

1984

A Legal Analysis of the Shooting of Korean Airlines Flight 007 by the Soviet Union

Farooq Hassan

Recommended Citation

Farooq Hassan, *A Legal Analysis of the Shooting of Korean Airlines Flight 007 by the Soviet Union*, 49 J. AIR L. & COM. 555 (1984)
<https://scholar.smu.edu/jalc/vol49/iss3/3>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in Journal of Air Law and Commerce by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

A LEGAL ANALYSIS OF THE SHOOTING OF KOREAN AIRLINES FLIGHT 007 BY THE SOVIET UNION

BY DR. FAROOQ HASSAN*

ON SEPTEMBER 2, 1983, the world was stunned by the news that during the previous day the Soviet Union had shot down a South Korean jetliner over the Sea of Japan, killing all 269 passengers aboard. The airliner, which was on a scheduled flight between New York and Seoul, had apparently strayed off course into Soviet airspace when it was destroyed by Russian jet fighter planes. The tragedy was brought to international attention through strong statements issued by the President and Secretary of State of the United States.¹ While some aspects of this incident may never be known,² sufficient data is available to analyze the legal aspects of the actions taken by the Korean airliner and the Soviet interceptors.

This article will focus on one central issue: the legal status of a trespassing civil foreign aircraft into the national airspace of another country. At the outset, the facts of the Korean jetliner incident will be presented. Next, the article will ex-

* Visiting Professor of Law, University of San Diego; Professor of Law, Willamette University; Barrister at Law, Lincoln's Inn, London; Senior Advocate, Supreme Court of Pakistan; member, Oregon Bar; member, International Institute of Strategic Studies, London.

¹ N.Y. Times, Sept. 2, 1983, at 1, col. 4.

² While the act of aerial trespass by the Korean jetliner is beyond question, exactly what led the Soviet interceptors to shoot it down is only known to the extent that they have chosen to broadcast to the international community. The Soviets maintain that the destroyed plane was engaged in espionage for the U.S. For Soviet allegations that Korean Airlines had been spying for the U.S. since 1970, see N.Y. Times, September 17, 1983, at 3, col. 5.

amine the application of international law, and more specifically, international air law, to the central issue. In addition, contemporary state practice will be analyzed to determine whether unofficial, customary law has emerged in this area of inquiry. In conclusion, the applicable international law will be applied to the facts of the Korean jetliner tragedy in order to evaluate the legal validity of the Soviet action in shooting down the Korean airliner.

I. EVENTS SURROUNDING THE ATTACK ON KOREAN AIRLINES FLIGHT 007

As stated previously, the news of the downing of the Korean plane was broadcast to the world by President Reagan and Secretary of State Shultz.³ The President expressed "revulsion" at what he described as a "horrifying act of violence."⁴ More specific details were provided in a news conference held by the Secretary of State.⁵ Further details were provided to the press by other officials of the State Department. KAL Flight 007 left New York at 11:50 p.m. EDT on August 31, from John F. Kennedy Airport, with 269 passengers bound for Seoul South Korea. En route it stopped at Anchorage and left at 10:00 a.m. on September 1. Sometime thereafter it drifted off course and at 1:00 a.m., Korean time, Soviet radar began to track the aircraft as it entered Soviet air space over the Kamchatka Peninsula.

The areas over which the KAL flight strayed are of a military nature and constitute strategic airspace of the Soviet Union.⁶ After two hours of tracking the plane by radar, Soviet pilots reported seeing the aircraft at 3:12 a.m. At that time the airliner was traveling westward, after going south across the southern tip of Sakhalin Island. This area contains some of the Soviet Union's most sensitive military installations.⁷ At 3:21 a.m. a Soviet pilot reported to his base that

³ N.Y. Times, Sept. 2, 1983, at 1, col. 4.

⁴ *Id.*

⁵ *Id.*, at 5, col. 1.

⁶ *Id.*, at 1, col. 5.

⁷ *Id.*

the aircraft was flying at an altitude of 33,000 feet. According to a statement issued by the official Soviet news agency on the day following the disclosure by the American government, the KAL plane had strayed by as much as 312 miles from its designated route.⁸ At 3:26 a.m., presumably after authorization from its base command, the Soviet interceptor jet reported firing a missile at the KAL aircraft. Four minutes later American and Japanese radar showed the altitude of the Korean plane to be only 16,400 feet. It had been hit and was on its way down into the Sea of Japan. At 3:38 a.m., the plane disappeared from the radar screens.⁹

Certain elements of the Korean airliner incident are particularly noteworthy for the present discussion. First, KAL Flight 007 was a scheduled civilian airliner carrying passengers of different nationalities on an international flight. Second, whether by accident on account of instrument malfunction, or by design, the Korean jetliner strayed off course over sensitive Soviet airspace.¹⁰ Third, the airliner was shot down apparently without warning from the Soviet interceptors.

The first Russian report of the incident did not appear until September 3, 1983, one day after the occurrence had been reported to the world by the United States. Furthermore, far from admitting what had happened, the Soviet report merely acknowledged that a foreign aircraft had been tracked by the Soviet Union, and that Soviet jet fighters had intercepted it. The report did not mention the crucial fact that the plane had been shot down.¹¹ The obvious vagueness of the original

⁸ N.Y. Times, Sept. 3, 1983, at 4, col. 1.

⁹ N.Y. Times, Sept. 2, 1983, at 1, col. 3 (relevant times found in map on page 1).

¹⁰ See NAT'L L.J. Sept. 19, 1983 at 3 (suggesting several theories for the airliner's skewed course: e.g., malfunction of navigational equipment or deliberate overflight as a timesaving short-cut); but see ICAO Restricted Doc. C-WP/7764, *Destruction of Korean Air Lines Boeing 747 over Sea of Japan*, 35-37 (1983) (finding no evidence to support theories of intentional overflight for purposes of espionage or short-cutting).

¹¹ N.Y. Times, Sept. 2, 1983, at 4, col. 1. The official Soviet report stated:

An unidentified plane entered the airspace of the Soviet Union over the Kamchatka Peninsula from the direction of the Pacific Ocean and then for the second time violated the airspace of the U.S.S.R. over Sakhalin Island on the night from Aug. 31 to Sept. 1. The plane did not have navigation lights, did not respond to queries and did not enter into con-

Soviet acknowledgment of the horrifying tragedy,¹² coupled with rising international outcry, led to a second Soviet explanation on the following day. Apart from criticizing the United States, and suggesting that the plane had been on an American espionage mission, the second explanation did not add much to what had been reported the day before.¹³ There were, however, several key items contained in the second Soviet report. First, the KAL aircraft reportedly had no navigational lights in operation at the time of the incident.¹⁴ Second, it was alleged that the jetliner refused to respond to signals from the Soviet interceptor jets.¹⁵ Third, the Soviets claimed that the airliner had ignored warning and tracer

tact with the dispatcher service. Fighters of the anti-aircraft defense, which were sent aloft towards the intruder plane, tried to give it assistance in directing it to the nearest airfield. But the intruder plane did not react to the signals and warnings from the Soviet fighters and continued its flight in the direction of the Sea of Japan. *Id.*

¹² The Soviet reluctance to acknowledge the shooting of the Korean jetliner was reminiscent of the United States Government's evasiveness when, in 1960, the Soviets shot down an American U-2 plane. See Wright, *Legal Aspects of the U2 Incident*, 54 AM. J. INT'L L. 836 (1960).

¹³ N.Y. Times, Sept. 3, 1983, at 4, col. 1. The second Soviet report stated:

As it has already been reported, on the night from August 31 to September 1 this year, an unidentified plane had rudely violated the Soviet state border and intruded deep into the Soviet Union's airspace. The intruder plane had deviated from the existing international route in the direction of the Soviet Union's territory by up to 500 kilometers and spent more than two hours over the Kamchatka Peninsula, the area of the Sea of Okhotsk and the island of Sakhalin.

In violation of international regulations the plane flew without navigation lights, did not react to radio signals of the Soviet dispatcher services and made no attempts to establish such communications contact. . . . It was natural that during the time the unidentified intruder plane was in the U.S.S.R. airspace Soviet anti-air defense aircraft were ordered aloft, which repeatedly tried to establish contacts with the plane using generally accepted signals and to take it to the Soviet Union. The intruder plane, however, ignored all this. Over the Sakhalin Island, a Soviet aircraft fired warning shots and tracer shells along the flying route of the plane.

Soon after this the intruder plane left limits of Soviet airspace and continued its flight toward the Sea of Japan. For about 10 minutes it was within the observation zone of radio location means, after which it could be observed no more.

Id.

¹⁴ *Id.*

¹⁵ *Id.*

shots fired by the intercepting aircraft.¹⁶ Obviously, the conflicting Soviet and American reports left many factual details in doubt.¹⁷ In particular, the crucial issue of whether the Korean plane was shot down without warning after it had been intercepted by the Soviet fighters was unresolved.

Many other questions were left unresolved. First, it is not clear why the Korean jetliner had strayed for such a great time and distance from its charted course into sensitive Russian airspace. Second, it is uncertain whether the air traffic controllers in Japan realized that the plane was off course. Third, it seems unusual that the Soviet pilots were not able to visually identify the plane as a commercial airliner. And fourth, it has not been revealed whether a distress signal was ever sent by the Korean aircraft.

II. THE NATURE OF A STATE'S SOVEREIGNTY OVER ITS AIRSPACE: HISTORICAL INTRODUCTION

A. *Domestic Law*

In the common law, the oft-quoted latin maxim, *Cujus Est Solum, Ejus Est Usque Ad Coelum Et Ad Infernos*, recognized that a subjacent landowner has a right of control over the airspace above his land.¹⁸ Lord McNair, the English international jurist, did not attribute this maxim to a rule of the Roman law,

¹⁶ *Id.*

¹⁷ On Monday, September 5, 1983, in a nationally televised broadcast, President Reagan presented excerpts of a recording indicating that the Korean jetliner had navigational blinking lights and was shot down without warning. N.Y. Times, Sept. 6, 1983, at 1. However, the State Department later issued a more detailed version of the recording indicating that a shot, possibly a warning shot, had been fired by the interceptors at the Korean jetliner. N.Y. Times, Sept. 12, 1983, at 1. Also, on September 12, 1983, U.S. officials acknowledged that although there had been an American spy plane, an RC 135, in the vicinity of the tragedy, they were about 1000 miles apart when Russian airspace was violated by the KAL plane. American officials also asserted that any initial confusion among the Soviets could not have remained when the airliner was shot down, because they had ample time to identify it as a commercial jetliner. N.Y. Times, Sept. 5, 1983, at 1.

¹⁸ Literally, the maxim means: To whomsoever the soil belongs, he owns also to the sky and to the depths. That is, the owner of a piece of land owns everything above and below it to an indefinite extent. For an extensive discussion of the origin and development of this doctrine, see Cooper, *Roman Law and the Maxim Cujus Est Solum in International Air Law*, 1 MCGILL L.J. 23 (1952).

but he recognized its strong influence on the common law.¹⁹ Both Coke and Blackstone cited the maxim with approval. Coke said that "the earth hath in law a great extent upwards, not only of water, as hath been said, but of ayre and of all other things even up to heaven."²⁰ Similarly, Blackstone asserted that "land hath also, in its legal signification, an indefinite extent upwards as well as downwards."²¹ In 1851, however, Lord Ellenborough, the Chief Justice of England expressed doubts as to whether entry into another's airspace *per se* constitutes trespass.²² Fifty years later in *Kenyon v. Hart*,²³ Lord Blackburn, while appreciating the doubts of Lord Ellenborough, reverted to the more categorical position adopted by Coke and Blackstone.²⁴

In the United States, the majority view appears to be that if the flights of a company's planes over the property of a private landowner demonstrate a consistent and permanent pattern, and are excessively low, the landowner has a cause of action against that company.²⁵ There is, however, no viola-

¹⁹ See A. MCNAIR, *THE LAW OF THE AIR* 393 (3d ed. 1964).

²⁰ 1 S. COKE, *INSTITUTES*, ch.1, § 1 at 4 (19th ed. 1832).

²¹ 2 W. BLACKSTONE, *COMMENTARIES* *18.

²² *Pickering v. Rudd*, 171 Eng. Rep. 70, 70-71 (1815).

I do not think it is a trespass to interfere with the column of air superincumbent on the close. I once had occasion to rule . . . that a man who, from the outside of a field, discharged a gun into it, so as that the shot must have struck the soil, was guilty of breaking and entering it But I am by no means prepared to say, that firing across a field *in vacuo*, no part of the contents touching it, amounts to a *clausum fregit*. Nay, if this board overhanging the plaintiff's garden be a trespass, it would follow that an aeronaut is liable to an action of trespass *quare clausum fregit* at the suit of the occupier of every field over which his balloon passes in the course of his voyage If any damage arises from the object which overhangs the close, the remedy is by an action on the case.

Id.

²³ 122 Eng. Rep. 1188, 1189 (1865).

²⁴ *Id.* at 252. Blackburn said, "[T]hat case raises the old query of Lord Ellenborough as to a man passing over the land of another in a balloon; he doubted whether an action of trespass would lie for it. I understand the good sense of that doubt, though not the legal reason of it." *Id.*

²⁵ See, e.g., *Griggs v. County of Allegheny*, 369 U.S. 84 (1962) (holding that the location of flight paths over residential property can constitute a compensable taking by the responsible municipality); *United States v. Causby*, 328 U.S. 256 (1946) (holding that a particular low-altitude military flight path over plaintiff's chicken farm constituted a compensable taking by the United States in light of damage to the farming

tion of any right in isolated and non-interfering flights across territory held by others.²⁶ In *Smith v. New England Aircraft Co.*²⁷ the court held that private ownership extends to all reasonable heights in the airspace.²⁸ In fact, the court even touched upon the international dimensions of this matter by observing:

It is essential to the safety of sovereign States that they possess jurisdiction to control the air space above their territories. It seems to us to rest on the obvious practical necessity of self-protection. Every government completely sovereign in character must possess power to prevent from entering its confines those whom it determines to be undesirable.²⁹

B. *International Law*

International law reflects the position of Anglo-American jurisprudence outlined above. International law clearly recognizes that the sovereignty of a state extends to the airspace above its territory.³⁰ Broadly speaking, the basis for granting a subjacent state the right to control the airspace above its territory is similar to that given in domestic law: the holder of patrimony in land should also be given the right to control the airspace directly above it. In other words, control over airspace is granted because of the existence of the sovereign rights of a state in the land below it. "Sovereignty" in the airspace is therefore a facet of the totality of interests a state

enterprise); *Swetland v. Curtiss Airports Corp.*, 55 F.2d 201 (6th Cir. 1932) (holding that low-altitude overflight may impose an actionable servitude upon landowner's property, but overflight is not trespass *per se*).

²⁶ *United States v. Causby*, 328 U.S. 256 (1946). The Court stated:

It is ancient doctrine that at common law ownership of the land extended to the periphery of the universe — *Cujus est solum ejus est usque ad coelum*. But that doctrine has no place in the modern world. The air is a public highway [W]ere that not true, every transcontinental flight would subject the operator to countless trespass suits. Common sense revolts at the idea.

Id. at 260-61.

²⁷ 270 Mass. 511, 170 N.E. 385 (1930).

²⁸ 170 N.E. at 390.

²⁹ *Id.* at 389.

³⁰ See generally I. BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* (2d ed. 1973).

has in its land, known as territorial sovereignty.³¹

In so far as the nature of territorial sovereignty is concerned, a helpful observation was made by Judge Huber in the *Island of Palmas* case.³² He noted that international law has established a "principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations."³³ The phrase "exclusive competence", used by Judge Huber to characterize territorial sovereignty, implies the legal inability of any state to interfere in another state's exercise of its territorial rights. While discussing the incident of the American U-2 spy plane which was shot down by the Soviet Union in 1960, one commentator, in answering the question of a state's right to exclude intruders from its territory and its airspace, said, "[t]his question must be answered in the affirmative. International Law and the United Nations Charter are based on the principle of respect by the states for the territory and independence of other states."³⁴ This principle has been supported by both small and large countries. For example, in United Nations Security Council debates concerning the U-2 incident, the delegate from Ceylon said that it is "absolutely necessary for the preservation of peace among nations" that a country's airspace, which is within its sovereignty, "cannot be invaded by any other state without its authority and permission."³⁵

As will be seen in the cases of aerial trespass which have been debated before international forums, the question of the sovereign right of a subjacent state to control its airspace has never been doubted. Even states which have shot planes down have not seriously contested the right of a territorial sovereign to total control of its airspace. For example, in the

³¹ See generally B. Cheng, *THE LAW OF INTERNATIONAL AIR TRANSPORT* 3 (1962).

³² *Island of Palmas Case* (Neth. v. United States), 2 R. Int'l Arb. Awards 831 (1928).

³³ *Id.* at 838.

³⁴ Wright, *supra* note 12, at 844. See also Lissitzyn, *Some Legal Implications of the U-2 and RB-47 Incidents*, 56 AM. J. INT'L L. 135, 137 (1962) (in which the author explains that the U-2 incident involved recognized international principles of a sovereign's exclusive jurisdiction over its airspace).

³⁵ Wright, *supra* note 12, at 842.

case concerning the downing by Bulgaria of an El Al Israel Airlines plane in 1955, the Israeli memorial before the International Court of Justice said, "the Government of Bulgaria has furthermore admitted that in so doing its armed forces displayed a certain haste and did not take all necessary measures to compel the aircraft to land."³⁶ Clearly implicit in the Israeli statement is a recognition of the lawful right of a subject state to control, albeit with some caution, the activities of an unauthorized aircraft. In summary, international law gives a territorial sovereign the right to control its airspace.

III. TRESPASSING AIRCRAFT IN INTERNATIONAL AIR LAW

A sovereign's right to control its airspace is equally well recognized in international air law as it is in general international law.³⁷ In fact, international air law, as it exists today, is grounded upon the fundamental principles of state sovereignty.³⁸ The Hague Peace Conference of 1899 issued a declaration which prohibited the discharge of projectiles and explosives into another country's airspace by balloons and other aviation devices.³⁹ Although the declaration did not specifically address the question of a nation's sovereignty over its airspace by prohibiting the discharge of projectiles across international borders, such sovereignty was clearly implied. At the beginning of this century, however, the French jurist,

³⁶ Aerial Incident of 27 July 1955, (Isr. v. Bulgaria, U.S.A. v. Bulgaria; U.K. v. Bulgaria) 1959 I.C.J. Pleadings 5, 127, 130. (Preliminary Objections) [hereinafter cited as Aerial Incident]. See Hughes, *Aerial Intrusions by Civil Airliners and the Use of Force*, 45 J. AIR L. & COM. 595 (1980).

³⁷ The term "international air law", as used herein, means the rules resulting from international conventions dealing with civil aviation. The term is, therefore, narrower than general international law of airspace.

³⁸ Wright, *supra* note 12, at 845. The author states:

Penetration of the airspace of states by unauthorized craft has been especially forbidden since the first World War. The Paris Convention of 1919, the Havana Convention of 1928, and the Chicago Convention of 1944 recognize that "every state has complete and exclusive sovereignty over the airspace above its territory" and consequently has the right to prevent passage by civilian aircraft of other states except as permitted by treaty.

Id.

³⁹ Declaration as to Launching of Projectiles and Explosives from Balloons, July 29, 1899, 32 Stat. 1839, T.I.A.S. No. 393.

Fauchille, advocated the concept of freedom of the air. His theory, resembling the doctrine of freedom of the high seas, was not destined to receive much acceptance.⁴⁰ In 1912, Sir Erle Richards, a professor of international law at Oxford, wrote that:

[there is] a principle of International Law which is fundamental in the determination of the extent of State sovereignty and must apply as much to the air space over State Territory as to the Territory itself. This principle is that Sovereign States are entitled to all those rights which are necessary for the preservation and protection of their territories.⁴¹

As a practical matter, the question of rights to airspace was of little importance to states at the turn of the century because aviation was in its infancy.⁴² Moreover, no international convention dealing with air rights existed at the time.

In response to German airpower in World War I, the Treaty of Versailles,⁴³ in 1919, contained several provisions relating to air law, and prohibited the development of the German air force.⁴⁴ The Versailles Treaty also created an aeronautical commission which ultimately drafted the Paris Convention of 1919.⁴⁵ The Paris Convention was the first major international treaty dealing with civil aviation. Although only thirty eight states signed it, its applicability was widespread. The Convention defined the nature of a subjacent state's rights to its airspace, envisaged international rights of way, and contained elaborate rules for the registra-

⁴⁰ See Denaro, *States' Jurisdiction in Aerospace Under International Law*, 36 J. AIR L. & COM. 689, 690 (1970). Fauchille presented his views at the Institute of International Law at Ghent, Belgium in 1906. For the text of Fauchille's position, see draft Convention, Regime of Aerostats and Wireless Telegraphy of 1906, 21 *Annaire de l'Institut de Droit Int'l*, 293, 327 (1906), reprinted in J. SWEENEY, C. OLIVER & N. LEECH, *THE INTERNATIONAL LEGAL SYSTEM* 230-39 (2d ed. 1981).

⁴¹ H. RICHARDS, *SOVEREIGNTY OVER THE AIR* 14 (1912).

⁴² See Denaro, *supra* note 40, at 689-94.

⁴³ Treaty of Versailles, June 28, 1919, 2 TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA, 1776-1949, 43 (C. Bevans, compiler 1969).

⁴⁴ See *id.* arts. 198-202.

⁴⁵ Convention Relating to the Regulation of Aerial Navigation, Oct. 13, 1919, 11 L.N.T.S. 173 [hereinafter cited as Paris Convention].

tion and operation of aircraft flying transnationally.⁴⁶ Article 1 clearly acknowledged a state's control over its airspace.⁴⁷ Furthermore, article 2 provided for the right of a participating state to fly through another state's airspace in times of peace.⁴⁸

Through another provision, the Convention expressly made the right to international passage of scheduled air services subject to the consent of the concerned state.⁴⁹ The Convention failed to give recognition to the principle of freedom of passage for international air services. Thus, the Paris Convention did not change the existing practice of leaving international civil aviation to the mercy of the states across whose territory aircraft might happen to pass.

The next important milestone in civil aviation was the Convention on International Civil Aviation signed at Chicago in 1944 (Chicago Convention).⁵⁰ The Chicago Convention, which is still in force, generally follows the pattern and philosophy of the Paris Convention of 1919.⁵¹ It did not secure the right for international civil air services to cross international boundaries without permission from the subjacent state. Conversely, neither did it recognize the absolute right of a subjacent state to control its airspace. Importantly, though, the Chicago Convention created the most important existing authority for the supervision of civil aviation, the International Civil Aviation Organization (ICAO).

The Chicago Convention is divided into three main parts. The second part deals with the creation of the ICAO,⁵² and the last part concerns international air services.⁵³ For the purposes of this article, it is the first part which is most rele-

⁴⁶ Paris Convention, *supra* note 45, arts. I-XXV.

⁴⁷ *Id.* art. 1. "The High Contracting Parties recognize that every Power has complete and exclusive sovereignty over the airspace above its territory. *Id.*

⁴⁸ *Id.* art. 2.

⁴⁹ *Id.* art. 15, para. 2.

⁵⁰ Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, T.I.A.S. No. 1591 [hereinafter cited as Chicago Convention].

⁵¹ Denaro, *supra* note 40, at 695-96.

⁵² Chicago Convention, *supra* note 50, pt. II.

⁵³ *Id.* pt. III.

vant since it deals with international aviation principles.⁵⁴ Article 1 confirms a subjacent state's right to control its air space: "The contracting States recognize that every State has complete and exclusive sovereignty over the air space above its territory."⁵⁵ Article 2 explains that the national airspace of a state includes the air above territorial waters as well as the air over land territory.⁵⁶ Article 3 provides that the Chicago Convention applies to civil aircraft, in exclusion of aircraft owned by states for military purposes.⁵⁷ Article 6 states: "No scheduled international air service may be operated over or into the territory of a contracting State, except with the special permission or other authorization of that State, and in accordance with the terms of such permission or authorization."⁵⁸ Thus, it was made absolutely clear that foreign civilian passenger airliners cannot pass without permission into other nations' airspace. The word used in article 6 is "scheduled," which refers to regularly operating civil passengers airlines. In contrast, article 5 applies to "non-scheduled" civilian aircraft.⁵⁹ Article 5 grants fairly extensive rights to purely private aircraft to fly across another country's airspace, subject to the restrictions contained in the Convention.⁶⁰ It is important to note for purposes of this article that

⁵⁴ *Id.* pt. I.

⁵⁵ *Id.* art. 1.

⁵⁶ *Id.* art. 2.

⁵⁷ *Id.* art. 3.

⁵⁸ *Id.* art. 6.

⁵⁹ *Id.* art. 5.

⁶⁰ Chicago Convention, *supra* note 50, art. 5. This article states:

Each contracting State agrees that all aircraft of the other contracting States, being aircraft not engaged in scheduled international air services, shall have the right, subject to the observance of the terms of this Convention, to make flights into or in transit non-stop across its territory and to make stops for non-traffic purposed without the necessity of obtaining prior permission, and subject to the right of the State flown over to require landing. Each contracting State nevertheless reserves the right for reasons of safety of flight, to require aircraft desiring to proceed over regions which are inaccessible or without adequate air navigation facilities to follow prescribed routes, or to obtain special permission for such flights.

Id. It was principally on account of this provision, giving non-scheduled aircraft certain rights to fly, that the Soviet Union refused to become a party to the Chicago

the Convention was designed to apply to private, rather than state-owned aircraft.

International aviation law is, therefore, similar to the broad international law principles applicable to airspace rights. The absolute sovereignty of a subjacent state over its airspace is well recognized among nations, and is accepted by the leading treaties on the subject. In addition, the right of international passage to civilian aircraft of foreign nations is based in each case on agreements with the subjacent state. It is always possible, however, that a subjacent state's national interest may act to oust the arrangements already made that allow civilian aircraft to fly through its airspace. In particular, two provisions of the Chicago Convention recognize that a subjacent state may, in certain circumstances, disregard existing arrangements concerning civil aviation. Article 89 provides for complete freedom of action in the event of war or national emergency.⁶¹ Furthermore, article 9 recognizes a nation's right to restrict the flight of foreign civil aircraft for reasons of military necessity or public safety. Such restrictions must not be discriminatory in favor of domestic, over foreign, airlines, and must restrict all foreign aircraft equally.⁶²

Thus, the legal control of a subjacent state over its airspace appears virtually absolute. One commentator, while recognizing that this absolute right could be abused, nevertheless acknowledged its existence when he said, "[s]tates seem to be agreed that each one of them has an absolute discretion in this matter; not only are no reasons for refusal condemned, but it seems to be agreed that no reason for refusal need be given."⁶³ As this commentator was astute to point out, the only real sanction against the abuse of a sovereign's right would appear to be international public opinion and world

Convention. In 1970, however, the Soviet Union finally adhered to the Chicago Convention. See Denaro, *supra* note 40, at 695-96.

⁶¹ Chicago Convention, *supra* note 50, art. 89.

⁶² *Id.* art. 9.

⁶³ Jennings, *International Civil Aviation and the Law*, 22 BRIT. Y.B. INT'L L. 191, 199 (1945).

conscience.⁶⁴ The strength of such a sanction is, at best, uncertain.

IV. THE FATE OF TRESPASSING AIRCRAFT: SOME PRECEDENT

On July 27, 1955, a Constellation of El Al Israel Airlines was shot down by Bulgarian fighters while trespassing over Bulgarian airspace. The flight was on its way from Vienna, Austria, to Istanbul, Turkey and was carrying fifty-one passengers and seven crew members. All aboard were killed.⁶⁵ An action was commenced before the International Court of Justice by Israel for the destruction of its aircraft and civilians as being contrary to international law. Similar actions for compensation were also commenced by the United States and the United Kingdom on behalf of their nationals who were killed in the incident.⁶⁶

Although the main action failed on the ground that Bulgaria had not accepted the jurisdiction of the court,⁶⁷ the pleadings of the claimants shed some light on the issues involved. From the pleadings it seems to have been accepted that a state which owns a civil aircraft which has trespassed into another country's airspace can legally expect that the subjacent state, instead of shooting down the intruder, will give the aircraft appropriate warnings, and then take measures to make it land safely.⁶⁸ It was also apparently conceded that a trespassing aircraft may be compelled to land by force in the subjacent state.⁶⁹ These points are, however, deducible from pleadings only, since the court did not give any authoritative pronouncement on the issues involved.⁷⁰

⁶⁴ *Id.*

⁶⁵ Hughes, *supra* note 36, at 602-03.

⁶⁶ *Id.* at 604-05.

⁶⁷ Article 36 of the International Court of Justice statute provides that the court may maintain jurisdiction only over those nations which accept its jurisdiction. Charter of the United Nations and Statute of the International Court of Justice, June 26, 1945, 59 Stat. 1031, T.S. No. 993, art. 36 [hereinafter cited as statute of I.C.J.].

⁶⁸ See Aerial Incident, *supra* note 36, at 94-95, 216-26, 223-40, 337-64; see also Hughes, *supra* note 36, at 608-10.

⁶⁹ See Aerial Incident, *supra* note 36, at 94-95, 216-26, 223-40, 337-64.

⁷⁰ Hughes, *supra* note 36, at 610-11.

On February 21, 1973, Israel shot down a Libyan jetliner on a scheduled flight between Libya and Egypt. It was carrying 113 people, out of whom 108 were killed. The plane was shot down when it strayed into airspace above the Israeli-occupied Sinai. When the jetliner, a Boeing 707, was fired upon it was twelve miles east of the closed Suez Canal and within sight of the Cairo airport.⁷¹

Libya, and other Arab and Western nations, strongly protested the Israeli actions. Israel's position was that the plane had been shot because it had strayed over fifty miles into Israeli-held territory, and had flown over military installations. Apparently no attempt had been made to land the plane because Israel asserted that the reason for bringing it down was that it was about to commit a terrorist act.⁷² Aside from the Israeli allegation, there was no evidence of terrorist activity. Regardless of factual disputes, however, military necessity was cited by Israel to justify the destruction of the passenger jet without warning.

Unfortunately, the destruction of an intruder aircraft, civil or military, has not been directly addressed by the existing treaty law. Indeed, both the Paris Convention and the Chicago Convention, which deal primarily with civil aviation, are silent on the issue of attacks on intruding foreign aircraft.⁷³ These treaties do, however, recognize, in unequivocal terms, a subjacent State's unfettered control over its airspace.⁷⁴ In summation, scheduled aircraft may traverse another state's territory by bilateral arrangements based on the subjacent country's consent. Furthermore, such consent, even if granted, may always be withdrawn on the grounds of national security interests, a state of emergency, or the public

⁷¹ The Times (London), Feb. 22, 1973, at 1, col. 1.

⁷² N.Y. Times, Feb. 22, 1973, at 1, col. 8. The shooting of the Libyan jetliner was condemned by the ICAO Council, which recommended that interception of a civilian passenger airliner should only be undertaken as a last resort. This statement is the only ICAO condemnation on record concerning the shooting of a trespassing passenger plane. Israel later apologized for the incident and paid compensation to the families of the dead victims. See N. MATTE, TREATISE ON AIR-AERONAUTICAL LAW 175-76 (1981).

⁷³ See *supra* text accompanying notes 42-58.

⁷⁴ *Id.*

interest. Although a valid reason for exercising this right of withdrawal may exist in some cases, in many instances the state merely acts on its own authority without concern for justification.

V. LEGAL PRINCIPLES DERIVED FROM INTERNATIONAL COMMUNICATIONS IN PAST AVIATION INCIDENTS

A leading international incident in which the correspondence between the concerned states throws light on international rights in airspace involved the shooting of two American military planes by Yugoslavia in 1946.⁷⁵ On two separate occasions American planes were shot down while passing through Yugoslav airspace.⁷⁶ There was disagreement as to whether the planes had been forced into Yugoslav airspace by bad weather, as the United States contended, or were intruding intentionally.⁷⁷ Furthermore, the American position was that the intercepting planes made no signal to request the American planes to land.⁷⁸ In response, Yugoslavia claimed that in the second incident the American plane had been requested to land approximately fifteen minutes before it was shot down.⁷⁹ It is evident that both the United States and Yugoslavia, while disputing the fundamental facts, did not doubt that it is a valid principle of law that the intruding planes should have been asked to land. If such a request had been refused, it might be argued that the Yugoslavs were justified in opening fire on the intruders. The United States rejected this position and stated that the planes did not constitute a threat to the security of Yugoslavia, and therefore the use of force was unjustified in international law.⁸⁰

Both the United States and Yugoslavia appeared to ac-

⁷⁵ See generally N.Y. Times, Sept. 4, 1949 at 1, col. 3, and at 4, col. 2.

⁷⁶ *Id.* The shootings occurred on August 9 and 19, with the second resulting in five deaths. *Id.*

⁷⁷ N.Y. Times, Sept. 4, 1946 at 4, col. 2.

⁷⁸ *Id.*

⁷⁹ *Protest Against Attack on American Plane and Detention of American Personnel*, 15 DEP'T ST. BULL. 415, 419 (1946).

⁸⁰ *Id.* at 417-18.

knowledge that, if on account of poor weather a plane intrudes into another country's airspace, there is no justification for shooting it down, even if it happens to be a military aircraft.⁸¹ In addition, the intruder must be warned by appropriate signals to land in the territory of the subjacent state.⁸² Marshall Tito admitted as much to a gathering of Anglo-American correspondents:

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 refuse to do so their identity should be taken and the Yugoslav Government informed thereof so that any necessary steps could be undertaken through appropriate channels.⁸³

In accordance with this conciliatory statement, Yugoslavia agreed on humanitarian grounds to pay compensation to the families of the dead victims.⁸⁴

In 1952, a French commercial aircraft, while flying from Frankfurt to Berlin, was fired upon by the Soviet Union.⁸⁵ No one was killed, but the plane was damaged and two of its occupants were injured.⁸⁶ The Soviets denied that they tried to bring down the plane by force when it deviated from its course and into Soviet territory.⁸⁷ Instead, they asserted that the plane had been inadvertently hit by warning shots.⁸⁸ In the ensuing Western protest it was denied that the plane had entered Soviet territory, and was asserted that to fire in any circumstances on an unarmed aircraft in time of peace is entirely unacceptable and contrary to all standards of civilized

⁸¹ See N.Y. Times, Sept. 4, 1946, at 4, col. 2.

⁸² *Id.*

⁸³ *Facts Relating to Flight of American Planes over Yugoslav Territory*, 15 DEP'T ST. BULL. 501, 505 (1946).

⁸⁴ N.Y. Times, Oct. 10, 1946, at 1, col. 6. The Yugoslav government paid \$30,000 to each of the families of the five victims. *Id.*

⁸⁵ N.Y. Times, April 29, 1952, at 1.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

behavior.⁸⁹

In the episode of the Soviet downing of a Swedish aircraft in 1952, the Soviet Union issued a communication which described its aerial interception procedures.⁹⁰ In the Soviet Union, "if a foreign aircraft violates the State frontier and if a foreign aircraft penetrates into the territory of another Power, it is the duty of the airmen of the State concerned to force such aircraft to land on a local airfield and, in case of resistance, to open fire on it."⁹¹ Thus, even the Soviet Union's position seems to be that an intruding foreign aircraft, civilian or military, will first be given a warning to land, and only fired upon in case of resistance.⁹²

In October of 1952, the United States lost a military aircraft when it flew over an area near northern Japan.⁹³ The American bomber was shot down by Soviet interceptors.⁹⁴ In its explanation of the incident, the Soviet Union pointed out that, in the USSR there are instructions in force which provide that, in case of a violation of the state frontier by a foreign airplane, flyers are required to force it to land at a local airport and in case of resistance to open fire upon the plane.⁹⁵ Once again, the Soviet position was that an intruding plane will be given a warning and may be fired upon only in the case of resistance or flight.

In March of 1953, a British military aircraft was shot down over East German territory.⁹⁶ In response to a British protest,

⁸⁹ *Id.*

⁹⁰ See SWEDEN, DOCUMENTS PUBLISHED BY THE ROYAL MINISTRY FOR FOREIGN AFFAIRS, NEW SERIES II: 2 STOCKHOLM 1952, ATTACKS UPON TWO SWEDISH AIRCRAFT OVER THE BALTIC IN JUNE 1952 [hereinafter cited as SWEDISH INCIDENT REPORT].

⁹¹ *Id.* at 16.

⁹² *Id.* Swedish interception rules provide that intruding aircraft are to be given a warning before they may be attacked. Aircraft in distress or desiring to land or both are to be directed where to land. Aircraft with obvious hostile intentions, which commit an act of violence in Swedish territory, may be fired upon without warning. *Id.* at 28.

⁹³ N.Y. Times, Oct. 12, 1952, at 5, col. 1.

⁹⁴ N.Y. Times, Oct. 13, 1952, at 1, col. 2.

⁹⁵ *Id.*; U.S.S.R. Charged With Misrepresenting Facts in Bomber Incident, 27 DEP'T STATE BULL. 649-50 (1952).

⁹⁶ See generally N.Y. Times, Mar. 13-18, 1953.

the Soviet Union asserted that warning shots had been fired by Soviet interceptors. The Soviet government maintained that not only were the warning shots ignored, the British plane even fired back at the interceptors. Only after such alleged acts of resistance was the British plane shot down.⁹⁷

The most thorough international comments on the status of intruding aircraft arose out of the incident involving the shooting down by Bulgaria of the Israeli passenger airliner in 1955, discussed in section IV of this article.⁹⁸ Because the matter was taken to the International Court of Justice, the claimant states submitted memorials outlining their legal position regarding the incident. The gist of the Israeli position was that, except for purposes of self-defense, a subjacent state can not rightfully shoot down a passenger airliner; instead, there is an obligation to take appropriate measures to warn and land the plane.⁹⁹ Israel argued that the Bulgarian authorities "knew that the aircraft, even when unidentified by them, was a foreign one of unknown origin, and for that reason they were ab initio obliged to comport themselves, in their relations with the aircraft, in accordance with the general rules of international law and standard international practices."¹⁰⁰ Israel then stressed that before it used force by Bulgaria it should have complied with the requisite rules of international law. According to Israel, the Bulgarians were under an obligation to use force commensurate with the reality and gravity of the threat posed by the intruding aircraft.¹⁰¹ With regard to the nature of the sovereign rights of a subjacent state, Israel acknowledged that "every state has complete and exclusive sovereignty over the airspace above its territory."¹⁰² It concluded, however, that such sovereignty may only be protected by appropriate means.¹⁰³ After con-

⁹⁷ *Id.*

⁹⁸ See Aerial Incident, *supra* note 36; See also Aerial Incident of July 27, 1955 (Isr. v. Bulgaria) 1959 I.C.J. Pleadings 5 (Application Instituting Proceedings on Behalf of the Government of Israel, Oct. 9, 1957) [hereinafter cited as Pleadings].

⁹⁹ Pleadings, *supra* note 98, at Memorial of the Government of Israel, June 2, 1958.

¹⁰⁰ *Id.* para. 59.

¹⁰¹ *Id.* para. 61.

¹⁰² *Id.* para. 65.

¹⁰³ *Id.*

tending that a subjacent state has an obligation to use appropriate means to assert its authority, Israel went on to list permissible methods of dealing with such an intruder.¹⁰⁴ First, the interceptors may signal to the intruder that it is performing an unauthorized act, and order it to return to authorized airspace or submit to examination after landing in the subjacent state.¹⁰⁵ A second alternative is for the subjacent state to deal with the infringement of its sovereignty by appropriate actions through diplomatic channels.¹⁰⁶ Furthermore, Israel asserted that, in normal times, once a civilian plane has been intercepted, "no legal qualification" exists to shoot it down.¹⁰⁷

The United Kingdom also made submissions to the court, which detailed its views. The British position, like that of Israel, rested on the limitations placed on the use of force by international law.¹⁰⁸ The British contended that force may only be used within the recognized limits of the principle of self-defense.¹⁰⁹ In this regard, the British asserted that "there can be no justification in international law for the destruction, by a State using armed force, of a foreign civil aircraft, clearly identifiable as such, which is on a scheduled passenger flight, even if that aircraft enters without previous authorization the airspace above the territory of that State."¹¹⁰ The British statement is the clearest yet on the point that even an unauthorized entry by a foreign civil airliner into the airspace of another country cannot justify destruction by interceptors from the subjacent state. The British position is that only as a matter of self-defense may an intruder plane be shot down. Unauthorized entry, or subsequent disobedience of an order to land are not sufficient grounds under this view for use of destructive force against intruding aircraft.

¹⁰⁴ *Id.* para. 66.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ Pleadings, *supra* note 98, at Memorial of the Government of the United Kingdom of Great Britain and Northern Ireland, Aug. 18, 1958.

¹⁰⁹ *Id.* para. 66.

¹¹⁰ *Id.*

It is interesting to note that the British submission analogized the case of an intruder aircraft to the situation of ships in distress under the law of the sea.¹¹¹ It contended that just as a ship in distress is entitled to protection while within the territorial waters of a foreign country,¹¹² the same is true of a strayed aircraft in distress.¹¹³ A final argument of the British position was that the silence of the Paris and Chicago Conventions as to the right of a subjacent state vis-a-vis the fate of a trespassing plane implies is that there is no right to destroy the intruder.¹¹⁴

The American submission to the court in the Bulgarian incident focused on the point that even if the Israeli plane had inadvertently trespassed into Bulgarian airspace, recognized interception procedures should have been followed in order to make the intruder land.¹¹⁵ The American memorial then suggested that two acceptable methods for dealing with the intruding plane would have been either to escort it safely to an air base, or file a diplomatic protest at a later time.¹¹⁶ The American memorial addressed the absence of any direct provision in international aviation law on the issue. The United States noted that while it is true that nothing in the Conventions disallows the shooting of an intruding plane, the existence of such a right is not supported by general principles of

¹¹¹ *Id.* para. 68-70.

¹¹² See Third U.N. Conference on the Law of the Sea, Draft Convention, U.N. Doc. A/Conf. 62/WP. 10/Rev. 3 (1980), at arts. 18, 24, 98.

¹¹³ Pleadings, *supra* note 98, at Memorial of the Government of the United Kingdom of Great Britain and Northern Ireland, Aug. 18, 1958, para. 68-70.

¹¹⁴ *Id.* para. 78.

¹¹⁵ Pleadings, *supra* note 98, at Memorial of the Government of the United States of America, Dec. 2, 1958, para. 1. The United States argued:

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 it 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 given a route to fly safely to Yugoslavia, or even to Greece. If there were Bulgarian terrain security questions already raised, 4X-AKC should have been given comprehensible communications to lead it to a designated airport with safety for the crew, the passengers and the aircraft.

Id.

¹¹⁶ *Id.*

international law.¹¹⁷

VI. INTERNATIONAL RULES AND PRACTICES

Under the Chicago Convention's rules of the air, standards and recommended practices are to be nationally enacted, though efforts should be made to make them uniform among nations. Article 12 of the Chicago Convention charges each participating state with the responsibility to ensure that its flight regulations are observed, that its aircraft obey foreign rules, and that its domestic rules conform to those established by the Chicago Convention.¹¹⁸ Furthermore, article 12 provides that over the high seas the rules of the Chicago Convention apply.¹¹⁹

Therefore, while a civil aircraft of one country is flying over another state's territory, the relevant rules of the air of that state should be respected. Accordingly, while the sanctity of the rules of the air stems from an international convention, the content of the rules is municipal in character. Regulations made by the ICAO, the international institution created by the Chicago Convention, are essentially in the nature of a model, because by the express terms of the Chicago Convention they have no binding force.¹²⁰ The Chicago Convention envisions that the participating states will maintain rules which are in harmony with those promulgated by the ICAO.¹²¹

The Chicago Convention calls for the creation of uniform "international standards" and "recommended practices".¹²²

¹¹⁷ *Id.* para. 2.

¹¹⁸ Chicago Convention, *supra* note 50, art. 12.

¹¹⁹ *Id.*

¹²⁰ *Id.* art. 37.

¹²¹ *Id.*

¹²² See ICAO Assembly Resolution A1-31, ICAO Doc. 7670 (1955).

In its first assembly, the ICAO adopted the following definition for "standards" and "recommended practices":

That "standard" means any specification for physical characteristics, configuration, material, performance, personnel or procedure, the uniform application of which is recognized as necessary for the safety or regularity of international air navigation and to which Member States will conform in accordance with the Convention; in the event of impossibility of compliance, notification to the Council is compulsory under Ar-

Therefore, it empowers the ICAO to promulgate such guidelines in order to provide a model to be followed by the various nations in pursuing international uniformity.¹²³ Article 54(l) makes it a mandatory function of the ICAO to adopt international standards and recommended practices in the form of annexes to the Chicago Convention and then to notify all contracting states of the action taken.¹²⁴

For a standard or recommended practice to become a part of the Chicago Convention, it must be designated as an annex and formally adopted as such through the procedure outlined in the Chicago Convention.¹²⁵ Like the "rules" envisaged by article 12, however, the "standards" and "recommended practices" do not acquire the status of law unless adopted through domestic legislation of the signatory states.¹²⁶ Thus, while the ICAO makes regulations, their ultimate validity depends on domestic enforcement legislation among the signatory nations. Furthermore, the philosophy of having the ICAO make such regulations is to achieve uniformity in the functioning of international civil aviation services. In accordance with this international scheme, the parties involved in past incidents of aerial trespass by civilian aircraft have relied either upon their own accepted practices or those of other countries in dealing with such situations.

The international aircraft interception procedures and the signals to be given when such situations arise are detailed in

ticle 38 of the Convention. The full name of this class of specifications will be "ICAO Standards for Air Navigation." The current abbreviation will be "Standards". That "Recommended Practice" means any specification for physical characteristics, configuration, material, performance, personnel, or procedure, the uniform application of which is recognized as desirable in the interest of safety, regularity, or efficiency of international air navigation, and to which Member States will endeavor to conform in accordance with the Convention. The full name of this class of specifications will be "ICAO Recommended Practices for Air Navigation." The current abbreviation will be "Recommended Practices".

Id.

¹²³ Chicago Convention, *supra* note 50, art. 37.

¹²⁴ *Id.* art. 54(l).

¹²⁵ *Id.* art. 90.

¹²⁶ *Id.*, arts. 12, 37; M. WHITEMAN, 9 DIGEST OF INTERNATIONAL LAW 404 (1973).

annex 2 of the Chicago Convention.¹²⁷ In the United States, domestic legislation has been enacted which respects the philosophy of the Chicago Convention. The relevant rules are found in the Federal Aviation Regulations and the instructions issued by the Federal Aviation Authority to aircraft operators.¹²⁸ The Federal Aviation Regulations provide that civil aircraft of United States registry must comply with annex 2 of the Chicago Convention when flying over the high seas.¹²⁹ Furthermore, the regulations require American civil aircraft to comply with the aviation rules of any country whose airspace they traverse.¹³⁰ Thus, while providing full deference to annex 2 of the Chicago Convention where applicable, it is stressed in the regulations that an aircraft bound by United States law must comply with local regulations while flying over a foreign country.¹³¹

VII. EMERGENT PRINCIPLES OF LAW

The clearest and most uncontroverted principle of international law supported by multilateral treaties is that a subjacent state has the right to control its own airspace.¹³² It is unnecessary to discuss the altitude limits of this right because this article is concerned with civil passenger airlines. Clearly, the altitude up to which airliners can fly are within the extent encompassed by this right.¹³³ One possible argument, however, for a state which loses a trespassing aircraft is that its plane was not actually in the attacking country's airspace. It seems obvious that a territorial sovereign may only exercise its rights against an aircraft which is actually over its land or water territory, and thus trespassing.

Another emergent principle of international law is that, regardless of whether an intruding plane might have only inadvertently strayed off course, the subjacent sovereign has the

¹²⁷ Chicago Convention, *supra* note 50, annex 2.

¹²⁸ 14 C.F.R. § 91 (1968).

¹²⁹ *Id.* at § 91.1.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² See Wright, *supra* note 12, at 847.

¹³³ *Id.*

right to intercept the trespasser and make efforts to land it. While the interception right of a subjacent state remains a valid one, there are two instances in which an unintentional trespass may be regarded as justifiable in law. Where applicable, these theories would operate to limit the actions taken by a subjacent sovereign.

First, it is apparent from the case of the shooting down of American military planes by Yugoslavia that if conditions of weather force an aircraft to intrude, the mere act of trespass should not entitle the subjacent state to shoot down the intruding plane. Both the United States and Yugoslavia seemed to agree on this position.¹³⁴ Moreover, when a civilian passenger plane is forced by weather conditions to intrude, the reasons for not attacking become even stronger.

The second circumstance in which an aircraft may justifiably stray into another country's airspace is if the aircraft is in distress. This was one of the major arguments made by the British in the Bulgarian incident.¹³⁵ This argument rests on two main foundations. First, in analogy to the law of the sea, if on account of over-riding necessity a plane enters another country's airspace, then like a vessel in distress it is not to be considered in violation of any law of the territorial sovereign.¹³⁶ Instead, it is entitled to assistance commensurate with its predicament.¹³⁷ Secondly, both the Paris Convention and the Chicago Convention contain provisions covering aircraft in distress. Article 22 of the Paris Convention provides that "[a]ircraft of the contracting States shall be entitled to the same measures of assistance for landing, particularly in case of distress, as national aircraft."¹³⁸ The corresponding provision in the Chicago Convention states:

¹³⁴ See generally N.Y. Times, Sept. 4, 1946, at 1 col. 3; Oct. 10, 1946, at 1, col. 6.

¹³⁵ See Pleadings, *supra* note 98, at Memorial of the Government of the United Kingdom of Great Britain and Northern Ireland, Aug. 28, 1958.

¹³⁶ Under the law of the sea, a vessel in distress has the right of innocent passage through a sovereign's territorial waters. The sovereign, moreover, has a duty to provide assistance to the craft. See Third U.N. Conference on the Law of the Sea, *supra* note 112, at arts. 18, 24, 98.

¹³⁷ *Id.* paras. 68-70; see also C. COLOMBOS, INTERNATIONAL LAW OF THE SEA 249 (3d ed. 1954).

¹³⁸ Paris Convention, *supra* note 45, art. 22.

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

139

It would seem, therefore, that if a trespassing aircraft gives an indication of its distress to the subjacent state, it should be provided with suitable assistance.¹⁴⁰

An important issue in international air law is the application of the doctrine of self-defense to cases of aerial trespass. In a number of the incidents considered above it was asserted by various parties that unarmed planes which pose no danger to a subjacent state cannot be justifiably shot down.¹⁴¹ Some of the most articulate statements on this issue are found in the pleadings of the case involving the shooting down of the Israeli plane by Bulgaria. The British government said, "[i]n general, the use of armed force against foreign ships or aircraft is not justified in international law, unless it is used in the legitimate exercise of the right of self-defense."¹⁴² Additionally, Israel argued that the degree of force employed by a state in such circumstances is governed by international law.¹⁴³ These nations contended that unless an intruder plane poses an immediate military threat, under general principles of international law concerning the use of force, it may not be shot down.¹⁴⁴ Conversely, an intruder may only be shot down under circumstances of legitimate self-defense.

In the application of the doctrine of self-defense, the distinction between civil and military aircraft assumes special significance. Obviously, an ordinary passenger airliner does

¹³⁹ Chicago Convention, *supra* note 50, art. 25.

¹⁴⁰ See Lissitzyn, *The Treatment of Aerial Intruders in Recent Practice and International Law*, 47 AM. J. INT'L L. 559, 588 (1953).

¹⁴¹ See, e.g., *supra* text accompanying notes 75-83.

¹⁴² See Pleadings, *supra* note 98, at Memorial of the Government of the United Kingdom of Great Britain and Northern Ireland.

¹⁴³ See Pleadings, *supra* note 98, at Memorial of the Government of Israel.

¹⁴⁴ See Pleadings, *supra* note 93.

not pose a military threat to the subjacent state. Thus, if the law states that even a trespassing military plane should not be shot down in the absence of a national security threat to the subjacent state, logically, an ordinary scheduled civil flight may not be destroyed in the absence of such a danger. Israel, however, which appeared to be a strong advocate of prohibiting the use of force against civil airliners, shot down a Libyan passenger airliner in 1973, on the pretext that it was a security risk.¹⁴⁵

The justification of self-defense is based on general principles of international law,¹⁴⁶ not on any specific rules of international air law. Each case of aerial trespass and subsequent shooting calls for an examination of the particular facts of the occurrence. Nevertheless, there exists a controlling legal principle to apply in such instances. This legal principle advocates that, *prime facie*, a passenger airliner, whether trespassing intentionally or not, should not be considered to pose a military threat to a territorial sovereign sufficient to justify the plane's destruction. A mere refusal to land after being ordered to do so is not a valid basis for use of force by the subjacent sovereign. Actual hostility committed, or about to be committed, by the trespassing plane is the only basis which can justify the subjacent state in using force against the plane. While normally a passenger airliner should not be considered a threat to a territorial sovereign, in an isolated case, given today's technology, a subjacent state may be justified in treating an apparently civilian aircraft as a security risk. Because this threat would only be true in the exceptional case, a heavy burden rests on a territorial sovereign to substantiate such an allegation before acting in self-defense.

Another issue which arises out of cases involving aerial trespass is whether an intruder plane allegedly involved in spying can be shot down, with or without warning, under the doctrine of self-defense. In other words, does spying constitute the kind of hostile action against a subjacent state which jus-

¹⁴⁵ The Times (London), Feb. 22, 1973, at 1, col. 1.

¹⁴⁶ See generally, Badr, *The Exculpatory Effect of Self-Defense in State Responsibility*, 10 GA. J. INT'L L. 1 (1980).

tifies the use of force by that country against the spying plane? The answer obviously depends upon whether spying activities can be equated in law with hostile acts against the security interests of the territorial sovereign.

The major precedent in this context is the American U-2 reconnaissance plane incident in 1960. In that case, not only was the admitted purpose of the plane military intelligence gathering, but the United States never protested the shooting nor the subsequent trial and imprisonment of its pilot, Gary Powers.¹⁴⁷ The American response led one author to conclude that:

the U-2 incident—particularly the absence of a United States protest against the shooting down of the plane further suggests that in some circumstances no previous warning or order to land is required by international law before an intruding foreign aircraft is shot down, even if the intruder does not itself attack or is likely to attack.¹⁴⁸

Therefore, in some cases aerial trespass for spying or military reconnaissance may be considered legally sufficient to justify the use of force by the subjacent state against the intruding aircraft.¹⁴⁹

Given the state of contemporary military sophistication, it is virtually impossible for a subjacent state to detect whether an intruder has any hostile intentions, or to wait for hostile acts to occur before taking any self-defense measures. The Soviet foreign minister, Andrei Gromyko, pointed out this difficulty when he opened the Security Council debate on the U-2 incident. He asserted that because even a single plane can carry a highly destructive warhead, immediate military retaliation against an intruder by the subjacent state is justified by the principles of international law.¹⁵⁰

The principle which emerges from an examination of com-

¹⁴⁷ Editorial Comment, 46 ANN. J. INT'L. 135 (1962).

¹⁴⁸ *Id.*, at 138.

¹⁴⁹ 15 U.N. SCOR (857th mtg) at paras. 53, 54, 64, 68-86, U.N. Doc S/P.V. 857 (1960).

¹⁵⁰ See Wright, *supra* note 12, and Lissitzyn, *supra* note 34 for further discussion of the U-2 incident.

munications between the states involved in past incidents of aerial trespass is that regardless of the voluntary or involuntary nature of the intrusion, and apart from whether the subjacent country considers it to be a security threat or not, once a foreign aircraft has been intercepted, it should be asked to land after appropriate warnings. This was the express or implied stand of all the countries which have been involved in past incidents. Despite the fact that the Chicago Convention interception guidelines are not technically binding, similar domestic rules have been followed or acknowledged in past cases of aerial trespass.

International interception procedures have, therefore, by force of widespread acceptance, become a part of customary international law. The International Court of Justice recognizes international custom as a major source of international law.¹⁵¹ International custom is that practice which states accept in their dealings as binding.¹⁵² Evidence of such customs can come from international correspondence, specific stands taken by nations on particular issues of law, and consistent practice by various countries of the world.¹⁵³ The uniformity necessary for a particular practice to qualify as international custom was described by the International Court of Justice:

The party which relies on a custom . . . must prove that this custom is established in such a manner that it has become binding on the other party . . . that the rule invoked . . . is in accordance with a constant and uniform usage practised by the States in question, and that this usage is the expression of a right appertaining to the State granting asylum and a duty incumbent on the territorial State. This follows from Article 38 of the Statute of the Court, which refers to international custom 'as evidence of a general practice accepted as law.'¹⁵⁴

Therefore, in order for any state practice to qualify as custom

¹⁵¹ Statute of the I.C.J., *supra* note 67, art. 38.

¹⁵² J. BRIERLY, *THE LAW OF NATIONS* 61 (6th ed. 1963).

¹⁵³ H. LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* 368-93 (1958).

¹⁵⁴ *Asylum Case (Colom. v. Peru)*, 1950 I.C.J. 266, 276 (Judgment of Nov. 20); *see also Fisheries Jurisdiction Case (U. K. v. Nor.)*, 1951 I.C.J. 116, 131 (Judgment of Dec. 18).

it must have been widely accepted as such by states at large. This requirement was recognized again by the International Court of Justice in 1951 in the *Fisheries Jurisdiction Case*, when it remarked that the twelve mile fishery zone "appears now to be generally accepted."¹⁵⁵

There is now a customary rule of international law that an intruding passenger airliner must not be attacked without being warned, in accordance with internationally recognized interception procedures, that it is in forbidden airspace and must land in the territory of the subjacent state. In various aerial trespass incidents occurring since the creation of the Chicago Convention, the aggressor states have consistently maintained that the intruder was brought down after the internationally recognized warning procedures were followed.¹⁵⁶ The observance of warning procedures seems to be generally acknowledged as binding. Although there was considerable doubt in some cases as to whether the subjacent states had actually employed warning procedures, their formal position was that warnings were given in accordance with internationally accepted procedures.¹⁵⁷ It was also generally accepted that interceptors can open fire in the event of a refusal by a trespassing plane to land or if the intruder fires at the interceptors.¹⁵⁸ In sum, it appears that a customary rule of international law exists which provides that the interception of an intruding passenger airliner may only take place in accordance with the guidelines contained in Annex 2 of the Chicago Convention.¹⁵⁹ Furthermore, no force should be used against a trespassing plane which strays from its scheduled course, unless appropriate warning signals have been given and disregarded. Destruction of a trespassing aircraft may only be justified when done in accordance with the doctrine of self-defense.

¹⁵⁵ 1951 I.C.J. Reports 116, 131.

¹⁵⁶ See, e.g., *supra* text accompanying notes 96-97.

¹⁵⁷ *Id.*

¹⁵⁸ See, e.g. *supra* note 92 and accompanying text.

¹⁵⁹ See Aerial Incident of March 10th, 1953 (United States v. Czech.), 1956 I.C.J. Pleadings 8 (Application Instituting Proceedings, March 22, 1955).

VIII. WAS THE SHOOTING OF THE KOREAN JETLINER UNLAWFUL?

In light of the foregoing discussion, consideration must be given to the issue of whether the Soviet Union's actions in shooting down Korean Airlines flight 007 on September 1, 1983, amounted to a violation of Soviet obligations under international law. There are two major aspects to this issue. First, since the airliner was admittedly far off course and well into Soviet airspace, the question arises whether it was warned by the Soviets.¹⁶⁰ Second, if appropriate warnings were given it is crucial whether the warnings were disregarded. Because available information is insufficient to provide answers to these factual issues, they must be dealt with on a hypothetical basis. If no adequate warning was given, the Soviet action would constitute a very serious breach of international law, especially given the great number of innocent passengers who lost their lives. Indeed, on September 5, 1983, the Soviet Union belatedly admitted that heavy loss of civilian life had occurred.¹⁶¹ As far as the original shooting down of the plane is concerned, however, it must be remembered that according to the Soviet Union the airliner was shot down because local Soviet commanders believed that the trespassing plane was a military reconnaissance aircraft rather than a civilian airliner.¹⁶²

Although the earliest American broadcasts concerning the Korean Airlines incident asserted that no warning shots had been fired, a revised statement issued by the State Department showed that six minutes before the final shooting, the Soviet pilot told his base that he had fired "cannon bursts".¹⁶³ The Soviet Union broadcast a television interview with the Soviet pilot who had shot down the Korean plane.¹⁶⁴ By Soviet bureaucratic standards, such a public explanation of how the shooting took place was a rare phenomenon. It is impor-

¹⁶⁰ See N.Y. Times, Sept. 12, 1983, at 1.

¹⁶¹ Washington Post, Sept. 6, 1983, at 1.

¹⁶² See *supra* note 13.

¹⁶³ N.Y. Times, Sept. 12, 1983, at 1, col. 1.

¹⁶⁴ See N.Y. Times, Sept. 11, 1983, at 1, col. 4.

tant to note that the Soviet Union not only deviated from its policy of remaining secretive about government operations, but it also made efforts to meet the major criticism leveled against the use of force in the incident. The Soviets maintained that the plane was shot down only after warnings were ignored by the intruder, and that the pilot was unable to identify the plane as civilian in nature.¹⁶⁵ Thus, the legal culpability of the Soviet Union is uncertain because of insufficient factual information. The Soviet action was arguably permissible if a clear warning was given and disregarded, and if the military commanders actually and reasonably perceived a serious threat to national security.

IX. CONCLUSION

Although there have been numerous cases of international aerial trespass, existing treaty law still does not provide for the situation where an intruder plane enters the airspace of a foreign country and disobeys a landing order. There are provisions proclaiming that sovereignty over airspace belongs to the subjacent state, as well as rules which envisage that foreign aircraft will seek proper authorization before entering foreign airspace. It is unclear, however, if an unauthorized intruder becomes automatically liable to be shot at by the interceptors of a territorial sovereign. The only treaty provision which indicates that a trespassing aircraft is not automatically at the mercy of the subjacent state is the one regarding aircraft in distress.¹⁶⁶ This provision suggests that unauthorized entry will not, by itself, render an intruder subject to being fired upon by the interceptors of the territorial sovereign whose airspace has been violated.

It appears that as a result of consistent state practice and national legislation, the interception procedures outlined earlier have acquired the force of customary rules of international law. In other words, the interception rules in Annex 2 of the Chicago Convention are now consistent with interna-

¹⁶⁵ *Id.*

¹⁶⁶ Chicago Convention, *supra* note 50, art. 25.

tional practice in civil aviation. It is important to note, however, that the interception procedures do not specifically describe what should happen if the intruder plane fails to land. It is possible, therefore, that an intruder which fails to land may justifiably be shot down. This is the assertion that has been made consistently by the Soviet Union in previous incidents of aerial trespass.

In the pleadings submitted by the three countries which lost people or property when the Bulgarians shot down the Israeli passenger plane in 1955, it was asserted that when an unarmed passenger plane unwittingly enters the airspace of another country, only two avenues are open to the subjacent state: either attempt to land it safely or file diplomatic protests at a later date.¹⁶⁷ In other words, a civilian plane, recognized as such, should never be shot down. On the other hand, the Soviet Union has consistently asserted that, in accordance with its domestic law, intruders will be warned, and if they fail to respond they are open to attack. In some cases, the other states involved have acquiesced in the Soviet rule.¹⁶⁸

In sum, international law contains two conflicting principles with regard to aerial trespass. First, there is no provision granting a subjacent state the right to shoot down an intruding plane which chooses to disobey a signal to land. In contrast, there is nothing in international law or custom which unequivocally prohibits such action. Under the doctrine of self-defense, force is only to be used against the aircraft of other nations when national security risks of the subjacent state are of an urgent nature. Therefore, unless the subjacent state can show that the intruding plane's mission was hostile

¹⁶⁷ See *supra* text accompanying notes 100-119.

¹⁶⁸ For example, in 1978, the Soviet Union forced a trespassing Korean Air Lines jetliner to land on a frozen lake in Murmansk, U.S.S.R., after it disregarded warnings. President Park of South Korea apologized for the incident and thanked the Soviet Union for the quick release of the passengers and for the reasonable treatment given the crew, who were detained for questioning, then released. President Park's statements were made in light of the fact that one crew member died in the forced downing of the craft. N.Y. Times, Apr. 24, 1978, at 10, col. 4.

or aggressive, it has no right under customary international law to shoot down a civilian passenger plane.

In view of the conclusion that it is generally unlawful to shoot a trespassing civilian airliner which disobeys a landing order, it remains to be seen whether a civilian aircraft on a spying mission, as alleged by the Soviets in the Korean Airlines incident, is fair game for violent retaliation. In such circumstances the lives of numerous innocent travellers may be threatened, and therefore the subjacent state must present cogent proof of the military mission of such a plane in order to justify itself in terms of self-defense. A mere allegation of self-defense is wholly insufficient, rendering the subjacent state a violator of international law and the murderer of innocent people. It seems fair, however, for the subjacent state to rely on a reasonable belief that the intruding aircraft poses a threat to its national security in deciding what action to take. An objective standard is essential for judging any such asserted reasonable belief in order to prevent abuses by subjacent countries.

As this article has pointed out, the applicable rules of international air law are plainly inadequate in dealing with incidents such as the destruction of Korean Airlines Flight 007. The only guidance available to analyze the rights of an intruding aircraft vis-a-vis the subjacent sovereign consists of general principles of international law. The need for a multinational agreement to resolve this unsettled state of affairs is both apparent and urgent.

Comments

