.N.T.S. 174.

¹² *Id.*

¹³ Lissitzyn, *supra* note 6, at 567.

¹⁴ *Id.*

¹⁵ Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295 [hereinafter Chicago Convention].

¹⁶ *Id.*

¹⁷ *Id.* arts. 5, 6.

¹⁸ See R.I.R. ABEYRATNE, *LEGAL AND REGULATORY ISSUES IN INTERNATIONAL AVIATION* 1–11 (1996); THOMAS BUERGENTHAL, *LAW-MAKING IN THE INTERNATIONAL CIVIL AVIATION ORGANIZATION* 3–12 (1969).

October 24, 1945.¹⁹ The purpose of the ICAO was to facilitate discussions and negotiations involving legal and technical issues of international aviation.²⁰ Perhaps the most important task assigned to ICAO was to “[p]romote safety of flight in international air navigation.”²¹ Two important features should be noted about the Chicago Convention. First, it does not apply to military aircraft.²² Second, it specifically provides that “[t]he contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory.”²³

Thus, like the Paris Convention, the Chicago Convention does not explicitly address the issue of when a country may fire on a civilian aircraft, nor does it prohibit doing so. Nonetheless, it would seem logical that any benefit given to a military aircraft *a fortiori* must be given to a civilian aircraft. Thus, if the Netherlands believed that warning a military aircraft of a belligerent state that violated its airspace was appropriate on humanitarian grounds, surely a civilian aircraft should be given at least that same warning. While perhaps a reasonable inference, such a principle has not been applied in practice, and there is no authority to that effect.

The question concerning the rules regarding firing on civilian aircraft can thus only be addressed by examining the law and the various incidents following World War II. One military example is, however, particularly important.

A. PRESIDENT TITO'S LETTER

On August 9, 1946, an unarmed American military transport aircraft, a C-47, while on a regular flight from Vienna, Austria, to Udine, Italy, was forced to crash-land in Yugoslavia after having been fired upon by a Yugoslav fighter plane.²⁴ Ten days later, Yugoslav fighters shot down another unarmed American military transport aircraft with all hands lost.²⁵

¹⁹ See United Nations, Basic Facts About the United Nations, *available at* <http://www.un.org/aboutun/basicfacts/unorg.html> (last visited Nov. 26, 2007).

²⁰ Chicago Convention, *supra* note 15, art. 44(h).

²¹ *Id.*

²² *Id.* art. 3(a) (providing that “[t]his Convention shall be applicable only to civil aircraft, and shall not be applicable to state aircraft”); *Id.* art. 3(b) (providing that “[a]ircraft used in military, customs and police services shall be deemed to be state aircraft”).

²³ *Id.* art. 1.

²⁴ Lissitzyn, *supra* note 6, at 569–70.

²⁵ *Id.* at 570.

The United States strenuously protested Yugoslavia's actions, with each side arguing different versions of the events, including whether the pilot of the second aircraft had refused instructions to land.²⁶ Nevertheless, without any admission of wrongdoing, Josip Broz Tito, Yugoslavia's president, stated in a letter to the American Ambassador dated August 31, 1946:

. . . I have issued orders to our military authorities to the effect that no transport planes must be fired at any more, even if they might intentionally fly over our territory without proper clearance, but that in such cases they should be invited to land; if they refused to do so their identity should be taken and the Yugoslav Government informed hereof so that any necessary steps could be undertaken through appropriate channels.²⁷

Yugoslavia subsequently agreed, on humanitarian grounds and with an explicit denial of responsibility, to pay \$30,000 to the families of each of the five crewmen that died in the August 19 incident.²⁸

While likely unintentional, President Tito established a baseline for comparison on this issue. Surely if an unarmed military transport should never be fired upon, it is even more reasonable that a country should never fire on a civilian aircraft. Even that, however, has not been the case. The question is, therefore, what is the international law regarding the shooting down of civilian aircraft?

II. SOURCES OF INTERNATIONAL LAW

Except for Article 3 *bis* to the Chicago Convention,²⁹ discussed below along with its failings, there is no explicit treaty law on the subject of firing on civilian aircraft. We are, therefore, left with three further, but related, "sources" of international law—natural law, *jus cogens*, and customary international law.

"Natural law" in earlier times was felt to reflect the law as derived from nature, and in earlier writings, generally reflects religious values.³⁰ It can, however, be summed up as, "a law so natural that it is to be found in any community, including the

²⁶ *Id.* at 570–73.

²⁷ 15 DEP'T ST. BULL. 505 (1946).

²⁸ Lissitzyn, *supra* note 6, at 573.

²⁹ See *infra* section III.F.

³⁰ See, e.g., Rodger D. Citron, *The Nuremberg Trials and American Jurisprudence: The Decline of Legal Realism, The Revival of Natural Law, and the Development of Legal Process Theory*, 2006 MICH. ST. L. REV. 385, 390–91 (2006).

community of states.”³¹ Unfortunately, the examples that we have, and the legal argumentation that has followed, appears to imply that, if there is a “natural” law regarding the firing on civilian aircraft, it is not universally recognized.

“*Jus cogens*,” commonly translated as a “peremptory norm,”³² is defined at Article 53 of the Vienna Convention on the Law of Treaties of 1969:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.³³

Some have suggested that *jus cogens* is a modern form of natural law.³⁴ The precise meaning of the term nevertheless remains elusive, not only because there are no universally accepted examples, but also because there are no examples of Article 53 having been applied to void a treaty.³⁵

It could be argued that the rule against targeting civilian objects in war, as codified in Article 52 of Protocol I to the Geneva Convention³⁶ has passed into being a rule of *jus cogens*. If we

³¹ MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 61 (2d ed. 1993).

³² BLACK'S LAW DICTIONARY 876 (8th ed. 2004).

³³ Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331.

³⁴ JANIS, *supra* note 31, at 63.

³⁵ *Id.* at 64 (citing Giorgio Gaja, *Jus Cogens Beyond the Vienna Convention*, 172 HAGUE RECUEIL 271, 286–89 (1981)). There was, however, an application of the concept by a United States court in *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 717 (9th Cir. 1992), *cert. denied*, 507 U.S. 1017 (1993) (citing a number of international conventions against torture, the court held that Argentina had implicitly waived its immunity under the U.S. Foreign Sovereign Immunities Act, implying that, at least in the United States, the courts have held that a rule of treaty law can be so fundamental so as to pass into becoming a peremptory norm).

³⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 52, June 8, 1977, 1125 U.N.T.S. 3. The full text of that article is as follows:

1. Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2.

2. Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial

regard that duty as a peremptory norm, surely if there is a prohibition against targeting civilian targets in the conduct of war, *a fortiori* they may not be targeted outside the context of war. The difficulty with that theory, however, is that it rests on the presumption that the rule is a peremptory norm, and there is no authoritative holding to that effect. Moreover, Article 52 of Protocol I provides exceptions and, as we will see, similar exceptions have been claimed in various incidents involving the shooting down of civilian aircraft.³⁷

Customary international law and general principles of international law are the final sources of international law.³⁸ While not precisely the same, the former looks to the practice of states, while the latter looks to the general principles of law common to nations.³⁹ It is generally held that to be considered customary international law, a law must satisfy two criteria: first, it must be in accordance with general international practice; second, the international community must accept it as law.⁴⁰

Thus, without an explicit treaty, "natural law," or *jus cogens*, we are left to investigate whether there is a common practice or general principle in international law against the shooting down of civilian aircraft. To answer that question, we must review the available cases to see what general principle or principles we might derive. It is important to note, however, that "[m]ere abstention by states from the exercise of certain powers need not signify that they regard such exercise as unlawful."⁴¹ This sentiment was clearly suggested in President Tito's letter, which, despite issuing orders to his military to change their rules regarding the interception of unarmed aircraft, asserted unequivocally that Yugoslavia had done nothing in violation of in-

destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

3. In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.

Id.

³⁷ See *infra* Section III.

³⁸ See JANIS, *supra* note 31, at 54–55 (expositing on the subtle differences between customary international law and general principles of international law).

³⁹ *Id.*

⁴⁰ H. THIRLWAY, *INTERNATIONAL CUSTOMARY LAW AND CODIFICATION* 46–60 (1972); Note, *Legal Argumentation in International Crises: The Downing of Korean Air Lines Flight 007*, 97 HARV. L. REV. 1198, 1201 (1984); Michael Akehurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT'L L. 1, 42–52 (1974–1975).

⁴¹ Lissitzyn, *supra* note 6, at 585.

ternational law, and further agreed to pay damages to the victims' family, but only on humanitarian grounds.⁴² Thus, in reviewing the available examples, it is important to review not only the reactions of the states involved, but also the rest of the world.

III. POST-WORLD WAR II INCIDENTS

A. SOVIET UNION—SHOOT DOWN OF FRENCH COMMERCIAL AIRLINER

On April 29, 1952, MiG-15 jet fighters from the Soviet Union fired on a French commercial aircraft while it was en route from West Germany to West Berlin.⁴³ Though the aircraft landed safely, two of its passengers were injured.⁴⁴ The Soviet Union claimed that the aircraft had deviated from the corridor established for such transit and was therefore liable to be fired upon.⁴⁵ The Allied High Commissioners of the occupying forces in Germany filed a joint protest in which they first disputed that the aircraft had deviated from the corridor, but then went on to state: "Quite apart from these questions 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 behavior."⁴⁶ The Soviet Union disagreed and refused to pay any compensation.⁴⁷

⁴² *Id.* at 572–73.

⁴³ John T. Phelps, *Contemporary International Legal Issues—Aerial Intrusions by Civil and Military Aircraft in Time of Peace*, 107 MIL. L. REV. 255, 276–277 (1985). It may be noted that an incident occurred during the previous month, on March 12, 1953, in which MIG-15 aircraft either threatened or fired on a Viking aircraft operated by British European Airways. See Walter Sullivan, *Soviet Regrets R.A.F. Loss; Shuns Blame But Asks Talks*, N.Y. TIMES, March 20, 1953, at 1. That incident had occurred only five days after an incident in which the Soviet Union had shot down a British Royal Air Force bomber. See *id.*; Walter Sullivan, *Soviet MIG's Down R.A.F. Plane, Kill 5 in Berlin Air Lane*, N.Y. TIMES, March 13, 1953, at 1; R. J. Hillhouse, *Cold War Secrets of the Berlin Air Corridor*, <http://www.internationalthrillers.com/secrets/ColdWar/aircorridor.php> (last visited Nov. 26, 2007); David Lednicer, *Aircraft Downed During the Cold War and Thereafter*, http://www.silent-warriors.com/shootdown_list.html (last visited Nov. 26, 2007).

⁴⁴ Phelps, *supra* note 43, at 277.

⁴⁵ *Id.*

⁴⁶ Lissitzyn, *supra* note 6, at 574.

⁴⁷ Phelps, *supra* note 43, at 277.

B. CHINA—SHOOT DOWN OF CATHAY PACIFIC FLIGHT

On July 23, 1954, Chinese fighter aircraft fired on a Cathay Pacific aircraft en route from Bangkok to Hong Kong.⁴⁸ The pilot was forced to ditch the aircraft in the sea resulting in the loss of several lives.⁴⁹ The Chinese claimed that the aircraft had been mistaken for a Nationalist Chinese military aircraft on a mission to raid a Chinese military base at Port Yulin.⁵⁰ Nevertheless, the Chinese apologized for the incident and agreed to pay compensation for the resulting losses.⁵¹

The key element of this incident is that the Chinese implied that had they known that the aircraft was a civilian passenger aircraft, they would not have fired upon it; that is, the Chinese viewed the aircraft as a valid military target, and thus their use of force was not improper. This incident, therefore, will fall in the same category as the downing of Iran Air Flight 655 discussed below.⁵²

C. BULGARIA—SHOOT DOWN OF ISRAELI EL AL PASSENGER JET

On July 27, 1955, Flight L402 operated by El Al, the State of Israel's national airline, was shot down by Bulgarian jet fighters while en route from Vienna, Austria to Tel Aviv, Israel.⁵³ The flight's intended course was to take it along a corridor over Yugoslavia near the Bulgarian border.⁵⁴ The aircraft strayed into Bulgarian airspace and was intercepted by MiG-15 jet fighters, who ordered it to divert to a military airbase west of Bulgaria's capital, Sofia.⁵⁵ The aircraft complied, but as it was making its approach for landing, the MiGs opened fire.⁵⁶ The aircraft crashed and all fifty-one passengers and seven crew members were lost.⁵⁷

This case is particularly unusual because, at first, the Bulgarian government claimed to have shot down the aircraft from

⁴⁸ *Id.* at 278.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² See *infra* Section III.G.

⁵³ MARVIN G. GOLDMAN, ET AL., *STAR IN THE SKY* 51 (1990) (describing the shooting down of El Al Flight LY402 in the context of the history of El Al); Phelps, *supra* note 43, at 279.

⁵⁴ Phelps, *supra* note 43, at 279.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

the ground because they could not identify it.⁵⁸ Three days later, an Israeli investigation team was permitted to examine the wreckage.⁵⁹ They immediately found that the fighter aircraft had shot down the El Al aircraft; that is, it was downed with air-to-air rather than surface-to-air munitions.⁶⁰ In light of that, on August 3, just seven days after the incident, Bulgaria reversed itself.⁶¹ They admitted that the aircraft had been shot down by its fighter aircraft and offered to pay compensation, but now claimed that its fighters had only fired after the pilot of the downed aircraft had ignored instructions to land.⁶² Shortly thereafter, Bulgaria changed its position yet again, disclaiming all responsibility, but proposed to make *ex gratia* payments in Bulgarian currency.⁶³

D. ISRAEL—SHOOT DOWN OF LIBYAN AIRLINES PASSENGER JET

On February 21, 1973, Israeli fighter jets fired on a Libyan airliner that was over one hundred miles off-course, killing 108 passengers.⁶⁴ It was undisputed that the Israeli fighter pilots had signaled the Libyan pilot to land, but despite those warnings, he had refused.⁶⁵ Later, the Libyan co-pilot acknowledged that he and the pilot were aware that the Israelis wanted them to land, but decided not to comply because of the poor relations between Israel and Libya.⁶⁶

The Israeli government defended its actions on three grounds. First, that they had instructed the pilot to land, but he had refused.⁶⁷ Second, that the action taken against the jetliner was intended to force it to land rather than destroy it.⁶⁸ Third, that the aircraft had flown over sensitive security locations, and the pilot's refusal to land only fed into Israeli suspicions that the aircraft was on a spy mission over Israel's secret air base at Bir

⁵⁸ *Id.* (citing KEESING'S CONTEMPORARY ARCHIVES 14,359 (1955)).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*; see *infra* note 102, and accompanying text regarding *ex gratia* payments.

⁶⁴ Phelps, *supra* note 43, at 288.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 289.

⁶⁸ *Id.*

Gafga.⁶⁹ Nevertheless, Israel offered to pay compensation on humanitarian grounds, that is, *ex gratia*.⁷⁰

Israel's actions were subsequently condemned by ICAO, which soundly rejected Israel's claim that this was a matter of defense of its national security interests in maintaining the secrecy of its secret air base.⁷¹

E. SOVIET UNION—SHOOT DOWN OF KOREAN AIRLINES
PASSENGER JET (FLIGHT 902)

One of the lesser-known incidents of military action against a civilian jet, perhaps because it is overshadowed by the incident discussed next involving the same parties, occurred on April 20, 1978.⁷² On that day, Korean Air Lines Flight 902, operating with a Boeing 707 aircraft while en route from Paris, France to Seoul, South Korea with a stopover for refueling in Anchorage, Alaska, lost its way and entered the Soviet Union's airspace.⁷³ Soviet fighter jets quickly intercepted the aircraft.⁷⁴ It is unclear, or at least disputed, if the pilots of the fighter jets signaled the civilian jet, but shortly after the interception, they opened fire on it.⁷⁵ The civilian jet's pilot was fortunately able to land on a frozen lake about 280 miles south of Murmansk, Russia.⁷⁶ Of the ninety-seven passengers and crew, two were killed and thirteen were injured.⁷⁷

The Soviet Union claimed that they believed that the aircraft was on a spy mission, and, after quickly returning the passengers, refused to pay any compensation.⁷⁸

F. SOVIET UNION—SHOOT DOWN OF KOREAN AIRLINES
PASSENGER JET (FLIGHT 007) AND ARTICLE 3 *BIS* TO
THE CHICAGO CONVENTION

While the attack on KAL Flight 902 passed into history with hardly a second look, another attack on a Korean Airlines flight

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 289–90.

⁷² SEYMOUR M. HERSH, *THE TARGET IS DESTROYED: WHAT REALLY HAPPENED TO FLIGHT 007 AND WHAT AMERICA KNEW ABOUT IT* 3 (1986).

⁷³ *Id.*

⁷⁴ *Id.* at 4.

⁷⁵ *Id.* at 3–4.

⁷⁶ *Id.* at 6.

⁷⁷ *Id.* at 7.

⁷⁸ *Id.* at 8.

a little over five years later is no doubt the most famous incident involving the shooting down of a civilian aircraft.⁷⁹ On September 1, 1983, fighter jets from the Soviet Union shot down Korean Airlines Flight 007, operated with a Boeing 747-200 aircraft, while en route from New York to Seoul, South Korea, killing all 269 passengers and crew aboard.⁸⁰ The literature on this incident is plentiful, and includes two books advancing various theories as to what really happened.⁸¹ It is also undisputed that the global reaction was swift and entirely against the Soviet Union.⁸² Moreover, a number of countries, including the United States, imposed various sanctions on the Soviet Union.⁸³ Nevertheless, the Soviet Union claimed that the aircraft had violated its airspace, speculated that it was on a spy mission, and denied any liability to the victims' families.⁸⁴

The United Nations Security Council met in a special session and considered a draft resolution that included the statement that "such use of armed force against international civil aviation is incompatible with the norms governing international behavior."⁸⁵ This statement is similar to the joint protest made by the Allied High Commissioners in 1952.⁸⁶ It was, however, vetoed by the Soviet Union.⁸⁷

Another United Nations agency, however, was somewhat more successful in its actions. The membership of ICAO gathered for an emergency meeting on September 15, 1983, just two weeks after the incident, and on September 17, the ICAO council adopted the following resolution:

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

⁷⁹ See generally *Legal Argumentation in International Crises: The Downing of Korean Air Lines Flight 007*, *supra* note 40 (providing an expansive legal analysis of the KAL 007 incident).

⁸⁰ *Id.* at 1198.

⁸¹ See generally ALEXANDER DALLIN, *BLACK BOX: KAL007 AND THE SUPERPOWERS* (1985); HERSH, *supra* note 72.

⁸² Phelps, *supra* note 43, at 257.

⁸³ *Id.* at 261.

⁸⁴ George J. Church et al., *The Price of Isolation*, *TIME*, July 25, 1988, at 34 (noting that the USSR never made any payment in connection with its shooting down of KAL 007).

⁸⁵ United Nations Security Council Consideration, 22 I.L.M. 1109, 1110 (1983).

⁸⁶ See Phelps, *supra* note 43, at 277.

⁸⁷ *Id.* at 262.

EXPRESSING its deepest sympathy with the families bereaved in this tragic incident,

URGING the Soviet Union to assist the bereaved families to visit the site of the incident and to return the bodies of the victims and their belongings promptly,

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,

CONCERNED that the Soviet Union has not so far acknowledged the paramount importance of the safety and lives of passengers and crew when dealing with civil aircraft intercepted in or near its territorial airspace,

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 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 an interim report to the Council within 30 days of the adoption of this Resolution and a complete report during the 110th Session of the Council[.]⁸⁸

On May 10 of the following year, still reacting to the downing of KAL 007, the members of the ICAO Assembly unanimously adopted Article 3 *bis* to the Chicago Convention, which provides:

(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.

⁸⁸ International Civil Aviation Organization (ICAO) Consideration, 22 I.L.M. 1149, 1150 (1983); ICAO BULL., Nov. 1983, at 10.

(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.⁸⁹

The amendment, however, was not ratified by a sufficient number of ICAO members to take effect until fourteen years later on October 1, 1998, with two subsequent resolutions of ICAO having been adopted urging its ratification by member states.⁹⁰

The members of ICAO also published the "Manual Concerning Interception of Civil Aircraft"⁹¹ that provides guidance to

⁸⁹ Protocol Relating to an Amendment to the Convention on International Civil Aviation, May 10, 1984, 23 I.L.M. 705-07 [hereinafter Article 3 *bis*].

⁹⁰ See ICAO, *Assembly Resolutions in Force (as of 5 October 2001)*, at I-6 to -9, ICAO Doc. 9790 (1st ed. 2002).

⁹¹ See generally ICAO, *Manual Concerning Interception of Civil Aircraft*, ICAO Doc. 9433-AN/926 (2d ed. 1990). See Yaakov Katz, *IAF Jets Forced to Buzz US Airliner*, JERUSALEM POST ONLINE EDITION, Apr. 11, 2007, available at <http://www.jpost.com/servlet/Satellite?cid=1176152772518&pagename=JPost%2FJPArticle%2FPrinter> (reporting on interception by Israeli Air Force fighter jets of a civilian Continental Airlines flight entering Israeli airspace and failing to contact the Ben Gurion Airport control tower in accordance with international regulations).

member states on the interception of civil aircraft with a view toward avoiding violent incidents.⁹² While helpful, 3 *bis* is not a panacea in that the apparently unequivocal bar to the use of force against civil aircraft in flight in the first sentence is subject to an all encompassing exception in the second—"This provision should not be interpreted as modifying in any way the rights and obligations of States set forth in the Charter of the United Nations."⁹³ Article 51 of the Charter of the United Nations provides for each member's right of self-defense.⁹⁴

G. UNITED STATES—SHOOT DOWN OF IRANIAN AIRLINES
PASSENGER JET (FLIGHT 655)

On July 3, 1988, the U.S.S. *Vincennes* fired on and destroyed Iran Air Flight 655, an Airbus A300 en route from Bandar Abbas, Iran, to Dubai.⁹⁵ All 248 passengers were killed.⁹⁶ This incident occurred during an engagement in which Iranian gunboats had fired on a U.S. helicopter and the *Vincennes* was engaged in hostilities with them in the Strait of Hormuz.⁹⁷ While it now seems clear that the incident was caused by a failure of the *Vincennes*'s computer and tracking systems to properly identify the aircraft as civilian,⁹⁸ it seems equally clear that the United States had no intention of firing on a civilian aircraft and that it did so only in the course of what it believed to be a combat situation against an enemy military aircraft.⁹⁹

The downing of Iran Air Flight 655, like that of China's attack on the Cathay Pacific aircraft on July 23, 1954, was likely an un-

⁹² It is also notable that on July 29, 1985, the United States, Japan, and the Soviet Union signed a memorandum of understanding establishing procedures for handling emergency situations and improving communications among them to help avoid another incident like the downing of KAL 007. Memorandum of Understanding Concerning Air Traffic Control, U.S.-Japan-U.S.S.R., July 29, 1985, 25 I.L.M. 74 (1986).

⁹³ Article 3 *bis*, *supra* note 89.

⁹⁴ U.N. Charter art. 51.

⁹⁵ WILL ROGERS, SHARON ROGERS & GENE GREGSTON, *STORM CENTER: THE USS VINCENNES AND IRAN AIR FLIGHT 655* 18-19 (1992) (providing a detailed account of the downing of Iran Air Flight 655 and its aftermath).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Alexander Cockburn & Ken Silverstein, *The System that Brought Down Flight 655*, *HARPERS*, Sept. 1988, at 64 (describing the failings of the electronic equipment that resulted in the downing of Iran Air Flight 655).

⁹⁹ *Id.*

fortunate error.¹⁰⁰ Thus, like the Chinese, the United States determined that because the incident did not arise from an improper use of force, the United States had no duty to pay compensation to the victims' survivors, but would nevertheless do so on humanitarian grounds.¹⁰¹ The United States even went so far as to assert that principles of international law that govern potential liability for injuries and property damage arising out of military operations are well-established:

(1) indemnification is not required for injuries or damage incidental to the lawful use of armed force; (2) indemnification is required where the exercise of armed force is unlawful; and (3) states may, nevertheless, pay compensation *ex gratia* without acknowledging, and irrespective of, legal liability.¹⁰²

The United States extended the issuance of its position on this point to note that only the Soviet Union, at least at the time (and still to this day), did not follow this policy.¹⁰³ It is likely that the contrition of the United States allowed it to avoid action from the international community.¹⁰⁴

H. CUBA—SHOOT DOWN OF "BROTHERS TO THE RESCUE" FLIGHTS

The next incident of a military attack on civilian aircraft occurred on February 24, 1996, when the Cuban Air Force shot down two unarmed aircraft operated by Brothers to the Rescue, a Miami-based humanitarian organization engaged in searching

¹⁰⁰ *Failure to Communicate*, TIME, Dec. 1988, at 30 (relating that ICAO had concluded that a failure to communicate had caused the error that caused the shooting down of Iran Air Flight 655).

¹⁰¹ Robin Wright, *U.S. to Pay Iranians Who Lost Kin on Downed Plane*, L.A. TIMES, Feb. 23, 1996, at 12 (relating that the United States had agreed to pay \$62 million to the relatives of the 248 passengers who lost their lives in the downing of Iran Air Flight 655, amounting to approximately \$250,000 per victim).

¹⁰² Abraham D. Sofear, *Compensation of Iranian Airbus Tragedy*, 8 DEP'T OF ST. BULL., Oct. 1988, at 58 (noting that Bulgaria offered to make *ex gratia* payments to Israel in 1955, Israel made *ex gratia* payments to Libya, and China paid compensation for Cathay Pacific).

¹⁰³ *Id.* at 59 (noting negatively that only the Soviet Union does not follow this rule). See also Robert M. Entman, *Framing U.S. Coverage of International News: Contrasts in Narratives of the KAL and Iran Air Incidents*, J. COMM., Autumn 1991, at 6, 10 (describing the very different reporting of the KAL 007 and the Iran Air 655 shoot downs).

¹⁰⁴ Church, *supra* note 84, at 34 (discussing how Iran failed to obtain a United Nations condemnation of the United States on the shoot down of Iran Air Flight 655).

for and aiding Cuban refugees in the Straits of Florida.¹⁰⁵ A third aircraft escaped.¹⁰⁶ While it is possible that the aircraft penetrated Cuban airspace, it is clear that Cuba pursued the aircraft outside of Cuban airspace and shot the two aircraft down over international waters.¹⁰⁷

While, to date, Cuba has refused to acknowledge any wrongdoing or even offer to make *ex gratia* payments, the United States Congress did not remain silent on this issue.¹⁰⁸ In an unusual step, less than a month later, on March 12, 1996, Congress passed a law regarding the incident in which it made a finding of fact that Cuba's actions were entirely wrongful¹⁰⁹ and thoroughly condemned them.¹¹⁰ It is notable that while Cuba maintains its position on this matter, when a subsequent civilian aircraft deliberately penetrated Cuba's airspace, Cuba refrained from taking military action and instead escorted the aircraft out of its airspace and pursued diplomatic protests with the United States.¹¹¹

I. ETHIOPIA—SHOOT DOWN OF LEARJET

On August 29, 1999, at approximately 5:00 p.m. local time, the Ethiopian military, apparently without warning, opened fire on a civilian aircraft that was en route from Naples, Italy, to Johannesburg, South Africa, having departed from a refueling stop in Luxor, Egypt, only two hours earlier.¹¹² The aircraft had been tracked by Eritrean air traffic controllers who lost track of it as it passed near the Eritrea-Ethiopia border.¹¹³ The aircraft

¹⁰⁵ See the World Wide Web site maintained by Brother to the Rescue for detailed information regarding the shooting by Cuba of two of its aircraft from their perspective. Brothers to the Rescue, <http://www.hermanos.org/> (last visited Nov. 26, 2007).

¹⁰⁶ *Id.*

¹⁰⁷ *Cuba the Outlaw*, *ECONOMIST*, Mar. 2, 1996, at 20 (describing the incident).

¹⁰⁸ *Id.*

¹⁰⁹ 22 U.S.C.A. § 6046(a) (West 2004).

¹¹⁰ 22 U.S.C.A. § 6046(b) (West 2004).

¹¹¹ See Jane Sutton, *U.S. Probes Leaflet Flight Over Havana*, *REUTERS*, Jan. 2, 2000; Andrew Cawthorne, *Havana Reacts With Fury to Pilot's Leaflet Drop*, *REUTERS*, January 3, 2000 (describing incident in which an American pilot dropping anticommunist leaflets in Cuba was escorted out of Cuban airspace by Cuban jet fighters).

¹¹² *Ethiopian Forces Shoot Down Aircraft*, *AGENCE FR. PRESSE*, Aug. 31, 1999 (describing the incident).

¹¹³ *Id.*

was downed, and the flight crew of two, the only people aboard, were killed.¹¹⁴

Ethiopia immediately claimed that it had shot down an Eritrean jet.¹¹⁵ It soon became clear that not only was the aircraft not Eritrean, but that the pilot, as required, had filed his flight plan with the Ethiopian government and had been given permission to fly over Ethiopia.¹¹⁶ Nevertheless, Ethiopia claimed that it was "forced" to shoot the aircraft down because it had entered Ethiopian airspace from Eritrean airspace.¹¹⁷ Likely because this incident involved the loss of only two lives, little information ever emerged about it. For example, it is not clear if Ethiopia paid compensation to the families of the two pilots. At the very least, to give Ethiopia the benefit of the doubt, if China could have mistaken a Cathay Pacific passenger jet for one belonging to the Chinese Nationalists, and the United States could have mistaken a passenger jet for an attacking fighter, Ethiopia might well have mistaken the plane that it shot down for an Eritrean attack. At the same time, the Ethiopian government refuses to respond to inquiries regarding this incident and whether it made any payments to the pilots' families.¹¹⁸

J. ISRAEL—SHOOT DOWN OF CESSNA 152

On May 24, 2001, an unlicensed student at a pilot school in Lebanon absconded with a Cessna 152 aircraft and flew it through a restricted military zone in Lebanon and then passed into Israel.¹¹⁹ Israel, on high alert for terrorist attacks on the

¹¹⁴ *Another Week*, FIN. MAIL (S. Afr.), Sept. 10, 1999, at 6 (noting that the owners of the jet insist that a valid flight plan had been filed and denies that the plane was in a no-fly zone).

¹¹⁵ *Id.*

¹¹⁶ *Eritrean News Agency Daily Update*, AFR. NEWS, Sept. 6, 1999 (claiming that the government of Ethiopia had shot down the aircraft despite having given permission to fly over Ethiopia because it entered Ethiopian airspace from Eritrean airspace).

¹¹⁷ *Id.*

¹¹⁸ Over the course of eight months in 2006 and 2007, your author made numerous efforts to obtain a reply on this subject from the Ethiopian Embassy to the United States. Despite assurances that a reply would be provided, none was.

¹¹⁹ See Brent Sadler, *Israel Shoots Down Light Aircraft*, CNN.COM, May 24, 2001, <http://archives.cnn.com/2001/WORLD/meast/05/24/israel.plane/index.html>; *Israel Shoots Down Lebanese Civilian Plane*, ASSOCIATED PRESS, June 19, 2001, <http://www.usatoday.com/news/world/mideast/2001-05-24-planeshotdown.htm>; *Israel Shoots Down 'Suicide' Plane*, IRISH EXAMINER, May 26, 2001, <http://archives.tcm.ie/irishexaminer/2001/05/26/story3927.asp> (characterizing the flights as possible terrorist attack).

anniversary of its withdrawal of troops from southern Lebanon, immediately began tracking the aircraft using jet aircraft and helicopters.¹²⁰ The Israelis established radio contact with the aircraft and made repeated efforts to communicate with the pilot.¹²¹ The pilot, however, refused to respond or identify himself.¹²² The Israeli pilots made eye contact with the pilot and fired a warning shot across his path.¹²³ A few minutes later, having failed to make contact with the pilot, and as the plane was approaching a populated area, the Israelis shot the aircraft down safely over a beach near the town of Mikhmoret in Northern Israel with much of the wreckage landing on its own naval training facility.¹²⁴

Given that the pilot of the aircraft, the only individual aboard, was engaged in nefarious and perhaps terrorist activities, and that there was no dispute even from Lebanese authorities that he had stolen the aircraft,¹²⁵ Israel's conduct was not questioned in the international media or by ICAO.

K. UKRAINE—SHOOT DOWN OF TUPOLEV 154

On October 4, 2001, a Tupolev Tu-154 en route from Tel Aviv, Israel, to Novosibirsk, Siberia exploded and crashed in to the Black Sea with all hands, sixty-six passengers and twelve crew, lost.¹²⁶ The Ukraine government initially denied any involvement in the incident.¹²⁷ Nevertheless, over the next twenty-one days of investigations, including analysis of data from spy satellites operated by the United States, it became clear that the aircraft had been shot down by a Ukrainian long-range surface-to-air missile.¹²⁸ By October 21, Ukraine had accepted responsibility.¹²⁹

¹²⁰ *Israel Shoots Down Lebanese Civilian Plane*, *supra* note 119.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ Michael Wines, *76 on Board Perish as Jet from Israel Explodes Off Russia*, N.Y. TIMES, Oct. 5, 2001, at A1.

¹²⁷ *Id.*

¹²⁸ Michael Wines, *Ukraine Defense Chief Resigns Over Downing of Passenger Jet*, N.Y. TIMES, Oct. 25, 2001, at A8. See also John J. Lumpkin, *U.S. Intelligence Believes Ukrainian Surface-To-Air Missile Brought Down Airliner*, ASSOCIATED PRESS, Oct. 5, 2001.

¹²⁹ Wines, *supra* note 128.

In November 2003, Ukraine and Israel signed an agreement under which Ukraine paid \$200,000 to the family of each of the forty Israeli citizens that had been killed in the accident.¹³⁰ An agreement under which the same amount was paid to the family of each of the thirty-eight Russian citizens that had been killed was signed in June 2004.¹³¹ Thus, Ukraine accepted the general practice of making payments when its use of force was improper (or, in this case, erroneous).

IV. SHOOTING DOWN DRUG TRAFFICKERS

The examples cited in Section III of this paper, particularly the unanimous action in passing and the ultimate entry into force of Article 3 *bis* to the Chicago Convention, might lead to the conclusion that the use of armed force against "innocent" civilian aircraft is universally condemned by all but the former Soviet Union and its once client-state, Cuba, despite the fact that both the Russian Federation and Cuba are now signatories to Article 3 *bis*.¹³² Nevertheless, it would seem that other nations, and even the United States, believe that there is at least one other exception: law enforcement (the example given in Section III.J. regarding Israel's shooting down of a Cessna 152 might be such an example and Cuba might claim the same justification).¹³³ Moreover, contrary to condemnation of the claims of a national security exception claimed by Israel and the Soviet Union, who shot down aircraft flying over their territory, this exception might even extend outside of a country's borders.¹³⁴ For example, the Peruvian Air Force has been very active in forcing suspected drug traffickers to either land or be shot down.¹³⁵

¹³⁰ *Russia Agrees Airliner Payout*, BBC NEWS, June 14, 2004.

¹³¹ *Id.*

¹³² See *Status of Certain International Air Law Instruments*, ICAO J., Sept./Oct. 2005, at 33-36.

¹³³ Steven B. Stokdyk, Comment, *Airborne Drug Trafficking Deterrence: Can A Shootdown Policy Fly?*, 38 UCLA L. REV. 1287, 1289-91 (1991) (discussing the plausibility and legality of a policy authorizing the shooting down of aircraft suspected of engaging in illegal drug trafficking).

¹³⁴ See Phillip A. Johnson, *Shooting Down Drug Traffickers*, 72 INT'L L. STUD.-U.S. NAVAL WAR COLL. 79, 90 (1998) (arguing that shooting down drug traffickers does not pose a threat to legitimate civilian aircraft and that it is a proper law enforcement interest rather than self-defense).

¹³⁵ See generally U.S. DEP'T OF JUSTICE, DRUG ENFORCEMENT ADMIN., FED. BUREAU OF INVESTIGATION, DEP'T OF THE TREASURY, U.S. CUSTOMS SERV., U.S. COAST GUARD NNICC, DEP'T OF STATE, DEP'T OF DEF., INTERNAL REVENUE SERV., CENT. INTELLIGENCE AGENCY, NAT'L INST. ON DRUG ABUSE, IMMIGRATION AND NATURALIZATION SERV., OFFICE OF NAT'L DRUG CONTROL POLICY, NAT'L NARCOTICS INTELLI-

It is also notable that the United States, while not engaging in such activity itself, not only provides financial assistance for such activities but has also granted immunity to the United States, agents of the United States, and agents of foreign governments for actions arising from drug interdiction actions by foreign governments when assistance is provided by employees and agents of the United States.¹³⁶ The immunity is, however, conditional on the President of the United States making a finding that the “country has appropriate procedures in place to protect against innocent loss of life in the air and on the ground in connection with such interdiction, which shall at a minimum include effective means to identify and warn an aircraft before the use of force is directed against the aircraft.”¹³⁷ The President has made such findings for Columbia¹³⁸ and Peru.¹³⁹ That “finding” was suspended in April 2001 following the accidental shooting down of an aircraft in Columbia carrying American missionaries.¹⁴⁰ But U.S. assistance for such efforts was reinstated in August 2003.¹⁴¹

We are thus left with a rather odd situation. While the United States clearly condemns the use of armed force against civilian aircraft, it directly supports the use of military force against aircraft suspected of trafficking in illegal drugs—even over international waters.¹⁴² Moreover, it does so when similar action would be prohibited within U.S. airspace, and the U.S. military is pro-

GENCE CONSUMERS COMM. (NNICC), *THE SUPPLY OF ILLICIT DRUGS TO THE UNITED STATES: THE NNICC REPORT 1996* (1996) (noting that the Peruvian Air Force (FAP) has been authorized to shoot down suspect trafficker aircraft under specific circumstances, such as when an aircraft flies illegally in Peruvian airspace and refuses to obey instructions to land, and further noting that the FAP had seized or downed thirty-nine drug trafficking aircraft in 1995 and that these efforts continue).

¹³⁶ See 22 U.S.C.A. § 2291–4 (West 2004).

¹³⁷ *Id.*

¹³⁸ Resumption of U.S. Drug Interdiction Assistance to the Government of Colombia, Pres. Det. No. 95–7 of Dec. 1, 1994, 59 Fed. Reg. 64,835, 64,835 (Dec. 15, 1994).

¹³⁹ Resumption of U.S. Drug Interdiction Assistance to the Government of Peru, Pres. Det. No. 95–9 of Dec. 8, 1994, 59 Fed. Reg. 65,231, 65,231 (Dec. 19, 1994).

¹⁴⁰ See Charles Aldinger, *U.S. to Resume Columbia Drug Interdiction Flights*, REUTERS, Aug. 19, 2003.

¹⁴¹ *Id.*

¹⁴² *Id.*

hibited from directly using armed force against civilian aircraft, even suspected drug traffickers.¹⁴³

V. IS THERE A RULE UNDER INTERNATIONAL LAW?

Returning to our example in the Introduction, may Country A fire on Flight AB123? What if Flight AB123 is actually committing an act of perfidy as that term is understood in the law of war, that is, "[a]cts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence,"¹⁴⁴ as prohibited under Article 37 of Protocol I to the Geneva Convention,¹⁴⁵ and intends to bomb or even deliberately crash into Country A's military headquarters (or financial center or a stadium full of sports fans)? One author has suggested the criteria for determining Country A's right to fire on Flight AB123 is determined according to three criteria:

- (1) It is necessary to affect a landing for the security of the offended territorial state;
- (2) The importance of discontinuing the intrusion by firing upon the aircraft is in reasonable proportion to the danger to the territorial state arising from it; and, most importantly,
- (3) All other practicable means of discontinuing the intrusion have been exhausted—the aircraft has refused to comply with clear and appropriate instructions to return to authorized airspace or follow interceptors to a designated airfield adequate for the type of aircraft involved.¹⁴⁶

The difficulty with those criteria is that they are subjective at each step. For example, in regard to (1), only Country A can determine if Flight AB123's landing is necessary. Israel believed that its security had been breached by the Libyan aircraft.¹⁴⁷ It had, after all, passed over one of Israel's secret air bases.¹⁴⁸ The

¹⁴³ Memorandum from Dep't of Justice Legal Counsel to Jamie S. Gorelick, Deputy Attorney Gen., United States Assistance to Countries that Shoot Down Civil Aircraft Involved in Drug Trafficking (July 14, 1994), <http://www.usdoj.gov/olc/shootdown.htm> (discussing resolution of conflict between agents of the United States providing assistance to Columbia and Peru on operations involving the shooting down of aircraft engaged in drug trafficking).

¹⁴⁴ Protocol I of the Geneva Convention, *supra* note 36, art. 37.

¹⁴⁵ *Id.*

¹⁴⁶ William J. Hughes, *Aerial Intrusions by Civil Airlines and the Use of Force*, 45 J. AIR L. & COM. 595, 620 (1980).

¹⁴⁷ Phelps, *supra* note 43, at 289.

¹⁴⁸ *Id.*

world community, however, rejected Israel's claim.¹⁴⁹ On the other hand, the world hardly took notice when Israel shot down the small aircraft that originated in Lebanon and that had refused to even acknowledge communications, let alone land.¹⁵⁰ Moreover, it is not clear that this is an appropriate criteria because Article 3 *bis* to the Chicago Convention, which entered into force long after these three criteria were proposed, grants any country whose airspace has been violated the right to require the offending aircraft to land.¹⁵¹

The second criteria is perhaps more subjective than the first. The danger presented by Flight AB123 is very likely unknown. Is it simply lost without means of communicating, or is it engaged in a terrorist act? Similarly, presuming that the Soviet Union truly believed that Korean Air Lines Flight 007 was operating a spy mission,¹⁵² that belief must still have been speculative – they could not know for sure until the spy camera was recovered from the wreckage (which never happened).

The issue therefore comes down to a balance between the risk of taking no action versus the risk of taking military action. In analyzing that balance, however, based on the examples discussed in Section III above, the global community is very intolerant of armed action against civilian aircraft. That intolerance is further demonstrated by the fact that, except for armed action against drug traffickers, no case in which firing on a civilian aircraft has been accepted as a favorable decision—although the Israeli shooting down of the Cessna aircraft after its substantial efforts to avoid doing so might have passed into the realm of acceptability.¹⁵³ Perhaps President Tito did establish a baseline that, barring perfidious or terrorist appearance or conduct, such action is never acceptable and must be pursued diplomatically rather than militarily.¹⁵⁴

VI. A NEW SET OF CRITERIA

It appears that a rule prohibiting the use of force against civilian aircraft sits at the cusp of becoming a norm of international law. Several items lend weight to this position. The strongest is the unanimous vote for the adoption of Article 3 *bis* to the Chi-

¹⁴⁹ *Id.* at 289–90.

¹⁵⁰ *Israel Shoots Down Lebanese Civilian Plane*, *supra* note 119.

¹⁵¹ Article 3 *bis*, *supra* note 89.

¹⁵² Church, *supra* note 84, at 34.

¹⁵³ See *supra* Section III.J. and accompanying text.

¹⁵⁴ See *supra* Section I.A. and accompanying text.

cago Convention and its ultimate entry into force.¹⁵⁵ Moreover, in addition to a law prohibiting the use of armed force against civil aircraft, the further norm of making *ex gratia* payments on humanitarian grounds when military force is used with proper military intent, but unknowingly against a civilian target, has wide acceptance.¹⁵⁶

Nevertheless, several key factors detract from the establishment of a clear rule. The first is that there are fortunately few cases. Second, even if countries do refrain from taking armed action against civilian aircraft, such abstention does not necessarily establish a position that they would consider such action illegal.¹⁵⁷

Given the trend in opposition to the use of armed force against civilian aircraft, the criteria discussed above appears insufficient, perhaps even incapable of application. An acceptable set of criteria would have to apply more restrictive successive standards such as the following:

- (1) The country whose airspace has been violated has directed the offending aircraft to land using generally recognized signals, such as those specified in the "Manual Concerning Interception of Civil Aircraft."¹⁵⁸
- (2) The offending aircraft continues to violate the airspace of the offended country, takes no action to land or end the offense, and there is no apparent reason for the failure to comply, such as a mechanical or communications problem.
- (3) The offended country reasonably perceives a threat from the offending aircraft that is more than mere speculation, such as information that the aircraft is probably engaged in an act of terrorism or perfidy¹⁵⁹ or is heading into a populated area or toward a strategically significant or particularly vulnerable target.
- (4) If the offended country fires on an aircraft in compliance with criterion (3) and civilians are harmed or killed, the offended country should make *ex gratia* payments to compensate the victims or their families, unless upon further investigation it

¹⁵⁵ See Article 3 *bis*, *supra* note 89, and accompanying text.

¹⁵⁶ Sofear, *supra* note 102, at 58.

¹⁵⁷ See THIRLWAY, *supra* note 40, at 46, and accompanying text.

¹⁵⁸ ICAO, *Manual Concerning Interception of Civil Aircraft*, at 4-8, ICAO Doc. 9433-AN/926 (2d ed. 1990).

¹⁵⁹ An aircraft being *conclusively* determined (as opposed to probably) to be a threat or engaged in espionage would be treated separately because such an aircraft would be engaged in an offensive military action to which the offended country is entitled to respond with force. See Protocol I of the Geneva Convention, *supra* note 36, art. 52(2).

is determined that the aircraft was actually engaged in an act of perfidy or terrorism.

The above criteria clearly omit reference to firing on aircraft that are suspected of being used in the trafficking of drugs, an on-going practice for over fifteen years.¹⁶⁰ Nevertheless, it appears clear that under a strict interpretation of Article 3 *bis*, such action would not be permitted for aircraft traveling internationally. Perhaps that is why the United States and Peru have not ratified Article 3 *bis* (although Columbia ratified it in 1989).¹⁶¹

VII. APPLICATION TO SEPTEMBER 11, 2001

On the morning of September 11, 2001, the question of an aircraft being used in an act of terrorism or perfidy, the third criteria proposed above, was theoretical. Greater concern lay with the possibility of an aircraft crashing into a populated area, which occurred when American Airlines Flight 587 crashed in Belle Harbor three months later on November 12, 2001.¹⁶² By the end of the day on September 11, 2001—after four aircraft had been commandeered by terrorists, two of the aircraft crashed into the World Trade Center in New York City, one crashed into the Pentagon, and the last was prevented from a similar fate by the heroic efforts of its passengers who had learned the fate of the other aircraft—it was no longer theory.¹⁶³ While the aircraft involved were all U.S. flag-carrying aircraft operating on domestic routes, the attacks of that day provide a

¹⁶⁰ Aldinger, *supra* note 140.

¹⁶¹ Over the course of seven months in 2006 and 2007 your author made numerous efforts to obtain a statement of the U.S. government's position regarding 3 *bis* from the U.S. Department of State and, in particular, why the United States has not ratified it nor even submitted it to the U.S. Senate for its advice and consent. Other than a stated, but not written, support for 3 *bis*, which does include voting in favor of the ICAO resolutions urging its adoption by its members, no reason for the failure of the United States to adopt Article 3 *bis* could be provided. A possible answer is perhaps suggested by United States Assistance to Countries that Shoot Down Civil Aircraft Involved in Drug Trafficking, *supra* note 143.

¹⁶² See Nat'l Transp. & Safety Bd., American Airlines Flight 587, <http://www.nts.gov/Events/2001/AA587/default.htm> (last visited Nov. 26, 2007).

¹⁶³ See THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 1–14 (2004) [hereinafter 911 COMMISSION REPORT]. See also *id.* at 4 n.21 (recording that in 1974, a man attempted to commandeer a plane at Baltimore Washington International Airport intending to force the pilots crash into the White House in an effort to kill president, but the police shot the man, and he then killed himself before the aircraft took off).

real-life example against which to test the above criteria—would it have been appropriate to shoot down those aircraft?

Prior to September 11, 2001, it was understood that an order to shoot down an aircraft in the United States could come only from the President.¹⁶⁴ Moreover, it has always been assumed that the threat presented by such an aircraft would originate outside of the United States allowing ample time to obtain the necessary authority and dispatch the appropriate resources.¹⁶⁵ Nevertheless, over the course of the morning of September 11, 2001, while orders regarding protocol for shooting down civilian aircraft that failed to follow instructions were communicated, the necessary resources were not dispatched until at least one-half hour after all four aircraft had crashed.¹⁶⁶

Applying the above criteria to the situation on the morning of September 11, 2001, allows us to determine if these criteria would help yield a useful direction. Applying the first and second criteria—that the aircraft has been directed to land and that the violation continues—we find that on three of the aircraft the transponders had been turned off, the code had been changed on the fourth, and that all communications had been cut off.¹⁶⁷ Thus, tracing the aircraft and communicating with the pilots had been rendered impossible. Therefore, it is the third criterion—that the offended country reasonably perceives a threat—that poses the question that must be answered.

From the outset, it must be noted that actual armed action against any of the aircraft that were hijacked on September 11, 2001, was never really possible. To illustrate, it must be appreciated that the relevant times on that day were when the military authorities in a position to take armed action became aware of certain issues, rather than when those issues actually occurred. For example, the first aircraft hijacked on September 11, 2001, was American Airlines Flight 11 (AA 11).¹⁶⁸ At 8:19 a.m., a flight attendant notified American Airlines that the aircraft had been hijacked.¹⁶⁹ Boston Center, the aviation tracking facility, be-

¹⁶⁴ *Id.* at 17 n.98 (noting that such authority was granted, but not applied, in 1999 for use against an aircraft carrying golf star Payne Stewart when all individuals aboard lost consciousness). *See also*, LARRY GUEST, *THE PAYNE STEWART STORY* 19 (2000).

¹⁶⁵ *See* 911 COMMISSION REPORT, *supra* note 163, at 17.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 32.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

came aware of the hijacking at 8:25 a.m., and they notified the North American Aerospace Defense Command's (NORAD) Northeast Air Defense Sector (NEADS) at 8:38 a.m.¹⁷⁰ Thus, the relevant information was in the appropriate hands to make a military response possible only at 8:38 a.m. NEADS scrambled jets to search for the aircraft at 8:46 a.m., and AA 11 crashed into the North Tower of the World Trade Center less than a minute later at 8:46:40 a.m.¹⁷¹ Thus, the opportunity for an armed response to AA 11 being less than ten minutes, a reasonable opportunity for armed action never really existed.¹⁷² The second aircraft that was hijacked was United Airlines 175 (UA 175).¹⁷³ While it crashed into the South Tower of the World Trade Center at 9:03:11 a.m., just under seventeen minutes after AA 11 crashed into the North Tower, New York Center did not contact NEADS until after the crash.¹⁷⁴ The third flight to be hijacked, American Airlines Flight 77 (AA 77), crashed into the Pentagon at 9:37:46 a.m.¹⁷⁵ The FAA had advised NEADS that AA 77 had been hijacked just under four minutes earlier.¹⁷⁶ Finally, with regard to the fourth hijacked aircraft, United Airlines Flight 93 (UA 93), which crashed at 10:03:11 a.m., NEADS was also not informed until just under four minutes after the crash.¹⁷⁷ Thus, while the crashes occurred over the course of seventy-seven minutes, a reasonable opportunity for a military response did not exist.

We are, therefore, left with a hypothetical question based on the facts of September 11, 2001. Presuming that an armed response could be instantaneous, was there sufficient information available to merit an armed attack on the civilian aircraft hijacked on September 11, 2001? Here the third criterion—that the offended country reasonably perceives a threat—is helpful. First, there was the deactivation of or change of the codes on the transponders. The only reason for such an action would be to make it more difficult to track the aircraft. Second, the aircraft had been hijacked. Third, the aircraft were clearly capable of

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² It is notable that at 9:21 a.m., Boston Center informed NEADS that AA 11 was heading for Washington, D.C. and at that notice, NEADS scrambled fighter jets within three minutes. *Id.* at 32.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 33.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

reaching strategically significant or particularly vulnerable targets. The 9/11 Commission noted that even UA 93 crashed only twenty flight minutes away from Washington, D.C., where the hijackers' likely targets were the Capitol or the White House.¹⁷⁸ It is possible that a question could have remained at 8:46 a.m., but not at 8:46:40 a.m., when AA 11 crashed into the North Tower of the World Trade Center. Thus, it would appear that the proposed criteria would have applied in practice and reflect the decision reached on September 11, 2001, that if an aircraft would not follow instructions, it could be fired upon.¹⁷⁹

The final question in this analysis is, presuming that the United States had shot down any of the aircraft used in the attacks on September 11, 2001, whether the United States would have had a duty to make *ex gratia* payments to compensate the victims or their families. Having determined that the aircraft were, in fact, engaged in an act of terrorism, it would seem certain that such payments would not be required with regard to the terrorists. That, however, leaves open the question of compensation to the innocent passengers. For them it would seem that the United States, having acted properly in the shooting down of the aircraft, would not have any liability to make payment, but using the true definition of *ex gratia*, such payments would be appropriate in such a circumstance.

CONCLUSION

While there is no definitive international law that restricts firing on civilian aircraft,¹⁸⁰ international law has developed to the point where, while not universally accepted, there are norms that are sufficiently widely accepted that the "right" to fire on aircraft that offend a country's airspace is quite restricted.¹⁸¹ The criteria proposed at the end of Section VI above likely meet that standard. Moreover, that proposed standard, while quite

¹⁷⁸ *Id.* at 14.

¹⁷⁹ *Id.* at 40.

¹⁸⁰ See United States Assistance to Countries that Shoot Down Civil Aircraft Involved in Drug Trafficking, *supra* note 143 (citing but reaching a different conclusion from Andreas F. Lowenfeld, *Looking Back and Looking Ahead*, 83 AM. J. INT'L L. 336, 341 n.17 (1989)); Sompong Sucharitkul, *Procedure for the Protection of Civil Aircraft in Flight*, 16 LOY. L.A. INT'L & COMP. L.J. 513, 519-20 (1994)); *contra* Sompong Sucharitkul, *Midterm Review of the UN Decade on International Law*, UN DECADE NEWSL., AM. SOC'Y INT'L L., Mar. 22, 1996, available at <http://library2.lawschool.cornell.edu/asil/11midtrm.htm> (asserting without support that 3 *bis* represents customary international law).

¹⁸¹ See *supra* Section V.

high, balances the humanitarian desire to avoid firing on civilian aircraft against a country's need to protect its security. In essence, it restricts firing until an analysis of the situation suggests that the aircraft is, in fact, a military threat—permitting the use of force as a proper defensive action under Article 51 of the Charter of the United Nations—or something sufficiently close to a military threat, that is, a threat to lives from a terrorist plot, to warrant comparable action.

