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## AERIAL INTRUSIONS BY CIVIL AIRLINERS AND THE USE OF FORCE

WILLIAM J. HUGHES\*

THE PRINCIPLE that every state has complete and exclusive sovereignty over the airspace above its territory is now a fundamental tenet of international law. Most international lawyers believe the principle has been firmly established as law since World War I. Indeed, it may be considered to have been one of the most rapidly accepted customary rules of the twentieth century.<sup>1</sup> The explicit recognition of the principle found in Article 1 of the Paris Convention of 1919,<sup>2</sup> and the Chicago Convention of 1944<sup>3</sup> was, therefore, merely declaratory of existing customary law on the subject.<sup>4</sup>

The comprehensive claim which states assert to authority over the airspace above their territory,<sup>5</sup> expressed in the familiar terms of "sovereignty," corresponds very closely to their most comprehensive claim with respect to the land masses themselves. One aspect of this claim is the comprehensive and continuing, even

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<sup>1</sup> Gihl, *The Legal Character and Sources of International Law*, 1 SCANDINAVIAN STUD. L. 51, 80-81 (1957).

<sup>2</sup> Paris Convention for the Regulation of Air Navigation (1919), 11 L.N.T.S. 173 [hereinafter cited as Paris Convention of 1919].

<sup>3</sup> Chicago Convention on International Civil Aviation (1944), 3 C. BEVANS, TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 1776-1949, MULTILATERAL 1931-1945, at 944 [hereinafter cited as Chicago Convention of 1944].

<sup>4</sup> M. McDUGAL, LAW AND PUBLIC ORDER IN SPACE 259-60 (1965).

<sup>5</sup> "Territory" is defined in Article 2 of the Chicago Convention of 1944: "For the purposes of this Convention the territory of a State shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State."

arbitrary, exclusive competence to control access to and the use of, the airspace above their national territory.<sup>6</sup> It is a claim, as put by Professor J.C. Cooper, to the "sole unilateral right to control all flight in the airspace above its land and waters," encompassing "every type of flight instrumentality," and "subject to no qualifications other than those to which it voluntarily agrees."

It is axiomatic from this principle that no aircraft is normally entitled to enter the airspace above the territory of a foreign state without the latter's permission. The question, however, ultimately arises as to the status and standards of treatment of an aircraft which in fact enters without such permission. Is such an aircraft completely at the mercy of the territorial sovereign? Does the right to destroy the aerial intruder<sup>8</sup> logically inhere in "complete and exclusive sovereignty"? Or does international law impose certain restraints upon the territorial sovereign in dealing with such aircraft?

Unlike Professor Lissitzyn's authoritative article<sup>9</sup> on the treatment of aerial intruders which considers military or state aircraft together with civil aircraft, the discussion to follow will differentiate between the two classes of aircraft and confine itself to aerial intrusions by civil airliners. The essential differences between intrusions by military and non-military aircraft will be discussed below. The treatment of intruding civil airliners, particularly the use of force against such aircraft, is by no means an academic question. During the period between 1952 and 1978, some five regularly scheduled airliners have been fired upon after unauthorized intrusions into national airspace.<sup>10</sup> All of these incidents resulted in the death or injury of many if not all passengers and crew aboard.

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<sup>6</sup> M. McDUGAL, *supra* note 4, at 254.

<sup>7</sup> 107 CONG. REC. A633, A634-35 (1961) (report of J.C. Cooper, "Flight-Space Law").

<sup>8</sup> Aircraft entering airspace without permission are referred to in this paper as "intruder" or "intruding aircraft."

<sup>9</sup> Lissitzyn, *The Treatment of Aerial Intruders in Recent Practice and International Law*, 47 AM. J. INT'L L. 559 (1953).

<sup>10</sup> See text at section II *infra*.

# I. NON-MILITARY INTRUDERS MUST BE CONSIDERED DISTINCT FROM MILITARY INTRUDERS

It is submitted that non-military intruders must be considered as distinct from military intruders and therefore should not be treated similarly by the offended territorial sovereign. Support for this proposition is found in international conventions, state practice and *opinio juris*.

The Convention for the Regulation of Air Navigation<sup>11</sup> signed at Paris in 1919 demonstrates an early acceptance of a distinction between military and non-military aircraft. Article 32 provided that "no military aircraft of a contracting State shall fly over the territory of another contracting State nor land thereon without special authorization." Each party to the convention, on the other hand, undertook to accord, in time of peace, freedom of innocent passage above its territory to the civil aircraft of the other party with the exception of aircraft engaged in scheduled services.<sup>12</sup> The Convention on International Civil Aviation<sup>13</sup> drafted in 1944, which has for all practical purposes superseded the Paris Convention, makes similar distinctions. The state aircraft of a party are forbidden to fly over or land in the territory of another state without authorization.<sup>14</sup> There is, however, a general right of transit and non-traffic stops for the civil aircraft, other than those engaged in scheduled international air services, of every party to the convention.<sup>15</sup> It must be pointed out by way of clarification that the reason a right of transit or innocent passage was denied scheduled civil air services was rooted in economic rather than security considerations. The grant of such a right was intended to be the subject of a separate bilateral or multilateral agreement between the states concerned, based on reciprocity. A privilege of transit and non-traffic stops for aircraft on scheduled international air services is granted in the separate International Air Services

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<sup>11</sup> Paris Convention of 1919, *supra* note 2.

<sup>12</sup> *Id.* arts. 2, 15.

<sup>13</sup> Chicago Convention of 1944, *supra* note 3.

<sup>14</sup> Article 3(b) of the Chicago Convention of 1944, *supra* note 3, provides that, "Aircraft used in military, customs and police services shall be deemed to be State aircraft . . . ."

<sup>15</sup> *Id.* arts. 5, 6.

Transit Agreement also signed at Chicago in 1944.<sup>16</sup>

That the United States views a distinction between military intruders and civil intruders to be important seems clear, although mainly by negative implication. The case of the American U-2 high altitude reconnaissance plane shot down on May 1, 1960, deep within Soviet territory, is illustrative. It must be noted that the United States did not formally challenge the right of the Soviets to shoot down the U-2,<sup>17</sup> which is clearly a state and not a civil plane under the definition of Article 3(b) of the Chicago Convention. On other occasions when an American military plane has been shot down by the Soviet Union or another Socialist state, on the allegation that it was flying over the territory or territorial waters of that state, including the RB-47 incident which occurred after the U-2 incident, the United States has protested on the ground that its plane was not over foreign territory or had gone there accidentally rather than on the ground of an illegal use of force.<sup>18</sup> These reactions to the use of force against intruding United States military craft can be sharply contrasted to American reactions as to the use of force against civil aircraft discussed below.

The Soviet Union, which jealously guards its air frontiers with frequent resort to the use of force against intruders, nonetheless appears implicitly to distinguish between state and civil aircraft, albeit on a functional basis. In regard to the Soviet attitude on aerial intruders in the context of the U-2 incident, Korovin states:

The fact that a violation of airspace, or to use Herter's expression, 'penetration' is sometimes effected, as the U.S. affirms, by 'un-armed', 'civil' aircraft, does not alter matters. Whatever category a plane formally belongs to, its character is determined by the function it performs, a plane used for military purposes will always be regarded as a reconnaissance plane, just like a transport plane used as a bomber, cannot expect to be treated as a commercial aircraft.<sup>19</sup>

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<sup>16</sup> International Air Services Transit Agreement (1944), C. BEVANS, *supra* note 3, at 922. See generally B. CHENG, *THE LAW OF INTERNATIONAL AIR TRANSPORT* (1962).

<sup>17</sup> Lissitzyn, *Some Legal Implications of the U-2 and RB-47 Incidents*, 56 AM. J. INT'L L. 135, 137 (1962); M. McDUGAL, *supra* note 4, at 274-75.

<sup>18</sup> Lissitzyn, *supra* note 17, at 139; Wright, *Legal Aspects of the U-2 Incident*, 54 AM. J. INT'L L. 836, 845-46 (1960).

<sup>19</sup> Korovin, *Aerial Espionage and International Law*, INT'L AFFAIRS 49, 50 (1960).

It would thus appear that an aircraft that was in fact a civil commercial aircraft would be treated differently from an aircraft functioning as a state aircraft.

State practice regarding the treatment of aerial intruders further dictates that a distinction be made between military and non-military aircraft. Most aerial incidents involving an intruding foreign military aircraft and Soviet fighters for example, are of limited value in an analysis of state practice or *opinio juris*. As Professor McDougal bluntly observes, it would be futile to engage in prolonged description of the numerous incidents involving American and Soviet military aircraft that have occurred after World War II, since the published documentation about most of the incidents discloses basic disagreement with respect to the facts.<sup>20</sup> Disputes about the facts usually relate to five fundamental issues:<sup>21</sup>

- (1) whether the intrusion was intended or unintended;
- (2) whether the incident occurred within or outside Soviet territorial airspace;
- (3) the true nature of the flight, be it reconnaissance or non-offensive;
- (4) whether warning issued before fire opened; and,
- (5) who opened fire first.

Of these five fundamental issues, most do not apply to, nor have they been raised with respect to use of force against intruding civil airliners.

The issue of who fired first, intruder or interceptor, has been central to most disputes involving incidents between Soviet and American military aircraft. The Soviet Union has maintained that the intruder in question was fired upon by interceptors only in response to unprovoked fire from the intruding plane or to a deliberate intrusion in the B-29 incident of 1952,<sup>22</sup> the P-2-Y "Neptune" incident of 1954<sup>23</sup> and the RB-47 incident of 1960.<sup>24</sup> This consistently disputed issue obviously does not arise in connection with the use of force against civil airliners. Another issue hotly

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<sup>20</sup> M. McDougal, *supra* note 4, at 272-73.

<sup>21</sup> See Lissitzyn, *supra* note 9, at 570.

<sup>22</sup> Aerial Incident of Oct. 7, 1952, U.S.A. v. U.S.S.R., I.C.J. Pleadings 29.

<sup>23</sup> Aerial Incident of Sept. 4, 1954, U.S.A. v. U.S.S.R., I.C.J. Pleadings 19.

<sup>24</sup> Lissitzyn, *supra* note 17, at 139.

contested in incidents involving military aircraft is whether such aircraft did in fact intrude into territorial airspace. There has rarely been any controversy as to whether the civil airliner was within or outside the airspace of the territorial state which had used force against it. Nor have the issues of the willfulness or nature of the intrusion received substantial debate in the case of civilian intrusions. The only major issue in common with intrusions by military aircraft which has arisen in the airliner incidents has been that of whether a warning was issued before firing. And even this common issue is clouded by the fact that some western states deny a right to use force against intruding airliners even if a warning is issued first.

Therefore, it must be concluded both on legal and functional grounds that the treatment of aerial intrusions by military aircraft be dealt with as distinct from intrusions by non-military aircraft. While the attitude of states toward military intruders shows little consensus, it is submitted that attitudes toward intruding civil airliners are far more uniform, and that certain standards with regard to the treatment of such civilian intruders may be regarded as established. A review of the incidents since 1952 wherein force has been used against intruding airliners, coupled with an analysis of the reactions of the party states and the community of states will support such a proposition.

## II. INCIDENTS INVOLVING THE USE OF FORCE AGAINST AIRLINERS (1952-1978)

The following incidents may be considered as the most important examples to date of the use of force by an offended territorial sovereign against an intruding airliner not only due to the gravity of the consequential damages but equally for the *opinio juris* generated by them.

The first such incident took place on April 29, 1952, when an Air France plane on a scheduled flight from Frankfurt to Berlin was attacked by Soviet fighters.<sup>25</sup> The fighters made three or four separate attacks, employing cannon and machine gun fire.<sup>26</sup> The

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<sup>25</sup> London Times, Apr. 30, 1952, at 6; see generally De La Pradelle, *Les Frontiers De L'Air*, 2 RECUEIL DES COURS 187 (1954).

<sup>26</sup> London Times, Apr. 30, 1952, at 6.

airliner managed a miraculous landing in Berlin despite serious damage to both starboard engines and fuel tanks.<sup>27</sup> Two passengers were severely injured by bullets, and three other passengers and the copilot were injured by metal splinters.<sup>28</sup>

There was in this case some disagreement as to the question of actual intrusion by the Air France plane. A few minutes before the attack the pilot had obtained a position report which showed him to be well within the boundaries of the twenty mile wide Berlin corridor.<sup>29</sup> The Soviet protest alleged however that the airliner had violated Soviet air regulations, presumably by an unauthorized entry into its airspace.<sup>30</sup>

The reactions by the West however, centered on the right of the Soviet Union to take such action against a civil airliner. While the Allied High Commissioners in Germany in a joint protest denied the aircraft was outside the corridor, they made the following statement: "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."<sup>31</sup> The Allied High Commissioners and the British, American, and French Commandants in Berlin requested the Soviet Union to conduct an immediate investigation of the incident, punish those responsible, and make reparations for resulting material damage to persons and property.<sup>32</sup>

The Soviet Union for its part issued a strong protest as to the actions of the French airliner. It was maintained that the airliner violated Soviet air regulations and refused to obey orders by interceptors to land. A further, and not unrevealing contention, was that the shots fired by a single fighter were intended as a warning to the Air France plane to land and were not meant to down the intruder.<sup>33</sup>

On July 23, 1954, a Cathay Pacific plane on a scheduled flight

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<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*; see also Lissitzyn, *supra* note 9, at 574.

<sup>31</sup> London Times, Apr. 30, 1952, at 6.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*



from Bangkok to Hong Kong was shot down ten miles east of the international air corridor off Hainan Island by fighters of the People's Republic of China.<sup>34</sup> Two passengers were killed by fire from the interceptors and numerous others drowned after the crippled airliner ditched into heavy seas.<sup>35</sup> Captain Blown, who survived the crash, stated that the Chinese fighters attacked without the slightest warning and "shot to kill," aiming at the petrol tanks with a continuous stream of bullets.<sup>36</sup>

The reaction from the West was one of uniform condemnation and outrage over this use of force by the Chinese interceptors. Further, both the United Kingdom and the United States demanded that the People's Republic of China pay compensation for the damage to persons and property caused by the fighter attack.<sup>37</sup> Mr. Dulles declared in a statement from Washington, "[t]he United States Government takes the gravest view of this act of further barbarity for which the Chinese Government must be held responsible."<sup>38</sup>

The Chinese initially remained silent as to any possible responsibility for the downing of the Cathay Pacific airliner. However, after the demand by the British Charge d'Affaires for adequate compensation, the Chinese immediately informed the British government that they took responsibility for the incident and were willing to consider appropriate compensation for the loss of life and damage to property.<sup>39</sup> They maintained that the airliner had been fired upon by accident as it was mistaken for a Kuomintang aircraft on a mission of aggression.<sup>40</sup>

One of the most striking incidents involving the use of force against an intruding airliner, both in terms of loss of life and response by the international community, occurred on July 27, 1955.<sup>41</sup> A Constellation airliner of Israel Airlines (the ElAl Com-

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<sup>34</sup> London Times, July 24, 1954, at 6; see generally De La Pradelle, *supra* note 25, at 187-88.

<sup>35</sup> London Times, July 24, 1954, at 6.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 8.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> KEESINGS CONTEMPORARY ARCHIVES 14359 (August 1955).

pany), flying from London to Israel via Paris, Vienna and Istanbul, was shot down by Bulgarian fighters near the Greco-Bulgarian border.<sup>42</sup> All fifty-one passengers on board were killed, as well as the crew of seven.<sup>43</sup>

On July 28, the Bulgarian government issued a communique saying the airliner had departed from its route and entered Bulgarian airspace without warning, and that anti-aircraft defenses had opened fire on the plane which they had been unable to identify.<sup>44</sup> This communique is noteworthy as the Bulgarians are deliberately misstating the manner in which the airliner was shot down. The actual circumstances, as later revealed, were that the ElAl plane was fired upon by fighters which were clearly in a position to identify the aircraft.<sup>45</sup> The Bulgarians were hesitant to let the actual circumstances surrounding the incident be known.

On the next day, July 29, the Israeli government sent two strongly worded notes to Bulgaria. The first denounced the attack on the airliner as "shocking recklessness" and "a wanton disregard for human life and for elementary obligations of humanity," and demanded the punishment of those responsible, as well as full compensation for the loss of the aircraft and for the families of the passengers and crews.<sup>46</sup> The second note protested the Bulgarian government's refusal to permit an Israeli investigating team to enter Bulgaria to examine the wreckage of the airliner.<sup>47</sup>

Israeli civil aviation experts were eventually allowed to enter Bulgaria and inspect the wreckage of the plane. Their report, published on August 1, stated that the plane was riddled with machine gun bullets indicating it had been shot down by fighters, and that the Bulgarian authorities had tampered with the wreckage in an attempt to remove incriminating evidence and had generally impeded their investigation.<sup>48</sup>

The passengers in the aircraft included British, Canadian, South African, American, French, and Swedish nationals, as well as

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

Israeli citizens. In addition to the Protest Notes from Israel, strong protests were made to Bulgaria by the British government (acting also on behalf of Canada and South Africa), and by the United States, French, and Swedish governments. The British Note stated that "H.M. Government cannot accept that any Government is in its right in shooting down a civil aircraft in time of peace."<sup>49</sup> The United States Note declared that the "brutal attack" on the Israeli airliner was a "grave violation of all principles of international law."<sup>50</sup> The French government described the Bulgarian action as an "act of war."<sup>51</sup> All the Protest Notes demanded the punishment of those responsible and the payment of full compensation to the families of those who had been killed.

The Bulgarian government issued a statement on August 3, admitting that the ElAl airliner had been shot down by two Bulgarian fighters and not, as originally claimed, by anti-aircraft fire.<sup>52</sup> Further, it promised to "discover and punish those responsible for the catastrophe," and to take "all measures to prevent a repetition of such incidents," and to pay compensation to the families of the fifty-eight victims.<sup>53</sup> The statement, claimed to be based on the findings of the Ministerial Commission of Inquiry, said that fighters had been sent to investigate the deep penetration of Bulgarian airspace, but the airliner had ignored their signal to land.<sup>54</sup> Believing that the plane was "trying to escape across the frontier," they had opened fire on the airliner, which had caught fire and crashed. The statement admitted that the air defenses had "shown hastiness" and had failed to take all necessary measures to force the aircraft to change direction.<sup>55</sup>

The United States, United Kingdom, and Israeli governments also submitted applications to the International Court of Justice instituting proceedings on the ElAl incident against the government of Bulgaria.<sup>56</sup> The Memorials submitted to the International Court

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<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> Aerial Incident of July, 1955, Israel v. Bulgaria; United States v. Bulgaria; United Kingdom v. Bulgaria, I.C.J. Pleadings.

are a rich source of *opinio juris* for these three states on the right to use force against intruding airliners.

The general position taken by the United States is perhaps best illustrated by the following statement from its Memorial: "regardless of the explanation for the aircraft's entering Bulgarian airspace, no pilot of a civil airliner would expect to be shot down without being given a safe alternative, and without the opportunity to keep himself, his passengers, and his crew from being killed."<sup>57</sup>

The position of Israel taken in its Memorial was similar in spirit, "The Government of Israel will . . . argue that in normal times there can be no legal justification for haste, and inadequate measures after interception of, and for the opening of fire on, a foreign civil aircraft, clearly marked as such."<sup>58</sup> The British attitude was more categorical. The following passage from its Memorial is useful by way of summary:

The Government of the United Kingdom submits 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 of the territory of that State.<sup>59</sup>

The legal arguments contained in these Memorials in support of the proposition that the Bulgarian action was illegal under international law warrant further inquiry. All three Memorials relied strongly on the principles illustrated by the judgment of the International Court of Justice in the *Corfu Channel* case.<sup>60</sup> The judgment was cited as evidence 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. In the well-known *Corfu Channel* case, the International Court based Albania's duty to warn shipping vessels of the presence of a mine field in its territorial waters on "general and well-recognized principles," one of which was "elementary

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<sup>57</sup> *Id.*, Memorial of the United States, at 210.

<sup>58</sup> *Id.*, Memorial of Israel, at 89.

<sup>59</sup> *Id.*, Memorial of the United Kingdom, at 358.

<sup>60</sup> *Corfu Channel Case*, [1949] I.C.J. 4.

considerations of humanity even more exacting in peace than in war."<sup>61</sup>

The British and American Memorials also cited the case of *Garcia v. United States*,<sup>62</sup> as additional support for the proposition that certain minimum or elementary considerations of humanity exist which are of a legal nature, and to elucidate the content of such principles.<sup>63</sup> In the *Garcia* case, which was decided by the Mexico-United States General Claims Commission, an American officer opened fire with a rifle on a raft which had crossed the Rio Grande River from the Mexican to the American side and was just setting out on the return journey. The officer stated that he fired from some distance, with no intent of hitting anybody, but with the object of frightening the persons on the raft. A small child aboard the raft was killed. The majority of the Commission held that the action by the American officer was illegal. In particular, it stated that the act of firing in such circumstances 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 neighborhood," nor should it be used "when other practicable ways of preventing or repressing the delinquency might be available."<sup>64</sup>

The United Kingdom submitted that the shooting down of the ElAl plane was contrary to the Charter of the United Nations. The Charter commends all members of the United Nations under paragraph four of Article 2, to 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. The British maintained that the use of armed force against aircraft is not justified in international law nor under Article 51 of the United Nations Charter, unless it is used in the legitimate exercise of self-defense.<sup>65</sup> It submitted that the use of force against a foreign airliner, clearly identifiable as such, cannot be justified even if

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<sup>61</sup> *Id.* at 22.

<sup>62</sup> *Garcia Case (Mexico v. United States)*, 4 R. Int'l Arb. Awards 119 (1928).

<sup>63</sup> Memorial of the United Kingdom, *supra* note 59, at 362.

<sup>64</sup> *Garcia Case (Mexico v. United States)*, 4 R. Int'l Arb. Awards 119 (1928).

<sup>65</sup> Memorial of the United Kingdom, *supra* note 59, at 358.

that aircraft enters the airspace above a state without previous authorization.

The United Kingdom also maintained that no justification for the use of force against civil aircraft on a scheduled flight which makes an unauthorized entry into the airspace of another state can be derived from the Paris Convention of 1919 or the Chicago Convention of 1944.<sup>66</sup> Both conventions provide that contracting states may establish areas in which, for military reasons or in the interests of public safety, the entry of aircraft of other contracting states may be prohibited.<sup>67</sup> Under Article 4 of the Paris Convention, an aircraft finding itself above a prohibited area established under Article 3 of that convention must, as soon as it is aware of the fact, give the signal of distress provided for in paragraph seventeen of Annex D to the Paris Convention, and land as soon as possible outside the prohibited area at one of the nearest aerodromes of the state whose territory it has entered. Under paragraph (c) of Article 9 of the Chicago Convention, each contracting state, under such regulations as it may prescribe, may require any aircraft entering one of the restricted or prohibited areas,<sup>68</sup> "to effect a landing as soon as practicable thereafter at some designated airport within its territory." The United Kingdom contended 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 scheduled flights which overfly other areas of their territory without permission."<sup>69</sup>

All three Memorials submitted to the International Court raised the well-established principle of international law, grounded in considerations of humanity, recognizing for ships a right of entry into the territory of a foreign state in cases of overriding necessity or distress. Numerous cases and authorities were cited and discussed in support of this maritime doctrine. It was uniformly maintained that there is, on the analogy of this right of

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<sup>66</sup> *Id.* at 363.

<sup>67</sup> Paris Convention of 1919, *supra* note 2, at art. 3; Chicago Convention of 1944, *supra* note 3, at art. 9.

<sup>68</sup> The establishment of restricted or prohibited areas is provided for in Article 9(a) of the Chicago Convention of 1944, *supra* note 3.

<sup>69</sup> Memorial of the United Kingdom, *supra* note 59, at 364.

entry to sovereign ports for ships in distress, a right of entry into the airspace of a foreign state for aircraft in distress. While it was conceded that this right is not specifically recognized in either the Paris or Chicago Conventions on Aerial Navigation, it was pointed out that both require a certain degree of assistance to be provided by the territorial state for aircraft of contracting states in cases of distress. Article 22 of the Paris Convention provided that "Aircraft of the contracting States shall be entitled to the same measures of assistance for landing, particularly in case of distress, as national aircraft." Article 25 of the Chicago Convention is headed "Aircraft in Distress" and reads as follows:

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 . . . .

The United States considered the Bulgarian government in violation of the principle articulated in Article 25 of the Chicago Convention and added, "[t]hat governments owe a duty of safety to overflying passengers and crew and a duty not to kill or destroy or tolerate destruction and pilferage, is plain."<sup>70</sup>

Each Memorial also contained the respective state's opinion as to the proper remedy for the intrusion by the ElAl airliner, or any such airliner. The British Memorial categorically rejected the use of force as a proper remedy. The United States and Israel, while generally rejecting the use of armed force against an intruding airliner, were less categorical in their responses. The American opinion was that the issue of the legality of the use of force in this situation could not even arise unless the offended territorial state raised an articulable security necessity caused by the intrusion and had already exhausted certain preliminary measures. The Israelis stressed what they considered to be the normal reaction of the territorial state to an unauthorized infringement of its airspace.

The British position was simply that the proper remedy of the offended territorial sovereign is through diplomatic channels.

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<sup>70</sup> M. WHITEMAN, 9 DIGEST OF INTERNATIONAL LAW 337 (1968).

Reference was made to the incident in which an unarmed United States military air transport was shot down over Yugoslavia on August 19, 1946, and the incident's ultimate resolution was cited with approval.<sup>71</sup> The Yugoslav government, although offering compensation on an *ex gratia* basis only, stated that orders had been given that in the future, transport aircraft should not be fired at, even in cases of intentional overflight, but should be invited to land. If they refused, their identity would be noted and the necessary steps taken through diplomatic channels.<sup>72</sup>

It was also noted that the government of the United Kingdom had affirmed the proposition that the appropriate remedy, in the case of an alleged violation of airspace, is for the state which alleges such violation first to attempt to obtain satisfaction from the owner of the aircraft, and failing this, to take the matter up through the diplomatic channels with the state whose nationality the aircraft bears.<sup>73</sup>

The United States Memorial maintained that no pilot of a civil airliner would expect to be shot down without being given a safe alternative and without an adequate opportunity to keep himself, his passengers, and his crew from being killed.<sup>74</sup> The Memorial continued:

A safe alternative means that the airplane should either have been told from the ground, by voice radio, or by CW transmission, on an international radio frequency used by airplanes in flight, or should have been told by the fighters intercepting it, that it was off course. It should then have been either escorted back to Yugoslavia, or even to Greece. If there were Bulgarian terrain security positions already raised, AX-AKC should have been given comprehensible communications to lead it to a designated airport with safety for the crew, the passengers and the aircraft.<sup>75</sup>

Any firing would have been unnecessary, the United States argued, since the pilots of the fighter planes had an opportunity to identify

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<sup>71</sup> Memorial of the United Kingdom, *supra* note 59, at 363.

<sup>72</sup> 15 DEP'T STATE BULL. 505 (1946).

<sup>73</sup> The government of the United Kingdom affirmed this procedure for redress on December 5, 1955, at the 682nd meeting of the Third Committee of the General Assembly of the United Nations (10th Session). See Memorial of the United Kingdom, *supra* note 59, at 363.

<sup>74</sup> Memorial of the United States, *supra* note 57, at 210.

<sup>75</sup> *Id.*



the ElAl plane from its appearance and markings and to report them to the Bulgarian ground authorities. The latter, in accordance with the present practice of civilized nations, then would take the matter up in appropriate diplomatic channels with the government of Israel.<sup>76</sup>

The United States finally maintained that should there have been a security necessity, which Bulgaria did not claim and could not claim in this case, to bring the airliner down, only reasonable methods for doing so could be used. An airfield of proper facilities must have been shown to the pilot of the ElAl plane, and the intercepting fighters must have led him there.<sup>77</sup> The United States concluded, "[a]bove all, it has not been stated or demonstrated that it was necessary to effect any landing for the security of Bulgaria or any other internationally proper reason. To have any semblance of international legal validity such evidence would be essential."<sup>78</sup>

The Israeli Memorial stated that in time of peace it is normal for the offended territorial state to react in one or both of two ways. The first remedy or reaction is to require the intruder to return to its authorized position within or without the airspace of the state in question or to require the intruder to submit to examination after landing at a place in the territory of the state in question, effectively indicated to it in an appropriate manner.<sup>79</sup> It stressed that all actions and instructions must be appropriate and not cause an undue degree of physical danger to the aircraft and its occupants. The second remedy is for the territorial state to subsequently deal with the infringement of its sovereignty by making the appropriate *démarche* through its diplomatic channels.<sup>80</sup>

The merits of the various arguments as to the status of the use of force against intruding civil airliners under international law were unfortunately never reached by the International Court of Justice. The cases brought by Israel, the United States, and the United Kingdom against Bulgaria were ultimately removed from

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<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 236.

<sup>78</sup> *Id.* at 242.

<sup>79</sup> Memorial of Israel, *supra* note 58, at 87.

<sup>80</sup> *Id.*

the Court's List for want of jurisdiction over Bulgaria.<sup>81</sup>

The most serious incident in terms of loss of life occurred on February 21, 1973, when a Libyan Airlines Boeing 727 was shot down by Israeli fighters over Israeli-occupied Sinai.<sup>82</sup> The Libyan airliner, on a flight from Tripoli to Cairo, overflowed Cairo, passing the Israeli-Egyptian cease fire line, and intruded some twelve miles into occupied Sinai before being fired on by Israeli interceptors.<sup>83</sup> The airliner crash-landed, which resulted in the destruction of the aircraft and loss of 108 lives.<sup>84</sup>

Vehement criticism of the action by the Israeli fighters was made by Egypt. Cairo Radio described the incident as "a monstrous and savage crime which is full of perfidy and which is not only a violation of international law but of all human values."<sup>85</sup> It went on to say that "it is premeditated murder of unarmed civilians including women and children."<sup>86</sup> Mr. Ahmed Nouh, Egyptian Civil Aviation Minister, denounced the action as a violation of international law.<sup>87</sup> Mr. Nouh also produced tapes of the Libyan airliner's conversation with Egyptian air traffic controllers in support of certain allegations as to the circumstances surrounding the incident. The tapes, it was alleged, confirmed that the four Israeli fighters attacked without warning. As Egyptian air traffic control was monitoring the same radio frequency as the Libyan airliner, it was argued that any radio warning to the airliner would have been picked up and recorded in Cairo. Further, the tapes indicated that the pilot realized he had lost direction and was in communication with Egyptian controllers just before the shots were fired.

Israel pointed out that the airliner violated airspace over a very sensitive Israeli-controlled area, namely occupied Sinai. Mr. Shimon Peres, Israel's Minister of Transport, stated that "Israel acted in accord with international law, defended its airspace and did

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<sup>81</sup> See generally Gross, *Bulgaria Invokes the Connally Amendment*, 56 AM. J. INT'L L. 357 (1962).

<sup>82</sup> London Times, Feb. 22, 1973, at 1.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 7.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

what was required after serious consideration."<sup>88</sup> Israel maintained that the pilot of the Libyan plane refused to heed repeated warnings which were conveyed according to international usages.<sup>89</sup> The Israeli fighter pilots responsible for the incident claimed they only tried to damage the aircraft to force it down and did not intend to shoot it down.<sup>90</sup>

The International Civil Aviation Organization (ICAO) took a very strong and important position vis à vis this incident. The ICAO Council, on March 5, 1973, instructed the Secretary General to institute a fact finding technical investigation on the destruction of the Libyan airliner. A team was formed of five experts, drawn entirely from the ICAO Secretariat. The Council examined the report of the team on June 4, 1973, and adopted the following resolution:

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 [February 1973] 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 established by the Secretary General in accordance with the Resolution A19-1, and finding from it no justification for the shooting down of the Libyan civil aircraft;

- (1) Strongly condemns 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.<sup>91</sup>

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<sup>88</sup> London Times, Dec. 23, 1973, at 17.

<sup>89</sup> *Id.* at 1.

<sup>90</sup> *Id.*

<sup>91</sup> ICAO Council Resolution of June 4, 1973, *ICAO Bulletin* 13 (July, 1973).

The most recent incident involving the use of force against an intruding airliner occurred on April 20, 1978.<sup>92</sup> A Korean Air Lines (KAL) Boeing 707 after entering Soviet airspace had been directed down by one or more Soviet fighter aircraft, one of which fired at the airliner, killing two passengers and injuring eleven others.<sup>93</sup> The KAL plane which was on a polar flight from Paris to Seoul, with a scheduled stop for refueling at Anchorage, made a forced landing on a frozen lake, 230 miles south of Murmansk.<sup>94</sup> The area where the airliner was intercepted, near the White Sea coast, is a Soviet high security zone closed to foreigners.<sup>95</sup>

Reaction by South Korea, which had no diplomatic relations with the U.S.S.R., was somewhat surprising in light of the previously reported incidents. Far from protesting the Soviet action, the President of South Korea, Park Chung Hee, expressed his gratitude to the Soviet Union for the speedy return of the passengers and crew members—this being in fact the first direct message ever sent to the Soviet Union by the government of South Korea.<sup>96</sup> Later on May 1, Mr. Park Tong Jin, the South Korean Foreign Minister, again expressly thanked the Soviet Union for the release of the airliner's captain and navigator.<sup>97</sup> South Korea did not rebuke the Soviet Union for firing on the KAL plane. Nor did other states, who have taken positions with regard to such incidents in the past, condemn the Soviet Union publicly. This attitude may perhaps be explained by the circumstances surrounding the firing on the airliner as reported by the Soviet Union which were unchallenged by South Korea.

According to an initial Soviet announcement on April 21, the KAL airliner had entered Soviet airspace on a south-bound flight from the Barents Sea, had not complied with orders given by Soviet fighters, and had not landed until two hours after entering Soviet airspace.<sup>98</sup> The Soviet authorities later claimed that after being intercepted the airliner had attempted to change course west-

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<sup>92</sup> KEESINGS CONTEMPORARY ARCHIVES 29060 (June 1978).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

wards in order to fly to Finland.<sup>99</sup> Later, according to a statement issued by Tass on April 29, the official Soviet investigation had established that the airliner's crew had failed "to abide by the international rules of flight" and had "refused to obey the demands of Soviet fighter planes of the air defence to follow them in order to land at an airfield." The pilot and navigator had pleaded guilty to violating Soviet airspace and the border, and also the international rules of flying, and they had confirmed that they had understood the orders of the Soviet aircraft but had not obeyed them.<sup>100</sup>

After reviewing the five prominent incidents of the use of force by offended territorial sovereign states against an intruding civil airliner in phenomenological fashion, certain patterns of state opinion and practice emerge. Standards of treatment for civil aerial intruders may be induced from these incidents.

### III. SUMMARY: STATE OPINION AND PRACTICE ARTICULATED IN THE INCIDENTS REVIEWED

One striking aspect of all these incidents is the absence of a claim by any of the offended territorial states to an unqualified right to use force against the intruding airliner. None of the territorial sovereigns simply asserted that the aircraft was shot down for its unauthorized entry and that such action was consistent with its rights and obligations under international law. Aggravating circumstances were claimed in each instance to justify the use of force.

The most common aggravating factor cited by territorial states employing armed force was the failure or refusal of the intruding aircraft to follow the instructions of intercepting fighters. The Soviet Union advanced the failure of the intruder to follow instructions to land as justification for firing in both incidents reviewed.<sup>101</sup> The Bulgarian government, after initially maintaining that the ELAl plane was shot down as an unidentified intruder by anti-aircraft batteries, claimed the airliner refused instructions to land.<sup>102</sup>

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<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> See London Times, Apr. 30, 1952, at 6; KEESINGS CONTEMPORARY ARCHIVES 29060 (June, 1978).

<sup>102</sup> KEESINGS CONTEMPORARY ARCHIVES 14359 (August, 1955).

Israel maintained in the incident of February 21, 1973, that the Libyan airliner refused to heed repeated warnings.<sup>103</sup> The People's Republic of China claimed that the Cathay Pacific plane was attacked by accident near Hainan Island as it was mistaken for a Kuomintang aggressor.<sup>104</sup> While the veracity of these claims may be disputed, it is important and revealing that all the states felt compelled to advance them.

It may, therefore, be initially concluded that there is no support for the proposition that territorial states have an unqualified right to use force against intruding civil airliners. State opinion, however, appears to diverge somewhat on the question whether force may ever be lawfully used against such an airliner in time of peace. This divergence of opinion, while never actually that great, has narrowed over time, merging into consensus.

In the earlier incidents reviewed, the opinions of the western powers seem quite categorical. The legitimacy of firing on a civil airliner was completely denied or denied in the particular factual situation. The Allied High Commissioners in Germany, in their joint protest over the Berlin corridor incident of April 29, 1952, flatly stated that firing on an unarmed aircraft in time of peace is entirely inadmissible and contrary to all standards of civilized behavior.<sup>105</sup> The Bulgarian incident of July 27, 1955, provoked similar responses from the West. The British Note to Bulgaria stated that "H.M. Government cannot accept that any Government is in its right in shooting down a civil aircraft in time of peace."<sup>106</sup> The United States, however, was less categorical, although calling the incident a violation of international law. The United States maintained that regardless of the explanation for the El Al plane entering Bulgarian airspace, no pilot of a civilian airliner would expect to be shot down without being given a safe alternative.<sup>107</sup> A safe alternative was considered to mean that the airliner would be notified that it was off course and interceptors would lead it out of Bulgarian airspace or to a designated air-

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<sup>103</sup> See London Times, Feb. 23, 1973, at 1.

<sup>104</sup> See London Times, July 24, 1954, at 6.

<sup>105</sup> London Times, April 30, 1952, at 6.

<sup>106</sup> KEESINGS CONTEMPORARY ARCHIVES 14359 (August, 1955).

<sup>107</sup> Memorial of the United States, *supra* note 57, at 210.

port.<sup>108</sup> The United States Memorial also stated that in any case there should be a security necessity for the territorial sovereign to bring the plane down to the ground, and only reasonable methods for doing so could be used.<sup>109</sup> Thus, the United States opinion as early as 1955 begins to beg the question whether a territorial state, which claims a security necessity, may bring down an airliner by the use of armed force if it refuses to comply with instructions given by interceptors to land.

The United Kingdom, in its Memorial to the International Court, contended that since the Paris and Chicago Conventions on Aerial Navigation do not sanction the use of force against aircraft flying above prohibited or restricted zones, no contracting state can be in any stronger position against civil aircraft "on scheduled flights which overfly other areas of their territory without permission."<sup>110</sup>

The Chicago Convention, at Article 9(c), provides that each contracting state may require any aircraft entering a prohibited area to effect a landing as soon as practicable thereafter at some designated airport within its territory. Therefore, the British contention that contracting states are not authorized to use force as a remedy for the unauthorized intrusion of a civil aircraft appears quite correct. It is submitted, however, that the British contention cannot be broadly interpreted. It seems clear that Article 9(c) of the Chicago Convention would deny contracting states the right to use force as a primary remedy for aerial intrusions into a prohibited zone or, by reasonable implication, intrusions in other areas. The primary and initial remedy is to require the intruder to land. Yet neither the Paris nor the Chicago Conventions explicitly limit the police power of states as to the methods which may be employed to enforce regulations on aerial navigation.

The ICAO made certain interpretations as to the legitimacy of the use of force against intruding airliners under the Chicago Convention in its response to the Sinai incident of February 21, 1973. The ICAO Council strongly condemned the Israeli action which resulted in the downing of a Libyan airliner and the death of

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<sup>108</sup> *Id.* See text accompanying note 75 *supra*.

<sup>109</sup> Memorial of the United States, *supra* note 57, at 236.

<sup>110</sup> *Id.* at 364.

108 persons on board. The Council considered that the Israeli attitude toward the use of force in such situations constituted a "flagrant violation of the principles enshrined in the Chicago Convention."<sup>111</sup> No specific articles or provisions were cited. The Council did not declare, however, that any use of force under any circumstances would be a violation of the Convention. Rather, after considering the report of the investigation team established in accord with an Assembly resolution, the Council found no justification for shooting on the intruding airliner. The Council impliedly rejected Israel's proffered aggravating circumstances justification: violation of airspace over a very sensitive area and failure of the Libyan airliner to heed warnings.<sup>112</sup>

The Sinai incident is also illuminating in that in 1955 it was Israel, in her protests to Bulgaria, who vehemently denied the legitimacy of the use of force against intrusions by civil airliners. In 1973, however, Israel was claiming a right to use such force in defense of its airspace "after serious consideration." While it may be seen as hypocrisy engendered by finding the shoe on the other foot, the incidents may be distinguished. It is clear that in the Sinai incident, Israel was invoking the so-called "security necessity" element raised by the United States in its Memorial against Bulgaria. While rejected by the ICAO Council based on its investigation report, Israel was apparently trying to couple this security necessity with the airliner's failure to follow instructions as sufficient justification for the use of force. Further, the Israeli Memorial submitted to the International Court on the Bulgarian incident was not categorical in its rejection of the use of force against intruders. It condemned the disproportionate degree of violence employed by Bulgaria. In the Sinai incident, Israel apparently felt that a disproportionate use of force was not employed. The ICAO investigation concluded otherwise.

Returning to the action by Israel, the United Kingdom, and the United States against Bulgaria before the International Court of Justice, certain legal arguments advanced give additional insight into state opinion on the content of the principle governing the use of force on intruders. All three Memorials before the

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<sup>111</sup> ICAO Council Resolution of June 4, 1973, *ICAO Bulletin* 13 (July, 1973).

<sup>112</sup> See text accompanying notes 88-89 *supra*.



International Court cited with approval the decision in the *Corfu Channel*<sup>113</sup> case. The judgment was advanced as evidence 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 of their property. Yet it must be noted that the International Court of Justice in the *Corfu Channel* case did not announce that it considered the use of force against citizens of other states to be illegal under international law. It was the unnecessary or reckless use of force against such persons which the court held to be violative of "elementary considerations of humanity even more exacting in peace than in war." The court stressed that Albania had a duty to warn shipping vessels of the presence of a mine field in its territorial waters; not that the mining itself was illegal under international law.<sup>114</sup>

The British and American Memorials also cited approvingly the case of *Garcia v. United States*.<sup>115</sup> This case supports the notion that "elementary considerations of humanity" are not subject to "black letter law" but are in fact subject to a weighing process in each instance. Whether a certain act by a state is violative of law must be viewed as a question of proportionality. The ICAO Commission held in the *Garcia* case that the act of firing by the state officer was illegal "unless the importance of preventing or repressing the delinquency by firing is in proportion to the danger arising from it . . . , " nor should it be used "when other practicable ways of preventing or repressing the delinquency might be available."<sup>116</sup>

The view that all other means of terminating the unauthorized entry must be exhausted before using force against an intruding airliner was in fact implicitly recognized by Bulgaria. The Bulgarian government in a statement issued on August 3, 1955, ultimately conceded that the EIAI airliner was shot down by Bulgarian fighters, promised to prevent a repetition of such incidents, and agreed to pay compensation for the loss of life to the families

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<sup>113</sup> [1949] I.C.J. 4.

<sup>114</sup> *Id.* at 22.

<sup>115</sup> *Garcia Case (Mexico v. United States)*, 4 R. Int'l Arb. Awards 119 (1928).

<sup>116</sup> *Id.*

of the victims.<sup>117</sup> The statement admitted that, based on findings of the ministerial commission of inquiry, the air defenses had "shown hastiness" and had failed to take all necessary measures to force the aircraft to change direction.<sup>118</sup> The Bulgarians apparently recognized that it was this failure to exhaust all other measures which rendered them liable for the resulting damages caused by their interceptors.

The presence of a security necessity coupled with an apparent exhaustion of other measures may explain the total lack of protest against the Soviet Union when armed force was employed to terminate the intrusion into its airspace by the Korean airliner on April 20, 1978. The use of force under the factual situation surrounding the incident was, it is submitted, viewed as lawful by other states.

The intrusion by the KAL plane may be considered the most serious intrusion among the incidents reviewed. The airliner had not merely strayed off course, it was in fact ninety degrees off course and had penetrated deep into the Soviet Union.<sup>119</sup> The area where the airliner was ultimately intercepted, moreover, is a Soviet high security zone which is closed to all foreigners.<sup>120</sup> Finally, accepting the facts as reported by Tass which remain unchallenged, the KAL airliner's crew failed to obey the demands of the Soviet fighters to follow them in order to land at an airfield although the pilot and navigator admitted that they had understood such demands.<sup>121</sup> Thus, it appears that the Soviet Union, claiming a security necessity to require the aircraft to land, provided the airliner's pilot with a safe alternative which was rejected. The use of force was, therefore, properly one of last resort.

#### IV. CONCLUSION: INTERNATIONAL STANDARDS FOR THE TREATMENT OF INTRUDING CIVIL AIRLINERS

It is submitted then that international customary law as evidenced by state opinion and practice, articulates certain standards

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<sup>117</sup> KEESINGS CONTEMPORARY ARCHIVES 14359 (August, 1955). See text accompanying notes 52 and 53 *supra*.

<sup>118</sup> KEESINGS CONTEMPORARY ARCHIVES 14359 (August, 1955).

<sup>119</sup> KEESINGS CONTEMPORARY ARCHIVES 29060 (June, 1978).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

for the treatment of intruding civil airliners by offended territorial states. Both international customary law and the Chicago Convention of 1944 reject the use of force against such aerial intruders as a primary remedy for the territorial state. The offended territorial state normally has two lawful remedies in dealing with intrusion by civil airliners. One or both of these two remedies may be employed. First, the territorial state must indicate to the airliner in an appropriate and effective manner, without causing an undue degree of physical danger to the aircraft and its occupants, that it is performing an unauthorized act. While exercising due care, the territorial state may require the intruder to return to its authorized position, within or without the airspace of the state in question, or to submit itself to examination after landing at an airfield adequate for the type of aircraft in the territory of the state in question, effectively indicated to the intruder in an appropriate manner. Secondly, and subsequently, the territorial state may deal with the infringement of its sovereignty by making appropriate protests or demands through diplomatic channels. The use of force against intruding civil airliners is narrowly limited by international customary law. Firing on such an aircraft can be considered lawful only if the following three criteria are satisfied:

- (1) It is necessary to effect 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.

If any of the above criteria are not satisfied, the offending territorial state cannot lawfully bring down the intruder with armed force. The state will be left with the normal remedies prescribed by international customary law and the 1944 Chicago Convention.