

AIR NAVIGATION SAFETY OVER PROHIBITED AND
DANGER AREAS: INTERNATIONAL REGULATION AND
STATE'S PRACTICE.

by

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Air Navigation Safety over
Prohibited or Danger Areas

D E D I C A T I O N

I dedicate this work to my husband, Claudio, who inspired me to higher achievements and by whose comprehension and infinite patience, this came into being.

A mi querida madre.

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ABSTRACT

States may establish prohibited or restricted areas in their airspace, according to article 9 of the Chicago Convention, while the creation of danger areas is subject to Annex 2 of the Convention. Consequently, States may set up certain areas above their territory in which all flight is prohibited or limited for reasons of military necessity or public safety.

It is the purpose of this study to determine, in the light of international and national regulations, as well as of the State's practice, whether, in the case of an aircraft who unintentionally is overflying such an area, the safety of air navigation is achieved.

RÉSUMÉ

Les états peuvent établir des zones interdites ou restreintes en accord avec l'article 9 de la convention de Chicago alors que la création des zones dangereuses est soumise au régime de l'annexe 2 de cette même convention. En conséquence, ils pourront constituer certaines zones au dessus de leur territoire donc le survol est interdit ou restreint, pour des raisons de nécessité militaire ou dans l'intérêt de la sécurité publique.

L'objet de cette étude est de déterminer, selon les réglementations internationales et nationales tout comme la pratique des états, si, dans le cas d'un aéronef survolant accidentellement une telle zone, la sécurité de la navigation aérienne est assurée.

TABLE OF CONTENTS

TABLE OF CONTENTS

	Page
<u>Introduction:</u> Status of the airspace above States	3
 <u>Chapter 1:</u> <u>Air Navigation over Prohibited, Danger</u> <u>Areas and the International Law</u>	
1.1. <u>Prohibited Areas</u>	9
1.1.1. The Chicago Convention Article 9 and Annexes	10
1.1.2. Disputes arising for the application of Article 9 of the Chicago Convention	17
1.2. <u>Danger Areas</u>	25
1.3. <u>Other Areas unforeseen at the Chicago</u> <u>Convention</u>	31
1.3.1. Flight Information Regions (FIR's). 31	
1.3.2. Air Defence Identification Zones (ADIZ's)	32
 <u>Chapter 2:</u> <u>Unauthorized air-navigation over a foreign</u> <u>airspace. The causes</u>	37
2.1. <u>Character of territorial violation</u>	37
2.1.1. Deliberate, with hostile intent ...	37
2.1.2. Deliberate (caused by an emergency)	39
2.1.3. Inadvertent or unintentional (caused by equipment malfunction) .	42
2.2. <u>The fate of trespassing aircraft</u> Some precedents	52
2.2.1. The shooting down of civil aircraft	52
2.2.2. The shooting down of military aircraft	58
2.2.3. The Kal 007 incident	61
 <u>Chapter 3:</u> <u>State Practice today</u>	76
Conclusion	82
Bibliography	92

PROLOGUE

Forty four years ago, at the Chicago Conference, the authors of the Convention on International Civil Aviation enshrined in the international charter of air law the aims and objectives of the International Civil Aviation Organization to ensure safe and orderly growth of international civil aviation throughout the world and to promote safety of flight in international air navigation.

With the vast technological advancement of the last four decades, aviation has achieved a remarkable degree of safety, unparalleled by any other means of transport.

However, the last two decades witnessed the emergence of an alarmingly wide scale of a new type of danger to international civil aviation, a danger which was not foreseen at the time when the Chicago Convention was drafted. This new type of danger is man-made and is manifested in violent human acts against the safety of civil aviation, use of force or threat of force, interception and many other forms of unlawful interference with civil aviation.

These violent acts constitute a worldwide problem, are not limited by geographic or political boundaries and no nation and no airline of the world is immune to such acts.

The security of international aviation is indivisible on the global scale and any local or regional arrangements are only as strong as the weakest link in the entire international community on a worldwide basis. Any failure of individual States to comply with the internationally agreed rules and international morality,

undermines the entire fabric of international security in the air.

In the absence of any international enforcement machinery, it is only for the sovereign States to safeguard the safety of the international air navigation by strict adherence to the internationally agreed rules.

Safety is a paramount topic throughout the history of mankind.

Those innocent people who are on civil aircraft, particularly civil airliners, are the last people who should be subject to any kind of danger or death and it seems not unnatural that the real concern should be about the safety of air passengers in future.

They are, from both a legal and a moral viewpoint, the objects which are to be accorded clear and definite protection when situations involving wayward civilian aircraft arise.

INTRODUCTION

STATUS OF THE AIR SPACE ABOVE STATES

There were a variety of theories prior to the First World War with regard to the status of the airspace above states and territorial waters. One view was that the airspace was entirely free, another that there was, upon an analogy with the territorial sea, a band of "territorial air" appertaining to the state followed by a higher free zone, a third approach was that all the airspace above a state was entirely within its sovereignty, while a fourth view modified the third approach by positing a right of innocent passage through the air space for foreign civil aircraft.¹

There was a particular antagonism between the French theory of freedom of the air and the British theory of state sovereignty although all agreed that the airspace above the high seas and terrae nullius was free and open to all.

However, the outbreak of the First World War with its recognition of the security implications of use of the air changed this.

The approach that then prevailed, with little dissension, was based upon the extension of state sovereignty upwards into airspace. This was acceptable both from the defence point of view and in the light of evolving state practice regulating flights over national territory. It was reflected in the 1919 Paris Convention for the Regulation of Aerial Navigation which recognised the full sovereignty of states over the airspace above their land and

¹See e.g. Oppenheim, International law, vol.1, 8th ed., 1955 and MATTE, Treatise on Air-Aeronautical law, 1981.

territorial sea.²

The principle of national sovereignty over air space in Article 1 of the Paris Convention of 1919 was embodied in Article 1 of the Chicago Convention on International Civil Aviation of 1944, the latest international effort toward working out rights in air space, in the following terms:

"The contracting States recognize that every State has complete and exclusive sovereignty over the air space above its territory".

By way of summary, the legal regime of the air space over the earth's surface may be stated as follows:

1. Every sovereign State has complete and exclusive sovereignty over the air space above its lands areas (including metropolitan dependent territories), inland waters, and territorial seas, to a limit fixed at 12 nautical miles by the United Nations Convention on the Law of the Sea (1982)³

2. The principle of "right of innocent passage", applicable to the passage of foreign vessels through national territorial seas, has never been accepted as part of the law of international flight. Therefore, aircraft have no rights in the air space of a

²Article 1. Each party also undertook to accord in peace time freedom of innocent passage to the private aircraft of other parties so long as they comply with the rules made by or under the authority of the Convention. Articles 5-10 also provided that the nationality of aircraft would be based upon registration and that registration would take place in the state of which their owners were nationals.

³Not in force.

foreign State unless specifically granted.

3. Every sovereign State in time of peace, and every neutral State in time of War, has complete unilateral and exclusive right to determine which, if any, foreign aircraft are permitted to enter or pass through its national air space, either in transit or for the purpose of landing.

4. The air space over the high seas and unclaimed portions of the earth's surface, not being subject to the sovereignty of any State, is free for the use of all.⁴

Article 1 of the Chicago Convention confirms the subjacent State's right to its air space. Article 2 further clarifies the position by stating that the national air space of a State includes the air above territorial waters no less than over land territory. Article 3 makes it clear that the application of the Convention is to civil aircraft and excludes those owned by States for military and allied purposes. Equally important to note are Articles 5 and 6. Article 6 specifically 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.

It is thus absolutely clear that foreign civilian passenger aircraft cannot trespass into other nations' air space. The word

⁴See: Fedele, Frank - 9 JAG Law Review - 1967 - N 5.

used in this provision is "scheduled". It prima facie applies to regularly civil air navigation services. In contradiction to this provision, Article 5 applies to "non-scheduled" but civilian aircraft. Apparently it gives fairly extensive rights to purely private aircraft to fly across another country's air space subject to the restrictions contained in this provision.

It would therefore appear that international air law is really declaratory of the broad international law principles applicable to this topic as outlined above. The absolute sovereignty of a subjacent State over its air space is definitely a rule pleno jure gentium as well as dispositive of the position as accepted by the leading treaties on the subject. Conversely, the right of international passage availing civilian air navigation from other nations is to be founded in each case on the basis of jure contractus. The sovereign and self-interest of the States, *jus imperii*, can always come into play to oust the arrangements already made for allowing civilian aircraft to fly across a country's territory.

Starting out from that premise, each State has the right to make detailed regulations concerning the passage of foreign aircraft through its air space and landing within its territory, to prescribe routes for the air navigation, and to prohibit the air navigation over the whole or any part of certain areas over its territory as Article 9 of the Chicago Convention expressly provides that member States may, for reasons of public safety or military necessity, establish prohibited areas, this right has been limited

by the unnecessary interference with civil air navigation. It is an established principle that no aircraft is normally entitled to enter the air space above the territory of a foreign state without the latter's permission.

Prohibited areas have been set up in the airspace since the beginning of air navigation. Originally established for security reasons, states set up innumerable zones till it became clear that international regulation was necessary. When in 1944 States drew up the Chicago Convention, Article 9 limited the right to establish prohibited areas by the concept of "reasonableness". It is worth noticing how vague this concept is. States have generally complied and the International Civil Aviation Organization has attempted to enforce this limitations. Yet some zones are still very extensive.

Prohibited areas are no longer set up for defence purposes; today, their role should be to further the SAFETY of air navigation, but they should not be created merely as a political measure.

The discussion so far has clearly pointed towards the undeniable conclusion that the passage of scheduled passenger aircraft over the territory of different States is subject to mutually acceptable arrangements on the lines analysed above. But what is the law if, as in the case of the Korean Airlines jet shot down by a Soviet fighter in 1983, a civilian aircraft of this type, whether by accident or design, strays into another country's military strategic air space.

The "law" on this particular point will be extracted by establishing the causes of trespassing in air space as well by examining some of the better known cases of this nature since the signing of the Chicago Convention in which currently relevant international practises were directly or indirectly acknowledged as well as the disputes arising for the application of Article 9 of the Chicago Convention.

I

AIR NAVIGATION OVER PROHIBITED, DANGER
AREAS AND INTERNATIONAL AIR LAW

1. Air Navigation over Prohibited, Danger Areas and international air law.

1.1. Prohibited areas

As it has been said, States may establish prohibited areas in their airspace. This means that they can designate certain areas above their territory or territorial waters in which all flight, or, more usually, all foreign flight is forbidden. Prohibited areas are created for many reasons: for the safety of people and property; for defence purposes; for public security; in order to prevent harm to aircraft; or sometimes just as a tactical manoeuvre. It seems that States have understood the importance of this right since the inception of flight, and still feel that it is of considerable significance. Therefore States can, and have indeed done so on occasion, set up prohibited areas in such numbers or of such a size as to be a serious impediment to air navigation. International, as opposed to domestic, air traffic is the key to the development of air transport, and thus if too many prohibited zones are created, so that international routes cannot be flown, air navigation will be brought to a standstill. The right to establish prohibited areas is important, for control of flight is necessary if it is to fulfill its aims of providing a SAFE and speedy means of communication; but if the right is exercised arbitrarily the future of air commerce could well be limited.

The concept of prohibited areas has developed gradually, though sometimes painfully, providing us today with a reasonable regime in the airspace. Nevertheless difficulties are still encountered, and it still retains some imperfections.

1.1.1. The Chicago Convention
Article 9 and annexes.

There was a lull in civil aviation and aviation law from 1939-44, the years of World War II. However, late in 1943, both the U.S.A. and the U.K. turned their thoughts to postwar international civil aviation, and began to understand its economic potential. With the 1944 wave of optimism for world peace and development, where the dominating factor of aviation had been security and safety, it now became one of economics. There was no longer, fear for the economic survival of the State, but there was fear for the economic survival of the State's aviation industry. U.S.A. and U.K. held preliminary negotiations, and on November 1st, 1944, the Chicago Conference was convened, its aim being to establish a world regime for the development of aviation. Much of the discussion was centred around the relative advantages and disadvantages of the 5 freedoms or 2 freedoms: on economic freedom of the air or protectionism and economic regulation. There was a little or no discussion on the question of sovereignty in the airspace - this was an already accepted rule and likewise the right to create prohibited areas was not a stumbling block. However, it was realised that a situation of numerous prohibited areas, like that

in Europe before the war, should not be allowed to repeat itself. Hence a State's right to set up prohibited areas was recognised, but the way in which it was to be exercised was limited.

The U.S.A. and Canada both prepared Draft proposals for a convention, and the U.K. had aired its views in a government white paper.⁵ Under the U.S. draft, a prohibited area could be set up for "military reasons or in the interest of public safety", and no distinction was to be made between the international scheduled airline services of the State setting up the zones and other States. An intruding aircraft was to land "as soon as practicable thereafter at some designated airport", and the State could in times of national emergency prohibit flight over all or part of its territory, though only temporarily and there could be no discrimination. This article was a natural progression from the Paris, Madrid and Havana Conventions - but it incorporated an important addition, (prompted by the pre 1939 practice of States), that the area should be of "reasonable extent". This was a clear acknowledgement of the CINA resolutions and was intended to prevent any state from prohibiting flight over vast areas of its territory as had been the former practice.

At the discussion of this problem, the conference delegates insisted that there should be a positive undertaking that the areas would not be unreasonably defined, in contrast to an agreement that

⁵Proceedings of the International Aviation Conference, Chicago, Nov. 1 - Dec. 7, 1944, pp 554-591.

they should just be of reasonable extent.⁶

Other slight modifications were made, but no other dramatic change, once the question of reasonableness had been resolved.

Thus Article 9 of the Chicago Convention was formulated:

(a) Each contracting State may for reasons of military necessity or public safety, restrict or prohibit uniformly the aircraft of another State from flying over certain areas of its territory, provided that no distinction is made in this respect between the aircraft of the State whose territory is involved, engaged in international scheduled airline services, and the aircraft of the other contracting State likewise engaged. Such prohibited areas shall be of reasonable extent and location so as not to interfere unnecessarily with air navigation. Descriptions of such prohibited areas in the territory of a contracting State, as well as any subsequent alterations therein, shall be communicated as soon as possible to the other contracting States and to the International Civil Aviation Organization.

(b) Each contracting State reserves the right, in exceptional circumstances or during a period of emergency, or in the interest of public safety, and with immediate effect, temporarily to restrict or prohibit flying over the whole or any part of its territory, on condition that such restriction or prohibition shall be applicable without distinction of nationality to aircraft of all other States.

(c) Each contracting State, under such regulations as it may prescribe, may require any aircraft entering the areas contemplated in subparagraphs (a) or (b) above to effect a landing as soon as practicable thereafter at some designated airport within its territory.

⁶Discussion at Fourth Meeting of Subcommittee 2 of Committee 1, November 10th, 1944, p.680. Art. 9 (b) of the Final Convention was proposed at that meeting by the U.K. delegate and adopted.

The fact that States may set up prohibited areas, is in no way prejudiced by the reciprocal rights granted under Article 5 regarding non-scheduled services, or under article 6 where permission has been granted to scheduled air services. It is, therefore, a condition precedent of any air agreement entered into by States who are parties to the Chicago Convention. Article 9 reads that a State "may restrict or prohibit ..." which recalls the Paris Convention's use of "la faculté" which was replaced by has the right" and "is entitled" in the Madrid and Havana Conventions respectively. Whether some import should be given to this change is interesting, but once States have recognized an absolute sovereignty in the airspace, then in creating prohibited areas they are merely exercising a right inherently theirs. Hence it is not a privilege or a power accorded by other States, and it seems that the wording is not fortuitous but may be disregarded as a drafting error. Under Article 9 (b) each State "reserves also the right ..." a phrase which tends to lend force to the above argument.

As far as prohibited areas are concerned, it is stipulated that the prohibition of overflight must be made without distinction between the aircraft of Contracting States and those belonging to the overflown State which are engaged in international scheduled airline services (international non-scheduled transport is not covered by this article)⁷ and this is to prevent a State reaping any commercial advantage from the creation of such zones. The

⁷Matte, N.M. "Treatise on Air-Aeronautical Law" IASL, McGill - 1981 - p.173.

Article does, however, fail to guarantee non-discrimination against other types of civil aircraft.

Only "certain zones" are to be prohibited and these are to be of "reasonable extent and location so as not to interfere unnecessarily with air navigation". This is the new element in the Chicago Convention and it is of the utmost importance. These are strict limitations on the right to create prohibited areas, incorporated to ensure that freedom of air navigation did not become a dead letter. The State overflown must inform the ICAO concerning such areas, in addition the others Contracting States.

Article 9 (b) is far wider in its application, but the right is severely curtailed, in that zones can only be created temporarily, they must be of immediate effect, set up in exceptional circumstances, during a period of emergency or in the interest of public safety.

Under Article 9 (c) intruders may be required to land, as soon as practicable at some designated airport.

On the whole Article 9 of the Chicago Convention is clear, but, who is to determine whether military necessity or public safety required the creation of a prohibited area? Who is to decide if the area is of reasonable extent and does not interfere unnecessarily with air navigation? Who is to judge the exceptional circumstances, the period of emergency, or the interests of public safety envisaged in Article 9 (b), and what does the word temporarily mean? Yet these decisions are not unlimited, for a prohibited area can only be set up within the terms agreed in the

Convention. Hence some sort of control must be exercised, either by the other contracting States or by ICAO.

Under the Chicago Convention, Article 54 (e), the Council of ICAO is empowered in accordance with Chapter 6 of the Convention to adopt annexes. 17 Annexes have been developed and some refer to prohibited areas. Annex 2 - Rules of the Air, defines prohibited, restricted and danger areas:-⁸

Prohibited area: an airspace of defined dimensions, above the land areas or territorial waters of a State, within which the flight of aircraft is prohibited.

Restricted area: an airspace of defined dimensions above the land areas or territorial waters of a State, within which the flight of aircraft is restricted in accordance with certain specified conditions.

Danger area: an airspace of defined dimensions within which activities dangerous to the flight of aircraft may exist at specified times⁹.

⁸ICAO Doc. Annex 2, Chapter 1. Definitions.

⁹For various reasons, all flying is prohibited over certain areas on the ground: over penitentiaries and prisons, over explosive factories, gasoline or gas storage plants; or over game preserves or fur farms because such flying may frighten and injure the animals.

Flying over certain military areas is also prohibited for military reasons.

The location of these prohibited areas is shown on Air Navigation maps issued by the Government; and they are described in detail in Information Circulars sent to pilots and operators of aircraft.

Certain classes of flying are considered dangerous and are, therefore, prohibited; e.g. flying so low over a city that, in case of engine failure, the aircraft could not land outside the city. Any flying that is low enough to endanger persons or property is prohibited.

Annex 4, Aeronautical charts, lays down that a reference or some other identification must be shown on charts, and specifies the symbols to be used.

Annex 12, Search and Rescue, allows each state to reserve to itself the sole right of undertaking search and rescue in a prohibited area established by it, though it is expected that the prohibition will be lifted if the state has inadequate facilities.

Annex 15, Aeronautical Information Services, lays down the information to be supplied by States when setting up prohibited areas.

As long as contracting States have not filed differences with the above Annexes, these rules are binding upon them. Hence not only is the creation of prohibited zones made conditional on fulfillment of the requirements of Article 9 of the Convention, but States must also comply (insofar as they have not filed differences) with the standards adopted in the Annexes specified above. The rules in the Annexes are designed to make air navigation SAFER, the limitations in Article 9 are designed to make air navigation possible.

Acrobatic flying is forbidden over cities or towns, at any height or over airports at less than 6,000 feet altitude.

Unless an aeroplane is properly equipped, it is not permitted to fly under certain conditions; commercial flying at night is only permitted from adequately lighted airports and along adequately lighted airways.

Airlines flying over substantially uninhabited land where, in the event of an emergency landing, polar conditions are likely to be met, should carry the following equipment (in addition to those required for the airlines which are flying substantial periods over water): gas stove suitable for use with aircraft fuel, one for every 75 people on board; a utensil for melting snow; two snow-shovels; two ice-saws; single or multiple sleeping bags sufficient for one third of all persons on board; and an arctic suit for each crew member. Ramsden, J.M. "The Safe Airline" McDonald & Jane's - London - p.81.

DISPUTES ARISING FOR THE APPLICATION OF ARTICLE 9
OF THE CHICAGO CONVENTION

INDIA - PAKISTAN (1952)

UNITED ARAB REPUBLIC - JORDAN (1958)

UNITED KINGDOM - SPAIN (1967)

NIGERIA - PORTUGAL (1968)

DISPUTES ARISING FROM THE APPLICATION OF ARTICLE 9

Since 1944, differences have arisen four times, of such a serious nature as to be brought before the Council, of the International Civil Aviation Organization (ICAO). The views put forward and discussions thereon at Council provide a useful source for the better understanding of prohibited areas, and their role in present day civil aviation. The first dispute of any great international importance concerning prohibited areas occurred in 1952, the litigants being India and Pakistan, with Afghanistan as an interested party.

Pakistan had declared the region adjacent to Afghanistan a prohibited area. On April 21, 1952, India complained to the ICAO Council about this measure which forbade the direct access of Indian air services from Delhi to Kabul, Capital of Afghanistan. In its complaint, the Indian government added that this measure also had a discriminatory character, given that an Iranian aviation company continued its scheduled commercial services over the prohibited area. India's complaint was supported by Afghanistan. Pakistan responded that the prohibited region has been considered as such, for reasons of safety, since 1935, which was before Pakistan and India became separate and independent countries.

A working group was set up by the ICAO Council and it recommended further negotiation between the governments.¹⁰ By February, 1953, thanks to the mediation by, and the recommendations

¹⁰ICAO Docs. 7291-7, 10/9/52; 7291-11, 10/9/52.

received from the ICAO Council, the latter recorded the settlement reached and congratulated the Governments on their cooperation.¹¹ Pakistan had offered to open two corridors over the prohibited area and also made provision for certain fuel arrangements; and this had been accepted by India.¹² The Pakistan's decision allowed Indian aviation companies to fly from New Delhi to Kabul following a much shorter route than that previously imposed.

This was the happy solution, if not the most helpful from the legal point of view. The question of who was to decide whether the prohibited area was reasonable, or interfered unnecessarily with air navigation, or constituted discrimination were not resolved.

Although the India-Pakistan dispute was never adjudicated, it is helpful in determining the legal issues involved in creation of prohibited areas. It is also helpful in resolving some of them. Both States recognized the limitations imposed by Article 9 and both recognized that States other than the one creating the prohibited area, have rights more than of mere interest in ensuring that zones are set up according to Article 9.

The second complaint which the ICAO Council discussed, even though it never became a formal dispute lodged under article 84, about the question of creation of prohibited areas, was in 1958, and this time brought by the United Arab Republic (UAR).

¹¹ICAO Doc. 7361-2, 4/2/53.

¹²See B. Cheng, "International Air Transport", London, 1962, p.102.

On July 22, UAR notified Jordan "with immediate effect and until further notice Jordanian carriers are not permitted to overfly and or land in UAR territory".¹³ Jordan notified UAR of a similar prohibition to its carriers the following day. There was a series of cross accusations, and in August, Jordan complained to the Secretary General of ICAO that UAR had violated Article 9 (b) of the Chicago Convention, and also the bilateral drawn up between the two countries. UAR complained to the President of the Council likewise, and in September, it was discussed in Council¹⁴ which, at the suggestion of the Mexican delegate asked the parties to negotiate, and the President was to offer his own good offices.¹⁵ By October, Jordan was agreeable to resumption of services as long as Jordan's carriers could also resume services; and in November, UAR informed ICAO that temporary permission had been given to Jordanian air carriers.¹⁶ Services were resumed and the question was not brought back to Council.

¹³ICAO Doc. C-WP/2743. The UAR-Jordan dispute was also fraught with political tension. In February, 1958, Syria and Egypt merged to become the UAR. Iraq and Jordan in an attempt to check this Pan Arabism, formed the Arab Union. Early in July a coup took place in Iraq and the military Commander General Kassem took power. Jordan feared a similar coup and British troops were sent in to uphold the monarchy. Iraqi and Jordanian relations with the UAR continued to deteriorate.

¹⁴ICAO Doc. 7934-1 (c), 25/8/58.

¹⁵Ibid. Dr. LOAEZA, Mexican delegate.

¹⁶ICAO Doc. 7960, A 12-P/1, p.60.

From the legal viewpoint this incident is not of great import, but again we see States setting up prohibited areas, and then giving their reasons for so doing before an impartial body; in acknowledgement that the right to set up prohibited areas is not an absolute right to be exercised just as the sovereign State sees it.

3. UNITED KINGDOM-SPAIN 1967

Not until 1967 was the Council again called upon to determine a dispute concerning prohibited areas between Spain and the United Kingdom, and it has arisen over creation of a prohibited zone by Spain in the vicinity of Gibraltar airport. Spain notified ICAO and issued two NOTAMS delimiting the land and sea areas of the zone. As the zone is very close to Gibraltar aerodrome and as a result aeroplanes landing and taking off in Gibraltar have had to change their normal flight paths, a fact which because of the geography of the area would in unfavourable weather conditions be extremely hazardous.

The United Kingdom asked that the matter be put on the agenda of the ICAO Council under Article 54 (n) of the Chicago Convention, and it was therefore discussed by the Council from 10th to 12th May.¹⁷ The United Kingdom contended that the Spanish action was in

¹⁷See ICAO Doc.- 8693-C/973, Action of the Council, 61st Session, p.8 et Seq., see also, Council Working Papers C-WP/4582; 4583, 4604, meetings on May 10, 11 and 13, 1967, and the Draft Council Minutes, 11th meeting of 68th Session, LXVIII/II, Part I - Decisions, para. 1. the U.K. memorandum asked the Council to consider the following questions:

1. Were there valid reasons of military necessity for the

contravention of Article 9 (a) of the Convention, because the prohibited zone was of such an extent and location as to interfere unnecessarily with the provisions of Annex 15 of the Convention, since the limits of the Zone had not been precisely defined. Spain took the position that Gibraltar was a military aerodrome and did not fall within the purview of the Convention. The prohibited zone of Algeciras had been established for reasons of military necessity and public safety. It was permissible, under Article 9 (a) of the Convention, for a prohibited zone to interfere with air navigation if this was necessary, and the only judge of the necessity was the State establishing the zone. Spain also replied that its NOTAMS delimited the zone and the military character of the aerodrome made more acute the military necessities causing the zone to be created. The Council rejected the British claim that the second NOTAM should not come into force until one month after its publication, (since it merely limited the area already established) and an Australian proposal for an inquiry did not receive the necessary majority, receiving 8:7 with 12 abstentions. The topic was then dropped from the Council discussions.

-
- creation of the Spanish prohibited zone?
2. Did the incidence of the Spanish prohibited area fall uniformly on the aircraft of other States?
 3. Was the Spanish prohibited area of reasonable extent and location so as not to interfere unnecessarily with air navigation?
 4. Was the description of the Spanish prohibited area adequate?

Thus, the dispute involved questions pertaining to all of the terms of Art. 9 (a) of the Convention.

The matter was thereafter settled by negotiations between the United Kingdom and Spain. At the request of both parties, consideration of the disagreement was deferred sine die by the Council during its 68th Session in autumn 1969.¹⁸

4. NIGERIA - PORTUGAL 1968

This time the question before Council does not involve creation of a prohibited area, but relates to violation of an already existing zone. On January 16, 1968, Nigeria complained to the Secretary General of an infraction by Portugal of various Articles of the Chicago Convention; alleging that aircraft operated from Port Harcourt to Sao Tomé in October and November, 1967, despite the fact that airspace over Eastern Nigeria was prohibited to foreign flight and therefore asked Council to consider the matter under Articles 54 (n), 55 (e) and 54 (j).

The Portuguese Government replied that they knew of the prohibited area, and accordingly no Portuguese aircraft that it was aware of, had flown over any part of Eastern Nigeria.¹⁹ Portugal could not be responsible, however, for planes of other nationalities which had departed from Sao Tomé. At discussion at the Council, the U.K. delegate considered more detailed and accurate information was required as the nationality marks which

¹⁸See ICAO Doc. 8903 - C/994, Action of the Council, 68th Session, p.27, subject no. 26.

¹⁹ICAO Doc. C-WP/4747 (R), 22/1/68.

Nigeria quoted did not even exist.²⁰

On the request of the Council, the Secretary General prepared a paper on States' responsibilities in which he said that a country had no obligation to ensure that aircraft fly in accordance with flight rules unless the plane have its nationality.²¹

In February, further discussions of the Council were held, and the Portuguese representatives whom were present²² denied the allegations, and asked for more information, an answer which was not at all satisfactory to the Nigerian government. The Council resolved to ascertain the facts and invited Nigeria and Portugal to cooperate.

During the February discussions, the Portuguese representative made the surprising statement, "under Article 9, Nigeria had the right to ask the aircraft to land, in fact to make them land, bringing them down if it wished. Why did it not do so?" Under Article 9 (c) of the Convention NO SUCH A RIGHT is accorded to States, the only words which might permit of such an action being "under such regulations as it (the State) may prescribe". However, the fact that any landing that may be required is to be at a "designated airport" does not seem to envisage planes being forced down. Even if there is possible more justification to shoot down

²⁰ICAO Doc. 8731-1 (c), c/977-1 (c), 20/2/68.

²¹ICAO Doc. C-WP/4749 (R), 29/1/68.

²²ICAO Doc. 8731-4 (c), c/977-4 (c), 22/3/68 M. Mendonça, Portuguese Delegate.

a plane flying over a prohibited area²³, nevertheless, it is not a right accorded by the Chicago Convention. If a State ever shoots down an aircraft it must be in the most extenuating circumstances.²⁴

The Nigeria-Portugal dispute raised a question about the application of Article 9 of the Convention which the Council determined to remove entirely any suggestion that States have a right to shoot down any violator of a prohibited area, under the Chicago Convention.

²³On 19th December, 1964, the UAR shot down a privately owned American aircraft; in the south east of Alexandria. The UAR said the plane had no identification marks, warning shots had been fired, and the plane had refused to land as instructed. The UAR had therefore exercised its legitimate right to defend its country. Rousseau states that the action was not warranted by self-defense, no prior attack had been made by the aircraft. However he called the attention to the fact that the UAR did not state that in that District of the Nile Delta various areas are prohibited, as they are used for gunnery practice. This would seem to suggest that Rousseau felt that if the plane had been shot down in a prohibited area, this would be a more legitimate basis for the UAR's action. See, Revue Generale de Droit International Public, Vol.69, 1965, pp.468-470.

²⁴On July 16th, 1965, a U.S. military plane flew over Pierrelatte in France, an area prohibited to foreign flight as it is the site of a nuclear research centre. The plane traversed the area several times and took many photographs, even though intercepted. The French protested and asked for the photographs, and the U.S. after and initial denial, finally delivered the photographs, and regrets for "the inadvertent violation during a training flight". The mild action of France is only explained by the fact that both countries were NATO allies. See, Revue Generale de Droit International Public, vol.69, 1965, p.1111-1114, and The Times (London), July 20th, 1965, p.10 col.I.

1.2. Danger areas

However, no provision is made for Danger Areas which have necessarily developed through State practice. Unlike the Restricted or Prohibited Areas which can be established only with respect to airspace which is situated over the territory of a State, Danger Areas may be established either over a territory or over the areas where no sovereign rights are exercised (e.g. over the high seas).

The definition of Danger Area given in the Annex 2 to the Chicago Convention implies the least degree of restriction, while the Prohibited Area constitutes its most stringent form. Furthermore, the "reasonable" test applied to Prohibited areas in Article 9 should be attributed, by analogy, to Danger Areas ("such prohibited areas shall be of reasonable extent and location so as not to interfere unnecessarily with air navigation).

The above leads to the conclusion that those who initiate Danger Area restrictions over the high seas are under an increased moral obligation to judge whether establishment of the Danger Area is unavoidable and to closely monitor the necessity of maintaining it.

As Turmen describes²⁵ the concept of Danger Area emerged from nuclear tests conducted after the Second World War. In 1947, the United States had declared an area of 30,000 square miles in the

²⁵Turmen, R., LLM thesis "Freedom of Flight in the Airspace over the High Seas and its Practical Aspects (1980), McGill Univ. p.111 et seq.

Pacific, in Eniwetok Atoll Area, to be a Danger Area for a period of one year. This period was subsequently extended "until further notice". In 1953 the Area itself was extended to include Bikini Atoll and was increased to 50,000 square miles. In March 1954, the Danger Area was further extended to cover 400,000 square miles. In 1957, the United Kingdom established a Danger Area around the Christmas Islands which was almost as large as the U.S. Danger Area. In 1972, France also established Danger Areas for its nuclear tests in the Pacific.

Annex 15 states:

Each prohibited area, restricted area or danger area, established by a State shall upon initial establishment, be given an identification and full details shall be promulgated.²⁶

It further states that the contracting States should give at least 7 days notice of the activation of established Prohibited or Danger Areas²⁷. Also, when a Danger Area is established, "the area should be as small as practicable and be contained within simple geometrical limits, so as to permit ease of reference by all concerned".²⁸ ATS²⁹ considerations are emphasized nowhere so that its establishment is at the discretion of States and if it hampers the expeditious and safe flow of the civil air traffic it may become a source of disputes as was manifested by the Nuclear Test

²⁶Annex 15 (6th ed., July 1973), para 3.4.5.1.

²⁷Ibid para. 5.1.1.4.

²⁸Ibid para. 3.4.5.5.

²⁹ATS: Air Traffic Services.

case 1973 between Australia and New Zealand on the one hand and France on the other.

Danger Areas are also mentioned in the Annex in connection with the AIRAC (Aeronautical Information Regulation and Control aimed at advance notification, based on common effective dates, of circumstances that necessitate changes in operating practices) system. This system gives advance notification (28 days) of circumstances that necessitate changes in operating systems. These circumstances are listed in Appendix 3 of Annex 15, which comprise, inter alia, "permanent (emphasis added) danger, prohibited and restricted areas .."

It is to be noted at this juncture that a distinction is made between the permanent establishment of a Danger Area and the activation of an established Danger Area. While the former subject to an AIRAC NOTAM³⁰ of 28 days of advance notice to be issued by the NOTAM office, the latter is subject to 7 days advance notice. According to the words of definition of Annex 2, "activities dangerous to the flight of aircraft may exist at specified times". Only when activated may dangerous activity take place within the Danger Area.

It is essential to safe, regular and efficient air navigation that one conducting activities dangerous to flight must provide advance notice of such to other States by means of an aeronautical information service (AIS). For this purpose world airspace is

³⁰Notice to Airmen

divided and apportioned to each State in order that each AIS shall collect, collate, edit and publish aeronautical information concerning the entire territory of the State as well as areas for which the State is responsible for air traffic services outside its territory.³¹ Therefore, the responsibility of ATS also assumes AIS, and accordingly the delineation of airspace for ATS responsibility for each State expressed in Flight Information Regions (FIRs) is applied for the purpose of AIS responsibility as well.

It is said however, that some States do not discharge their AIS responsibility to other States, as prescribed in paragraph 3.1.3 of Annex 15, which requires them to disseminate any information necessary for the safety, regularity or efficiency of air navigation. An example is Libya's refusal to notify other States by NOTAM of U.S. aircraft carrier's military exercises over the high seas near the Gulf of Sidra but within the Tripoli FIR. In such circumstances the U.S.A. must assume the AIS responsibility, in particular notifying other States of its military activities. The American action, although not foreseen by ICAO rules, should be justified for the safety of aviation, a paramount rule of public air law.

What if a civil aircraft is harmed over the high seas by the activity for which the Danger Area was established? ICAO rules do not establish the legality of the Danger Areas. The only Annex

³¹See Annex 15, para. 3.1.1.1.

that contains any rules on Danger Areas is Annex 15, which only addresses communications about such areas. Nevertheless, considering the definition under Annex 2 as well as the relevant rules of Annex 15, it is submitted that the criteria for which the Danger Areas established may be justified include:

- a) Dimensions of the Danger Areas should be defined and promulgated in accordance with Annex 15;
- b) It should be established for the purpose of conducting activities which may be dangerous to the flight of aircraft, The activities may comprise nuclear tests, military operations, training of military pilots, firing exercises, rocket launchings, etc.;
- c) The Danger Area cannot constitute a permanent hindrance to the flight of aircraft. It may be activated and the dangerous activity may be conducted within this area temporarily and only during specified times;
- d) "Reasonable" test as explained above should be satisfied.³²

³²Turmen, R. Freedom of Flight in the Airspace over the High Seas and its Practical Aspects. Unpublished LLM thesis (1980), McGill University, p.121.

A special kind of Danger Area can be found in the PANS-RAC³³ which states:

Temporary airspace reservation, either stationary or mobile, may be established for the use of large information flights or other military air operations.

It continues: "Arrangements for the reservation of such airspace shall be accomplished by co-ordination between the user and the appropriate ATS authority.

It is generally accepted practice that airspace reservations should only be applied during limited periods of time and should be terminated as soon as the activity which caused their establishment ceases. Furthermore, it is not as developed a concept as that of Danger Areas. Before it reaches a level of maturity that would allow it to be incorporated into an Annex and before it becomes a restriction on the freedom of flight over the high seas which differs from a Danger Area in name only, it would be desirable to contain the concept of an airspace reservation within that of a Danger Area. It could called a "temporary" danger area.

³³Procedures for Air Navigation Services, Rules of the Air and Air Traffic Services, ICAO Doc. 4444 - RAC /501/12, 12th ed., 1985.

1.3. ANOTHER REGIONS UNFORESEEN AT THE CHICAGO CONVENTION:

1.3.1. Flight Information Regions (FIR's)

1.3.2. Air Identification Zones (ADIZ's)

ANOTHER REGIONS UNFORSEEN AT THE CHICAGO CONVENTION1.3.1. FLIGHT INFORMATION REGIONS (FIR's)

There are also Flight Information Regions (FIR's), a concept unforeseen by the Chicago Convention which has been developed for practical reasons. Its formulation was to provide maximum efficiency in the provision of air traffic services (ATS) to aircraft, with an emphasis on safety. This may be why the Recommendations for Standards, Practices and Procedures (now Annexes) prepared by the then Provisional International Civil Aviation Organization (PICAO) originally employed the term "Flight Safety Region"³⁴ which was replaced by the FIR after the first session of the ICAO Assembly in 1947.³⁵

The FIR is defined as "an airspace of defined dimensions within which flight information service and alerting service are provided".³⁶ Flight information service is defined as a service provided for the purpose of giving advice and information (by means of communications) useful for the safe and efficient conduct of flights. A State is empowered to establish and delineate FIR's over its territorial airspace.³⁷ Therefore when its FIR meets that of another, an international boundary needs to be established. It

³⁴PICAO Doc. 2010 RAC/104, Feb. 1946, p.16, para. 2.1.16.

³⁵ICAO Doc. 4041, AL -TE/2, p.10.

³⁶See "Definitions" of each Annex to the Chicago Convention.

³⁷USSR has approximately 100 FIR's over its territory and USA has approximately 30.

is to be noted that it is up to the States concerned to delineate the FIR boundary (internationally, other than that within a State) on the advice of the Regional Air Navigation Meetings or as suggested by the States concerned.

1.3.2. AIR DEFENCE IDENTIFICATION ZONES (ADIZ's)

Justification for the extra - territorial exercise of the State's jurisdiction claimed in the ADIZ and CADIZ.³⁸ regulations is rooted in "security". The title of the Canadian NOTAM which pronounced the CADIZ rules include the phrase "security control of air traffic".³⁹ The U.S. ADIZ regulation employed a similar title, but also defined the Zone as :

Air space of defined dimensions designated by the Administrator of Civil Aeronautics within which the ready identification, location and control of aircraft is required in the interest of national security.

It may be stated in support of ADIZ regulations that advance notice of approaching aircraft is more important to a State than is the keeping of the contiguous waters clear of potential smugglers. This follows, according to the argument, because it is virtually impossible to determine from a distance the intention of an approaching aircraft. Indeed this was the case even during World War 1, where air speeds were a fraction of what they are

³⁸Canadian ADIZ.

³⁹3 Alberta Law Review p.182 (1964) I.L. Head, "ADIZ, International Law and Contiguous Airspace".

today.

Unquestionably a State always has had the right of self - defence to preserve its existence, and this right is guaranteed to member nations by the United Nations Charter but only in the event of armed attack. ADIZ regulations do not purport to operate only in the event that the United States or Canada is attacked by an armed force. For this reasons they cannot be regarded by even their most ardent advocates as a form of self-defence, but must rather instead fall into the much broader category of "self-protection".

ADIZ was adopted by the U.S. government in December 1950, during the Korean War.

There are three kinds of such areas: a) Coastal ADIZ, b) domestic ADIZ, c) Distant Early Warning Identification Zone (DEWIZ). It is the coastal ADIZ which is relevant to this study.

Canada followed the American example five months later, and a similar one for Philippines (PADIZ) came into being in the latter part of 1953. Iceland, Japan, the Republic of Korea, and Italy also established basically similar zones for identification over the high seas.

The ADIZ, in some areas extends to about 300 miles from the US Coast. It requires positive identification of all aircraft approaching the shores of North America either when they enter the ADIZ or when they are not less than one hour and not more than two hours cruising distance via the most direct route from the US. The

aircraft, if not identified, are detected on the radar and subject to interception by the U.S. fighter aircraft. However, aircraft which do not purport to enter the US territory but only pass through the zone en route are not required to identify themselves. Canadian rules have similar provisions.

ICAO had recognized the identification zones and those contracting States which did not file their differences to provisions of Annex 15 and Annex 2 have accepted their lawfulness.

As to State practice, the legality of ADIZ never seems to have been contested except for one instance when a Soviet civil aircraft carrying the Soviet President was intercepted in the French identification zone off the Algerian coast.⁴⁰

Unlike the Danger Areas, the ADIZs and FIRs over the high seas can not be established by non-coastal States. The two latter are established on a long term basis, Danger Areas are often established on a relatively temporary basis over the high seas because Danger Areas interfere with freedom over the high seas and

⁴⁰During the Algerian conflicts, France established an identification and defence zone extending approximately 60 km. from the Algerian Coast into the Mediterranean Sea and forbade overflight of this zone. On February 1961 the USSR aircraft on which Mr. Brezhnev was travelling to Morocco, entered the French ADIZ. It was intercepted by French fighter planes and twice warned by international radio signals to leave the area. Since there was not response to these signals, they fired in front of the aircraft to force it to leave the zone, which it eventually did. On February 11, the French government received a Russian protest which stated who allowed the French authorities to identify foreign aircraft flying above the high seas if they should be fully aware that recognized rules of International law provide for freedom of flight above the High Seas, and asked furthermore, since when has it become a custom to identify an aircraft by opening FIRE? See Matte "Treatise on Air Aeronautical law (1981) p.176.

give rise of the question of whether "peaceful use" or "peaceful purpose" enshrined in the Law of the Seas Convention (LOSC) is impaired by the activities for which Danger Areas were established.⁴¹ In this context it is unfortunate that the International Court of Justice, in its judgement on May 1973 on the Nuclear Test case did not have the opportunity of pronouncing on whether establishment of Danger Areas for nuclear tests on the high seas is compatible with international law.

It should be noted that the entry, without notification to the appropriate authority, of an aircraft, civil or military, into airspace over the high seas which is delineated or established under certain regimes (FIR, ADIZ, Danger Area), is not a violation of law. The worst thing the aircraft could encounter in this case is the risk of collision for want of ATS coordination within the FIR and some other risks it might have in the Danger Areas. But no incidence of deliberate acts of national authorities inconsistent with international law seem to have occurred. Similarly, no problems have arisen in the airspace over international straits or archipelagic sea lanes.

However, such has not been the case when unauthorized aerial intrusions have been made into national airspace. We are aware of a number of such incidents in the past forty years. But axiomatically, there is an important problem which needs to be

⁴¹For peaceful use see Articles 58, 88, 141, 301 of the LOSC. See also FRANCIONI, "Peacetime Use of Force, Military Activities, and the New Law of the Sea", 18 Cornell International Law Journal (1985) 221-225.

answered. What legal rights does such an intruded State have over those aircraft? Does it have a right irrespective of the circumstances?

It is these and other such questions, that we shall examine farther on.

CHAPTER 2

UNAUTHORIZED AIR-NAVIGATION OVER A FOREIGN AIR
SPACE OR CHARACTER OF TERRITORIAL VIOLATION

CHAPTER 2

UNAUTHORIZED AIR NAVIGATION OVER A FOREIGN AIR SPACE. The causes

a. Deliberate, with hostile intent

An aircraft entering a foreign air space without authorization is always in violation of the air sovereignty of the latter State, as any unauthorized entry into the sovereign territory of a State. A right of free passage through foreign air space corresponding to the right of passage under maritime law, does not exist in air law.⁴²

If an aircraft intrudes deliberately into the air space of another nation with hostile purposes, the interests of the territorial State apparently deserves more to be protected than in the case of an unintentional intrusion by civil aircraft.

In time of peace, in cases where there is reason to believe that the intruder's intentions may be hostile, a warning or order to land should normally first be given and the intruder may be attacked if it disobeys.

Deliberate aerial intrusions for an unlawful purpose clearly justify action to repel the offending aircraft.

In case of attack by an intruding aircraft, we encounter no major legal problems as the U.N. Charter recognizes an inherent right of self defence and every State is entitled to shoot down the

⁴²The word "trespass" or "intruder" will be used in this work to describe the unauthorized entry by the aircraft of one country into the air space of another.

aggressor without further requirements.

A State whose air space is being violated by a foreign aircraft usually cannot determine immediately whether the intrusion is illicit or harmless. The natural tendency, particularly between States of opposing ideologies, is to assume that the intrusion is for a hostile purpose and to take immediate action to repel the intruder by force.

Military aircraft

By international customary law military aircraft have the right to fly, outside the air-space of their own State, only in the air-space over the high seas. The right to enter the air space of another State is completely prohibited unless specific authority is granted by that State.⁴³ The unauthorized intrusion of military aircraft into the air space of another State in peacetime has exacerbated tensions between States, more perhaps, than any other factor.

Nevertheless intrusions in the air medium of one State by the military aircraft of another State can be caused by conditions independent of the pilot's will and these circumstances must be taken into account when considering possible reprisals. For example when a military aircraft of the United States' coastal navy entered the "air space" of the USSR while overflying the Bering Strait, due to bad weather, it was buzzed by USSR fighter aircraft

⁴³BIN CHENG "State Ships and State Aircraft, Current Legal Problems", (1958) p. 237.

and, during this incident, eleven members of the American crew were injured. The USSR agreed to pay for 50% of the damage caused to the aircraft and to the passengers of the American plane. On the other hand, when a military plane overflew USSR territory (a C18 on 27 June 1958 over Armenia and on July 11, 1969, an RB47 over the Kola Peninsula), they were shot down by USSR military aircraft and these incidents were then discussed at a political level. It will be seen that, even when admittedly military aircraft have been shot down, the point has been stressed that initially it should be warned by well-recognized interception procedures. Conversely, it means that, when even a trespassing military aircraft cannot be shot down straight away, a fortiori, a civilian passenger aircraft must at least be entitled to the same treatment.

2.2 Deliberate (caused by an Emergency)

Although this group represents probably a large percentage of aerial trespassing there has been no clearly established case of this kind. The State whose territory has been overflown usually claims that it was a deliberate and provocative action on the part of the intruding aircraft. The national State of the aircraft, on the other hand, either denies that an intrusion has taken place, or otherwise that a deviation has happened due to navigational error or bad weather. The exchange of diplomatic notes in these cases, however, shows that there are some generally recognized rules with respect to these violations.

Despite the unqualified assertions of the sovereignty of the subjacent States over the airspace and the express prohibitions of unauthorized entry of foreign State aircraft which are found in international conventions, there is a right of entry for all foreign aircraft, State or Civil, when such entry is due to distress not deliberately caused by persons in control of the aircraft and there is reasonably safe alternative.

This argument rests on two main foundations. First, on the analogy of the law of the sea, if, on account of overriding necessity, the aircraft goes off into another country's air space, then, like the vessel in distress, it is not to be considered to be violating any law of the territorial sovereign. Indeed, it is entitled to the help and amenities commensurate with its predicament. Second, both the Paris Convention (Article 22) and the Chicago Convention (Article 25) contain direct provisions covering this point. They provide in essence that an aircraft in distress should be given the necessary assistance. It would therefore seem that, if a trespassing aircraft gives to the subjacent State an indication of its distress, it is bound to be provided with suitable measures of help.⁴⁴ In such cases, the entry

⁴⁴According to the State practice of the European countries during the First World War, neutral States did, however, claim to however shoot down belligerent aircraft entering their air space; see generally LISSITZYN "The Treatment of Aerial Intruders in Recent practice and International Law" (1953) 47 A.J.I.L. 559. However, if the intruding aircraft gave any distress signal, there is some indication that even a trespassing belligerent aircraft should not be fired on. See also Oppenheim, International Law (8th ed., 1955) p.605; de la Pradelle, "Les incidents de frontiere a rienne et leur reglement" (1954-II) Recueil des Cours 180, 191.

may be "intentional" or "deliberate" in the sense that the pilot knows he is entering foreign air space without express permission, but the probable alternatives, such as crash landing or ditching, expose the aircraft and its occupants to such unreasonably great risk that the entry must be regarded as forced by circumstances beyond the pilot's control (force majeure).⁴⁵

An aircraft in distress has a right of entry but not right of innocent passage. This means that it has to obey all orders of the territorial State.

The right of entry only means that seizures and punishment are not inflicted upon the crew if they entered in distress and there is no presumption of harmlessness. This right of entry in distress is broader than in maritime law, it covers all situations where a pilot has lost his route involuntarily, but military aircraft in emergency do not enjoy the same privileges as are accorded to warships in distress.⁴⁶

It is noteworthy that while Article 25 of the Chicago Convention deals with assistance measures to be afforded to civil aircraft, there is no comparable provision relating to military or other State aircraft in distress. Notwithstanding, there is one exception to the general rule that military aircraft are allowed to fly over foreign national navigable air space only by special

⁴⁵LISSITZYN, Oliver, J., "The Treatement of Aerial Intruders in Recent Practice and International Law" p.588 A.J.I.L. (1953).

⁴⁶For DISTRESS and its legal consequences in international maritime law, see JESSUP "The Law of Territorial Waters and Maritime Jurisdiction (1927), pp. 194, 220, 254, 450, 466.

permission. If a military aircraft (or other State-owned aircraft is in distress⁴⁷ not deliberately caused by persons in control of the aircraft and there is no reasonable SAFE alternative) it can land at the nearest airport regardless of nationality or status of clearance.⁴⁸

The right of entry of all aircraft when in distress or when such entry is caused by force majeure is regarded as established by customary rules of international law.

2.3 INADVERTENT OR UNINTENTIONAL (caused by equipment malfunction)

It happens not too infrequently that an aircraft, having lost its bearings as a result of a mechanical failure, inadvertently strays into the air space over foreign territory.

On January 8, 1962, a Belgian Sabena commercial airplane with 19 passengers and 8 crew members aboard strayed on its regular route Teheran-Brussels into Soviet airspace due to failures in its navigational instruments.⁴⁹ It was intercepted by 4 Soviet fighter planes and forced to land. Since January 9, 1962, the Belgian

⁴⁷"DISTRESS" is defined in Annex 12 on Search and Rescue as adopted by the Council of I.C.A.O. (4th ed. May 1960) as: "A state of being threatened by serious and imminent danger and requiring immediate action". This definition is not binding on ICAO members, since Annex 12 represents "International Standards and Recommended practises under Article 37 of the Chicago Convention.

⁴⁸See McDougal, Lasswell and Vlasic, p.272.

⁴⁹Rousseau, Chronique des faits internationaux in 68, Revue Générale de Droit International Public, pp. 384 (1962).

Ambassador in Moscow requested the return of the plane and its passengers and crew members. He assured that the intrusion was unintentional. The Soviet government protested against the violation of its airspace but ordered the return of passengers (January 11th) and aircraft (January 12th) to Brussels. An open question is what would have happened if the Sabena airliner had not complied with the order to land? It is important that the Soviet authorities obviously instituted no proceedings against the crew of the airplane when it became apparent that the straying was due to a navigational failure.

On October 3, 1963, a training airplane, Cessna-150, belonging to a private air club in West Germany, piloted by a flight student with no more than 30 flight hours, crossed the German-Czech border due to a navigational error.⁵⁰ It was attacked by a Czech military aircraft and forced down when it tried to escape. The pilot died in the crash. It is interesting that the Czech government justified its action by arguing that the plane was engaged in "spying activities", although the plane was obviously unequipped for such purposes. It is important to remark that a series of intrusions occurred before the incident. We can see in fact that incidents occur very often as a reaction to other intrusions, intended as a warning against the State from where the intruder came. A similar incident occurred on Israeli territory - On April 4, 1965, a Spanish commercial airliner was forced to land by

⁵⁰Rousseau, *Chronique des faits internationaux*, in 68 *Revue Generale de Droit International Public*, pp. 158,159 (1964).

Israeli fighter planes at LOD airport.⁵¹ The airplane had violated the Israeli airspace at Ashkelon and was ordered by an Israeli fighter plane to land. It ignored this order and proceeded on its route. The Israeli plane then fired warning shots and forced the airplane to land. The crew of the Spanish plane was interrogated by Israeli authorities and was later allowed to leave. This case shows again, that in case of unintentional intrusion, no action has been taken against crew and aircraft. The Israeli authorities did not seem to have punished the pilots because of non-obeyance with its orders.

Such was the case of a South Korean aircraft when On April 20, 1978, flight KAL 902, a Boeing 707 on a regular run from Paris to Seoul with 110 passengers on board, apparently found itself seriously disoriented. Seemingly, the plane's navigation system (allegedly its gyroscope) in the days before the INS was widely used by commercial planes, malfunctioned to the extent of sending the aircraft more than one thousand miles out of its way off the polar route south over the Soviet Union, at a 112-degree turn, straight on to the Murmansk Peninsula - a development which has been called "the worst navigational error in modern aviation history". There the Korean airliner flew for some two hours over sensitive military installations before it was intercepted by a Soviet SU-15 fighter, which signaled it to land at the nearest airfield. The South Korean pilot later claimed that there was no

⁵¹Rousseau, *Chronique des faits internationaux*, in 69 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC, p.707 (1965).

way of establishing radio communication because the Boeing's and the Sukhoi's radios operated on different frequencies. When the plane did not respond, the SU-15 fired its cannon at the plane, hitting one wing and the fuselage, causing some damage and considerable havoc and killing two passengers -- the KAL pilot finally managed to put the plane down on a frozen lake near the city of Kem, south of Murmansk.

American officials have privately indicated that communications intercepts show an explicit exchange between the Soviet fighter pilot demonstrating that the intruder was a civilian plane carrying passengers, and ground controllers telling him to proceed with shooting it down nonetheless. According to one version, the order was "to force the plane down by firing on it, but to bring it down in a condition that would permit a thorough examination". In this bizarre incident, which has never been adequately explained, the Soviet Union did recover the plane's "black box" - its flight recorder - but never made public any of its contents. Nor did Moscow charge the Korean crew with any subversive activities or intelligence intentions (though it claimed that the plane had no identification marks). Within ten days, Moscow announced that the pilot and copilot had admitted their guilt of violating Soviet air law and failing to obey the instructions of Soviet fighters to follow them to the nearest airfield, and that therefore the Soviet Union, "guided by principles of humaneness", limited its action to expelling them from the Soviet Union. The passengers were airlifted out and

allowed to leave, while the Boeing 707 remained where it had crashed, presumably soon to be dismembered by Soviet personnel. Curiously, the pilot was never reprimanded or punished by KAL. The reaction of all governments and media concerned was subdued and moderate. It is ironic, in retrospect, that after the incident the London Guardian should have editorialized: "there ought to be fool proof system, short of gunfire, whereby a military aircraft can warn a civilian one that it is committing an offense".⁵² What the Soviet authorities knew or suspected about the plane's purpose remains unknown. What obviously bothered the officers in charge of the Soviet air defense forces after this incident was the fact that an unarmed civilian plane, there was no doubt here about the fact that it was a commercial aircraft - could with impunity fly over Soviet territory, and especially over sensitive military and naval installations which studded the Murmansk area, for two hours without being picked up or forced down. That experience was to leave its mark on Soviet policies and personnel.

The story of KAL 007 on September 1983, that we are going to relate later, raises more questions than there are satisfactory answers. That there are doubts about motives and intentions should not be surprising: that, after all, is true in all human affairs. That there should also be such fundamental uncertainty concerning

⁵²The Guardian (London), April 26, 1978; New York Times, April 21-24, 1978. Aviation Week and Space Technology, May 1, 1978. New York Times, September 9 (interview with Captain Kim Chang Kyu); Anthony Paul, "Shot Down Over Russia! The Mysterious Saga of Flight 902", Reader's Digest, November 1978, pp.138-44.

the events themselves and their causes may be more disconcerting, especially when it applies not only to the Soviet Union but also to the United States and its friends. Research and reflection cannot entirely remove the vast areas of conflicting allegations, nor can they fill the substantial gaps in evidence; but a careful review of the available information and a more or less systematic exploration of alternative hypotheses and explanations can help shrink the parameters of uncertainty. One question: what explains the behaviour of KAL 007?? The South Korean airliner in route from Anchorage to Seoul flew over Kamchatka, the Sea of Okhotsk, and Sakhalin Island before being shot down. As its greatest deviation from the flight plan, it was over 300 miles off course. The plane had sophisticated modern equipment and an experienced crew. There are only four categories of reasons that might account for its deviation from the normal track which had been prescribed by its computerized flight plan:

1. Causes beyond the control of the plane's flight crew, mechanical failure of navigation equipment and hijacking are obvious candidates in this group.
2. Innocent human error, unintended and presumably undetected.⁵³

⁵³It is of course possible to imagine a scenario in which innocent error was detected by the cockpit crew during the final minutes of the flight, as the Soviets interceptors came near. This might account for the "evasive" action allegedly taken over Sakhalin, according to Soviet accounts, and would support one hypothesis according to which the aircraft had no lights on over Kamchatka but did have them on over Sakhalin. However this would not be consistent with the innocuous (and incorrect) position reports broadcast by KAL 007 until the end.

3. Wilful action by the captain, co-pilot, and flight engineer, for essentially non political reasons; saving time or fuel by flying the most direct route would fall into this rubric; so would sheer adventurism.
4. Deliberate action by at least some of the crew in fulfillment of a surreptitious assignment or mission, such as carrying out a secret task for a South Korean or American Intelligence Agency.

These are logically exhausting alternatives: the cause was either beyond the crew's control or it was not; the deviation was either intended or unintended; it was either known to the crew or it was not; it either constituted a secret mission or it did not.

The more serious are the hypotheses of equipment malfunction (or innocent error in its use). The aircraft was equipped with three inertial navigation systems (INS), three VHF (very high frequency) and two HF (high frequency) radio transceivers, two transponders, two weather radars, four receivers, and a variety of other altimeters, indicators, compass systems, autothrottles and autopilots.⁵⁴ Of these the prime candidates for malfunction were the INS systems.

The Boeing 747 had three redundant LITTON LTN-72R INS systems, any one of each can, when connected to the plane's autopilot system, steer it to a succession of nine positions or checkpoints en route to a destination. A light signal indicates each change

⁵⁴ICAO Report, p.11.

of direction, speed, or altitude at the designated checkpoints. While the INS, initially developed for guidance of ballistic missiles - requires technologically sophisticated equipment to operate, the performance record of the INS has been excellent, and aviation industry professionals as well as civil aviation administrators rather unanimously dismiss as exceedingly small the likelihood of simultaneous mechanical failure or malfunction of all three independent INS, which had previously worked without noticeable error.

Even more unlikely is the scenario in which their total failure remained entirely undiscovered by the plane's flight crew: the malfunction hypothesis assumes an alert crew not engaged in any secret mission. In fact, the plane's personnel never in their various transmissions after leaving Anchorage indicated the slightest suspicion of equipment malfunction or their awareness of flying the wrong route. Moreover, during the flight the crew provided position reports to ground control, including expected time of arrival at the next way point, wind velocity and other pertinent information presumably supplied by well-functioning INS equipment.

Assuming the very unlikely combination of circumstances by which all three INS had suddenly malfunctioned and that for some reason the flight crew during the entire flight had had no inkling that anything was wrong, the crew still had available to it the weather radar system, which in its ground mapping mode would have shown clearly when KAL 007 was flying over or near land - such as

Kamchatka and Sakhalin at a time when the flight plan (and the flight crew's position reports to Anchorage and Narita) had it over water (if, on the other hand, the radar system was in the weather mode over Sakhalin, it should have picked up the Soviet interceptors nearby). The plane was equipped with two Bendix RDR. If weather radar sets which had a range of 200 nautical miles with a 180 degree scan capability⁵⁵ there is no reason to suspect that the radar system was not functioning properly, and normal procedures called for its use in the ground mapping mode

Finally, while there is some question about the radio contact by KAL 007 during the flight (at times relayed through another Korean airliner, not an unusual occurrence on this route) its multiple VHF and HF radio systems permitted it at all times to be in touch with either a U.S. or a Japanese air traffic control center. Not until the garbled message sent after the SV-15's missiles had hit the plane did any radio communication from KAL 007 suggest any mishap or any awareness of being off course. All in all, the hypothesis of equipment failure cannot be entirely disproven.⁵⁶

⁵⁵ICAO Report, p.14 - "Everyone flying Red 20 should use their radar for back-up" says 747 Captain Chuck Hall of San Diego, who has flown that route for 15 years. Presumably if the KAL 007 pilots had used their weather radar, and if the equipment was working, they would have picked up Soviet landmasses" (TIME, September 19 - p.25).

⁵⁶Other important deviations occurred on 19 January 1981 (75 Km); on 20 January 1982 (264-300 Km. due to INS failure); on 12 August 1983 (102 km. due to multiple equipment failure); on 23 September 1983 (111 Km).

The Time, September 19, p.25, stresses that South Korean pilots were particularly sensitive to airspace violations, given the 1978 incident and the problems created by the proximity of the demilitarized zone and North Korean airspace near Seoul.

As indicated, the B747 had three VHF (very high frequency) transceivers and two HF (high frequency) transceivers, as well as two SSR (secondary surveillance radar) transponders. KAL procedures required one of the VHF radios to be set at 121.5 MHz, the international emergency frequency, and a second radio to be reserved for air traffic control communications. While one of the three VHF radios had been reported out of order on the New York - Anchorage lap, it was tested and found to be functioning at the stopover - VHF communications between KAL 007 and Anchorage ATC seemed to be normal until the plane was beyond the VHF range - something like 150 miles. The record of VHF and HF communications with ground stations (and transmissions relayed by other planes) is available but does not appear to contain any information helpful in our analysis. It is apparently not unusual for aircraft at considerable distance from ground control stations to relay messages by way of other planes.⁵⁷

It seems to be fairly clear that, irrespective of the fact that the intruding aircraft may have strayed off course by mistake, the territorial sovereign does have the right to intercept it and make efforts to land it, but it is also clearly deducible that the

⁵⁷ICAO Report, pp. 11, 17-21, 31, G13-14.

trespass will not entitle the subjacent State to shoot it down.

2.2 The fate of trespassing aircraft

Some precedents

The discussion so far has clearly pointed towards the undeniable conclusion that the passage of scheduled passenger aircraft over the territory of different States is subject to mutually acceptable arrangements on the lines analyzed above. But what is the law if, as in the case of the Korean airliner, a civilian aircraft of this type, whether by accident or design, strays into another country's air space?

The "law" on this particular point will now be extracted by examining briefly some of the better known cases of this nature since the signing of the Chicago Convention in which currently relevant international practices were directly or indirectly acknowledged.

2.2.1 The shooting down of civil aircraft

In this context two earlier cases, before the KAL 007 incident, may be specifically mentioned.

(i) On 27 July 1955, a Constellation of EL Al Israel Airlines was shot down by Bulgaria while trespassing over its air space. The flight was on its way from Vienna to Lydda and was carrying 58 people, including seven crew members. All of them were killed. An international action was commenced before the International Court of Justice by Israel for the loss of its aircraft and civilians as being contrary to international law. Similar actions

for compensation were also commenced by the United States and United Kingdom for and on behalf of their nationals who died in this tragedy.

While the main action failed on the ground that Bulgaria had not accepted the compulsory jurisdiction of the Court, and then the British and American proceedings were discontinued, the pleadings of the claimants throw some light on the issue now being focused upon. From the passage appearing in the Israeli Memorial in this case⁵⁸, it seems clear that a State - instead of shooting down the intruder straight away - will issue the aircraft with appropriate warnings and then take measures to make it land safely. It is apparently conceded, nevertheless, that a trespassing aircraft can be forced or COMPELLED to land by force by the subjacent State.

On 21 August 1955 Israel requested that an item on the question of the safety of civil aircraft flying in the vicinity of or across international frontiers be placed on the agenda of the U.N. General Assembly's 10th Session. In explanation it was stated that in recent years a number of tragic incidents had occurred, resulting in serious loss of life and causing grave international friction and that the existing international rules and practices failed to provide the necessary protection for aircraft and their

⁵⁸"... the Government of Bulgaria has further more 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". See the Memorial of the Government of Israel which is quoted in the case concerning the Aerial Incident of 27 July, 1955, Preliminary Objections [1959] I.C.J. Rep. 127,130; see also (1959) 53 A.J.I.L.. 923 (emphasis added).

passengers in such circumstances. In proposing the item, the Government of Israel stated also that its purpose was to propose that the Assembly request the Secretary-General to study this question in consultation with the specialized agencies concerned, and any other appropriate body, and report to the Assembly at its 11th Session his findings and any recommendations he might wish to make for the prevention of such incidents and the provision of greater safety for air passengers.

Several delegations stressed the importance of the question from both the humanitarian and technical viewpoints.

This resulted in General Assembly Resolution 927(X)⁵⁹ which called upon all States to take necessary measures to avoid such incidents, and invited the attention of the appropriate international organizations to the instant resolution and to the debate on the matter held in the tenth session of the General Assembly.

In 1957 the United Nations General Assembly called upon ICAO and other international organizations to look into the serious problem of aerial intrusion.

The ICAO Council thus asked the Secretariat to prepare a paper on the legal aspects of the problem, and to include "how far the obligation in Article 9 of the Chicago Convention to communicate descriptions of prohibited areas to ICAO and the other contracting States was being observed, and what knowledge the organization had

⁵⁹Adopted Dec. 14, 1955 by a vote of 45 to 0, with 13 abstentions.

in consequence of the existence of prohibited areas....⁶⁰

The paper revealed that the "vast majority of contracting States have complied with the relevant provision of Article 9".⁶¹ The Secretariat stated further that, from the information available in 1958, "there are no prohibited, restricted or danger areas in ten States ... of the remaining 62, 45 have prohibited areas ..., most such areas are of minimum extent and for the most part have had little effect on international air navigation. "That this could be written authoritatively in 1958, demonstrates that the intention of the drafters of the Chicago Convention in 1944, that prohibited areas be of reasonable extent, had met with considerable success. The paper also showed, however, that the practice of States regarding intruding aircraft was far from uniform. Some States had required landing, others had used force if the aircraft did not comply, enquiries has been instituted, or there has been prosecution of the crew (with varying punishments) or confiscation of the plane. Some legislations provide that unavoidable intrusion (bad weather, etc.) will exempt the crew from punishment. Before shots may be fired, a warning is usually required, though even this may be dispensed with if the intent of the aircraft is blatantly hostile. The paper concluded, "international legal rules should be developed to ensure the safety of civil aircraft flying in the vicinity of, or inadvertently crossing international frontiers ...

⁶⁰ICAO Doc. C.WP/2609, 21/2/58.

⁶¹Ibid. See also Appendix 5.

particularly in cases where an aircraft crossed a frontier or entered a prohibited area innocently, and in all cases, so far as concerns passengers, who had nothing to do with the operation of the aircraft."⁶²

The Air Navigation Commission (ANC) had also reported on the problem.⁶³ It considered that at the time no international signalling system should be adopted, because all so far suggested might cause confusion. It did however recommend that States devise their own individual system, for even if it involved danger it was preferable to more extreme measures. However, it could furnish no solution other than to recommend States to avoid such intrusions, and to improve their navigation aids to this end. The Council approved this report, though in 1958 at discussions of the Council, many delegates spoke of the complete inadequacy of this recommendation⁶⁴, and the ANC was asked to reconsider the problem.

The ANC reported once again⁶⁵, stating that any procedure for use by an aircraft finding itself above a prohibited area would necessarily be used only very rarely, and if it did ever not occur notification to the air traffic services should be made. The means of identification was also difficult, especially if the plane was high and was unaware of the need to identify itself. Identification

⁶²ICAO Doc. C.WP/2609, 21/2/58.

⁶³ICAO Doc. C.WP/2376, 6/5/57.

⁶⁴ICAO DOC. 7878-10, 30/5/58.

⁶⁵Ibid. 63.

friend or foe (IFF) would be insufficient, for a State "was hardly likely to accept a particular IFF coding as positive identification that an intruder was a civil airline." It would make no recommendation on this point or on an interception procedure. Most States signalling procedures were obsolete but all of the procedures suffered from major inherent defects. It concluded again, "at the present time the best solution is improvement of air navigation facilities so as to ensure that the chances of infringement of restricted airspace are remote."⁶⁶

Some Council delegates again expressed dissatisfaction.⁶⁷ The French delegate said, "a solution MUST be found. A situation that exposes aircraft and their crew to incidents of the kind that started ICAO on this study simply cannot be allowed to continue."⁶⁸ Nevertheless, it was felt that little could be done and the topic was placed on Category B of the ANC items for discussion.

In the afternoon of 21 February 1973, Israel shot down a Libyan Arab Airlines jet on a scheduled flight between Libya and Egypt (Cairo). It was carrying 113 people, of whom 108 died. It was shot down when it strayed into the air space above Israeli - occupied Sinai. When the airliner, a Boeing 707, was fired upon, it was 12 miles east of the closed Suez Canal and within sight of Cairo Airport.

⁶⁶Ibid. n. 63.

⁶⁷ICAO Doc. 7934-7, 11/2/59.

⁶⁸Ibid. H. Bouche, French Delegate.

Libya and other Arab and Western nations strongly protested on the occurrence of this tragedy. Israel's position was that the aeroplane had been shot since at one point it had strayed over 50 miles into Israeli - held territory and had also flown over military installations. Apparently no clear attempt had been made to land the aircraft as Israel asserted that the predominant reason for bringing it down was that it was about to commit a terrorist act.⁶⁹ How that was to happen is not known. For present purposes, therefore, it can be said, for the moment at least, that military necessity was cited to justify the shooting down of a passenger aircraft without warning.

2.2.2 The shooting down of military aircraft

The purpose of discussing cases of aerial trespass by military aircraft is to be able to argue that, if a certain standard is expected to be meted out to a military intruder, a civilian trespasser is not to be given any less - as a minimum -, in order to secure the safety of the air navigation all over the world.

It will be seen from the following precedents that, whether taken individually or collectively, such cases clearly suggest:

- (1) That the trespassing aircraft should be warned by the subjacent State that it is unlawfully intruding;

⁶⁹New York Times, 2, Sept. 1983, pp.7,4. While considering this incident, the ICAO Council recommended on 5 June 1973 that even interception of civilian passengers airliners was to be undertaken only as a last resort. Initially the well - accepted international procedures were to be followed with appropriate signals. See General MATTE, *Traite de droit aerien - aeronautique* (1981), pp. 175-176. Israel later apologized for this incident and paid compensation to the families of the dead victims.

- (2) That it must in fact be over the subjacent State's air space;
- (3) That efforts must than be made to make this aircraft land; and
- (4) That it can only be fired upon if it is about to flee.

As most of such cases have been examined in other writings⁷⁰, it is not necessary to go through them again. One case went⁷¹ to the International Court of Justice only to be discontinued for a lack of proper jurisdiction. In two other cases⁷² the defence was that the intruder had FIRST fired upon the intercepting aircraft, the implication being that the shooting down of the plane was done as a matter of military necessity. The element of self-defence in such an argument is self-evident. Furthermore, in both these cases, the complainant State was the United States and the respondent was the Soviet Union. In another incident in which the Soviet Union shot down a Swedish aircraft, it seems to have been the common understanding of the two countries that even a military aeroplane must first be given the warning and opportunity to land

⁷⁰See Term Paper." The treatment of aerial intruders on Int'l. Law" by Vlachos, T., I.A.S.L., McGill Univ., 1988

⁷¹[1954] I.C.J. Rep. 99.

⁷²[1956] I.C.J. Rep. 9 [1958] I.C.J. Rep. 158.

before being fired upon.⁷³

It is then apparent from the foregoing analysis of the precedents involving military aircraft that even the entry of such an aircraft into the air space of another country is not enough to justify immediate application of force by the subjacent State. The use of force, must a fortiori be governed by the law which specifically deals with its application. But when precisely the destruction of an intruder aircraft, civil or military, should or may take place, has not been directly covered by the existing treaty law.

Indeed, both the Paris Convention and the Chicago Convention, which incidentally deal mainly with civil aviation, are essentially silent on this issue. But, at the same time, sovereign rights are granted in unequivocal terms to the subjacent State over its air space. Quite clearly, scheduled (or for that matter other) foreign aircraft can only traverse another State's territory by bilateral arrangements on the basis of such country's consent. But such consent, even if granted, can always be withdrawn on grounds of national security, or of some other form of emergency or public interest.

⁷³For the facts of this incident, 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.

2.2.3 The KAL 007 Incident

Forty-four years, to the day, after World War II had broken out, the world stumbled into another crisis whose dimensions were at first hard to gauge. For newspaper readers and television audiences in the West, it began with an ambiguous dispatch. A South Korean Airliner on a flight to New York, with a stop at Anchorage, Alaska, scheduled to land in Seoul, South Korea, at 20.53 GMT, had failed to arrive and had not been heard from for some time. At Anchorage the aircraft refuelled, was serviced for the remainder of the flight to Seoul and, in accordance with standing company practice, the flight and cabin crews were changed.

The flight departed at the planned estimated time of departure which, in keeping with the standard Korean Air lines procedure, is separately calculated for each flight of KE 007. The estimated time of departure at Anchorage is planned so that its arrival in Seoul is at its scheduled arrival time of 0600 (local time) or as close thereto as possible. The actual departure time of 1300 hours on 31 August should have resulted in an on-time arrival of KE 007 at Seoul had the flight been completed successfully and fully in accordance with its filed flight plan.

On departing from Anchorage, the flight had 269 persons on board consisting of three flight crew members, twenty cabin attendants, six crew employees of KAL being repositioned to Seoul for duty assignments and 240 passengers.

On September 1st, 1983 the President of the Council of the International Civil Aviation Organization declared in a press

release on the KE 007 incident: "thus far the only official information we have received comes from the Republic of Korea asking us to find out what has happened to a Korean airline flight 007 Boeing 747 flying from Anchorage to Seoul."

In fact, the first news and the first official request for intervention addressed to the President of ICAO by the Korean authorities on September 1st, 1983 spoke of "missing aircraft". The Korean authorities firstly suspected a possible landing of their aircraft in Soviet territory; consequently they asked ICAO to intervene to the end of rendering every possible assistance to passengers, crew, and aircraft. On September 1st however, the same Korean authorities put forward the theory that the aircraft might have been shot down near Sakhalin Island. This was confirmed the following day, September 2, 1983.

The Korean Government, thereupon asked the President of the ICAO Council to convene, under rule 20 of the rules of procedure of the Council, an extraordinary Session of the Council on September 15th, 1983, in order to consider the case of the Korean Airline aircraft.⁷⁴ The government of Canada associated itself with that request. On September 2, 1983, a statement was issued by the

⁷⁴On September the Council was not in Session. In order to convene the Council it was therefore necessary to apply rule 20 of the rules of procedure of the ICAO Council which states: "Between the consecutive sessions of the Council, the President, on his own initiative or at the request of a Contracting State, after consulting the members of the Council and with the approval of the majority of the members has set for the opening of the next session. No such action shall result in a Council meeting being held on less than seven days' notice".

News Agency of the Soviet Union (TASS) declaring that "on the night from August 31st to September 1st, an unidentified plane rudely violated the Soviet State border and intruded deep into the Soviet Union's air space" and that a civilian aircraft was operated by the American Authorities "in an Intelligence Service". The press release reported that the Soviet anti-air defence aircraft, after having carried out all the international procedures for interception, had terminated the flight. The statement conclude: "Tass is authorized to state that in the leading circles of the Soviet Union regret is expressed over the loss of human life and at the same time a resolute condemnation of those who consciously or as a result of criminal disregard, allowed people to die and are now trying to use this occurrence for unseemly political aims, ... (the Tass statement was officially distributed by the Press Office of the USSR Embassy in Canada). To quote from the subsequent ICAO Secretary-General's Report on what happened, "Soon after the departure from Anchorage, KE 007 began deviating to the right (north) of its assigned direct route to Bethel. This aeration resulted in an ever greater lateral displacement to the right of its planned route which, ultimately, resulted in its penetration of adjacent high seas airspace in flight information regions operated by the Union of Soviet Socialist Republics (USSR), as well as of sovereign USSR airspace overlying portions of the Kamchatke Peninsula and Sakhalin Island and their surrounding territorial waters.

At about 18.20 hours when it was in the vicinity of Sakhalin Island (USSR) the flight was intercepted by military aircraft operated by the USSR. At 18.27 hours, the aircraft was hit by at least one of two air-to-air missiles fired from one of the USSR interceptor aircraft whose pilot had been directed by his ground command and control unit to terminate the flight of KE 007.

As a direct result of the missile attack, KE 007 crashed and sank into the Sea of Japan southwest of Sakhalin Island. There were no survivors among the passengers, flight crew and cabin attendants.⁷⁵

On the Soviet side, Pravda on September 5, 1983, published an article entitled "Political Provocation with Far-Reaching Aims," by Colonel General Semion F. Romanov, Chief of Staff of the Air Defence Forces (which appeared in the form of an interview with Romanov in Krasnaia Zverda, the armed forces newspaper, the following day). The intruder-plane, he argued, had not responded either to the standard radio call signal or to other internationally accepted techniques by Soviet interceptors of warning other planes, such as rocking one's wings and blinking one's lights. "Having used all possibilities of attracting attention and escorting the intruder - plane out of our sovereign airspace, the pilot of our interceptor fired warning shots, using tracer shells, along the path of the intruder - plane, in yet

⁷⁵From the "Report of ICAO Fact-Finding Investigation, Destruction of Korean Air Lines Boeing 747 over sea of Japan, 31 August 1983 presented by the Secretary General (C-WP/7764 - 2/12/1983).

another effort to draw the attention of the intruder - plane's crew to the flagrant violation of our airspace." General Romanov continued: "In the West a great deal of noise is being made to the effect that the Soviet pilot knew very well that he was dealing with a civilian airplane. **But this is just what the Soviet Pilot didn't know**". Moreover, the intruder-plane was allegedly flying with its lights out - Romanov went on to list a number of alleged violations of Soviet airspace by American planes, all of which were part of the same pattern of "authorized provocations" other Soviet media wasted no time in painting an elaborate scenario of American intelligence activities and "provocations" into which the flight of KAL 007 allegedly fitted perfectly.

On the American side, the verbal escalation reached its peak with President Reagan's address to the Nation on September 5 and with Ambassador Jeane Kirkpatrick's presentation of the case before the United Nations Security Council on September 6. Only later did it become known that these statements were preceded by high-level arguments in Washington on how most appropriately to respond to the downing of KAL 007. While the words remaining strong, it was actually the more moderate orientation in the White House, the National Security Council, and the State Department that prevailed - largely because of the President's own preference - over those who had pressed for more drastic action. Thus, Defense Secretary Caspar Weinberger had proposed suspending some of the ongoing arms-control negotiations with Moscow.

In his television address, the President Reagan proclaimed: "Let me state as plainly as I can: there was absolutely no justification, either legal or moral, for what the Soviets did." As for the cause of the Boeing 747 flying so far and so long over Soviet territory, despite its advanced technological equipment, "no one will ever know whether a mistake was made in giving the computer the course or whether there was a malfunction."

The tapes of Soviets intercepts from which Ronald Reagan had included two brief excerpts in his speech constituted the dramatic centerpiece of Ambassador Jeane Kirkpatrick's address to the UN Security Council the following day. The Council had begun debating the matter on September 2 and had heard vigorous denunciations of the Soviet action by Canadian, Australian, and other Council Members and the South Korean observer, as well as a repetition of the standard TASS version by deputy delegate Richard Ovinnikoo. Then, on September 6, the U.S. introduced the tapes.

These tapes, permitted the U.S. to indicate when Soviet radar had begun tracking the Korean airliner over Sakhalin, how Soviet fighters had tried to intercept it, and what the three the fighter pilots had told their ground stations during the final pursuit which led to the jet's destruction. If the tapes were authentic, and there was no serious challenge on that score - there could be no doubt about the intentioned destruction of the aircraft by Soviet fighter plane, on instructions from its ground controllers.

Mrs. Kirkpatrick continued:

The transcript we have just heard needs little explanation. Quite simply, it establishes that the Soviets decided to shoot down a civilian airliner, shot it down, murdering the 269 persons on board, and lied about it.... Contrary to what the Soviets have repeatedly stated, the interceptor pilot saw the airliner's navigation lights and reported that fact to the ground on three occasions. Contrary to Soviet statements, the pilot made no mention of firing any warning shots - only the firing of the missiles, which he said struck the target. Contrary to Soviet statements, there is no indication whatsoever that the interceptor pilot made any attempt either to communicate with the airliner or to signal it to land in accordance with accepted international practice.

She remarked: "Perhaps the most shocking fact learned from the transcript is that at no point did the pilots raise the question of the identity of the target aircraft, nor at any time did the interceptor pilot refer to it as anything other than the "target." "Reviewing the Soviet Statements since the incident, Ambassador Kirkpatrick concluded: "None of these lies, half-lies and excuses can withstand examination. STRAYING OFF COURSE IS NOT RECOGNIZED AS A CAPITAL CRIME BY CIVILIZED NATIONS. NO NATION HAS THE SOVEREIGN RIGHT TO SHOOT DOWN ANY PERSON OR VEHICLE THAT MAY STRAY ACROSS ITS BORDER IN PEACE TIME. Once again the indictment went from the particular to the system that was responsible for the plane's destruction: some observers, she remarked thought that it was not an isolated case of unconcern for human life but "a

deliberate stroke designed to intimidate: a brutal, decisive act meant to instill fear and hesitation in all who observed its ruthless violence, much as the destruction of an Afghan village or the imprisonment of the Helsinki monitors (by the Soviet authorities) are intended to secure compliance by terror. Whichever the case we are dealing here not with pilot error, but with decisions and priorities characteristic of a system". And she went on to quote Lenin in support of the proposition that "the Soviet Union is a State based on dual principles of callousness and mendacity dedicated to the rule of force".⁷⁶

The response by Soviet Ambassador Oleg Troyanovsky, clearly following his instructions, was little more than a lame rehearsal of the official Soviet position. Meanwhile, however, Moscow had decided at last to acknowledge what could scarcely any longer be denied: the fact that a Soviet plane had downed the Korean jet. An official Soviet government Statement, which Troyanovsky read without apparent embarrassment to the Security Council at its next session, the same afternoon, repeated the previous account of Soviet warnings and attempts to communicate with the intruder plane and continued:

⁷⁶United Nations, Security Council, Provisional Verbatim Record, September 6, 1983, Doc. S/PV.2471, pp. 2-20; see also New York Times, September 7 - also American Society of International Law, International Legal Materials, 1983, pp.1109-48.

The regional Air Defence Forces Command, having analyzed the action of the intruder plane and its route, which passed over military bases in the area of Sakhalin as well, finally came to the conclusion that a reconnaissance plane performing special missions was in USSR airspace. We also reached this conclusion because the plane's course was passing over strategically important regions of the Soviet Union. A fighter fired warning shots, using tracer shells, along the flight path of the intruder plane. This measure is also provided for by international rules.

Since even after this intruder plane did not obey the demand to head for a Soviet airfield and tried to escape, an air force fighter-interceptor fulfilled the command station's order to stop the flight. Such actions are fully in keeping with the Law on the USSR State borders, which has been published.

In stopping the intruder-plane's actions, the Soviet pilots could not know that it was a civilian airplane. It was flying without aerial navigation lights, in the dead of night and in conditions of poor visibility, and it had not responded to signals.

The statement then made official the charges Soviet media had insistently disseminated for days: the plane was sent over Soviet territory" to perform a spy mission". The plan, it alleged, was either to carry it out without hindrance or else "to turn all this into a large-scale political provocation directed against the

Soviet Union.⁷⁷

To complete our account of the U.N. Security Council deliberation: in order to forge the broadest possible coalition prepared to vote for a common resolution, the United States and Japan found themselves obliged to remove a direct reference condemning the Soviet Union from the draft resolution introduced over this issue. After considerable haggling, the resolution came to a vote on September 12 and received nine favourable votes - the minimum needed for adoption - from Britain, France, Jordan, Malta, the Netherlands, Pakistan, Togo, the United States, and Zaire. Poland and the Soviet Union voted against it (the Soviet vote constituting a veto). Four other Nations - China, Nicaragua, Guyana and Zimbabwe - abstained. As finally passed (and vetoed), the resolution, after reaffirming both the principles of territorial integrity and the necessity to adhere to internationally agreed procedures to deal with violations of airspace, stressing the need for an impartial investigation, expressing itself "gravely disturbed that a civil airliner of the Korean Air Lines on an international flight was shot down by Soviet Military aircraft, with the loss of all 269 people on board", and reaffirming the right to appropriate compensation, proceeded to make an innocuous series of statements. It deplored the destruction of aircraft and lives; it declared such use of force incompatible with legal and elementary humanitarian norms; it

⁷⁷U.N. Record, September 6, 1983, Doc. S/PV. 2472.

welcomed the forthcoming consideration of the incident by the International Civil Aviation Organization (ICAO); it invited the Secretary-General to conduct a speedy investigation; and it "decided to remain seized of the issue".⁷⁸

Thanks to the Soviet veto, the Security Council failed to do so.

The 38th session of the UN General Assembly opened on September 20 with Soviet Foreign Minister Andrei Gromyko absent, for the first time in many years, after the Governors of New York and New Jersey had refused to let the Soviet plane carrying him land either at John F. Kennedy or at Newark airport. They made clear that their action was in retaliation for the Soviet downing of the Korean airliner. Although the State Department had offered to let Gromyko land on a military airfield (provided he arrived in a military plane, since Aeroflot aircraft were banned), Moscow charged the U.S. with violating its obligations to assure normal conditions of access, as required by international agreement.

The extraordinary session of the ICAO Council was, nevertheless, convened on September 15 and 16, 1983, once the procedure initiated by Korea and Canada was completed. In accordance with Article 53⁷⁹ of the Convention on International

⁷⁸U.N. Record, September 12, 1983, Doc.S./PV.2476, pp. 53-55; New York Times, September 13, 1983.

⁷⁹Article 53 of the Chicago Convention: "Any contracting State may participate, without a vote, in consideration by the Council and by its committees and commissions of any question which especially affects its interests ..." Article 32 of the Rules of Procedure of the Council: Any contracting State may participate, without a vote, in the consideration by the Council and by its committees and commissions of any question which especially affects its interests (Art. 53 C.C.) ... If a contracting State requests

Civil Aviation and Rule 32 of the Rules of Procedures for the Council, the Government of the Republic of Korea (which is not a member of the ICAO Council) was invited to participate, without a vote, in the session. As we had seen, legal norms, customary rules and international practice have been invoked by all parties concerned.

The problems here include not only the ambiguity and unenforcibility of international law (except where the parties to a dispute agree) but also the fundamental disagreement over the facts in the case, facts whose determination would be crucial to any quasi-judicial inquiry or proceedings as well as some basic peculiarities of Soviet international law.

It is generally recognized that every State has complete sovereignty over the airspace above its territory. However, there is no international consensus concerning the means by which any state may protect this sovereign right. While, moreover, Western States have at times insisted that State action must confirm to "elementary consideration of humanity" (a formula developed by the International Court of Justice in 1949 in the Corfu Channel case), this factor does not figure prominently in Soviet Law or practice. Most countries condemn the use of force in cases of violations of airspace by civilian aircraft; indeed the ICAO Council, meeting soon after the KAL disaster, was able to include in its resolution

permission to participate on the grounds of special interest, the President may approve the request if he finds that the condition of special interest, is fulfilled. Otherwise, he shall refer the request to the Council for final decision.

instituting an investigation a "reaffirm[ation of] the principle that States when intercepting civil aircraft, should not use weapons against them."

An ambiguity does exist, however, in cases where such aircraft (or vessels within territorial waters) engage in espionage or other illegal activities. In Western practice, the sinking of the Lusitania by a German submarine in World War I provides something of a relevant precedent: the British passenger ship was suspected of carrying military equipment - a consideration which the United States and others dismissed in condemning the sinking.

In the case of the KAL 007 flight, the explanation which proposes that it was intended to carry out clandestine data collection by means of photographic, radar or sensor equipment carried aboard. The area overflown was unquestionably of considerable military interest, from nuclear submarine bases to ICBM sites to sensitive air defense and nuclear installations. And yet this fairly widespread and popular hypothesis seems to fall that for several compelling reasons.

For one thing, it is not clear where in the fuselage of the B 747 such rather bulky equipment could be installed undetected. To equip the plane in this fashion, it would have had to be withdrawn from regular traffic for at least a short time. Though there have been entirely unverified claims that a Boeing 747 without markings had been spotted at Andrews Air Force Base, Maryland, weeks before the fatal flight, no such action can be deduced from the available records (assuming they have not been

falsified), and of the many persons who would have had occasion to observe it, no one has come forward with such information.⁸⁰ And the suggestion, made more than once, that this is what the forty minutes' delay in Anchorage was needed for is technically totally unrealistic. Moreover, the aircraft stopped at Airports in different countries where service personnel, as well as passengers, of diverse nationalities and political persuasions had occasion to come near the plane: no intelligence operation would want to lay itself open in this fashion, and there is no indication that it did.

Nor is it clear that photography in the middle of the night would have been worth the risks involved in this or any mission, given the excellent and detailed photographs produced by space satellites, except perhaps infra-red pictures taken from much lower altitudes than the 747 would go to. Everything considered, this alternative, too, can be set aside as highly unlikely - Nor has any credible suggestion been advanced as to what otherwise unavailable data, other than photography, could have been procured by such an overflight, except for one set of surmises discussed below.

⁸⁰THE ANC Reports states: (a) the handling staff in New York and Anchorage had free access to all parts of the aircraft and none of those personnel reported any unusual equipment, (b) the point of view of the manufacturer was that any modification for intelligence gathering purposes would require substantial outage from service, and service records proved that this had not been the case.

On 6 March 1984 the Council of the International Civil Aviation Organization approved the resolution which ended its juridical proceedings on the KAL 007 incident.

On January 13, 1988, U.S. reports exonerated Soviets in KAL attack in an assessment made public on January 12, U.S. intelligence officials told Congress that the Soviet Union probably didn't know it was shooting down a civilian airliner when it destroyed KAL airplane. U.S. intelligence officials said: "the bottom line is that the Soviets, through their own ineptitude, probably were not certain what type of aircraft they were shooting down,"⁸¹

⁸¹The Gazette, Montreal, Wednesday, January 13, 1988, p. A-11.

CHAPTER 3

STATE PRACTICE TODAY

(3) STATE PRACTICE TODAY

As we have seen, States have continued to set up prohibited areas since 1944, but as the ICAO study showed, the vast majority cause no interference with air navigation. The desire for reasonableness, demonstrated at Chicago seems to have been realized and no situation like that existing in Europe before World War II has been recreated. We have also seen that disputes, although they have been of great international importance, have been few in number. Yet all States seem to feel it essential that they retain the power to set up prohibited areas, and a review of some national legislations on this topic is appropriate.

The U.S.S.R. by the Article 47 of its Air Code established:

"Special rules shall be established for flight of aircraft in restricted border areas and at the points for crossing the national frontier.

Air flights may be restricted or prohibited in accordance with the procedure established by the Council of Ministers over certain areas, or populated areas, as well as over individual objects of particular importance to state.

By Article 62:

Aircraft which violate established flight rules must comply with air traffic control instructions or it will be forced to land, and an examination will be held. The plane can only continue the journey with the authority of the main Administrator for Civil Aviation attached to the Council of Ministers."⁸²

⁸²See Air Laws and Treaties of the World, Washington, 1965, Vol.2, p. 2552. See also Air Law of the USSR, Soviet Legislation Series, Moscow, 1967, Translated by V. Vesey p.23.

These are very wide powers available under URRS sovereignty. Russia's right to establish prohibited areas is absolute, unless limited by reciprocity and reasonableness under general international law, notions that are not too strictly defined. It is impossible to learn to what extent the U.S.S.R. uses this power, though all planes flying into Russia have to cross the frontier at designated points and fly prescribed corridors across the country.⁸³

In contrast to this very wide power, the Kingdom of the Netherlands Aviation Act, 1958, Article 11(1) established:

In so far as is not otherwise provided by international agreement, the performance of civil air navigation above certain parts of the Netherlands can be restricted or prohibited:

a) for reasons of public safety, by our Minister of Transport and Waterstaat;

b) for reasons of military necessity, by our Ministers of War and of the Navy, each inasmuch as he is concerned and after consultation with our Minister of Transport and Waterstaat.

Article 12:

Insofar as is not otherwise provided by international agreement, under exceptional circumstances or in the interests of Public Safety, the performance of civil air navigation above the Netherlands or any part thereof may be temporarily restricted or prohibited by us.⁸⁴

⁸³Ibid. p. 2575 - Art. 34 reads: Criminal proceedings in accordance with the laws of the URRS will be instituted against the violators of flight rules (... non-observance of the corridors across the State border, and air routes prescribed

⁸⁴Ibid. See footnote 159 at p.1811.

This was really just an incorporation into national legislation of Article 9 of the Chicago Convention. Even under its national legislation, Holland was no greater power to set up prohibited areas than that accorded by the Chicago Convention.

The Argentinian Air Code of 1968 also follows Article 9 of the Chicago Convention very closely.

Article 7 reads:

Cuando se considere comprometida la defensa nacional, el Poder Ejecutivo podrá prohibir o restringir la circulación aérea sobre el territorio argentino.

Article 8:

La actividad aérea en determinadas zonas del territorio argentino, puede ser prohibida o restringida, por razones de defensa nacional, interes público o seguridad de vuelo.⁸⁵

Other national legislations are however far wider. In Jordan, the Law of Civil Aviation 1953, Article 45 reads:

The Minister may impose a temporary prohibition preventing flight over or near places used for public meetings, or related to defence purposes on the request of Ministers of Defence and the Interior.

In extraordinary circumstances related to defence the Cabinet has the right to impose an instant prohibition to prevent flight over all or part of Jordan.

Such prohibition shall be issued by an order of the Cabinet. Any aircraft which enters the prohibited area must land immediately at the nearest aerodrome upon being ordered to do so.

⁸⁵See Código Aeronáutico, Ley 17.285, Buenos Aires, 1967.

If a prohibition has been issued for a certain area and any aircraft violates that order, it will be detained upon landing at any point inside the Kingdom, its crew will be turned over to military courts to be tried for spying, unless the crew and pilot are able to show reasonable cause why they were obliged to fly over such prohibited areas.

If an aircraft was observed in flight, it must upon hearing the first warning or warning shots, land at the nearest aerodrome and if it refuses, it will be forced to land.⁸⁶

This legislation allows drastic action if a plane enters a prohibited area, but while ICAO and its members are loath to formulate any procedures to be followed in such a case, Jordan can provide as it wishes under its own legislation. The Chicago Convention does not give Jordan or any other State the right to take this action, but neither does it prohibit it.

Other national legislations are more general, as Canada, United Kingdom or U.S.A.

From this brief summary of States national legislations, we see that States require the power to set up prohibited areas. Some are wider than others, some more specific than others, but while national legislations may vary in content enormously, the actual practice of creating prohibited areas is generally similar.

State practice is not, however, uniform in regard to intruding aircraft. The reasons are manifold. Without doubt, all States consider their national territory as sacrosanct. However, previous

⁸⁶See Air Laws and Treaties of the World, Washington, 1965, vol.2, p.1504, Fn.

aerial incidents have indicated that socialist bloc of States have placed a greater emphasis on the sanctity of their sovereignty and have not hesitated to use force or weapons against intruding aircraft irrespective of their category, i.e. civil or military. The underlying philosophy can perhaps be best understood by quoting Prof. Korovin, the leading Soviet jurist on International law. According to him:

Whatever 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.⁸⁷
(Emphasis originally supplied)

What in effect he implies is that if it suspects a civilian aircraft as a threat to its sovereignty either in terms of actual physical damage (aerial bombing) or espionage, it (the Soviet Union) would be justified in using force or weapons. Moreover in certain previous incidents relating to military aircraft, it had shot at them on the ground that the intruding aircraft had not heeded their warnings to land or that such aircraft was on a hostile mission. Considering the mist of uncertainty that surrounds these incidents, coupled with its refusal to permit authorities of the State of registry to attend as observers at

⁸⁷Morgan, "The downing of Korean Air Lines Flight 007", 11 The Yale Journal of Int'l Law (1985) 247-8, note 106 therein.

the inquiry⁸⁸ (as required under Article 26 of the Chicago Convention), one is not in a position to support or deny such allegations.

Interception is a normal reaction by a State whose airspace is violated by unidentified or unwelcome foreign aircraft. But interception itself is dangerous. That is why ICAO made Special Recommendations in regard to interception of civil aircraft, the text of which is contained in Attachment A of Annex 2 to the Chicago Convention.

The recent work of the ICAO Council and ANC (Air Navigation Commission) leading to upgrading the interception instruments is a big achievement. Thus, the kind of measure and their employment by the intercepting aircraft in the event of an interception have been considerably strengthened.

We had noted the contention put forth by the Soviet bloc States of adhering to the appropriate interception procedures. But we have never been able to say with any degree of certainty whether these contentions were true or not. If it is not a case of self-defence, the use of weapons cannot be envisaged as was evidenced by the practice of the majority of States. It is hoped that all States follow the internationally recognized rules. The observance of international law is nothing but the result of political will of States and it still needs their will for it to be implemented.

⁸⁸Following the KAL 007 incident in 1983 the U.S.S.R. did not respond at all to requests of Korean government that Observer of the State of registry of the aircraft be allowed to be present at the Soviet inquiry in accordance with Article 26 of the Chicago Convention.

CONCLUSION

The situation in Europe before both the first and second world wars, was by no means conducive to the advance of air transport; for the fact that air corridors set up by various countries were not contiguous, just served to effectively prevent flight between these countries. Although States appreciated the impediment they were causing to the circulation of the air navigation, none could afford to lose its so-called position of security.

In 1945, collective security was seen as the answer to all ills. A new era of peace would initiate progress and development in all fields, for the prosperity of mankind. Nevertheless, that dream, of a world at peace did not last long. However, the Chicago Convention was drawn up in 1944, when the mood of optimism reigned, and it has provided the basis for civil aviation since. Thus Article 9 reflecting this optimism, accorded States the right to set up prohibited areas only if they were reasonable and did not interfere unnecessarily with air navigation.

It is difficult to assess whether States have complied with this provisions because of respect for the Chicago Convention and ICAO; because of the desire to foster air navigation and simultaneously their national air commerce; or because of the realization that modern day weapons the reasons which prompted States to set up prohibited areas prior to 1939 are no longer of any weight. Probably, the reasons have been an amalgam of all these, coupled with the original post war desire for Collective

security as opposed to individual State security. Thus generally States comply with the terms of Article 9, though as differences have sometimes arisen.

Also it may be inevitable to have conflicting interests between sovereignty and SAFETY of the aircraft. The former is explicit and has been so codified since the First World War. The latter was merely implied in conventional laws and regulated by other sources of international law such as the customary law and the general principles of law, both uncodified sources having been developed since the First World War. In respect of the safety of the lives on board the aircraft, the Chicago Convention provided several Articles, i.e. 3(d), 9(c), 25 as qualifications to exclusive sovereignty. However, the fact surrounding most aerial incidents are too blurred to allow the application of those provisions without controversy.

The ambiguity of the facts should be interpreted in the light of the practice of the majority of States, by which the intruding aircraft are seldom met by the use of weapons. Furthermore the paramount importance of the Safety of human lives, especially those of innocent passengers can never be neglected. In this context it should be recalled that "elementary considerations of humanity" became a customary rule since the ICJ referred to it in the Corfu Channel case, which has also been incorporated in the Protocol of 10 May 1984 relating to an amendment to the Chicago Convention,

Article 3 bis.⁸⁹

In occasion of the ICAO Council President Mr. Kotaite's address to the 25th Session (extraordinary) of the Assembly he stated: 'ICAO's goal is the maximum level of safety in international civil aviation.

The basic principle and objective on which ICAO is based is to ensure safe and orderly growth on international civil aviation throughout the world. The concept of safety of civil aviation could be read in each and every provision of the Convention, of related Conventions adopted under auspices of the Organization, and in all regulatory materials adopted by the Organization with respect to civil aviation.

To embody in the Convention a specific provision that States must refrain from resorting to the use of force against civil aircraft by the constitutional decision of the Assembly, it will be fully in line with the basic philosophy which motivated the authors of the Convention 40 years ago in Chicago.

There may be some who believe that the prohibition of use of force against civil aircraft is already a firm part of general international law and there is no need to codify that provision in the body of the Convention. True enough, the general international law is motivated by the principles of humanity, safety and protection of human life. Even in time of war, international law

⁸⁹The fifth para. of the Preambular part of the Protocol relating to an amendment to the Convention on International Civil Aviation, 10 May, 1984.

has explicit provisions for the protection of civilians in armed conflict, on the protection of the wounded and shipwrecked, and on the protection of the prisoners of war.

The International Court of Justice ruled, referring to customary international law, that these fundamentally humanitarian principles are more exacting in time of peace than they are in time of war. There is no doubt that these humanitarian principles concerning the protection of human life are deeply rooted in customary international law.

However, the international community believes that "only written law can remove the uncertainties of the other prime source, customary law; it fills existing gaps in the law and gives precision to abstract general principles, the practical applications of which have not previously been settled". These are the words of the Secretary-General of the United Nations, Mr. Javier Pérez de Cuellar, which he used in his address to the International Law Association in September 1982.

A written rule of law is far superior to general principles recognized as customary law because frequently the very existence of a customary law or its exact scope and content may remain subject to challenge.

International law-making in its substance is a process of mutual accommodation and reaching a balance of sensible interests for the benefit of every State and every human being.⁹⁰

⁹⁰ICAO Bulletin. No.39. June 1984, p.13. "ICAOs goal is the maximum level of safety" - Dr. Assad Kotaite.

Another important effort in this area which should be given due consideration and weightage, after Article 3 bis comes into force, is the Canadian proposal for a separate Convention on the interception of civil aircraft. The proposal deals with the contingency where the intercepted aircraft does not land in the intercepting State, a state of affairs which should be of great concern to States. For the safety of civil aviation it is submitted that this Canadian proposal should be examined and adopted.

All the great authorities on the subject of aerial intrusion are of the opinion that the safety of the intruding civil aircraft is of paramount importance. Lissitzyn⁹¹ and Greig⁹² said that the aircraft cannot be attacked even if it does not obey orders to land, while Hughes⁹³ would allow the firing on such aircraft only

⁹¹"In time of peace, intruding aircraft whose intentions are known to the territorial sovereign to be harmless must not be attacked even if they disobey orders to land, to turn back or to fly a certain course". Lissitzyn "The Treatment of Aerial Intruders in Recent Practice and International Law" 17 AJIL (1953) p.587.

⁹²"Use of force against a civilian airliner is not permissible, and that it does not become justifiable because of its failure to comply orders to land which may or MAY NOT be understood by its pilot." GREIG, International Law, 2nd. Ed. (1976) London Note 21, p.358.

⁹³Hughes, after repeating two lawful remedies, as suggested by the UK Memorial in the EL AL incident, which the offended territorial State can exercise, stated:

"Firing on such an aircraft can be considered lawful only if the following three criteria were 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 a reasonable proportion to the danger to the territorial State arising from it; and,

in limited circumstances.

The same consideration is expressed in Article 3 bis but with limitation and ambiguities which blur the effect of its prescriptions. So where do we go from here? Would establishing an independent fact-finding body subordinate to the International Court of Justice or ICAO be a panacea to the present problems facing the international aviation community vis-a-vis an aerial shooting?

The USSR and its satellites have never accepted the jurisdiction of ICJ. Moreover, in the U.S.A. - Nicaragua case, the former did not submit to ICJ's jurisdiction. With both the major Powers taking such a stand, such an independent body does not have much of a chance in terms of its effectiveness and axiomatically in its own survival.

To have such an independent body under the ICAO Secretariat would also not serve any purpose. Because it adds nothing new for the Secretariat has already assumed twice the role of an investigating body, in 1973 Libyan Airlines incident and 1983 KAL 007 incident. The alternative is to establish the independent body

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- 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. Hughes, "Aerial Intrusions by Civil Airliners and the use of force", 45 JALC (1980) p.620.

subordinate to the ICAO Council.⁹⁴ The powers invested in the Council are strong enough but, apart from the questions of its enforceability, it has never fulfilled such powers as we have seen in a few cases related to the Prohibited Areas: India v. Pakistan in 1952; the U.K. v. Spain in 1967; Pakistan v. India in 1971.

Taking the issue to the U.N. would also be an exercise in futility considering that all the major Powers have a permanent seat in the Security Council, and thus would kill any sanctions against it with a veto.

So, we can conclude that the creation of a properly constituted investigating body depends on the political will of States.

The four disputes brought to the Council, however, have all had a political background. This seems a mere reflection of the world in which we live. Our world of peaceful co-existence is a thin tight rope on which States may over balance easily; especially when a State wishes to know how far it can push the other tight rope workers. The disputes brought before the Council (with the possible exception of the Nigeria-Portugal dispute) can all be viewed as tactical manoeuvres designed to put another State to the test; to cause it annoyance; or to retaliate for other measures.

⁹⁴The idea of establishing the fact-finding "Commission of Experts" was once discussed by the Special Sub Committee of the ICAO Legal Committee in Sept. 1972 in Washington - Fitzgerald "Recent proposals for Concerted Action Against States in Respect of Unlawful Interference with International Civil Aviation, 40 JALC (1974) pp.172-175, 177.

The work of ICAO illustrates this convincingly. Since 1944 it has done much useful work in the facilitation of air navigation with regard to prohibited areas, yet whenever political overtones are present, then it becomes a practically non-functioning body. Its recommendations on violation of prohibited areas, and its delays in solving disputes concerning prohibited areas, merely serve to show that when it comes to politics, States forget their desire for collective advancement, and revert to their former individual State prejudices.

It could well be however, that in years to come the concept of prohibited areas will be viewed as an historic anachronism. With the age of supersonic aircraft, with planes flying higher and faster, prohibited areas set up over atomic stations would lose all of their *raison d'être*. The use of satellites for reconnaissance also destroyed any basis that prohibited zones might have had in protection of the security of the State. Above all, modern day weapon systems removed entirely any belief that prohibited areas can be used as a defence measure. Thus prohibited areas will be used in the future as a means of ensuring the safety of the aircraft, or persons or property on the surface. They could also continue to be used as a political instrument.

As has already been said, States are setting up far more danger and restricted areas which is evidence of their concern for

safety rather than security.⁹⁵

To this end, it is likely that States will make increasing use of the practice of prohibiting flight below a certain altitude in certain areas, for this guarantees the SAFETY of the aircraft and persons and property on the ground as far as is possible. Any thoughts of security will thus be discarded. This would seem to be the best role of prohibited areas in present day and future air navigation, ensuring the "safe and orderly growth of civil aviation throughout the world".⁹⁶

However, there is fear that States will renounce this ideal and will set up prohibited areas merely as a move in the game of politics. It is to be sincerely hoped that States will fully appreciate in the very near future the damage they are causing to international organizations by giving their political problems to these non-politicians. Political tension seems to underlie all of the prohibited areas of any size established.

The role of prohibited areas lies in the development of the safety of the air navigation, it is to be hoped that States will refrain from using it as an instrument of politics.

The amendment to the Chicago Convention (Art. 3 bis) had laid down as one of its general principles that contracting States

⁹⁵Such areas are set up over industrial complexes, highly populated areas, factories making combustible material and the like. Also such areas have been set up over the high seas. Danger areas are created for rocket and weapon tests, military manoeuvres, and recovery of spacecraft, and are designed to ensure the safety of persons who may be in the vicinity of the zone.

⁹⁶Article 44(a) of the Chicago Convention 1944.

undertook to have due regard for SAFETY of navigation of civil aircraft. In addition to the general provision in Article 3, Annex II to the Convention had provided for detailed procedures to be followed in cases of interception, procedures which were apparently not complied with in the case of the Korean Airlines tragedy.⁹⁷

Annex II also provided that "intercepting aircraft should refrain from the use of weapons in all cases of interception of civil aircraft". The right of States to require a civil aircraft to land at a designated airport, where the aircraft is flying above its territory without authority or where there are reasonable grounds to conclude that it is being used for any purpose inconsistent with the Convention, was reaffirmed in subsection (b). There are several points that may be made with regard to the amendment.

It is to be noted that reference is made to "weapons" not "force" in the prohibition provisions. Presumably this means that force may be used against civil aircraft in flight in pursuance of an interception, provided that weapons are not actually fired.

⁹⁷See ICAO Report, 23 ILM, 1984, p.864 and De la Rochère, "L'affaire de l'Accident du Boeing 747 de Korean Airlines", AFDI, 1983, p.749.

B I B L I O G R A P H Y

B O O K S

1. Oppenheim, International Law, Vol.1, 8th ed., 1955.
2. Matte, N.M. "Treatise on Air-Aeronautical Law "IASL" McGill - 1981.
3. Ramsden, J.M. "The Safe Airline" Mc. Donald & Jane's - London - P.81.
4. Cheng, B. (1) "International Air Transport", London, 1962, p.102 - (2) "State Ships and State Aircraft; Current Legal Problems", (1958) p.237.
5. Turmen, R., LLM Thesis "Freedom of flight in the Airspace over the High Seas and its Practical Aspects (1980), McGill Univ. p.111 et seq.
6. Jessup "The Law of Territorial Waters and Maritime Jurisdiction (1927) pp., 194, 220, 254, 450, 466.
7. McDougal, Lasswell and Vlasic p.272
8. Fedele, Frank, "Peacetime Reconnaissance from Air Space and Outer Space: A Study of Defensive Rights in Contemporary International Law" (1965), p.97. Institute of Air and Space Law, McGill University, Montreal, Canada 1965.
9. Johnson, D.H., "Rights in Airspace", 70 (1965).
10. Diop, C.M., "Les implications juridico-politiques de la présence irrégulière d'un aéronef étranger dans l'espace aérien d'un Etat", 1978.

11. Brownlie, "International Law and the Use of Force by States" (1963), pp.373, 366.
12. Brierly, "The Law of the Nations", p.418, (1963).
13. Kindred, Castel, Fleming, Vlasic, Graham de Mestral and Williams, "International Law Chiefly as Interpreted and Applied in Canada", (1987), p.399.
14. Shawcross and Beaumont, "Air Law" (1st Ed.) p.644.
15. Cooper, J.C., "The Legal Status of Aircraft (1949), 41 Princeton, N.J.
16. Bamford, V. James, "The Puzzle Palace" (Boston: Houghton Mifflin, 1982), p.138.

ARTICLES, PERIODICALS AND NEWSPAPERS

1. 9 JA6 LAW REVIEW - 1967 - N° 5 - Fedele, Frank.
2. Revue Générale de Droit International Public, Vol.69, 1965, pp.468-470; 707; and pp.1111-1114./In Vol.68, 1962, Rousseau, "Chronique des faits internationaux", pp. 384.
3. The Times (London), July 20th, 1965, p.10; Col.I.
4. 3 Alberta Law Review, p.182 (1964) I.L. Head, "ADIZ, International Law and Contiguous Airspace".
5. CORNELL International Law Journal, (1985), N°18, p.221-225 - FRANCIONI; "Peacetime Use of Force, Military Activity and the New Law of the Sea".
6. 47 A.J.I.L. (1953) pp. 559, 587 LISSITZYN "The Treatment of Aerial intruders in Recent practice and International Law".
7. Recueil des Cours; (1954-II) p.180, 191 - de la Pradelle, "Les incidents de frontière sérienne et leur règlement".
8. The Guardian (London), April 26, 1978.
9. New York Times, May 1, 1952 April 21-24, 1978 and September 9th (interview with Captain Kim Cheng Kyu) - 2 Sept. 1983, p.7; 13 September, 1983.
10. Reader's Digest, November 1978, pp. 138-44 Anthony Paul "Shot Down Over Russia! The Mysterious Saga of Flight 902".
11. Aviation Week and Space Technology, May 1, 1978.
12. 22 INTERNATIONAL LEGAL MATERIALS, 1983, pp.1109-48. American Society of International Law.

13. The Gazette, Montreal, Thursday, December 10, 1987 - Wednesday, January 13, 1988 - Pag, A-11, Tuesday, January 26, 1988, p.A-10.
14. 11 The Yale Journal of Int.'l Law (1985) 247-8, note 106 therein - Morgan, "The downing of Korean Air Lines Flight 007".
15. International Law, 2nd, ed. (1976) London, note 21, p.358. Greig.
16. 45 JALC (1980) p.620 - Hughes, "Aerial Intrusions by Civil Airliners and the use of force".
17. 40 JALC (1974) pp. 172, 175, 177 - Fitzgerald "Recent proposals for Concerted Action Against States in Respect of Unlawful Interference with International Civil Aviation".
18. AFDI, 1983, p.749. De la Rochère, "L'Affaire de l'Accident du Boeing 747 de Korean Airlines".
19. Annals of Air and Space Law, Vol.X, (1985), p.271. Sundberg, Jacob, "Legitimate Responses to Aerial Intruders, (The View from a Neutral Side)"; and Vol. XI, (1986), p.127, Milde, M. "Interception of Civil Aircraft vs. misuse of Civil Aviation (Background of Amendment 27 to Annex 2)".
20. Air Worthy, Liber Amicorum Honoring Pr. Dr. I.H. Ph. Diedericks - Verschoor, Deventer, (1985) p.60, Cheng, Bin., "The Destruction of KAL Flight KE 007, and Article 3 bis of the Chicago Convention".

21. 22 The Canadian Yearbook of International Law, (1984), p.304.
FITZGERALD, Gerald F., "The Use of Force Against Civil Aircraft: The Aftermath of the KAL Flight 007 Incident."
22. International Herald Tribune, August 4, 1975, p.2.
23. London Times, July 24, 1954, at 6.
24. Far Eastern Economic Review, Jan. 19, 1984, p.64.
25. 8 Law and State, 1973. Hailbronner Kay, "Topical Problems of International Aviation Law".

ICAO PUBLICATIONS AND LAWS

1. Proceedings of the International Aviation Conference, Chicago, Nov. 1 - Dec. 7, 1944, pp.554-591.
2. Discussion at Fourth Meeting of Subcommittee 2 of Committee 1, November 10th, 1944, p.680.
3. ICAO Doc. Annex 2, Chapter 1, Definitions.
4. ICAO Docs. 7291-7, 10/9/52; 7291-11, 10/9/52.
5. ICAO Doc. 7361-2, 4/2/53.
6. ICAO Doc. C-WP/2743.
7. ICAO Doc. 7934-1 (C), 25/8/58.
8. ICAO Doc. 7960, A 12 - P/1, p.60.
9. ICAO Doc. 8693 - C/973, Action of the Council, 61st Session, p.8 et seq.
10. ICAO Doc. C-WP/4582; 4583; 4604 - meetings on May 10, 11 and 13, 1967, and the Draft Council Minutes, 11th meeting of 68th Session, LXVIII/II, Part I - Decisions, para. 1.
11. ICAO Doc. 8903 - C/994, Action of the Council, 68th Session, p.27, Subject No.26.
12. ICAO Doc. C-WP/4737 (R), 3/1/68.
13. ICAO Doc. C-WP/4747 (R), 22/1/68.
14. ICAO Doc. 8731-1(C), C/977-1(C), 20/2/68.
15. ICAO Doc. C-WP/4749 (R), 29/1/68.
16. ICAO Doc. 8731-4(C), C/977-4(C), 22/3/68.
17. Chicago Convention - Annex 15 (6th ed., July 1973), paras. 3.4.5.1., 5.1.1.4., 3.4.5.5., 3.1.1.1.

18. ICAO Doc. 4444 - RAC/501/12, 12th ed. 1985 "Procedures for Air Navigation Services, Rules of the Air and Air Traffic Services".
19. PICAO Doc. 2010 RAC/104, Feb. 1946, p. 16, para. 2.1.16.
20. ICAO Doc. 4041, AL-TE/2, p.10.
21. L.O.S.C. Articles 58, 88, 141, 301.
22. Chicago Convention - Annex 12 on Search and Rescue as adopted by the Council of I.C.A.O. (4th ed. May 1960).
23. ICAO Doc. C-WP/2609, 21/2/58.
24. ICAO Doc. C-WP/2376, 6/5/57.
25. ICAO Doc. 7878-10, 30/5/58.
26. ICAO Doc. 7934-7, 11/2/59.
27. I.C.J. [1954] Rep. 99.
[1956] Rep. 9.
[1958] Rep. 158.
28. ICAO Doc. C-WP/7764 - 2/12/1983.
29. UNITED NATIONS, Security Council, Provisional Verbatim Record, September 6, 1983, Doc. S/PV.2471, pp. 2-20; Doc. S/PV.2472 and Doc. S/PV. 2476, pp. 53-55.
30. ICAO Report, 23 ILM, 1984, p.864.
31. ICAO Bulletin; No. 39, June 1984, p. 13 Dr. Kotaite, A., "ICAO's goal is the maximum level of safety".
32. Air Laws and Treaties of the World, Washington, 1965, Vol.2, pp. 2552; 2575; 1504; Fn.
33. Air Law of the U.S.S.R., Soviet Legislation Series, Moscow, 1967, Translated by V. Vesey, p. 23.
34. Código Aeronáutico de la República Argentina, Ley 17.285. Buenos Aires, 1967. (Article No.7).