# THE INTERCEPTION OF CIVIL AIRCRAFT OVER THE HIGH SEAS IN THE GLOBAL WAR ON TERROR

by

**ANDREW S. WILLIAMS**

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The views expressed in this article are those of the author and do not reflect the official policy or position of the United States Air Force, the Department of Defense, or the U.S. Government.

## ABSTRACT – ENGLISH

This study addresses a narrow but important facet of the war on terror: the interception of civil aircraft over the high seas without the consent of the state of registry, when such aircraft are suspected of transporting weapons of mass destruction or terrorists. It introduces the contemporary legal regime over the high seas, in particular the customary norms relating to freedom of overflight, jurisdiction over aircraft, and the 'Rules of the Air' adopted by the International Civil Aviation Organization (ICAO). The study also examines the legal status of military aircraft in international law as a symbol of a state's sovereignty. It explores the justifications for lawful interceptions as well as the legal obligation of states to show 'due regard' for the safety of civil air navigation. The ICAO standards for the interception of civil aircraft and their applicability to state aircraft are also discussed. In conclusion the remedies an aggrieved state may pursue for alleged violations of international law are addressed.

## ABSTRACT – FRENCH

Cette étude a pour objectif une petite mais importante facette de la guerre contre le terrorisme : l'interception d'un aéronef civil en survol de haute mer, sans le consentement de l'État d'immatriculation, lorsqu'un tel aéronef est suspect de transporter des armes de destruction massive ou des terroristes. Elle introduit le régime légal contemporain de survol de haute mer, en particulier les normes coutumières relatives à la liberté de survol, à la juridiction de l'aéronef et aux 'Règles de l'air' adoptées par l'Organisation de l'aviation civile internationale (OACI). Cette étude examine aussi le statut légal de l'avion militaire en loi internationale comme un symbole de souveraineté d'État. Elle explore les justifications d'interceptions licites ainsi que l'obligation légale des États à assurer la sécurité de l'aéronautique civile. Sont aussi discutés, les standards de OACI concernant l'interception d'un aéronef civil et leurs applications à un aéronef d'État. En conclusion, sont aussi abordées, les voies de recours offertes à un État lésé en cas de violations alléguées de la loi internationale.

## ACRONYMS AND ABBREVIATIONS

| | |
|---|---|
| ADIZ | Air Defense Identification Zone |
| HSC | High Seas Convention |
| ICAO | International Civil Aviation Organization |
| I.C.J. | International Court of Justice |
| I.L.M. | International Legal Materials |
| NATO | North Atlantic Treaty Organization |
| OAS | Organization of American States |
| PSI | Proliferation Security Initiative |
| T.I.A.S. | Treaties and Other International Acts Series |
| U.K. | United Kingdom |
| U.N. | United Nations |
| UN SCOR | United Nations Security Council Resolution |
| U.N.T.S. | United Nations Treaty Series |
| U.S.T. | United States Treaties and Other International Agreements |
| UNCLOS | United Nations Convention on the Law of the Sea |
| U.S. | United States of America |
| WMD | Weapons of mass destruction |

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# INTRODUCTION

The events of September 11, 2001, marked a new development in international terrorism, namely, the use of civil aircraft as a major weapon. This new threat is especially dangerous because the largest U.S. cities are located along the Pacific and the Atlantic coasts, providing easy access from the sea. In addition, the clandestine movement of weapons of mass destruction heightens the threat, because of the capacity of such weapons to inflict massive loss of life. These weapons, and the materials needed to make them, should be interdicted wherever possible:

> If they could obtain [highly enriched uranium], terrorists would face few obstacles to building a crude nuclear device capable of delivering a multiple-kiloton yield; a sophisticated implosion design would be unnecessary. Depending on the degree of enrichment and the design of the device, tens of kilograms of weapon-grade uranium are sufficient for one nuclear warhead. Highly enriched uranium is a particularly attractive target for theft because it emits low levels of radiation, which makes it difficult to detect at border crossings and checkpoints and less dangerous to handle than plutonium, qualities that make it easier to divert.[1]

The challenge posed by terrorists seeking to acquire weapons of mass destruction is exceedingly urgent and immediate.

This study addresses a narrow but important facet of the war on terror: the interception of civil aircraft over the high seas without the consent of the state of registry, when such aircraft are suspected of transporting weapons of mass destruction or terrorists.

Chapter I of this study reviews some of the events triggering the war on terror, and the U.S. strategy in waging it, including the Bush Administration's stated intention to act preemptively, if necessary, to defend the United States. The Proliferation Security Initiative (PSI), a cooperative effort by partner states to interdict the movement of weapons of mass destruction is also discussed.

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[1] Morten Bremer Maerli & Lars van Dassan, "Europe, Carry Your Weight" (November/December 2004) Bulletin of the Atomic Scientists 19. Morten Bremer Maerli is a senior research fellow at the Norwegian Institute of International Affairs, Oslo, Norway. Lars van Dassan is the director of the Swedish Nuclear Nonproliferation Assistance Program of the Swedish Nuclear Power Inspectorate, Stockholm, Sweden.

Chapter II introduces the contemporary legal regime over the high seas, in particular the customary norms relating to freedom of overflight, jurisdiction over aircraft, and the 'Rules of the Air' adopted by the International Civil Aviation Organization (ICAO).

Chapter III examines the legal status of military aircraft in international law as a symbol of a state's sovereignty and prestige.

Chapter IV addresses the legal grounds permitting a state to intercept foreign civil aircraft over the high seas without the consent of the state of registry.

Chapter V discusses the legal obligation of states to have 'due regard' for the safety of civil air navigation, an obligation recognized by the laws of armed conflict, the law of the sea, and public air law. The ICAO standards for the interception of civil aircraft and their applicability to state aircraft are also examined.

Chapter VI focuses on the remedies an aggrieved state may pursue for violations of international law whenever another state intercepts its civil aircraft without a proper legal justification or in a manner that is incompatible with the concept of 'due regard.'

# CHAPTER I.
# AMERICA AT WAR AGAINST INTERNATIONAL TERRORISM

On September 11, 2001, hijackers seized control of four commercial airliners shortly after their departure, two from Boston's Logan International Airport, one from Washington Dulles International Airport, and one from Newark (New Jersey) Liberty International Airport.[2] The hijackers intentionally crashed the first two aircraft—American Airlines Flight 11 and United Flight 175—into the Twin Towers of the World Trade Center in New York City.[3] With the third aircraft—American Airlines Flight 77—they struck the Pentagon.[4] The fourth aircraft—United Airlines Flight 93—crashed in the Pennsylvania countryside after the passengers unsuccessfully struggled with the hijackers. All 232 passengers and all 33 crew members on board the four aircraft died that day. Over 3,000 people perished at the World Trade Center, the Pentagon, and in the Pennsylvania countryside. The U.S. economy suffered heavy loss, and international civil aviation, major disruptions.

## A. Pre- and Post-9/11 Attacks

Before September 11, 2001, the United States had been the target of several major attacks by the terrorist organization Al Qaeda. In August 1996, Osama bin Laden, the leader of Al Qaeda, published a fatwa, or Islamic order, in *Al Quds Al Arabi*, a London-based newspaper, entitled "Declaration of War against the Americans Occupying the Land of the Two Holy Places."[5] On February 23, 1998, Osama bin Laden published another fatwa, this time calling for the murder of every American—military or civilian—as the "individual duty

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2 U.S., National Commission on Terrorist Attacks upon the United States, *The 9/11 Commission Report: Final Report of the National Commission on the Terrorist Attacks upon the United States* (Washington, D.C.: United States Government Printing Office, 2004) at 1-15 [*The 9/11 Commission Report*].

3 *Ibid.* at 1-2.

4 *Ibid.* at 2-4.

5 PBS, "Bin Laden's Fatwa" *PBS Online NewsHour* (August 1996), online: PBS Online NewsHour <http://www.pbs.org/newshour/terrorism/international/fatwa_1996.html>.

for every Muslim who can do it in any country in which it is possible to do it."[6] In an interview three months later, bin Laden stated, "[w]e do not differentiate between military or civilian. As far as we are concerned, they are all targets."[7]

Al Qaeda is known or suspected to be responsible for several major incidents prior to 9/11, including the first attack on the World Trade Center on February 26, 1993, when a bomb exploded in the underground parking lot of the Center, killing five persons and injuring dozens more;[8] the bombing of the Khobar Towers complex on June 25, 1996, in Dhahran, Saudi Arabia, which housed U.S. Air Force personnel, killing nineteen airmen, and injuring hundreds more;[9] the bombings on August 7, 1998, of the U.S. Embassies in Nairobi, Kenya, and Dar es Salam, Tanzania, killing more than 200 persons and injuring more than 1,000;[10] and the attack on the USS Cole at Aden, Yemen, on October 12, 2000, killing 17 members of the ship's crew and wounding 39 others.[11]

Since 9/11, Al Qaeda is also believed to have orchestrated attacks on the mass transit systems of Madrid and London. On March 11, 2004, suicide bombers launched attacks on commuter trains in Madrid, killing 191 people and wounding 1,500 more.[12] On July 7, 2005,

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6. PBS, "Al Qaeda'a Fatwa" *PBS Online NewsHour* (23 February 1998), online: PBS Online NewsHour <http://www.pbs.org/newshour/terrorism/international/fatwa_1998.html>.

7 PBS, "Hunting Bin Laden" *PBS Frontline* (May 1998), online: PBS Frontline <http://www.pbs.org/wgbh/pages/frontline/shows/binladen/who/interview.html>.

8 BBC News, "On This Day, 26 February 1993" *BBC News*, online: BBC News <http://news.bbc.co.uk/onthisday/hi/dates/stories/february/26/newsid_2516000/2516469.stm>.

9 Rebecca Grant, "Khobar Towers" *Air Force Association Magazine* (June 1998), online: Air Force Association < http://www.afa.org/magazine/june1998/0698khobar.asp>.

10 Ruth Wedgwood, "Responding to Terrorism: The Strikes Against Bin Laden" (1999) Yale J. Int'l L. 559 at 560; BBC News, "On This Day, 7 August 1998" *BBC News*, online: BBC News <http://news.bbc.co.uk/onthisday/hi/dates/stories/august/7/newsid_3131000/3131709.stm>; *The 9/11 Commission Report, supra* note 2 at 115-16 (linking Osama Bin Laden and Al Qaeda to the bombings).

11 U.S., Congressional Research Service, *Terrorist Attack on USS Cole: Background and Issues for Congress* (Order Code RS20721) (Washington, D.C., The Library of Congress, 2001), online: George Washington University <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB55/crs20010130.pdf>.

12 CNN. "Madrid Bombings: One Year On" *CNN News* (11 March 2005), online: CNN News <http://edition.cnn.com/SPECIALS/2004/madrid.bombing/>; CNN. "Al Qaeda Suspects Held in Spain" *CNN News* (19 May 2004), online: CNN News <http://edition.cnn.com/2004/WORLD/europe/05/19/madrid.arrests/>.

suicide bombers detonated bombs on three of London's Underground trains and on a bus, killing 52 people and injuring 700 others.[13]

## B. The Response to 9/11

Immediately after the attacks of September 11, President George W. Bush issued Proclamation 7463, declaring a national emergency.[14] The President characterized the attacks "as an act of war," telling a joint session of Congress that the evidence pointed to "a collection of loosely affiliated terrorist organizations known as Al Qaida."[15] Congress promptly authorized the President "to use all necessary and appropriate force" against those whom he determined had a role in the attacks, "in order to prevent any future acts of international terrorism against the United States."[16]

The international community also responded immediately. On September 11, the North Atlantic Treaty Organization (NATO) met in an emergency session and released a statement declaring its solidarity with the United States and condemning "these barbaric acts."[17] The statement deplored the "mindless slaughter of so many innocent civilians," calling it "an unacceptable act of violence without precedent in the modern era."[18]

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[13] CNN, "7/7 Report Faults Terror Planning" *CNN News* (11 May 2006), online: CNN News <http://edition.cnn.com/2006/WORLD/europe/05/11/london.bombings/index.html>.

[14] U.S., The White House, *Declaration of National Emergency by Reason of Certain Terrorist Attacks* (Proclamation No. 746) (14 September 2001) 337 Weekly Comp. Pres. Doc. 1310.

[15] President George W. Bush, "Address Before a Joint Session of the Congress On the United States Response to the Terrorist Attacks of September 11," (20 September 2001) 37 Weekly Comp. Pres. Doc. 1347.

[16] *Authorization for the Use of United States Armed Forces*, Pub. L. No. 107-40 § 2(a), 115 Stat. 224 (2001) [*Authorization for Use of US Armed Forces*].

[17] NATO, Press Release, PR/CP (2001) 122, "Statement by the North Atlantic Council" (11 September 2001), online: NATO <http://www.nato.int/docu/pr/2001/p01-122e.htm>.

[18] *Ibid.*

On the next day, September 12, NATO met again "in response to the appalling attacks perpetrated [the day before] against the United States,"[19] to invoke Article 5 of the North Atlantic Treaty,[20] declaring that, "if it is determined that this attack was directed from abroad against the United States, it shall be regarded as an action covered by Article 5."[21] Article 5 of the North Atlantic Treaty states that "an armed attack against one or more of the Allies in Europe or North America shall be considered an attack against them all."[22]

Never before in its history had NATO invoked Article 5 of the Treaty. In invoking Article 5 against a non-state actor (Al Qaeda), NATO took pains to note that the Alliance's commitment to self-defense was "first entered into in circumstances very different from those that exist now, but [the commitment] remains no less valid and no less essential today, in a world subject to the scourge of international terrorism."[23] NATO thus determined that the events of September 11 amounted to an "armed attack."

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19 NATO, Press Release, PR/CP (2001) 124, "Statement by the North Atlantic Council" (12 September 2001), online: <http://www.nato.int/docu/pr/2001/p01-124e.htm> [NATO, "Press Release of 12 September 2001"].

20 *North Atlantic Treaty*, 4 April 1949, 34 U.N.T.S. 243.

21 NATO, "Press Release of 12 September 2001," *supra* note 19.

22 The full text of Article 5 of the North Atlantic Treaty states:

> The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in the exercise of the right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.
>
> Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.

*North Atlantic Treaty*, *supra* note 20.

23 NATO, "Press Release of 12 September 2001," *supra* note 19.

The U.N. Security Council also condemned the attacks of September 11 in two resolutions that contained language recognizing the inherent right of self-defense. The Security Council adopted Resolution 1368[24] on September 12, the same day as NATO's decision to invoke Article 5 of the North Atlantic Treaty. In this resolution, the Council condemned "the horrifying terrorist attacks" of September 11 as a "threat to international peace and security."[25] The Resolution called on all states "to work together urgently" to bring the perpetrators to justice and "to redouble their efforts ... by increased cooperation" in suppressing and preventing terrorist acts.[26] The Resolution also expressed the Council's readiness "to take all necessary steps to respond to the terrorist attacks of 11 September 2001, and to combat all forms of terrorism, in accordance with its responsibilities under the Charter of the United Nations."[27]

The Security Council adopted the second resolution—Resolution 1373—on September 28, 2001.[28] In this resolution, the Council also decided that all states are to deny safe haven to those who support or commit terrorist acts and that they must prevent "the movement of terrorists or terrorist groups by effective border controls."[29] Significantly, the Security Council called upon States to intensify and accelerate the exchange of operational information concerning the "movements of terrorist persons," "traffic in arms," "explosives

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24 UN SCOR, 56th Sess., 4370th mtg., UN Doc. S/RES/1368 (2001), online: United Nations <http://www.un.org/TMP/9798191.html> [U.N. S.C., Resolution 1368].

25 *Ibid.* (emphasis in original).

26 *Ibid.*

27 *Ibid.*

28 UN SCOR, 56th Sess., 4385th mtg., UN Doc. S/RES/1373 (2001), online: United Nations <http://daccess-ods.un.org/TMP/9542914.html> [U.N. S.C., Resolution 1373].

29 *Ibid.* paras. 2(c) & (g).

or sensitive materials," and "the threat posed by the possession of weapons of mass destruction by terrorist groups,"[30] noting "the close connection between international terrorism and transnational organized crime, illicit drugs, money-laundering, illegal arms-trafficking, and illegal movement of nuclear, chemical, biological and other potential deadly materials."[31] In both resolutions, the Security Council in effect determined that the United States was a victim of several armed attacks on September 11.

The Organization of American States (OAS) also passed a resolution, declaring that the "terrorist attacks against the United States of America are attacks against all American states."[32] The OAS pledged the support of its members in using "all legally available measures to pursue, capture, extradite, and punish" the perpetrators of the September 11 acts, and to render "assistance and support to the United States and to each other, as appropriate, to address the September 11 attacks and also to prevent future terrorist acts."[33]

On October 7, 2001, the United States notified the Security Council by letter that it had initiated action that day in Afghanistan in response to "the armed attacks carried out against the United States on 11 September 2001."[34] The letter stated that the United States, together with other states, was exercising "its inherent right of individual and collective self-

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30 *Ibid.* para. 3(a).

31 *Ibid.* para. 4.

32 OAS, *Resolution on Terrorist Threat to the Americas* (21 September 2001), reprinted in (2001) 40 I.L.M. 1273.

33 *Ibid.*

34 U.S., "Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council," U.N. Doc. S/2001/946 [Letter dated 7 October 2001], reprinted in (2001) 40 I.L.M. 1281, online: United Nations <http://www.un.int/usa/s-2001-946.htm>.

defense ... to prevent and deter further attacks on the United States."[35] The Security Council later adopted additional resolutions, reminding all states of their obligation to combat the Taliban and the Al Qaeda organizations.[36]

## C. The U.S. National Security Strategy

In September 2002, the White House released *The National Security Strategy of the United States of America*[37] which included the announcement of the 'preemption doctrine,' (the Bush doctrine).[38] The 'Bush doctrine' provides for the use of "preemptive military strikes to address threats to the United States before they fully materialize."[39] Section III of the *2002 Strategy* states that the U.S. government will:

> defend[] the United States, the American People, and our interests at home and abroad by *identifying and destroying the threat before it reaches our borders*. While the United States will constantly strive to enlist the support of the international community, we will not hesitate to act alone, if necessary, to exercise our right of self-defense by acting *preemptively* against such terrorists.[40]

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35 *Ibid.*

36 UN SCOR, 59th Sess., 4908th mtg., U.N. Doc. S/RES/1526 (2004), online United Nations <http://daccessdds.un.org/doc/UNDOC/GEN/N04/226/69/PDF/N0422669.pdf?OpenElement> (calling for international cooperation in combating "the Taliban and the Al-Qaida organization"); UN SCOR, 59th Sess., 5053rd mtg., UN Doc. S/RES/1566 (2004), online: United Nations <http://daccessdds.un.org/doc/UNDOC/GEN/N04/542/82/PDF/N0454282.pdf?OpenElement> (referring to the "Al-Qaida/Taliban Sanctions Committee"); UN SCOR, 60th Sess., 5244th mtg., UN Doc. S/RES/1617 (2005), online: United Nations <http://daccessdds.un.org/doc/UNDOC/GEN/N05/446/60/PDF/N0544660.pdf?OpenElement> (reaffirming its unequivocal condemnation of Al-Qaida, Osama bin Laden, and the Taliban).

37 U.S., The White House, *The National Security Strategy of the United States of America* (September 2002), online: The White House <http://www.whitehouse.gov/nsc/nss.pdf> [The White House, *2002 Strategy*].

38 Ian Brownlie, *Principles of Public International Law*, 6th ed. (Oxford: Oxford U. Press, 2003) at 702 n. 16.

39 Thomas Graham, Jr., "National Self-Defense, International Law, and Weapons of Mass Destruction" (2003) 4 Chi. J. Int'l L. 1.

40 The White House, *2002 Strategy*, *supra* note 37 at 5 (emphasis added).

The *2002 Strategy* asserted that for centuries international law has recognized that states need not suffer an attack but could act to defend themselves in the face of an imminent danger of attack.[41]

A notable instance involving a preemptive strike occurred in 1837 when British forces entered U.S. territory and destroyed the *Caroline,* a U.S.-registered steamboat.[42] The *Caroline* was used to ferry men and arms across the Niagara River to an island in Canada in support of an anti-British rebellion. Some rebels, who had fled to the United States, had also fired at British boats from the U.S. shore.[43] Despite repeated British requests for U.S. authorities to control the rebels on their side of the border, the rebels continued to roam freely on U.S. territory. In a surprise attack on December 29, 1837, British forces crossed the Niagara River and boarded the docked *Caroline*, killing two Americans. The British then cut the *Caroline* loose, set it on fire, and towed it into the current of the river, permitting it to descend the Niagara falls.[44]

In a diplomatic protest, the U.S. Secretary of State, Daniel Webster, called on the British Government to justify its act by showing:

> *a necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation.* It will be for it to show, also, that the local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories of the United States at all, did

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41 *Ibid.* at 15.

42 R.Y. Jennings, "The *Caroline* and *McLeod* Cases" (1938) 32 Am. J. Int'l L. 82 at 89.

43 *Ibid.* at 83.

44 *Ibid.* at 84.

> nothing unreasonable or excessive; since the act, justified by the necessity of self-defense, must be limited by that necessity and kept clearly within it.[45]

Though Secretary Webster formulated this legal standard, the British accepted it—thereby creating a precedent for anticipatory self-defense.[46] The *Caroline* case reflects an "exacting standard of customary law," according to which the expected attack includes so high a degree of imminence as to "preclude effective resort by the intended victim to non-violent modalities of response."[47]

Equally important, the British strike was not directed towards the United States but against insurgents operating within it. In a similar vein, interceptions of foreign civil aircraft over the high seas are not directed toward the aircraft's state of registry, but against the persons misusing them. As one commentator observes about the preemption doctrine:

> Furthermore, preemptive action [need] not entail overthrowing a government; the spectrum of possible options is substantially broader. Non-military as well as "semi-military" actions could include interrupting information streams, capturing ships, *intercepting aircraft*, establishing blockades, or acts of sabotage. Each of these options has a different level of acceptability and feasibility.... None of these actions can be justified unless the threat is exceedingly urgent and immediate.[48]

The *Caroline* case provides a powerful legal basis to justify the interception of foreign civil aircraft suspected of transporting WMD or terrorists.

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[45] *Ibid.* at 89 (emphasis added).

[46] *Ibid.* at 91-92.

[47] Myres S. McDougal & Florentino P. Feliciano, *Law and Minimum World Public Order: The Legal Regulation and International Coercion* (New Haven: Yale U. Press, 1961) at 231-32, 237 [McDougal & Feliciano].

[48] Karl-Heinz Kamp, "Preemption: Far From Forsaken" (March/April 2005) Bulletin of the Atomic Scientists 26 at 64 (emphasis added).

The U.S. *2002 Strategy* acknowledges that the legitimacy of preemption was specifically based on the existence of an imminent threat.[49] In the past, however, states could detect large scale mobilizations of conventional armies, navies, and air forces indicating preparations for attack.[50] By contrast, the danger posed by international terrorism is not subject to easy detection. Accordingly, the *2002 Strategy* argued for a modification to the concept of 'imminent threat' to reflect the modern capabilities and objectives of today's adversaries:

> Rogue states and terrorists do not seek to attack us using conventional means. They know such attacks would fail. Instead, they rely on acts of terror and, potentially, the use of weapons of mass destruction—weapons that can be easily concealed, delivered covertly, and used without warning.[51]

The 'Bush doctrine' claims a right of preemptive action against any non-state actors (terrorists) who are seen as *potential* adversaries, regardless of any proof of an imminent attack.[52] The 'Bush doctrine' of preemption is controversial because the United States had never in its history taken a 'preemptive' military strike against another nation until it invaded Iraq in 2003.[53] Several commentators have also noted that the 'doctrine' is inconsistent with international law.[54]

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[49] The White House, *2002 Strategy*, *supra* note 37 at 5.

[50] *Ibid.*

[51] *Ibid.*

[52] *Ibid.*

[53] U.S., Congressional Research Service, *U.S. Use of Preemptive Military Force* (Order Code RS 21311) (Washington, D.C., The Library of Congress, 2002), online: U.S. State Department <http://fpc.state.gov/documents/organization/13841.pdf>.

[54] See, e.g., Brownlie, *supra* note 38 at 702 (noting that "[t]his doctrine lacks a legal basis"); Yoram Dinstein, *War, Aggression & Self-Defence*, 4th ed. (Cambridge: Cambridge U. Press, 2005) at 183 (stating "to the extent that [the 'Bush doctrine'] will actually bring about a preventive use of force in response to sheer threats, it will not be in compliance with Article 51 of the Charter") (citation omitted); *ibid.* at 186 (rejecting the 'destructive potential of nuclear weapons' as a reason for calling into question "any and all

In particular, the 'doctrine' conflicts with the U.N. Charter, which expressly limits the use of force to two circumstances, namely, in self-defense in case of an armed attack or if mandated by the U.N. Security Council.[55]

> But the U.N. Charter was written almost six decades ago when the main threats to international stability originated from conflicts *between* states. This has changed fundamentally: Today's security concerns mostly result from conflicts *within* states (civil war, genocide), from crumbling state authority, or from non-state actors. None of these threats is mentioned in the U.N. Charter—in fact, the written international law no longer reflects international realities.... Here lies the key to the further evolution of international law. The future will require interpretation and judgment as well as formal rules.[56]

Moreover, the current logic behind the preemption doctrine is the acknowledgement that

> the threat situation has fundamentally changed as a result of three factors: the spread of weapons of mass destruction; the increasingly available means of their delivery by missile, unmanned aerial vehicle, and so on; and the technological progress that has been made in range and accuracy. Geographical distance is becoming less of a factor in threat analysis as more states and even non-state actors are achieving the ability to project power over

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received rules of international law regarding the trans-boundary use of force.") (citation omitted); Graham, *supra* note 39 at 17 ("[T]he apparent intended implementation of the new *Strategy* [against Iraq] is not consistent with international law."). The principal difficulty with the doctrine of preemption is in its regulation. Absent an imminent threat, the doctrine becomes a license for the unregulated use of force. A state should have powerful reasons for resorting to preemptive strikes. The potential adversary should have first demonstrated its willingness and its capacity to inflict great harm. Daniel H. Joyner, "The Proliferation Security Initiative: Nonproliferation, Counterproliferation, and International Law" (2005) 30 Yale J. Int'l L. 507, 522 (defining anticipatory self-defense as "an attack on a state that actively threatens violence and has the capacity to carry out that threat, but which has not yet materialized or actualized that threat through force"). In defending its vital interests, the United States should not be perceived as an aggressor state, and responsible for encouraging similar behavior by other states. There is no need to resort to the 'doctrine of preemption' in the war against terror. The doctrine is by definition concerned only with potential adversaries and not declared enemies. The United States is already at war with Al Qaeda and its supporters, and the United States enjoys the full support of the international community in this conflict. As previously noted, the Security Council has authoritatively determined that the United States may legally exercise its inherent right of self-defense to prevent and deter future attacks by Al Qaeda. See text accompanying notes 24 - 27. The Security Council has also called upon all states to combat Al Qaeda and its supporters. See text accompanying notes 28 - 31. Hence, in this conflict, the United States is authorized to exercise its rights as a belligerent power. A belligerent can legally attack an enemy at any time, even when the enemy has temporarily retreated. See Chapter IV.A, *infra*. In justifying the use of force in self-defense, a state should not assert a controversial reason when a generally accepted one is available.

[55] *Charter of the United Nations* at arts. 39, 42 & 51.

[56] Kamp, *supra* note 48 at 27 (emphasis in original).

> long ranges. At the same time, the defender's reaction time is growing shorter. ... Instead, in extreme cases, *threats must be countered before they become acute—and by military means if necessary....*[57]

In March 2006, the U.S. Administration published an updated version of *The National Security Strategy of the United* States.[58] This version reaffirms the 'Bush doctrine' of preemption, but with the assurance that preemptive strikes will conform to several traditional principles of international law regulating the use of force:

> [U]nder long-standing principles of self-defense, we do not rule out the use of force before attacks occur, even if uncertainty remains as to the time and place of the enemy's attack. *When the consequences of an attack with WMD are potentially so devastating, we cannot afford to stand idly by as grave dangers materialize.* This is the principle and logic of preemption. The place of preemption in our national security strategy remains the same. We will always proceed deliberately, weighing the consequences of our actions. The reasons for our actions will be clear, the force measured, and the cause just.[59]

The references to deliberate action, clear reasons, just causes, and measured force reflect principles of customary international law, namely, military necessity and proportionality.[60]

## The *So San*

In December 2002, two months after the *2002 Strategy* was published, a Spanish warship stopped and boarded the freighter *So San*, a North Korean commercial vessel, at the

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[57] *Ibid.* at 26 (emphasis added).

[58] U.S., The White House, *The National Security Strategy of the United States of America* (March 2006), online The White House <http://www.whitehouse.gov/nsc/nss/2006/nss2006.pdf> [The White House, *2006 Strategy*].

[59] *Ibid.* at 23 (emphasis added).

[60] See *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Judgment of 27 June 1986, [1986] I.C.J. Rep. 14 at 94 ¶ 176 (stating that the principles of military necessary and proportionality are "well established in customary international law"). For a discussion of these principles as they apply to the interception of civil aircraft, see Chapters IV.A and V.A.

request of the United States.[61] The interception occurred about 600 miles off coast of Yemen in international waters.[62] U.S. intelligence had been tracking the ship for over a month after it departed North Korea, sailing without a flag or markings.[63] U.S. authorities arrived on the scene after the interception.[64] An inspection of the cargo resulted in the discovery of 15 Scud missiles and rocket fuel.[65] The ship's manifest did not list any of these items.[66]

Yemen protested the interception, demanding its release on the ground it had ordered the weapons from North Korea for its own defense.[67] After determining that it had no legal basis to arrest the vessel or seize its cargo, the United States released the crew and permitted the *So San* to sail to Yemen with its cargo.[68]

At about the same time as the *So San* incident, the White House published *The National Strategy to Combat Weapons of Mass Destruction*,[69] signaling a more activist approach to countering proliferation. The United States would not only work to enhance traditional nonproliferation measures through diplomacy, arms control, threat reduction assistance, and export controls, but it would make effective interdiction a critical part of its

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61 U.S., Congressional Research Service, *Weapons of Mass Destruction Counterproliferation: Legal Issues for Ships and Aircraft* (Order Code RL32097) (Washington, D.C., The Library of Congress, 2003) at 3, online: Federation of American Scientists <http://www.fas.org/spp/starwars/crs/RL32097.pdf> [CRS, *Weapons of Mass Destruction Counterproliferation*].

62 CNN, "Spain: U.S. Apologizes over Scud Ship" *CNN.com* (12 December 2002), online: CNN.com <http://archives.cnn.com/2002/WORLD/asiapcf/east/12/12/missile.ship/index/html>.

63 *Ibid.*

64 *Ibid.*

65 *Ibid.*

66 *Ibid.*

67 *Ibid.*

68 CRS, *Weapons of Mass Destruction Counterproliferation, supra* note 61 at 3; see also Ari Fleisher, White House Press Briefing (11 December 2002) (WL).

69 U.S., The White House, *The National Strategy to Combat Weapons of Mass Destruction* (December 2002), online: The White House <http://www.whitehouse.gov/news/releases/2002/12/WMDStrategy.pdf>.

strategy to combat the flow of WMD and their delivery means to hostile states and terrorist organizations.[70]

## D. The Proliferation Security Initiative

On May 31, 2003, in Krakow, Poland, President Bush unveiled the Proliferation Security Initiative (PSI), stating "[t]he greatest threat to peace is the spread of nuclear, chemical and biological weapons.... When weapons of mass destruction or their components are in transit, we must have the means and the authority to seize them."[71]

The purpose of the PSI is to improve cooperation among nations to allow for the search of ships and aircraft carrying suspected WMD-related cargo.[72] The PSI is not a treaty-based organization and it does not create any formal obligations. Rather, the PSI is described as a voluntary set of activities based on a commitment to adhere to the measures contained in the Statement of Interdiction Principles.[73] Over 70 nations have agreed to these measures.[74]

The Statement of Interdiction Principles commits participating states to take action in three areas, namely, (1) to facilitate the more rapid exchange of information concerning suspected proliferation,[75] (2) to review and strengthen national laws,[76] and (3) to undertake a

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70 *Ibid.* at 2.

71 President George W. Bush, "Remarks at Wawel Royal Castle in Krakow, Poland" (31 May 2003), online: The White House <http://www.whitehouse.gov/news/releases/2003/05/20030531-3.html>.

72 CRS, *Weapons of Mass Destruction Counterproliferation, supra* note 61 at 10.

73 U.S., State Department, *What is the Proliferation Security Initiative?*, online: U.S. State Department <http://usinfo.state.gov/products/pubs/proliferation/proliferation.pdf>.

74 *2006 Strategy, supra* note 58 at 18.

75 U.S., The White House, Office of the Press Secretary, *The Proliferation Security Initiative: Statement of Interdiction Principles* (4 September 2003) at princ. 2, online: U.S. State Department <http://www.state.gov/t/isn/rls/fs/23764.htm> [The White House, *Statement of Interdiction Principles*].

number of interdiction measures within their jurisdiction.[77] The Statement of Interdiction Principles recommends specific activities regarding the illegal transport of WMD-related cargo to entities of proliferation concern, activities squarely within each PSI partner's sovereign prerogative. PSI partners commit to board and search any vessel flying their own flag that is reasonably suspected of transporting WMD-related cargo, either at their own initiative or at the request of another State;[78] they also commit to seriously consider giving consent to other states to board and search their own flag vessels;[79] and they agree to stop and search within their own territorial seas any vessel of whatever registry that is reasonably suspected of carrying such cargoes.[80]

The principles concerning the interception of aircraft are similar. PSI partners agree to require aircraft transiting their airspace to land for inspection if the aircraft are reasonably suspected of carrying WMD-related cargo to or from entities of proliferation concern.[81] Where possible, PSI partners should deny these aircraft transit rights through their own airspace in advance of such flights.[82] In this respect, states have greater flexibility under air law to prevent the transport of such cargo than they do under the law of the sea. The 1944 Convention on International Civil Aviation prohibits civil aircraft from carrying munitions or

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[76] *Ibid.* at princ. 3. The U.N. Security Council unanimously adopted Resolution 1540, which calls on all States to criminalize the proliferation of weapons of mass destruction, especially by non-State actors, and to implement effective controls on the export of such weapons. UN SCOR, 59th Sess., 4956th mtg., UN Doc. S/RES/1540 (2004), online: United Nations <http://daccess-ods.un.org/TMP/8051902.html>.

[77] The White House, *Statement of Interdiction* Principles, *supra* note 75 at princ. 1 & 4 (a).

[78] *Ibid.* at princ. 4(b).

[79] *Ibid.* at princ. 4(c).

[80] *Ibid.* at princ. 4 (d).

[81] *Ibid.* at princ. 4(e).

[82] *Ibid.*

implements of war above the territory of a state without that state's permission.[83] On the other hand, the 1982 U.N. Convention on the Law of the Sea provides that ships enjoy the right of innocent passage through the territorial seas of other states, even when those ships carry nuclear or other inherently dangerous or noxious substances.[84] In any case, PSI partners agree to actively ensure that their own ports, airfields, or other facilities are not being used as transshipment points for shipments of WMD-related cargoes to or from entities of proliferation concern. The PSI works with, rather than against, the consent of the state of nationality of aircraft and ships.[85] The U.S. initiative to defeat WMD proliferation through effective interdiction is thus firmly based in international law.

In addition to the PSI, the United States has also signed bilateral agreements with several countries, including Panama and Liberia, the two nations with the largest shipping registries.[86] These bilateral agreements grant each signatory a reciprocal right to board and inspect the other's ships on the high seas.[87] The combination of these bilateral agreements and commitments from PSI partners provides the United States with "rapid action consent

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[83] *Convention on International Civil Aviation*, 7 December 1944, 15 U.N.T.S. 295, T.I.A.S. 1591 (entered into force 4 April 1947), at art. 35 [*Chicago Convention*]. For nearly sixty years, the "Magna Charta" of public international air law has served two basic functions. First, it established a comprehensive framework for international civil aviation, carrying forward most of the customary norms initially codified within the Paris Convention of 1919. Secondly, the Chicago Convention created the International Civil Aviation Organization (ICAO), a specialized agency of the United Nations. The Convention's provisions are thus universally binding because they reflect customary international law, and because they have been ratified by 189 states, or nearly the entire international community. "States Parties to the Convention on International Civil Aviation, (1995) 30 Annals of Air & Space L. Part I, at 51.

[84] *United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 U.N.T.S. 3, arts 17, 21 & 23 [*UNCLOS*].

[85] Jack I. Garvey, "The International Institutional Imperative for Countering the Spread of Weapons of Mass Destruction: Assessing the Proliferation Security Initiative" (2005) J. of Conflict and Security L. 125 at 133; Michael Byers, "Policing the High Seas: The Proliferation Security Initiative" (2004) 98 Am. J. Int'l L. 526 at 529.

[86] Byers, *supra* note 85 at 530 n. 30, 31.

[87] *Ibid.* at 530.

procedures for boarding, search, and seizure" of over 50 percent of the world's shipping.[88] However, at this time a similar regime for the interception of aircraft is lacking.

### The *BBC China* and Other Interdictions

In late September 2003, the same month as the publication of the PSI Interdiction Principles, U.S. and British intelligence services notified Germany that the German-owned freighter *BBC China* was transporting suspected WMD cargo from Malaysia to Libya. Germany ordered the *BBC China* to divert to Italy where authorities searched it. The inspection resulted in the discovery of thousands of parts for gas centrifuges capable of enriching uranium. Significantly, none of these items were listed on the manifest. The successful interception of these materials is credited with convincing President Moamar Quaddafi to abandon his WMD program.[89] More importantly, it also led to the dismantling in 2004 of the nuclear smuggling network of Dr. Abdul Qadeer Khan, considered the father of Pakistan's nuclear weapons program.[90]

Since the PSI program was announced in 2003, it has resulted in at least a dozen interdictions of WMD material bound for countries of concern.[91] One such interdiction occurred in December 2003 when the U.S. Navy intercepted a small vessel in the Strait of

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[88] Garvey, *supra* note 85 at 132.

[89] *2006 Strategy*, *supra* note 58 at 19.

[90] *Ibid.*; Joyner, *supra* note 54 at 539.

[91] See *e.g.* Secretary of State Condoleezza Rice, "Remarks on the Second Anniversary of the Proliferation Security Initiative" (31 May 2005), online: U.S. State Department <http://www.state.gov/secretary/rm/2005/46951.htm> (noting 11 interdictions in nine months).

Hormuz in the Persian Gulf.[92] The inspection of the ship yielded two tons of illicit drugs and the capture of three Al Qaeda suspects.[93] Interdictions of this type confirm the Security Council's concern expressed in Resolution 1373 about the close connection between international terrorism and the illegal movement of arms and illicit drugs and other prohibited materials.[94]

There are no reported interceptions of civil aircraft on the basis of the PSI program, although two interceptions from the mid-1980s serve as important precedents.

*Egypt Air Flight MS 2843*

On October 10, 1985, U.S. Navy jets over the Mediterranean Sea intercepted Egypt Air Flight MS 2843, en route from Cairo to Tunis, and forced it to land in Sicily.[95] The flight was carrying four members of the Palestine Liberation Front who had hijacked the Italian cruise liner *Achille Lauro* in international waters near Egypt only three days earlier.[96] While in control of the ships, the hijackers killed Leon Klinghoffer, a 69 year-old United States

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92 Ian Patrick Barry, "The Right of Visit, Search and Seizure of Foreign Flagged Vessels on the High Seas pursuant to Customary International Law: A Defense of the Proliferation Security Initiative" (2004-2005) 33 Hofstra L. Rev. 299.

93 *Ibid.*

94 U.N.S.C., *Resolution 1373, supra* note 28 at para. 4.

95 ICAO, Document, LC/29-WP/2-1, Attachment 1, Secretariat Study on *"Civil/State Aircraft"* (3 March 1995) at ¶ 4.8.3 [ICAO, *Civil/State Aircraft*]; George M. Borkowski, "Use of Force: Interception of Aircraft—*Interception of Egyptian Airliner by the United States*, Oct. 10, 1985; *Interception of Libyan Airplane by Israel*, Feb. 3, 1986" (1986) 27 Harv. Int'l L.J. 761.

96 *Ibid.*

citizen confined to a wheelchair, and threw him overboard.[97] Eventually, the hijackers surrendered to a representative of the Palestine Liberation Organization (PLO) in Egypt.[98]

The pilot of the Egyptian aircraft reported that the U.S. Navy jets threatened to shoot the aircraft down unless he followed them to Italy.[99] Tunisia and Greece both refused permission for the Egypt Air flight to land in their territory after it was intercepted by the U.S. Navy jets.[100]

Publicly, at least, Egypt denounced the interception as an act of piracy "unheard of under any international law or code," and demanded that the United States make a public apology for the interception.[101] However, Egypt did not file a complaint with the ICAO. The United States in justification of its act claimed that the interception was directed against known terrorists and was based on highly reliable intelligence concerning their movements.[102] In a letter to International Federation of Airline Pilots' Associations dated November 13, 1985, the U.S. government wrote

> it is our view that the aircraft was operating as a state aircraft at the time of the interception. The relevant factors – including exclusive State purpose and function of the mission, the presence of armed military personnel on board and the secrecy under which the mission was attempted – compel this conclusion.[103]

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97 *Ibid.* at 761 n. 5.

98 *Ibid.* at 761.

99 *Ibid.* at 762 n. 15.

100 *Ibid.* at 762 n. 9.

101 *Ibid.* at 763.

102 *Ibid.* at 762-63.

103 ICAO, *Civil/State Aircraft*, *supra* note 95 at ¶ 4.8.3 (1).

*Libyan Arab Airlines*

On February 4, 1986, four months after the interception of the Egypt Air aircraft, Israeli fighters diverted a Libyan Arab Airlines aircraft over the Mediterranean Sea, forcing it to land in Israel where it was searched for seven hours before being permitted to resume its journey.[104] The civil aircraft was on an unscheduled flight from Tripoli to Damascus when it was intercepted east of Cyprus, 70 miles from the coast of Israel.[105]

The Israelis believed the aircraft was carrying top Palestinian leaders, whereas the only passengers on board were seven Syrian politicians and two low-ranking Lebanese militia officials.[106] When Libya brought the matter before the ICAO, Israel attempted to justify the interception on the ground that the Palestinians thought to be on board the Libyan aircraft were involved in "planning" attacks against Israel; Israel did not defend the interception as an attempt to capture known perpetrators.[107] On February 28, 1986, the ICAO Council condemned Israel for intercepting and diverting the Libyan Arab Airlines aircraft in international airspace, after determining the action violated the Chicago Convention.[108]

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[104] *Ibid.* at ¶ 4.8.3 (2); Borkowski, *supra* note 95 at 763.

[105] *Ibid.* at 763 n. 28.

[106] *Ibid.* at 763.

[107] *Ibid.* at 764.

[108] ICAO, *Civil/State Aircraft*, *supra* note 95 at ¶ 4.8.3 (2).

# CHAPTER II.

## THE LEGAL REGIME OVER THE HIGH SEAS

The contemporary law of the sea consists of a highly developed set of international rules that are binding on all nations. This law derives primarily from the extensive and generally uniform practice of states. These customary rules were codified in the 1982 U.N. Convention on the Law of the Sea (UNCLOS),[109] the most comprehensive and important codification to date in international law. The Convention not only reaffirms the traditional law and customs of the sea, but it also contains important elements of "progressive development of international law," envisioned under Article 13 of the U.N. Charter.[110] To date, the UNCLOS has been ratified by 149 states, including the major maritime nations, except the United States.[111]

Though the United States took an active role in the drafting of the Convention, it did not sign or ratify it, because it objected to the provisions concerning deep seabed mining in Part XI.[112] However, the United States accepts the remaining provisions as reflecting either

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[109] *UNCLOS*, *supra* note 84. Efforts to codify the law of the sea took place in Geneva in 1958, which resulted in four conventions, one of which is the Convention on the High Seas. *Convention on the High Seas*, 29 April 1958, 450 U.N.T.S. 82 [*HSC*]. In the Preamble, the High Seas Convention purports "to codify the rules of international law relating to the high seas." The United States has ratified it.

[110] For a summary of these developments, see Michael Milde, "United Nations Convention on the Law of the Sea—Possible Implications for International Air Law" (1983) 8 Annals of Air & Space L. 167 at 172-75 [Milde, "Possible Implications"].

[111] U.N., *Status of the United Nations Convention on the Law of the Sea, of the Agreement relating to the implementation of Part XI of the Convention and of the Agreement for the implementation of the provisions of the Convention relating to the conservation and management of straddling fish stocks and highly migratory fish stocks* (as of 28 April 2006), online: United Nations <www.un.org/depts/los/reference_files/status2006.pdf>.

[112] U.S., The White House, *United States Ocean Policy* (10 March 1983), reprinted in 22 I.L.M. 464.

customary international law or an appropriate "balance of interests" worthy of recognition.[113] The United States thus observes the UNCLOS, except for the provisions in Part XI, and it has worked "both diplomatically and operationally to promote the provisions of the Convention as reflective of customary international law."[114] The current law of the sea provides stability in international relations while meeting the needs of an increasingly interdependent world.[115]

Because the development of customary international law is a decentralized process, a state must in principle consent to a new norm to be bound by it. In practice, every state's consent is presumed during the formation of a new norm.[116] To avoid being bound by the new rule, a state must actively and persistently object to it.[117] Such opposition can be difficult and costly, politically and financially, prompting even a superpower like the United States to occasionally relent. For example, until at least 1980, the United States consistently refused to recognize territorial sea claims in excess of three miles when the overwhelming majority of other states claimed up to 12 miles.[118] By 1988, the United States publicly

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[113] On March 10, 1983, President Ronald Reagan announced that the United States accepted the UNCLOS and would immediately adhere to it, except for the provisions in Part XI. *Ibid.* at 464.

[114] William H. Taft IV, Legal Advisor, U.S. Department of State, "Written Statement Before the Senate Armed Services Committee on April 8, 2004, Concerning Accession to the 1982 Law of the Sea Convention and Ratification of the 1994 Agreement Amending Part XI of the Law of the Sea Convention" (addressing national security aspects of the Convention), online: U.S. Senate <http://armed-services.senate.gov/statemnt/2004/April/Taft.pdf>.

[115] U.S., Department of the Navy, *The Commander's Handbook on the Law of Naval Operations* (NWP 1-14M) (October 1995) at 22 (stating that international law provides "expectations that certain acts or omissions will effect predictable consequences") [*Commander's Handbook*].

[116] R. R. Churchill & A. V. Lowe, *The Law of the Sea*, 3rd ed. (Manchester: Manchester U. Press, 1999) at 9; see also Brownlie, *supra* note 38 at 11 (discussing the persistent and subsequent objector).

[117] Churchill & Lowe, *supra* note 116 at 8.

[118] *Ibid.*

announced that every state could clam a 12-mile territorial sea and accordingly extended its own territorial sea to 12 nautical miles from its baseline.[119]

The importance of customary rules to U.S. forces cannot be overstated. The legal regime of the high seas forms the legal foundation for the global mobility of U.S. forces and is, for this reason, of paramount importance to U.S. national security.[120] The most important principle of the law of the sea is the principle of freedom of passage over the high seas, a principle that "applies in time of war or armed conflicts as well as time of peace."[121] This principle, however, was not always the rule.

In the 15th and 16th centuries, several states laid sovereign claims over vast areas of the oceans,[122] with some levying tolls as a condition of passage through the seas under their control.[123] In 1493, for example, Pope Alexander VI purported to divide the Atlantic Ocean between Spain and Portugal.[124] With the rise of international trade between states in the 17th century, maritime powers were unable to sustain their claims to sovereignty over the seas.[125] By the 18th and 19th centuries, a *laissez-faire* legal regime dominated the high seas.[126] However, in the past century, states have developed a capacity to exert more control over the oceans to enhance their security, to exploit the ocean's resources, and to control pollution and

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[119] U.S., Presidential Proclamation No. 5928 (27 December 1988), 54 Fed. Reg. 777.

[120] Byers, *supra* note 85 at 527.

[121] Brownlie, *supra* note 38 at 225.

[122] Myres S. McDougal & William T. Burke, *The Public Order of the Oceans: A Contemporary International Law of the Sea* (New Haven: Yale U. Press, 1962) at 766 [McDougal & Burke].

[123] Churchill & Lowe, *supra* note 116 at 204.

[124] McDougal & Burke, *supra* note 122 at 765; Churchill & Lowe, *supra* note 116 at 204.

[125] Churchill & Lowe, supra note 116 at 204-05.

[126] *Ibid.* at 2, 205.

over-fishing.[127] The result has been an increase in the breadth of each state's territorial sea from three to 12 nautical miles,[128] and in the recognition of "exclusive economics zones" extending up to 200 nautical miles from shore.[129]

Nevertheless, the cornerstone of modern international law governing the high seas continues to be anchored in two fundamental principles, namely, that the high seas are 'open' to all states[130] and that no state may validly purport to subject any part of it to its 'sovereignty.'[131] The practical consequence of these principles is that all states may freely use the high seas for any lawful purpose without interference from other states.[132] In effect, no state may prevent the ships and the aircraft of other states from using the high seas for any 'lawful purpose'.[133]

## A. The Freedom of Overflight

The UNCLOS provides that all states may enjoy at least six freedoms on the high seas.[134] Along with the freedom of navigation,[135] the principal and most important freedom

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127 *Ibid.* at 205.

128 *UNCLOS, supra* note 84 at art 3.

129 *Ibid.* at art. 57.

130 *Ibid.* at art. 87; *HSC, supra* note 109 at art. 2.

131 *UNCLOS, supra* note 84 at art. 89; *HSC, supra* note 109 at art. 2.

132 Churchill & Lowe, *supra* note 116 at 203.

133 *Ibid.* at 204.

134 *UNCLOS, supra* note 84 at art 87.1.

135 In the *Nicaragua* case, the International Court of Justice declared that the Convention's provisions regarding freedom of navigation in territorial waters, the exclusive economic zone, and on the high seas were customary international law. *Nicaragua, supra* note 60 at 111-112 ¶¶ 213-14.

is that of overflight.[136] It is the least disputed freedom[137] and may be enjoyed anywhere above the high seas.

It is important to stress that the UNCLOS does not include the exclusive economic zone in its definition of the 'high seas,'[138] but it does provide that all states may enjoy the freedoms of navigation and overflight in the exclusive economic zones of other states.[139] For purposes of these freedoms, the legal regime of the 'high seas' applies to all parts of the sea not included in the territorial sea or in the internal waters of a State.[140] In keeping with this understanding, the U.S. *Commander's Handbook* defines 'international waters' as "all ocean areas *not* subject to the territorial sovereignty of any nation," which include contiguous zones, exclusive economic zones, and the high seas.[141]

Some coastal states have claimed the right to establish security zones beyond their territorial sea in which they purport to exclude or regulate the activities of foreign warships and military aircraft in those zones.[142] International law does not recognize the right of coastal nations to restrict the exercise of non-resource-related high seas freedoms beyond the territorial sea.[143] On the other hand, states may establish Air Defense Identification Zones (ADIZ) in the international airspace adjacent to their territorial airspace for purposes of

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136 McDougal & Burke, *supra* note 122 at 782.

137 *Ibid.* at 785; Milde, "Possible Implications," *supra* note 110 at 180 ("[T]here is no clear record of any fundamental international disagreement with respect to those provisions of the Convention which relate to the right of navigation and overflight in the different jurisdictional zones of the seas.").

138 *UNCLOS*, *supra* note 84 at art. 86.

139 *Ibid.* at arts 58, 86.

140 *Ibid.*

141 *Commander's Handbook*, *supra* note 115 at 1-6 (emphasis in original).

142 *Ibid.* at ¶ 1.5.4.

143 *Ibid.*

regulating the admission of aircraft into its territory in the interest of national security.[144] Aircraft intending to enter a state's territorial airspace may be required to file detailed flight plans and to identify themselves while in international airspace before penetrating the ADIZ.[145] International law permits states to establish reasonable conditions of entry into their territorial airspace, provided that the conditions are applied to the aircraft of all contracting states "without distinction" as to their nationality.[146] Foreign aircraft not intending to enter a state's territorial airspace need not comply with the coastal state's ADIZ requirements.[147]

## B. The Exclusivity of Flag-State Jurisdiction

For centuries, states have had the exclusive competence to prescribe regulations for their own ships,[148] and, more recently, for their own aircraft.[149] But states could not, unless specially permitted by international law, exercise jurisdiction over the ships of other states.[150] Ships are thus generally subject to the exclusive jurisdiction of the state where they are registered.[151] For this reason, every ship must bear the nationality of some state and sail under the flag of that state only.[152] Each state in turn has certain obligations concerning its

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144 *Ibid.* at ¶ 2.5.2.3.

145 See e.g., U.S., *Security Control of Air Traffic,* 14 C.F.R. §§ 99.11 & 99.15 (2006) (requiring aircraft intending to enter U.S. airspace to identify themselves at least 15 minutes before penetrating the U.S. ADIZ and to make position reports one to two hours cruising time from the United States).

146 *Chicago Convention, supra* note 83 at art. 11.

147 *Commander's Handbook, supra* note 115 at ¶ 2.5.2.3.

148 McDougal & Burke, *supra* note 122 at 798.

149 See *e.g.*, U.S., *Special Maritime and Territorial Jurisdiction of the United States,* 18 U.S.C. § 7 (2006) (extending U.S. jurisdiction to U.S. aircraft and vessels).

150 *Ibid.*

151 *UNCLOS, supra* note 84 at art. 92(1); *HSC, supra* note 109 at art. 6(1).

152 *UNCLOS, supra* note 84 at art. 92(1); *HSC, supra* note 109 at art. 6(1).

ships, including fixing the conditions under which a ship may acquire its nationality,[153] maintaining a register of ships,[154] and taking measures to ensure the seaworthiness and safety of its ships.[155]

The principle of exclusive jurisdiction of the state of nationality applies *mutatis mutandis* to aircraft. Every aircraft must be registered in some state and bear its nationality.[156] States must also ensure that their aircraft will comply with the rules and regulations in force wherever the aircraft may be;[157] states are also required to issue certificates of airworthiness for their aircraft and to provide licenses for the crews of those aircraft.[158] The state of registry has jurisdiction over offenses committed on board its aircraft.[159] While on or over the high seas, both ships and aircraft are treated as a portion of the territory of the state whose nationality they have.

In this respect, the 1927 decision of the Permanent Court of International Justice in the *Lotus* case is instructive.[160] The French ship *Lotus* collided on the high seas with a Turkish vessel, sinking it. Although several shipwrecked Turkish nationals were rescued, including its captain, eight of its crew were lost at sea. After the *Lotus* arrived in Constantinople, Turkish authorities conducted an inquiry and arrested both the Turkish

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153 *UNCLOS*, *supra* note 84 at art. 91(1); *HSC*, *supra* note 109 at art. 5.

154 *UNCLOS*, *supra* note 84 at art. 94(2).

155 *Ibid.* at art. 94(3); *HSC*, *supra* note 109 at art. 10.

156 *Chicago Convention*, *supra* note 83 at arts. 17 & 18.

157 *Ibid.* at art. 12.

158 *Ibid.* at arts. 31 & 32.

159 *Convention on Offenses and Certain Other Acts Committed on Board Aircraft*, 14 September 1963, 704 U.N.T.S. 219, 20 U.S.T. 2941, at art. 3 [*Tokyo Convention*].

160 *S.S. "Lotus" (France v. Turkey)*, (1927) P.C.I.J. (Ser. A) No. 10 at 18-19 [*Lotus*].

captain and the French officer of the watch at the time of the collision. Turkish authorities then prosecuted the Turkish captain and the French officer together for involuntary manslaughter. France objected to Turkey's assertion of penal jurisdiction over the French officer as being contrary to international law. Turkey agreed to submit the matter to the Permanent Court for its judgment.

Despite considerable evidence of state practice supporting the principle of exclusive flag-state jurisdiction, the Court upheld Turkey's assertion of concurrent penal jurisdiction. The Court acknowledged that, apart from certain special cases which are defined by international law, "vessels on the high seas are subject to no authority except that of the State whose flag they fly" and that "no State may exercise any kind of jurisdiction over foreign vessels upon them."[161] Because vessels are placed in the same position as national territory, "a ship on the high seas is assimilated to the territory of the State the flag of which it flies."[162] Under international law, the perpetrator of an offense is subject to the jurisdiction of the state where the offense is committed, even if the perpetrator was in the territory of a different state "at the moment of its commission:"[163]

> If, therefore, a guilty act committed on the high seas produces its effects on a vessel flying another flag or in foreign territory, the same principles must be applied as if the territories of two different States were concerned, and the conclusion must therefore be drawn that there is no rule of international law prohibiting the State to which the ship on which the effects of the offense have taken place belongs, from regarding the offense as having been committed in its territory and prosecuting, accordingly, the delinquent.[164]

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[161] *Ibid.* at 25.

[162] *Ibid.*

[163] *Ibid.* at 23.

[164] *Ibid.* at 25.

The Court's analysis is the same as would apply today in a non-maritime context; if, for example, a person in France had fired a weapon across the border with Germany, fatally wounding another individual, both Germany and France would have jurisdiction over the incident. Though it upheld Turkey's concurrent jurisdiction, the Court was careful to reinforce the principle of exclusive flag-state jurisdiction:

> Thus, if a war vessel, happening to be at the spot where a collision occurs between a vessel flying its flag and a foreign vessel, were to send on board the latter an officer to make investigations or to take evidence, such an act would undoubtedly be contrary to international law.[165]

Turkish officials boarded the *Lotus* and arrested the French officer only after the *Lotus* had entered Turkey's territorial sea and docked in Constantinople. The *Lotus* decision is much criticized for permitting Turkey to exercise its jurisdiction over the French officer,[166] and it has since been superseded by the 1958 High Seas Convention and the UNCLOS.[167] Hence, even in cases involving a collision, crew members of a ship are today subject only to the exclusive jurisdiction of the ship's state of nationality.

Similarly, while the interception of foreign aircraft over the high seas may be legitimate, it nevertheless interferes with the integrity and political independence of the aircraft's state of registry. For this reason, the 1985 interception of Egypt Air Flight MS 2843 by the United States and the 1986 interception of Libyan Air Flight by Israel each impinged on the sovereignty of Egypt and Libya.[168] This conclusion follows from the

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[165] *Ibid.*

[166] Churchill & Lowe, *supra* note 116 at 208.

[167] *UNCLOS*, *supra* note 84 at art. 97(1) & (3); *HSC*, *supra* note 109 at art. 11(1) & (3).

[168] Borkowski, *supra* note 95 at 765.

reasoning employed by the Permanent Court of International Justice in the *Lotus* case where the Court stated that, for purposes of a state's assertion of criminal jurisdiction, its vessel on the high seas is assimilated to a portion of its territory. An aircraft is similarly assimilated to a portion of the territory of its state of registry. Any interference with the aircraft's flight is a violation of the sovereignty of its state of nationality.

The exclusivity of flag-state jurisdiction applies to some extent within the territorial waters and airspace of other nations. For example, the UNCLOS provides that the coastal state should not exercise its criminal jurisdiction on board a foreign ship over offenses committed on the foreign ship during its passage through the coastal state's territorial waters unless the consequences of the crime extend to the coastal state, or the offense disturbs the good order of the territorial sea, or in suppression of the illicit traffic of narcotic drugs.[169] The Tokyo Convention similarly prohibits the territorial state from interfering with a foreign civil aircraft in flight over its airspace unless the offense has an effect on the territorial state, or it has been committed by or against a national or a permanent resident of the territorial state, or it affects the good order of the territorial state's airspace.[170] Thus Article 4 of the Tokyo Convention restricts the "unencumbered sovereign power" a state may have traditionally exercised over its own airspace.[171] The Tokyo Convention implicitly recognizes that, unless an offense on board an aircraft affects the territorial state in some manner, the

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[169] *UNCLOS*, *supra* note 84 at art. 27; *Convention on the Territorial Sea and the Contiguous Zone*, 29 April 1958, 516 U.N.T.S. 205, at art. 19.

[170] *Tokyo Convention*, *supra* note 159 at art. 4. For a discussion of the application of Article 4 of the Tokyo Convention over the high seas, see Chapter III.D, *infra*.

[171] Sami Shubber, *Jurisdiction over Crimes On Board Aircraft* (The Hague: Martinus Nijhoff, 1973) at 86 n. 128.

territorial state should have "little or no interest at all in exercising jurisdiction over an offence committed, perhaps at a height of 40,000 feet, on [a foreign] aircraft cruising at a speed of, perhaps, 500-600 miles per hour."[172]

However, all merchant ships entering ports and civil aircraft upon landing are subject to the laws of the state in whose territory they enter for purposes of safety, security, customs, immigration, and quarantine. They may be intercepted and boarded for inspection by local officials to ensure compliance with local law.[173]

## C. The 'Rules of the Air'

Whereas every state enjoys the freedom of overflight and navigation over the high seas, international law also requires that each state exercising its freedoms show 'due regard' or 'reasonable regard' for the interests of other states.[174] The rapid growth of international civil aviation and maritime shipping has created the need for international rules governing the safe use of the international airspace and the high seas. To this end, two specialized agencies of the United Nations have adopted basic highway codes to prevent collisions: one for the airspace over the high seas and the other for the surface and subsurface of the high seas.[175] The International Maritime Organization has adopted rules for the navigational safety of surface and subsurface vessels contained in the International Regulations for

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[172] *Ibid.* at 100.

[173] However, local officials have no such authority with respect to warships and military aircraft. See Chapter III, *infra.*

[174] *UNCLOS*, *supra* note 84 at art. 87(2) (due regard); *HSC*, *supra* note 109 at art. 2 (reasonable regard).

[175] Michael Milde, "Status of Military Aircraft in International Law" (Lecture presented to the Third International Law Seminar, Singapore, 29 August 1999) at 160-61 [Milde, "Status of Military Aircraft"].

Preventing Collisions at Sea, known formally as the 'International Rules of the Road.'[176] The ICAO has likewise adopted the 'Rules of the Air' to promote the safety of air navigation.[177] 'Rules of the Air' apply without exception to international airspace as well as to the "highest practicable degree" in the sovereign airspace above every state.[178]

The 'Rules of the Air' have been eminently successful in facilitating the safe and orderly development of international civil aviation. Although the rules are not compulsory for state aircraft,[179] they have been a great benefit to U.S. forces overseas. The *Commander's Handbook* acknowledges their value to military aircraft:

> The same standardized technical principles and policies of ICAO that apply in international and most foreign airspace are also in effect in the continental United States. Consequently, U.S. pilots can fly all major international routes following the same general rules of the air, using the same navigation equipment and communication practices and procedures, and being governed by the same air traffic control services with which they are familiar in the United States.[180]

For this reason, U.S. military aircraft follow ICAO flight procedures on routine point-to-point flights through international airspace" as a matter of policy.[181]

The binding nature of these rules over the high seas is derived from Article 12 of the Chicago Convention: "Over the high seas, the rules in force shall be those established under

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[176] *Commander's Handbook, supra* note 115 at ¶ 2.7.1. These rules have been adopted as law by the United States. See *International Regulations for Preventing Collisions at Sea,* 33 U.S.C. §§ 1601-1606 (2006).

[177] ICAO, *International Standards, Rules of the Air,* Annex 2 to the Convention on International Civil Aviation (9th ed. July 1990) [Annex 2].

[178] *Chicago Convention, supra* note 83 at art. 37. For a discussion of a state's obligation to comply with a standard to the "highest practicable degree," see text accompanying notes 190 – 192.

[179] See Chapter IV, *infra.*

[180] *Commander's Handbook, supra* note 115 at 2.7.3.

[181] U.S., Department of Defense Directive 4540.1, *Use of Airspace by US Military Aircraft and Firings Over the High Seas,* (13 January 1981) (certified current as of 8 December 2003) at ¶ 5.3.1 [DoDD 4540.1]; *Commander's Handbook, supra* note 115 at 2.5.2.2.

this Convention."[182] The Convention assigns the responsibility of adopting international standards and recommended practices contained in the 'Rules of the Air' to the organization's executive body—the ICAO Council.[183] The Council's power to adopt rules that are binding *erga omnes* necessarily corresponds to the surrender by every state of a nominal portion of its sovereignty over the exclusive control of its aircraft over the high seas. In the words of Professor Michael Milde:

> It is a unique feature in international law-making that an executive body of an international organization can legislate by a two-thirds majority vote with binding effect for all 156 [now 189] contracting States with respect to the Rules of the Air applicable over the high seas which cover some 70 percent of the surface of the earth.[184]

The ICAO Council has by and large succeeded in adopting the 'Rules of the Air' without controversy, despite its plenary authority to do so over the objection of any contracting state.

In practice, a majority of states have never registered their disapproval of an Annex. This is not surprising in light of the frequent consultations between the ICAO's Air Navigation Commission, the Council, and other interested contracting states.[185] Though

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[182] *Chicago Convention, supra* note 83 at art. 12 (providing that "[e]ach contracting state undertakes to ensure the prosecution of all persons violating the regulations applicable").

[183] *Ibid.* at arts. 37(c) & 54(l).

[184] Michael Milde, "Interception of Civil Aircraft vs. Misuse of Civil Aviation (Background of Amendment 27 to Annex 2)" (1986) 11 Annals of Air & Space L. 105, 106 [Milde, "Misuse of Civil Aviation"].

[185] For an appreciation of this phenomenon, a brief introduction into the ICAO organizational structure and lawmaking process would be instructive. The ICAO is composed of an Assembly, a Council, and other bodies. *Chicago Convention, supra* note 83 at art. 43. All contracting states are represented in the Assembly and each state has one vote within it. *Ibid.* at art. 48(b). The Assembly meets every three years to elect the Council, which consists of representatives from 36 of the contracting states. *Ibid.* at arts. 49(b) & 50 (a). The Council, in turn, appoints 15 members of the Air Navigation Commission, all of whom must be experts in aeronautics. *Ibid.* at art 56. The experts on the Air Navigation Commission study the issues and propose international standards and recommended practices to the Council for its consideration. *Ibid.*

ICAO standards and recommended practices are not technically part of the Convention itself, they are annexes to it, and, hence, over the high seas they are binding without exception and in territorial airspace they are legally binding under the Convention to the "highest practicable degree."[186]

## D. The Applicability of Standards Without Exception over the High Seas

The 'Rules of the Air' are contained in Annex 2. This Annex is unique in that it contains only standards and no recommended practices.[187] A *standard* is defined as any specification "the uniform application of which is recognized as *necessary* for the safety or regularity of international air navigation."[188] By contrast, a *recommended practice* means a specification "the uniform application of which is recognized as *desirable* in the interests of safety, regularity, or efficiency of international air navigation."[189] Every state has an obligation to comply with international standards to the "highest practicable degree."[190] Of course, this obligation depends upon the state's ability to do so. Some states lack the

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at arts. 54(m) & 57. If a contracting state is not represented on the Council, it may still participate "without a vote" in the Council's consideration of "any question which especially affects its interests." *Ibid.* at art. 53. The Council must vote to adopt or amend a standard or a recommended practice by a two-thirds vote at a meeting called for that purpose. *Ibid.* at art. 90. This requirement of a two-thirds vote is the primary check on the Council's lawmaking power. For convenience, the adopted international standards and recommended practices are included in Annexes to the Convention. *Ibid.* at art. 54(l). After the Council votes to adopt or modify a standard or recommended practice within an Annex, the Annex is then submitted to all ICAO member states to allow them the opportunity to register their disapproval with the Council. *Ibid.* at art. 90. Unless a majority of the contracting states register their disapproval with the Council, the Annex will come into force within three months of its submission to them. *Ibid.* The Council may also grant member states a longer period of time in which to register their disapproval. *Ibid.* Hence, the contracting states collectively retain an important institutional check on the Council's lawmaking authority, though they may not be represented on the Council. Bin Cheng, *The Law of International Air Transport* (London: Stevens & Sons, Ltd, 1962) at 115-16.

186 See *Chicago Convention*, *supra* note 83 at art 37.

187 Milde, "Status of Military Aircraft," *supra* note 175 at 161.

188 Annex 2, *supra* note 177 at *vi.*

189 *Ibid.*

190 *Chicago Convention*, *supra* note 83 at art. 37.

resources, the technology, or the expertise to comply with certain standards. When a regulation is beyond the power of a state to comply with it, international law does not require the state to do the impossible, or, as it is said, *ultra posse nemo tenetur.*

If a state "finds it impracticable to comply in all respects with any such international standards or procedure," the state shall immediately file a 'difference' with the ICAO, notifying it of "the differences between its own practice and that established by the international standard."[191] The ICAO will then immediately notify the other states of this 'difference.' Thus, if uniformity of standards cannot be achieved over a state's territory, at least the other contracting states will know where the differences lie in that state's territory.

Though the Convention permits states to file a "difference" with respect to their own territorial airspace, no state may file a "difference" with respect to the 'Rules of the Air,' because these rules apply over the high seas without exception.[192] If civil aircraft are unable to comply with the 'Rules of the Air,' then those civil aircraft cannot legally use the airspace over the high seas. Hence, the ICAO Council's legislative authority to enact international standards which bind all 189 contracting states, and from which no "difference" can be filed in their application over the high seas, is a welcome innovation in public international law. Aviation, as an international enterprise, needs uniform standards to thrive. At the same time, uniform standards can make the interception of civil aircraft over the high seas safer and simpler.

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[191] *Ibid.* at art. 38. Because recommended practices are merely regarded as desirable, states are invited, but not required, to notify the ICAO of departures from recommended practices. Cheng, *supra* note 185 at 70.

[192] Annex 2, *supra* note 177 at § 2.1.1 [explanatory] note.

## E. The Criterion of Reasonableness

The two dominant principles of the legal regime over the high seas—the freedom of the high seas and exclusive flag-state jurisdiction—are each accompanied by their own separate problems. Every freedom, especially that of overflight, gives rise to competing claims and conflicting uses, each demanding protection in the name of freedom of the high seas.[193] These claims and uses, in turn, create the need for rules governing the safe use of the international airspace. In general, decision-makers must, on a case-by-case basis, apply the criterion of reasonableness to ensure that the most deserving use of the high seas is realized.[194] For instance, not all areas over the ocean are of equal importance for international air transport.[195] International air transport should therefore almost always be accorded privileged status over certain parts of the high seas. Other parts of the high seas may occasionally, for limited periods of time, be used for military exercises to the exclusion of civil air transport. This limitation on the freedom of the high seas is at least a century old and has probably acquired the status of a customary rule.

However, the exclusivity of flag-state jurisdiction detracts from the public order of the oceans even as it contributes to it: "If a ship on the high seas can only be called to order by its own national authorities as regard the proper use of the high seas, the resulting situation is far from satisfactory and definitely prejudicial to the general interests."[196] Though the UNCLOS and the Chicago Convention are comprehensive, they are not all-

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[193] McDougal & Burke, *supra* note 122 at 783.

[194] *Ibid.* at 784.

[195] *Ibid.*

[196] *Ibid.* at 797 (quoting Professor Gidel).

encompassing;[197] the law of armed conflict and other norms of international law are also relevant when discussing the legal regime of the high seas. In addition, the application of the written rules is always subject to the test of reasonableness.

[197] *Ibid.*; Milde, "Possible Implications," *supra* note 110 at 181.

# CHAPTER III.

## THE LEGAL STATUS OF MILITARY AIRCRAFT UNDER INTERNATIONAL LAW

### A. Sovereign Immunity of Military Aircraft

Warships enjoy a unique position in international law. In time of peace, warships of every nation are immune from the jurisdiction of all other states, even when they are in the territory of those other states.[198] Although all ships, including warships, must comply with certain rules regarding innocent passage,[199] police and port authorities of another state may not board or inspect a warship without the permission of the commanding officer.[200] A coastal state may also not seize or arrest a warship; it may only order the unwelcome warship to leave its territorial sea immediately.[201]

Military aircraft have the legal status as warships. As Milde observes, states have always been "openly hostile to the idea that their military aircraft – tools and symbols of their military power, sovereignty, independence and prestige – should be subject to [foreign or] international regulation."[202] Local officials may not board the military aircraft of another state without the consent of the aircraft commander.[203] The territorial sovereign may not arrest or seize foreign military aircraft lawfully in its territory, but it may order it to promptly

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198 *UNCLOS, supra* note 84 at arts. 95 & 110(4) (applying its provisions *mutatis mutandis* to military aircraft).

199 *UNCLOS, supra* note 84 at arts. 17-26.

200 *Commander's Handbook, supra* note 115 at ¶ 2.1.2.

201 *UNCLOS, supra* note 84 at art. 30; *Commander's Handbook, supra* note 115 at ¶ 2.1.2.

202 Milde, "Status of Military Aircraft," *supra* note 175 at 153.

203 *Ibid.* at ¶ 2.2.2.

leave.[204] According to Professor John Cobbs Cooper, the chairman of the committee who drafted and reported Article 3 of the Chicago Convention:

> It is felt that the rule stated in the Paris Convention that aircraft engaged in military services should, in the absence of stipulation to the contrary, be given the privileges of foreign warships when in national port is sound and may be considered as still part of international air law even though not restated in the Chicago Convention.[205]

Of course, different rules apply to military aircraft unlawfully in foreign sovereign airspace or territory.[206] Under international law, military aircraft are prohibited from flying in a foreign nation's airspace or landing in its territory without special permission.[207]

## B. 'Civil Aircraft' versus 'State Aircraft'

Article 3(a) of the Chicago Convention declares that the Convention applies only to civil aircraft and not to state aircraft.[208] The main drawback for states of having their aircraft subject to the Chicago Convention is that foreign officials would have the right to board and search their aircraft on landing and departure, and could demand to see the aircraft's certificates and other documents required by the Convention.[209] However, states are not

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[204] Milde, "Status of Military Aircraft," *supra* note 175 at 156.

[205] John Cobb Cooper, "A Study on the Legal Status of Aircraft" in Ivan A. Vlasic, ed., *Explorations in Aerospace Law* (Montreal: McGill U. Press, 1968) 205 at 243.

[206] See *e.g.*, Oliver J. Lissitzyn, "The Treatment of Aerial Intruders in Recent Practice and International Law" (1953) 47 Am. J. Int'l L. 559.

[207] *Chicago Convention*, *supra* note 83 at art. 3(c).

[208] *Ibid.* at art 3(a).

[209] *Ibid.* at art. 16. For a list of required documents, and prohibited cargo and apparatus, see Articles 29- 36.

likely to submit their military aircraft to external control solely to permit them to benefit from the privileges afforded by the Chicago Convention.[210]

The only provision in the Chicago Convention to address the distinction between civil aircraft and state aircraft is contained in Article 3(b), which states, "[a]ircraft used in military, customs and police services shall be deemed to be state aircraft." As several commentators have observed, because of the word "deemed," Article 3(b) is not a definition of state aircraft.[211] It merely provides a rebuttable presumption that an aircraft *used* in certain activities at a particular time will be *deemed* to be a state aircraft.[212] According to the commentators, the presumption applies to the nature of the flight and not to the aircraft itself.[213] It is not based on the aircraft's design or technical characteristics, call sign, registration, or markings—all of which fall within the competence of its state of nationality. The Convention thus adopts a functional approach for the determination of its character as a

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[210] Civil aircraft enjoy significant rights under the Convention. Non-scheduled civil aircraft do not need permission from a contracting state to fly over or to make stops for non-traffic purposes in its territory. *Chicago Convention*, *supra* note 83 at art. 5. State aircraft, on the other hand, are prohibited from flying over or landing in foreign territory without special permission. *Ibid.* at art. 3(c). Contracting states must assist civil aircraft in distress in their territory, and they must permit the aircraft's owners or state of registry to do the same. *Ibid.* at art. 25. States owe no such duty to foreign state aircraft. Civil aircraft enjoy protection against weapons recognized in Article 3 *bis* of the Convention, whereas state aircraft that stray over foreign territory can be shot down. Lissitzyn, *supra* note 206. If a civil aircraft has a mishap, the state of registry has a right to appoint observers to be present at the investigation of an accident and it has a right to receive a copy of the report and its findings. *Chicago Convention*, *supra* note 83 at art. 26. There is no such right for state aircraft. None of the aviation security instruments apply to state aircraft. Hence, contracting states are not obligated to take appropriate measures to restore control of an unlawfully seized state aircraft to its commander, or to prosecute or extradite anyone who had tried to hijack or sabotage a state aircraft. See Chapter IV.D, *infra.*

[211] Milde, "Status of Military Aircraft," *supra* note 175 at 161; Michel Bourbonniere & Louis Haeck, "Military Aircraft and International Law: Chicago Opus 3" (2000-2001) 66 J. Air L. & Com. 885 at 896 [Bourbonniere & Haeck]; Chester D. Taylor, "International Flight of Military Aircraft in Peacetime: A Legal Analysis" (1968) 28 Fed. B.J. 36 at 48.

[212] ICAO, *"Civil/State Aircraft" supra* note 95 at ¶ 5.1.1; Milde, "Status of Military Aircraft," *supra* note 175 at 163; Bourbonniere & Haeck, *supra* note 211 at 826, Taylor, *supra* note 211 at 48.

[213] ICAO, *"Civil/State Aircraft" supra* note 95 at ¶ 5.3.2; Milde, "Status of Military Aircraft," *supra* note 175 at 163; Bourbonniere & Haeck, *supra* note 211 at 904; Taylor, *supra* note 211 at 48.

state aircraft.[214] If an aircraft is used in any of three activities—military, customs, or police services—it will be deemed to be a state aircraft. No more precise definition of military aircraft is provided.[215]

## C. Early Attempts to Define Military Aircraft

The Chicago Convention does not change the customary norms affecting the legal status of military aircraft.[216] Before the 1944 Convention was adopted, there were at least three efforts to define military aircraft in a written instrument. The first attempt was in 1910 at the Paris Conference.[217] Although the conference did not result in a convention, it produced several notable provisions. Article 40 defined public aircraft as "the aircraft employed in the service of the contracting State, and placed under the orders of a duly commissioned official of that State."[218] Article 41 required every military aircraft to bear the sovereign emblem of its state as its distinctive national mark.[219] In addition, Article 46 granted military aircraft the privilege of "extra-territoriality" if the aircraft was legitimately in or over the territory of a foreign state.[220] The members of crew were also granted the same privileges, provided that they wore "uniforms while forming a distinct unit or carrying out their duties." The Paris Conference thus furnished clear definitions of public aircraft and

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214 ICAO, *"Civil/State Aircraft" supra* note 95 at ¶ 5.3.2; Milde, "Status of Military Aircraft," *supra* note 175 at 163; Bourbonniere & Haeck, *supra* note 211 at 904; Taylor, *supra* note 211 at 48.

215 ICAO, *Civil/State Aircraft*, *supra* note 95 at ¶ 2.2.1.

216 Bourbonniere & Haeck, *supra* note 211 at 892.

217 Taylor, *supra* note 211 at 39.

218 *Ibid.*

219 *Ibid.*

220 *Ibid.*

military aircraft. If these provisions did not declare customary international law, then they helped form it.

The second effort to define military aircraft took place in 1919 with the signing of the Convention Relating to the Regulation of Aerial Navigation (Paris Convention),[221] the forerunner to the Chicago Convention. The Paris Convention asserted that aircraft "exclusively employed in State service," to include military aircraft, would be "deemed" to be public aircraft[222] and "[e]very aircraft commanded by a person in military service detailed for that purpose shall be *deemed* to be a military aircraft."[223]

In 1923, a third attempt to define military aircraft was made in the Proposed Rules for the Regulation of Aerial Warfare, drafted by Commission of Jurists at the Hague.[224] Although the Hague Rules were never adopted in a convention, they "have always had great weight as a sound statement of the rules of international air law applicable in time of war."[225] While Article 2 of the Hague Rules holds that military aircraft are to be "considered" as public aircraft, Article 3 provides that "[a] military aircraft must carry an exterior mark indicating its nationality and its military character."

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221 *Convention Relating to the Regulation of Aerial Navigation*, 13 October 1919, (1922) L.N.T.S. No. 297 at 173 (no longer in force) [*Paris Convention*].

222 *Ibid.* at art. 30.

223 *Ibid.* at art 31 (emphasis added).

224 *Hague Rules Concerning the Control of Wireless Telegraphy in Time of War and Air Warfare* (17 February 1923), Part II, at art. 3 [*Hague Rules of Aerial Warfare*], reprinted in Dietrich Schindler and Jiri Toman, *The Laws of Armed Conflict: A Collection of Conventions, Resolutions and Other Documents* 4th ed. (Leiden/Boston: Martinus Nijhoff Publishers, 2004) at 317 [Schindler & Toman].

225 John C. Cooper, "National Status of Aircraft" (1950) 17 J. Air L. & Com. 292 at 304; see also Schindler & Toman, *supra* note 224 at 315 ("The rules were never adopted in legally binding form, but are of importance 'as an authoritative attempt to clarify and formulate rules of law governing the use of aircraft in war.") (quoting Oppenheim/Lauterpacht, *International Law*, 7th ed Vol. II at 519).

Several commentators have suggested that the reluctance to define military aircraft in a conclusive manner is attributable to "the ease in which a civil aircraft can be converted to military use and vice versa."[226] However, it is suggested that the fuller explanation can be traced back to the end of World War I, when the Allies in the Peace Treaties of 1919 prohibited Germany from acquiring a military or naval air force.[227] The Allies believed that a formal definition of military aircraft had to be rejected if they were to keep Germany from obtaining a military aviation. For two years the Allies kept confiscating aircraft which they ruled as "military" but which Germany claimed to be "civil."[228] A commission was instructed to draw up rules to distinguish between the two types of aircraft. The commission originally reported that the task was impossible, "since civil aviation is very readily convertible to war purposes," but on further direction the commission drafted a set of regulations known as the "Nine Rules."[229] Eventually, the Allies recognized the manifest unfairness of imposing this set of regulations on German civil aviation, and the "Nine Rules" were abandoned as unworkable.[230]

The legal uncertainty concerning the definition of military aircraft (as well as other types of state aircraft) has since been perpetuated, at least in theory, by the inclusion of the definitional presumption in Article 3(b) of the Chicago Convention. The presumption was likely carried forward from the Paris Convention because the Chicago Convention was itself

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[226] Milde, "Status of Military Aircraft," *supra* note 175 at 155; Bourbonniere & Haeck, *supra* note 211 at 892.

[227] Milde, "Status of Military Aircraft," *supra* note 175 at 154; Taylor, *supra* note 211 at 44.

[228] Milde, "Status of Military Aircraft," *supra* note 175 at 154; Taylor, *supra* note 211 at 44.

[229] ICAO, *Civil/State Aircraft supra* note 95 at ¶ 2.1.3; Taylor, *supra* note 211 at 44.

[230] ICAO, *Civil/State Aircraft supra* note 95 at ¶ 2.1.3; Taylor, *supra* note 211 at 44.

adopted near the end of World War II. Hence, the lack of a clear definition stems from a futile attempt to deny a former enemy a military aviation program.

## D. The Need for Clarity

In 1993, the ICAO Council instructed the ICAO Secretariat to undertake a study on the interpretation of Article 3(b) on the subject of state and civil aircraft.[231] In its report, the ICAO Secretariat concluded that there are currently "no clearly generally accepted international rules, whether conventional or customary, as to what constitutes state aircraft and what constitute civil aircraft in the field of air law."[232] However, the Secretariat Study reaffirmed that "[t]he usage of the aircraft in question is the determining criterion [of a state aircraft]."[233]

The functional approach of Article 3 is unduly complicated. Professor Milde illustrates how the same aircraft under Article 3(b) may be a 'state/military aircraft' in one situation and a 'civil aircraft' in another:

> There is, e.g., an undocumented story of an unarmed F-18 piloted by a military officer cleared under a civil flight plan for flight to another country's civil airport to deliver a rare serum for a critically ill person – this would be an example of a humanitarian "mercy flight" and the aircraft could claim civil status... Another illustration of the possibly complicated status of the same aircraft is the case of USAF CT-43A (a military version of B-737-200), registration 31149 which crashed, on 3 April 1996, at Dubrovnik, Croatia; it carried VIP passengers and the Croatian accident investigation report

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[231] ICAO, Document 9630-LC/189, Legal Committee 29th Session Report, 4-15 July 1994 (Montreal, Canada), at para. 2.5

[232] ICAO, *Civil/State Aircraft*, *supra* note 95 at ¶ 1.1.

[233] *Ibid.* at ¶ 1.3.

> expressly recognized the aircraft as "civil aircraft in accordance with Article 3 of the Convention" and not "as a flight for military purposes."[234]

Moreover, the transport of restricted cargo does not automatically transform a civil aircraft into a state aircraft under the Chicago Convention. The Convention implicitly recognizes that civil aircraft, with permission, may transport munitions and implements of war above the territory of a foreign state.[235]

The absence of a formal definition of state aircraft can be problematic, making it difficult to determine the Convention's scope for a particular flight, and it may also create uncertainty for the crew itself. Several countries frequently charter civil aircraft to carry military personnel and equipment for military purposes. When this occurs, the chartered plane still carries its civilian markings, but the decision on how to characterize the aircraft's flight varies by nation. For instance, Canada gives such flights a military call sign and issues "special identification cards to the civilian crew in order to offer the protection of the Geneva Conventions," without which "the opposing belligerent forces could treat the civilian personnel as spies if captured."[236] On the other hand, the United States as a matter of policy normally does not designate the chartered aircraft as a state aircraft.[237] If the chartered aircraft operates as a civil aircraft, it must follow the ICAO Rules of the Air.

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[234] Milde, "Status of Military Aircraft," *supra* note 175 at 163 (footnote omitted).

[235] *Chicago Convention*, *supra* note 83 at art. 35. In fact, Article 35 invites states to give due consideration to such recommendations as ICAO may make from time to time on what constitutes munitions and implements of war. *Ibid.*

[236] Bourbonnniere & Haeck, *supra* note 211 at 905, n. 69 (citing Geneva Conventions I, II, III).

[237] *Commander's Handbook*, *supra* note 115 at 2.2.3.

## E. Prevailing State Practice

The United States defines military aircraft as "all aircraft operated by commissioned units of the armed forces of a nation bearing the military marking of that nation, commanded by a member of the armed forces, and manned by a crew subject to regular armed forces discipline."[238] This same clear definition of a military aircraft appears verbatim in the U.K *Manual of the Law of Armed Conflict*.[239] The definition mirrors the definition of a *warship* contained in the UNCLOS.[240]

> For the purpose of this Convention, 'warship' means a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed forces discipline.[241]

The definition of military aircraft contained in the U.S. *Commander's Handbook* and the U.K. *Manual* also appears verbatim in the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* published in 1994.[242] The *San Remo Manual* was prepared under the auspices of the International Institute of Humanitarian Law and is the most contemporary and comprehensive restatement of the law of warfare at sea.[243] It was produced by a group of international lawyers and naval experts in a series of roundtables

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238 *Commander's Handbook, supra* note 115 at 2.2.1.

239 U.K., Ministry of Defence, *The Manual of the Law of Armed Conflict* (New York: Oxford U. Press, 2004). at § 12.10 [U.K. Manual].

240 *UNCLOS, supra* note 84 at art. 29.

241 *Ibid.*.

242 International Institute of Humanitarian Law, *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (New York, Cambridge U. Press, 1995) [*San Remo Manual*] at ¶ 13(j).

243 *Ibid.* at preface; Louise Doswald-Beck, "The San Remo Manual on International Law Applicable to Armed Conflicts at Sea" (1995) 89 Am. J. Int'l Law 192 at 193; Schindler & Toman, *supra* note 224 at 1154.

from 1986 to 1994. The *San Remo Manual* "is based on treaty law of continuing validity and State practice and takes into account developments in related areas of international law, in particular, the effect of the U.N. Charter, the 1982 Law of the Sea Convention, air law and environmental law."[244] In 2004, the United Kingdom incorporated the provisions of the *San Remo Manual* into its *Manual of the Law of Armed Conflict*.[245]

## F. The Definition of a 'Civil Aircraft'

Despite its ambivalence, the ICAO Secretariat Study reached an important conclusion with respect to the definition of 'state aircraft': the three activities—military, customs, and police services—are the only types of activities that would qualify an aircraft to be deemed a state aircraft.[246] Aircraft performing other types of public services would likely be treated as civil aircraft. This conclusion is significant because civil aircraft do not enjoy the immunities of state aircraft.

In support of its conclusion, the Secretariat Study referred to the 1919 Paris Convention, which treated "all state aircraft other than military, customs and police aircraft" as "private aircraft."[247] Contemporary public air law instruments, such as the 1963 Tokyo Convention and the 1970 Hague Convention, each contain a provision stating that the

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[244] *San Remo Manual*, *supra* note 242242 at preface.

[245] See U.K. Manual, *supra* note 239 (using citations to the *San Remo Manual*).

[246] ICAO, *State/Civil Aircraft*, *supra* note 95 at ¶¶ 5.2.3 – 5.2.5; Cheng, *supra* note 185 at 112.

[247] *Paris Convention*, *supra* note 221 at art. 30.

conventions do not apply to aircraft used in "military, customs or police services."[248] These conventions do not refer to 'state aircraft' as such.

Professor Cooper wrote in an article published in 1949 two years after the Chicago Convention's entry into force:

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

Of course, the Chicago Convention also does not define civil aircraft, but it is undisputed that all other aircraft, including state-owned aircraft in commercial service, are implicitly considered to be civil aircraft for purposes of the Chicago Convention.[249] For instance, Article 79 of the Chicago Convention expressly mentions state-owned and partly state-owned commercial air transport undertakings as falling within the ambit of international civil aviation.[250] The *San Remo Manual* uses a similar definition for civil aircraft for purposes of the law of armed conflict at sea.[251]

Because international law treats state and civil aircraft differently, the status of each type of aircraft should be easily ascertainable. In the event of an interception, the

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[248] *Tokyo Convention*, *supra* note 159 at art. 1(4); *Convention for the Suppression of Unlawful Seizure of Aircraft*, 16 December 1970, 22 U.S.T. 1641 at art. 3(2) [*Hague Convention*].

[249] Bourbonniere & Haeck, *supra* note 211 at 901 n. 63, citing ICAO, Doc. LC/29-WP/2-1, Attachment I, at 13 (3 March 1995).

[250] See also Cheng, *supra* note 185 at 112.

[251] *San Remo Manual*, *supra* note 242 at ¶ 13(l) (defining civil aircraft as all aircraft other than a military, customs, or police aircraft).

intercepting aircraft and the intercepted aircraft both have an interest in clear guidelines. Only certain types of state aircraft—military, customs, and police aircraft—may legally intercept civil aircraft over the high seas.[252] If the intercepting aircraft is not an appropriate state aircraft, then it is a pirate aircraft, and the aircraft being intercepted may justifiably ignore, resist, or flee the intercepting aircraft.[253] State aircraft used in military, customs, and police services are themselves immune from interceptions by other states.[254]

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[252] See *Chicago Convention*, *supra* note 83 at art. 3(b) (describing state aircraft as aircraft used in the military, customs, or police services); *UNCLOS*, *supra* note 84 at arts. 107 & 110(4), (5) (permitting seizure or the right of visit only by warships or military aircraft, or other duly authorized ships or aircraft "clearly marked and identifiable as being on government service").

[253] For a discussion of pirate aircraft, see Chapter IV.C.

[254] *UNCLOS*, *supra* note 84 at arts. 95, 96, 110(4).

# CHAPTER IV.

## LAWFUL INTERCEPTIONS OVER THE HIGH SEAS

As mentioned in Chapter II, no state may prevent the aircraft of other states from using the high seas for any "lawful purpose."[255] However, the lawful use of the high seas presupposes adherence to the obligations which international law places upon states.[256] The high seas are expressly reserved for "peaceful purposes."[257] Whenever civil aircraft over the high seas threaten the peace and security of any state or of the international community in general, international law justifies the use of force to prevent or remove the threat. Because interceptions are in all cases potentially hazardous, they may only occur in certain situations and according to specific norms. Here as elsewhere, the central problem remains the permissible use of force and its limits.[258]

### A. Self-Defense under the United Nations Charter

Self-defense is the principal ground on which a state may justifiably use force. Article 51 of the U.N. Charter recognizes and preserves the customary right of every nation to defend itself:

> Nothing in the present Charter shall impair the *inherent* right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations....[259]

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[255] Churchill & Lowe, *supra* note 116 at 204.

[256] McDougal & Burke, *supra* note 122 at 805.

[257] *UNCLOS*, *supra* note 84 at art. 88.

[258] McDougal & Feliciano, *supra* note 47 at 122.

[259] *Charter of the United Nations*, art. 51 (emphasis added).

As Article 51 acknowledges, every state may resort to the use of force in self-defense whenever an 'armed attack' occurs.[260] In the global war on terror, the existence of repeated

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[260] The International Court of Justice left open the issue of whether there exists under Article 51 of the U.N. Charter a broader right of anticipatory self-defense. *Nicaragua, supra* note 60 at 103 ¶ 194. There is considerable debate about whether Article 51 has modified—or can modify—the pre-existing customary right of self-defense. Philip Jessup interpreted Article 51 as limiting the right of self-defense to instances following an armed attack:

> This restriction in Article 51 very definitely narrows the freedom of action which states had under traditional law. A case could be made out for self-defense under traditional law where the injury was threatened but no attack had yet taken place. Under the Charter, alarming military preparations by a neighboring state would justify a resort to the Security Council, but would not justify resort to anticipatory force by the state which believed itself threatened.

Philip C. Jessup, *A Modern Law of Nations* (New York: Macmillan Co., 1948) at 166. Dinstein similarly calls for a restrictive reading of Article 51, wondering "what may be the point of stating the obvious (i.e., that an armed attack gives rise to the right of self-defense) if not to apply the maxim *expressio unius est exclusion alterius*, latin for 'the expression of one thing is the exclusion of another.'" Dinstein, *supra* note 54 at 185. He doubts that "the right of self-defence may be classified as *jus cogens* (thus curtailing the freedom of States to contract out of it)," stating that a treaty like the Charter can modify the customary right of self-defense. *Ibid.* Brownlie similarly posits that Article 51 succeeded in changing customary international law. Ian Brownlie, *International Law and the Use of Force by States* (Oxford: Clarendon Press, 1963) at 274.

On the other hand, Myres McDougal wrote that "it is common record in the preparatory work that Article 51 was not drafted for the purpose of deliberately narrowing the pre-existing customary-law permission of self-defense against imminent attacks." McDougal & Feliciano, *Law and Minimum World Public Order, supra* note 47 at 235. In urgent circumstances, a state may need to exercise the right of self-defense instead of bringing the matter before the Security Council. In such circumstances, "every State must be the judge in its own cause, since it would be impossible to await the decision of an international authority." Jessup, *supra* note 260 at 164. It is here that the lines between preparation and attack become blurred and arbitrary. In exercising its right of self-defense, the state must necessarily make an independent judgment as to whether it is under attack and what kind of response is justified.

When the international community renounced aggressive war as an instrument of national policy in the ill-fated 1928 Treaty of Paris, also known as the Kellogg-Briand Pact, *General Pact for the Renunciation of War*, 27 August 1928, reprinted in (1928) 22 Am. J. Int'l L. Supp. 171-73, the United States declared the proposed Treaty would not in any way restrict or impair the right of self-defense:

> That right is inherent in every sovereign state and is implicit in every treaty. Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion and it alone is competent to decide whether circumstances require recourse to war in self-defense.

U.S., State Department, *Identic Notes of the Government of the United States relating to the Multilateral Treaty for the Renunciation of War* (23 June 1928), reprinted in (1928) 22 Am. J. Int'l L. Supp. 109-110 (emphasis added). The speed with which a decision to act must be made depends on the nature of the threat. For example, there is universal agreement that the definition of an armed attack includes "not simply the dropping of an atomic bomb, but also certain steps in themselves preliminary to such action." Jessup, *supra* note 260 at 166-67. Because the speed of a modern aircraft is so great, the requirement that there be "imminence of danger in point of time" before a state resorts to self-defense "is no longer

'armed attacks' by Al Qaeda operatives against the United States and its allies is undisputed. In such circumstances, a state's right to use force against its attackers wherever they may be is similarly incontestable.

Although every state may legitimately act in self-defense, its use of force must comply with the laws of armed conflict and, in particular, with the principles of necessity and proportionality. The use of force in self-defense must be directed towards identifiable military objectives in repelling the armed attack or the continuing threat of an armed attack.[261] It must also be "limited in intensity, duration, and scope to that which is reasonably required to counter the attack or threat of attack and to ensure the continued safety of U.S. forces."[262] In this respect, belligerents must distinguish between "combatants" and "noncombatants" to prevent unnecessary suffering, especially among innocent civilians.[263]

It is interesting to note that, following the September 11 attacks, the U.S. Congress authorized the President "to use all necessary and appropriate force" against those whom he determined had a role in the attacks, "in order to *prevent* any future acts of international terrorism against the United States."[264] The United States was also careful to inform the Security Council that it had initiated action in Afghanistan solely for the purpose of

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necessary to the doctrine of necessity." John Taylor Murchison, *The Contiguous Airspace Zone in International Law* (Ottawa: Department of National Defence, 1956) at 75.

261 *Commander's Handbook, supra* note 115 at ¶ 4.3.2(1).

262 *Ibid.* at ¶ 4.3.2(2).

263 *Ibid.* at ¶ 5.3.

264 *Authorization for Use of US Armed Forces, supra* note 16 (emphasis added).

preventing and deterring "further attacks on the United States."[265] Hence, in this conflict, the United States assumed the role of a belligerent.

A belligerent can lawfully attack its enemy's military and economic assets, including enemy military aircraft.[266] Civil aircraft—especially civil airliners—are generally exempt from attack, even during an armed conflict.[267] Article 3 *bis* of the Chicago Convention declares that "every State must refrain from resorting to the use of weapons against civil aircraft in flight."[268] However, this same provision also makes clear that it must not be "interpreted as modifying in any way the rights and obligations of States set forth in the Charter of the United Nations."[269] The Chicago Convention implicitly recognizes the inherent right of every state to act in self-defense in accordance with Article 51 of the U.N. Charter; accordingly, "traditional belligerent rights are thereby also retained."[270] In any case, Article 89 of the Chicago Convention states, "[i]n case of war, the provisions of this Convention shall not affect the freedom of any of the contracting States affected, whether as belligerents or as neutrals."

Thus civil aircraft are not in all circumstances exempt from attack. They may lose their exemption if, "by their nature, location, purpose or use [they] make an effective contribution to military action" and their "total or partial destruction, capture or

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265 Letter dated 7 October 2001, *supra* note 34.

266 *San Remo Manual*, *supra* note 242 at ¶¶ 65-66.

267 *Ibid.* at ¶¶ 53(c), 62.

268 *Chicago Convention*, *supra* note 83 at art. 3 *bis* (a).

269 *Ibid.*

270 Doswald-Beck, *supra* note 243 at 205.

neutralization, ... offers a definite military advantage."[271] Of course, a civil aircraft cannot lawfully be attacked if the expected loss of innocent life on board the aircraft "would be excessive in relation to the concrete and direct military advantage anticipated from the attack as a whole."[272] It follows that civil aircraft can lawfully be attacked only to secure a greater

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[271] *San Remo Manual, supra* note 242 at ¶ 40; see also *ibid.* ¶¶ 62-64. One commentator considers the issue of "whether the United States has a right to destroy a civil aircraft that ignores ADIZ requirements and eventually enters U.S. airspace." Major Stephen M. Shrewsbury "September 11th and the Single European Sky: Developing Concepts of Airspace Sovereignty" (2003) 68 J. Air. L. & Com. 115, 140. While he suggests that it may be "difficult to imagine any circumstance that would warrant the destruction of a foreign civil aircraft in a U.S. ADIZ outside of U.S. national airspace," he also asserts "the use of force against an aircraft carrying a known weapon of mass destruction may be an exception under the doctrine of anticipatory self-defense." *Ibid.* at 140 n. 135. Brownlie similarly allowed that, "in view of the destructive power of even a single nuclear weapon carried by an aircraft," a state could justifiably shoot down without warning an unidentified fast aircraft penetrating deeply into its airspace "although no actual attack has occurred." Brownlie, *supra* note 260 at 373-74.

[272] *San Remo Manual, supra* note 242 at ¶ 46(d). This provision is nearly identical to Article 57(2)(iii) of *Protocol Additional to the Geneva Conventions of 12 August of 1949 and the Relation to the Protection of Victims of International Armed Conflict (Protocol I)*, 8 June 1977, 1125 U.N.T.S. 3, at art. 57(2)(iii) (stating belligerents must refrain from launching an attack when the "incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, ... would be *excessive in relation to the concrete and direct military advantage anticipated*") (emphasis added), reprinted in (1977) 16 I.L.M. 1391 [*Additional Protocol I*]. Additional Protocol I reflects customary law, although the United States has chosen not to ratify it. *Commander's Handbook, supra* note 115 at ¶ 5.4.2; see also U.S., *Department of Defense Report to Congress on the Conduct of the Persian Gulf War – Appendix on the Role of the Law of War* (10 April 1992) [*Report to Congress*], reprinted in (1992) 31 I.L.M. 612 at 624 – 627 (confirming that many provisions of Additional Protocol I codify the customary practice of nations). In 1992, the U.S. Department of Defense denied that Article 52(3) of Additional Protocol I was such a codification. *Ibid.* at 627. Article 52(3) states, "In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used." *Additional Protocol I, supra* note 272 at art. 52(3). The United States criticized the provision for shifting "the burden for determining the precise use of an object from the party controlling that object (and therefore in possession of the facts as to its use) to the party lacking such control and facts." *Report to Congress, supra* note 272 at 627. If Article 52(3) of Additional Protocol I or Article 3 *bis* of the Chicago Convention do not reflect customary international law, then they may cause a legal interoperability problem between the United States and its allies. For instance, Canada shares responsibility for the common defense of North America and, in particular, for the air approach to North America. See *e.g.*, North American Aerospace Defense Command, *About Us*, online: NORAD< http://www.norad.mil/about_us.htm> (discussing the organization's bi-national missions of aerospace warning and aerospace control for North America). Aircraft going to the United States from Europe often fly through Canadian airspace. Canada has joined every major U.S. ally in ratifying Additional Protocol I and Article 3 *bis* of the Chicago Convention. See *Canada Treaty Information on Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, online: Canada<http://www.treaty-accord.gc.ca/Details.asp?Treaty_ID=102898> (listing parties to the treaty); *Canada Treaty Information on Protocol Relating to Amendment to the Convention on International Civil*

military advantage or to prevent a greater loss of innocent life, and, even then, solely as a last resort, when all other measures have failed, to deter the civil aircraft from its intended course.

Civil aircraft in flight become legitimate targets whenever they are converted into weapons, as the hijackers employed them in the September 11, 2001 attacks, or when they transport troops or munitions—or terrorists and WMD under their control.[273] During an armed conflict a civil aircraft may also be attacked if its refuses to obey an order "to identify itself, divert from its track, or proceed for visit and search to a belligerent airfield."[274] The relevance of this last provision is illustrated by the destruction of a Libyan airliner by Israeli fighters on February 21, 1973, resulting in the death of 106 persons.[275] The airliner had strayed over the Israeli-occupied Sinai Peninsula, flying over sensitive military installations and a key airfield.[276] The Israeli fighters initially approached the aircraft and repeatedly instructed it to land, but the airline pilot indicated that he was flying on and would not land.[277] In justifying its action, the Israeli government invoked security considerations, stating, "the more the pilot objected and tried to get away, the more suspicious he became."[278]

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*Aviation (Article 3 bis)*, online: Canada<http://www.treaty-accord.gc.ca/Details.asp?Treaty_ID=103574> (same). For an explanation of why the United States should ratify Additional Protocol I, see George H. Aldrich, "Prospects for United States Ratification of the Additional Protocol I to the 1949 Geneva Conventions" (1991) 85 Am. J. Int'l L. 1.

273 *San Remo Manual*, *supra* note 242 at ¶¶ 63(a), (b).

274 *Ibid.* at ¶ 63(e).

275 Major John T. Phelps II, "Aerial Intrusions by Civil and Military Aircraft in Time of Peace" (1985) 107 Mil. L. Rev. 255 at 288.

276 *Ibid.*

277 *Ibid.*

278 *Ibid.* at 289.

By contrast, Germany's constitutional court in 2006 struck down a law allowing the military to shoot down passenger planes suspected of being hijacked for terror attacks.[279] The German law was enacted following the attacks of September 11.[280] The judge found that the law infringed the right to life and human dignity, and violated the constitutional guarantee barring the military services from being used for domestic security.[281] The German pilots' union was also against the law, saying it could lead to a tragic mistake.[282] Other critics of the law also argue that "the government has no right to kill those on the plane to try to save the lives of others."[283] This argument makes two assumptions. It denies that a government has also a duty to protect its citizens on the ground, and it presumes that government inaction would save the lives of those on board the aircraft. In exercising its right of self-defense, the government must necessarily make an independent judgment as to whether it is under attack and what kind of response is justified.

When a state exercises its right of self-defense, it must immediately notify the Security Council of this fact under Article 51 of the U.N. Charter. A state that fails to report its use of force to the Security Council assumes the risk of later being found not to have acted in self-defense.[284] In the *Nicaragua* case, the International Court of Justice rejected the U.S. claim that it had been acting in collective self-defense in providing arms and logistical support to the *contra* forces, partly because the United States had not reported its actions to

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279 BBC News, "German Court Rejects Hijack Law" (15 February 2006), online: BBC News <http://news.bbc.co.uk/go/pr/fr/-/2/hi/europe/4715878.stm>.

280 *Ibid.*

281 *Ibid.*

282 *Ibid.*

283 *Ibid.*

284 *Nicaragua, supra* note 60 at 121 ¶ 235.

the Security Council as required by Article 51. By contrast, the United States met this requirement when it reported to the Security Council on October 7, 2001, that it had "initiated action that day against the Taliban-led Afghanistan in response to the armed attack of 9/11."[285]

In any event, international terrorists do not openly carry weapons or fly in aircraft marked as "enemy aircraft." They are more likely to misuse aircraft registered in the state of an ally or fly a domestic aircraft, as was the case in the 9/11 attacks.

## B. Enforcement Actions and Neutrality under the United Nations Charter

The U.N. Charter creates a system of collective security. The Charter vests the Security Council with the responsibility to maintain or restore 'international peace and security.'[286] To this end, the Council may render a decision about "the existence of any threat to peace, breach of the peace, or act of aggression."[287] It may therefore take sides in a dispute, and denounce the breach as well as the actor, as it has on numerous occasions.[288] The Security Council may also decide on a wide range of measures, including the interception of civil aircraft.[289]

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285 Letter dated 7 October 2001, *supra* note 34.

286 See generally, *Charter of the United Nations*, chapter VII.

287 *Charter of the United Nations*, at art. 39.

288 See *e.g.* UN SCOR, 28th Sess., 1740th mtg., UN Doc. S/RES/337 (1973), online: United Nations <http://daccess-ods.un.org/TMP/5859179.html>.(condemning Israel for forcibly diverting from Lebanon's airspace a Lebanese airliner); UN SCOR, 51st Sess., 3683rd mtg., UN Doc. S/RES/1067 (1996), online: United Nations <http://daccess-ods.un.org/TMP/958198.3>.(condemning the shootdown of two U.S. civil aircraft by Cuba).

289 *Charter of the United Nations*, at arts. 39, 41.

The Security Council has occasionally authorized states to intercept ships on the high seas, as for example, when in 1966 it authorized Great Britain to enforce an oil embargo against Rhodesia.[290] In relying upon this authorization, Great Britain boarded or fired shots at two Greek merchant ships and one French tanker.[291] In 1990, the Security Council authorized member states to use "all necessary means" to compel Iraq to comply with its earlier resolutions with respect to Kuwait.[292] An earlier authorization permitted member states to intercept all shipping to and from Kuwait in the Persian Gulf "in order to inspect and verify their cargoes and destinations" to ensure their compliance with other resolutions.[293] In 1992, the Council adopted yet another resolution with respect to shipping destined for the Federal Republic of Yugoslavia.[294]

An enforcement action may also be taken under regional arrangements or by regional agencies, such as the Organization of American States. During the Cuban missile crisis in 1962, the Organization of American States authorized the blockade of Cuba under the authority of Chapter VIII of the U.N. Charter.[295]

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290 UN SCOR, 21st Sess., 1277th mtg., UN Doc. S/RES/221 (1966), online: United Nations <http://daccess-ods.un.org/TMP/3030737.html>..

291 Churchill & Lowe, *supra* note 116 at 423.

292 UN SCOR, 45th Sess., 2963rd mtg., UN Doc. S/RES/678 (1990), online: United Nations <http://daccess-ods.un.org/TMP/4946161.html>. Some commentators have stated that it is unclear whether Resolution 678 was the sole basis for the use of force against Iraq or whether it merely 'approved' the exercise of collective self-defense. Churchill & Lowe, *supra* note 116 at 423.

293 UN SCOR, 45th Sess., 2938th mtg., UN Doc. S/RES/665 (1990), online: United Nations <http://daccess-ods.un.org/TMP/9961158.html>.

294 UN SCOR, 47th Sess., 3137th mtg., UN Doc. S/RES/787 (1992), online: United Nations <http://daccess-ods.un.org/TMP/5071411.html> [U.N. S.C., Resolution 787].

295 Churchill & Lowe, *supra* note 116 at 217, 425-26. However, the Security Council did not authorize the OAS to impose the quarantine on Cuba, leading two commentators to conclude that "[w]hen powerful States [like the United States] feel strongly enough, legal rules are unlikely to be effective constraints upon their actions." *Ibid.* at 425.

In the current war on terror, the U.N. Security Council condemned the attacks of September 11 in two resolutions—Resolution 1368[296] and Resolution 1373.[297] These resolutions also called on all states to work together to prevent in the future similar attacks.[298] When the Security Council makes a decision as to a threat, breach of the peace or an act of aggression, all U.N. member states have a legal obligation to act in accordance with the decision.[299] States may not rely on "the law of neutrality to justify conduct which would be incompatible with their obligations under the Charter or under decisions of the Security Council."[300] Hence, every state must refrain from giving any assistance or sanctuary to terrorists, and it must not permit them to operate from its territory.[301] Furthermore, every state should readily consent to the interception of its civil aircraft when those aircraft are reasonably suspected of transporting terrorists or WMD.

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296 UN S.C. Res. 1368, *supra* note 24.

297 UN S.C. Res. 1373, *supra* note 28.

298 See text accompanying notes 24 – 31.

299 *Charter of the United Nations*, at art. 25.

300 *San Remo Manual, supra* note 242 at ¶ 8. When the Security Council fails to act, states may declare their neutrality and revert to the traditional law of neutrality. The traditional law of neutrality, which gives rise to concrete rights and duties for both neutrals and belligerents, developed during the 17th and 18th centuries. Brownlie, *supra* note 260 at 402. The law emerged in an era when belligerents, retaining the practical ability to impose duties on non-participants, did not want to provoke the non-participants into closer ties with their enemy. Howard J. Taubenfeld, "International Actions and Neutrality" (1953) 47 Am. J. Int'l L. 377. The non-participants, on the other hand, insisted on certain rights but also did not want to be seen as aiding the enemy in illegitimate ways. *Ibid.*

For example, during the Seven Years' War between Great Britain and France from 1756 to 1763, British war strategy partly depended on the interception of Dutch merchant ships on the high seas in search of contraband destined for France, without unduly alienating the Dutch who traded with France. Tara Helfman, "Neutrality, the Law of Nations, and the Natural Law Tradition: A Study of the Seven Years' War" (2005) 30 Yale J. Int'l L. 549, 563 at 572. Prize courts in the United Kingdom heard cases on whether Dutch vessels and cargo had been improperly seized on the high seas. In the process, these courts created and refined several important doctrines, such as the doctrine of 'free ships, free goods' and the doctrine of 'continuous voyage,' *ibid.* at 550, 581-84, the latter doctrine having special relevance to the current global war on terror. *Ibid.* at 586. The doctrine of 'continuous voyage' required a merchant ship to account for all intermediate stops during the course of its voyage, including to enemy ports not displayed on the bills of lading, thereby revealing the cargo's true origin and destination. *Ibid.* at 584.

301 *Hague Rules of Aerial Warfare, supra* note 224 at arts. 43-45.

If a state is unable or unwilling to prevent terrorists from misusing civil aircraft bearing its nationality, international law should permit threatened states to take self-defensive action against the offending aircraft. The law of armed conflict permits a belligerent to intercept or attack neutral civil aircraft performing unneutral service to the same extent and for the same reasons as enemy civil aircraft contributing to the war effort.[302]

## C. Piracy and the Concept of *'Hostes Humani Generis'*

Every state has a right—indeed, a duty—to act against pirates, even if not directly affected by the piratical act.[303] The basic idea behind the traditional law of piracy is that pirates disrupt trade and render the high seas unsafe. Pirate ships were historically stateless, operating outside the exclusive authority of any state.[304] Because piracy posed a serious threat, pirates became the enemy of all humanity, or *hostes humani generis*. Under customary international law, every state can punish individual pirates and seize their aircraft or ship, even if the aircraft or ship may have the nationality of a foreign state. This universal right is the only instance of such extensive competence granted in peacetime to every state and it marks a clear exception to the exclusivity of flag-state jurisdiction.[305]

The UNCLOS defines piracy as any illegal act of violence on the high seas or outside the jurisdiction of any state committed *for private ends* by the crew or the passengers of a

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[302] See *San Remo Manual*, *supra* note 242 at ¶¶ 70, 125.

[303] Churchill & Lowe, *supra* note 116 at 209.

[304] McDougal & Burke, *supra* note 122 at 813.

[305] *Ibid.* at 876.

private ship or aircraft against *another* ship or aircraft.[306] This definition conforms to the traditional law of piracy, which requires the involvement of at least two aircraft (or vessels)—pirate and victim.[307] Thus, piracy is different from a hijacking, which involves the attempt by persons already on board to gain control over the aircraft or vessel.

The *Santa Maria* incident highlights the requirement that the piracy be undertaken for private, and not political, ends. When the Portuguese liner *Santa Maria* with its 560 passengers disappeared in the Caribbean in January 1961, it was initially believed that pirates were responsible for its disappearance. But after learning that the ship had been hijacked by members of a rebel group engaged in an armed struggle with Portugal and Spain, several nations, including the United States, withdrew their earlier assertions that the *Santa Maria* had been the victim of piracy.[308] Some commentators have suggested that the hijackings were undertaken for private, and not political, ends because the rebel leader did not hold a public office.[309] Yet the failure of a rebel leader to hold public office "has never been an accepted criterion for distinguishing private from political objectives."[310]

Nevertheless, "[p]erhaps it is time, definitional problems aside, to label the terrorist *hostes humani generis*—the enemy of all humanity—and allow any nation to capture and punish him or her in the interest of all."[311] An armed attack upon a state by terrorists "from an area outside the jurisdiction of all States, to wit, the high seas or outer space," should

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306 *UNCLOS*, *supra* note 84 at art. 101(a); see also HSC, *supra* note 109 at art. 15

307 McDougal & Burke, *supra* note 122 at 814; Churchill & Lowe, *supra* note 116 at 210.

308 McDougal & Burke, *supra* note 122 at 821-22.

309 See *e.g.*, C.G. Fenwick, "'Piracy' in the Caribbean" (1961) 55 Am. J. Int'l L. 426 at 428.

310 McDougal & Burke, *supra* note 122 at 822-23.

311 Borkowski, *supra* note 95 at 770 (footnote omitted).

constitute piracy under international law.[312] A terrorist organization like Al Qaeda operates in many nations, making it difficult for any state, without the cooperation of all the others, to combat it. Such is the rationale under international law for permitting all nations to combat piracy.[313] As Philip Jessup observes:

> Accepting the hypothesis that individuals are directly bound by international law would result in the conclusion that the individual or individuals responsible for such an [armed] attack would themselves be liable to punishment under international law."[314]

In consequence, international law should recognize the competence of any state to punish the illegal act, as it does today in trials for piracy.[315]

The Security Council has, through its resolutions, in effect declared present-day terrorists *hostes humani generis.*[316] Every state is thus duty-bound to cooperate in the fight against terrorists and should permit the interception of its civil aircraft when they are reasonably suspected of transporting terrorists or WMD. If circumstances are such that the consent of the state of registry cannot be readily obtained, the state whose aircraft is intercepted would be hard pressed to complain if the interception turns out to be justified, as was the case when the United States intercepted Egypt Air Flight MS 2843.[317] Although President Mubarak publicly condemned the interception as an act of piracy, Egypt did not bring the matter before the Security Council or ICAO; it could only complain if the

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312 Dinstein, *supra* note 54 at 205.

313 Borkowski, *supra* note 95 at 770 n. 80.

314 Jessup, *supra* note 260 at 168.

315 *Ibid. Contra* Joyner, *supra* note 54 at 532 (describing the effort to equate WMD trafficking with piracy as it is defined in the UNCLOS, Article 101, as totally implausible).

316 See U.N. S.C., Resolution 1368, *supra* note 24 and U.N. S.C., Resolution 1373, *supra* note 28.

317 See text accompanying notes 95 to 103.

interception had somehow unnecessarily endangered the lives of innocent passengers and crew on board the aircraft.

### D. Hijacking and Other Crimes Committed On Board Aircraft

Public air law furnishes additional authority for states to intercept foreign civil aircraft over the high seas. The most prominent reason concerns hijacking, the method used by the September 11th terrorists. According to the Tokyo Convention, hijacking includes any unlawful interference, unlawful seizure, or wrongful control of an aircraft,[318] and provides universal jurisdiction for such offenses. Whenever a hijacking has occurred or is about to occur, contracting states have an obligation to take "all appropriate measures to restore control of the aircraft to its lawful commander or to preserve his control of the aircraft."[319] Every contracting state is thus duty-bound to take "all appropriate measures," without regard to whether the state has any connection to the hijacked aircraft or to the crime itself. The state in whose territory the hijacked aircraft has landed has both the jurisdiction and the obligation, "without exception whatsoever" to prosecute the hijackers or to extradite them to a state willing to prosecute.[320] The same is true for any state where the alleged offenders may be present.[321]

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[318] *Tokyo Convention*, *supra* note 159 at art. 11(1); *Hague Convention*, *supra* note 248 at art. 1.

[319] *Tokyo Convention*, *supra* note 159 at art. 11(1); *Hague Convention*, *supra* note 248 at art. 9.

[320] *Hague Convention*, *supra* note 248 at arts 4, 7, 8.

[321] *Ibid.* at art. 4(2).

In addition, the Tokyo Convention lists five circumstances in which a state may 'interfere' with a foreign aircraft in flight.[322] Article 4 of the Convention provides:

> A Contracting State which is not the State of registration may not interfere with an aircraft in flight in order to exercise its criminal jurisdiction over an offence committed on board except in the following cases:
>
> (a) the offense has an effect on the territory of such State;
>
> (b) the offense has been committed by or against a national or a permanent resident of such State;
>
> (c) the offense is against the security of such State;
>
> (d) the offense consists of a breach of any rules or regulations relating to the flight or manoeuvre of aircraft in force in such State;
>
> (e) the exercise of jurisdiction is necessary to ensure the observance of any obligation of such State under a multilateral international agreement.

One commentator argues that this provision only permits interceptions by a state whose territory is actually being overflown by the foreign aircraft, noting that the jurisdictional bases listed in subparagraphs (a) and (d) can only be met if the foreign aircraft enters the territorial airspace of the state making the interception.[323] The commentator concludes that "on the high seas and *terra nullius*, ships and aircraft are subject to the exclusive jurisdiction of the flag States, and save in the case of piracy, self-defence or a treaty obligation, no other State can exercise jurisdiction over such ships and aircraft."[324] While this last statement accurately describes customary international law, it ignores the fact that an international agreement may confer additional rights and obligations on the contracting states.

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[322] *Tokyo Convention, supra* note 159 at art. 4.

[323] Sami Shubber, *supra* note 171 at 85-86.

[324] *Ibid.* at 85.

Unlike Article 27 of the UNCLOS,[325] which addresses a foreign ship's passage through the coastal state's territorial waters, Article 4 of the Tokyo Convention does not specifically refer to the airspace of the intercepting state. Though the plain language of Article 4 would permit its application to foreign aircraft anywhere in the world, it would admittedly not allow interference with aircraft over a foreign state's territory because that would lead to a violation of the foreign state's airspace.

Subparagraphs (b) and (c) of Article 4 of the Tokyo Convention contain elements of general principles of international law which have enabled states to exercise their criminal jurisdiction over serious offenses committed beyond their territory. Subparagraph (b) would permit a state to intervene against a foreign aircraft in flight if the crime committed on board the aircraft was committed by or against a national or permanent resident of the intercepting state. This provision contains elements of both the 'nationality' and the 'passive personality' principles. The 'nationality' principle is one in which states assert criminal jurisdiction over their own nationals or permanent residents who commit serious crimes abroad.[326] On the other hand, the 'passive personality' principle is one in which states assert jurisdiction over aliens abroad for having harmed one of their nationals or permanent residents.[327] The latter principle is much criticized as an unlawful basis for the exercise of a state's extraterritorial jurisdiction.[328]

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[325] *UNCLOS*, *supra* note 84 at art. 27 (right of passage through territorial waters).

[326] Brownlie, *supra* note 38 at 301-02; Shubber, *supra* note 171 at 77-79.

[327] Brownlie, *supra* note 38 at 302; Shubber, *supra* note 171 at 77-79.

[328] Shubber, *supra* note 171 at 79-80.

Subparagraph (c) of Article 4 reflects the 'protective' or 'security' principle, a well-recognized principle in which "[n]early all states assume jurisdiction over aliens for acts done abroad which affect the security of the state."[329] This principle is invoked in cases affecting a vital interest of the state, such as its credit or immigration. Thus, states invoke the 'protective' or 'security' principle to combat counterfeiting of currency or to halt illegal immigration on the high seas.[330]

As a practical matter, most states lack the ability to intercept foreign aircraft far from their territory. Only a few nations possess the means to intercept foreign aircraft anywhere in the world. In addition, it is unlikely that a state would decide to intercept a foreign aircraft over the high seas in the absence of a compelling reason, such as in self-defense or to protect a vital interest. Public air law adequately covers offenses such as hijacking, sabotage, and any other crimes on board aircraft. The Tokyo and the Hague Conventions supply a notable exception to the principle of exclusive flag-state jurisdiction over the high seas, at least as far as the interception of civil aircraft is concerned.

## E. Misuse of Civil Aviation by States

Article 4 of the Chicago Convention declares that every contracting state "agrees not to use civil aviation for any purpose inconsistent with the aims of this Convention." These aims are succinctly stated in the Preamble to the Convention.[331] Professor Milde asserts,

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[329] Brownlie, *supra* note 38 at 302-03; see also Shubber, *supra* note 171 at 81-82.

[330] Brownlie, *supra* note 38 at 302-03.

[331] The Preamble states:

"Article 4 is of no relevance to the problem of criminal use of civil aviation (such as drug trafficking) since it refers only to the obligations ... and ... the acts of States."[332] Accordingly, a state may not invoke this provision as a justification for having interfered with a civil aircraft in flight because individuals acting in their private capacity misuse civil aviation.

However, nothing prevents a state from invoking Article 4 as a justification for interfering with a civil aircraft that has been misused by another state. Following the interception in 1985 of Egypt Air Flight MS 2843, the United States and the pilot of the Egyptian aircraft differed on whether the intercepted aircraft was a state aircraft or a civil aircraft.[333] The Egypt Air pilot considered the flight to be a civil flight, a "charter VIP flight,"[334] apparently in the mistaken belief that a civil aircraft could not be lawfully intercepted over high seas. On the other hand, the United States viewed the intercepted aircraft "as a state aircraft at the time of the interception."[335] Despite the Egyptian aircraft's exterior markings, the United States followed the functional analysis called for by

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WHEREAS the future development of international civil aviation can greatly help to create and preserve friendship and understanding among nations and peoples of the world, yet its abuse can become a threat to the general security; and

WHEREAS it is desirable to avoid friction and to promote that cooperation between nations and peoples upon which the peace of the world depends;

THEREFORE, the undersigned governments having agreed on certain principles and arrangements in order that international civil aviation may be developed in a safe and orderly manner and that international air transport services may be established on the basis of equality of opportunity and operated soundly and economically;

Have accordingly concluded this Convention to that end.

*Chicago Convention*, *supra* note 83 at prmb.

[332] Milde, "Misuse of Civil Aircraft," *supra* note 184 at 122.

[333] See text accompanying footnotes 95 to 103.

[334] ICAO, *Civil/State Aircraft supra* note 95 at ¶ 4.8.3 (1).

[335] *Ibid.*

Article 3(b) of the Chicago Convention,[336] referring to such factors as "the aircraft's exclusive state purpose and function of the mission, the presence of armed military personnel on board, and the secrecy" surrounding the mission.[337] The refusal by Greece and Tunisia to permit the Egyptian aircraft to land in their territory suggested their belief that the aircraft was a state aircraft.[338]

Yet the interception of a foreign state aircraft over the high seas is a *per se* violation of international law. The U.S. position on the legal character of the Egypt Air flight is best understood as an effort to avoid having the dispute raised before the ICAO Council for resolution under the Chicago Convention.[339] Israel unsuccessfully attempted this same legal tactic following its interception of the Libyan Arab Airlines flight in 1986. When the matter was brought before the ICAO Council, Israel questioned the Council's competence to examine the issue on the basis that the Libyan aircraft was in fact a state aircraft.[340] The Council disagreed and voted to condemn Israel for committing "an act against international civil aviation in violation of the principles of the Chicago Convention."[341]

The essential difference between the U.S. and the Israeli interceptions is that the United States had successfully interdicted the transport of terrorists. Thus, even if the United States had been incorrect about the status of the Egyptian airliner, the attempt by Egypt to

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[336] For a discussion of the difference between 'state aircraft' and 'civil aircraft', see Chapter III.B, *supra.*

[337] ICAO, *Civil/State Aircraft supra* note 95 at ¶ 4.8.3 (1).

[338] *Chicago Convention, supra* note 83 at art. 5 (permitting unscheduled flights to land for a non-commercial purpose without prior permission).

[339] For a discussion of dispute resolution before the ICAO Council, see Chapter VI.C, *infra.*

[340] ICAO, *Civil/State Aircraft supra* note 95 at ¶ 4.8.3 (2).

[341] *Ibid.*

transport known terrorists was a rare instance in which a state had been caught misusing civil aviation in violation of Article 4 of the Chicago Convention. The transport of known terrorists on civil aircraft by any state is contrary to the fundamental purposes of the Chicago Convention.

## F. Stateless Aircraft

The UNCLOS confers a universal right on all states to intercept stateless aircraft over the high seas,[342] because such aircraft do not enjoy the protection of any state.[343] Similarly, an aircraft registered in more than one state may be treated as an aircraft without nationality.[344] The most obvious kind of aircraft that can be treated as stateless is one without any markings or registration.[345] When an aircraft exhibits appropriate markings and is registered, the aircraft's registration is *prima facie* evidence of its nationality. Article 17 of the Chicago Convention states that "[a]ircraft have the nationality of the State in which they are registered."[346] However, an aircraft's registration may be changed from one state to another.[347] The Convention merely provides that an aircraft "cannot be validly registered in more than one State.[348] In the words of John Cobb Cooper: "Registration does not create

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342 *UNCLOS*, *supra* note 84 at art. 110(1)(d).

343 Churchill & Lowe, *supra* note 116 at 214; *Commander's Handbook*, *supra* note 115 at 3.11.2.3 (noting that "because [stateless vessels] are not entitled to the protection of any nation, they are subject to the jurisdiction of all nations").

344 *Chicago Convention*, *supra* note 83 at art. 18 (prohibiting dual registration of aircraft); see also *UNCLOS*, *supra* note 84 at art. 92(2) (stating that a ship which sails under two or more flags may not claim the nationality of any of them).

345 See *Chicago Convention*, *supra* note 83 at art. 17 (linking the aircraft's nationality to its registration) & art. 20 (requiring the display of marks).

346 *Ibid.* at art. 17.

347 *Ibid.* at art. 18.

348 *Ibid.*

nationality. It is simply an evidence of nationality, and nothing in the Chicago Convention should be read to the contrary."[349]

The UNCLOS requires the existence of a 'genuine link' between the state of registration and the ship,[350] and, according to Brownlie, the same requirement applies to aircraft.[351] The requirement of a "genuine link" was recognized by the International Court of Justice in the *Nottebohm* judgment, where it declared that "nationality must correspond with the factual situation."[352] More recently, the Security Council decreed in Resolution 787, which permitted the interception of ships belonging to the Federal Republic of Yugoslavia, that any vessel owned or controlled by a Yugoslav national would be considered a Yugoslav vessel, "regardless of the flag under which the vessel sails."[353]

In the case of aircraft, the 1919 Paris Convention, which first codified public air law, provided that no aircraft could be registered in a state unless it belonged wholly to its nationals, with special provisions for aircraft owned by an incorporated company.[354] While a similar provision was not included in the Chicago Convention, nearly every state requires

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349 Cooper, *supra* note 225 at 307.

350 See *e.g. UNCLOS*, *supra* note 84 art. 91; see also *HSC*, *supra* note 109 at art. 5(1).

351 Brownlie, *supra* note 38 at 413, 472.

352 *Nottebohm, Second Phase (Liechtenstein v. Guatemala)* [1955] I.C.J. Rep. 4 at 22. The Court denied Liechtenstein's attempt to assert a claim against Guatemala on behalf of a German national after hastily giving him citizenship. The Court held that there was no genuine connection between Liechtenstein and the German national.

353 U.N. S.C., Resolution 787, *supra* note 294 at para. 10.

354 *Paris Convention*, *supra* note 221 at 173, art. 7.

that its aircraft be owned by its nationals.[355] As Brownlie observes, "[*b*]*ona fide* national ownership, rather than registration or authority to fly the flag, provides the appropriate basis for protection of ships" and "aircraft."[356]

The UNCLOS also requires each state to "*effectively exercise its jurisdiction and control* in administrative, technical and social matters over ships flying its flag."[357] The same essentially applies to civil aircraft. The state of registry is thus the protector of its aircraft and the guarantor of their conduct.[358]

Some commentators object to the 'genuine link' doctrine as undermining the exclusive competence of states to confer nationality on their vessels or aircraft.[359] The UNCLOS provides some support for this view. Article 94(6) of the Convention states:

> A State which has clear grounds to believe that proper jurisdiction and control with respect to a ship have not been exercised may report the facts to the flag State. Upon receiving such a report, the flag State shall investigate the matter and, if appropriate, take any action necessary to remedy the situation.

The UNCLOS thus appears to leave the aggrieved state without a remedy. However, international law frowns upon the misuse of flags of convenience. Professor Cheng suggests that the 'genuine link' rule enunciated by International Court of Justice in the *Nottebohm* case should extend to ships and aircraft so as to exclude flags of convenience.[360] In fact,

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355 See *e.g.*, *Registration and Recordation of Aircraft*, 49 U.S.C. § 44102 (2006) (requiring that all aircraft registered in the United States be owned by U.S. citizens or permanent residents, or by companies incorporated and doing business in the United States).

356 Brownlie, *supra* note 38 at 398 n.167, 410, 472.

357 *UNCLOS*, *supra* note 84 at art. 94; see also *HSC*, *supra* note 109 at art. 5(1) (emphasis added).

358 Cooper, *supra* note 225 at 307.

359 McDougal & Burke, *supra* note 122 at 1008-140.

360 Cheng, *supra* note 185 at 131.

Article 21 of the Chicago Convention requires every contracting state "to supply to any other contracting State or to the International Civil Aviation Organization, *on demand*, information concerning the registration and ownership of any particular aircraft registered in that State."[361] Brownlie observes, "international law has a reserve power to guard against giving effect to ephemeral, abusive, and simulated creations."[362] Not surprisingly, the temptation to misuse flags of conveniences is greatest in time of war. While a civil aircraft bearing the marks of an enemy state is conclusive evidence of its enemy character,[363] a civil aircraft bearing the marks of a neutral state is only prima facie evidence of its neutral character.[364]

Any state may thus lawfully intercept foreign civil aircraft over the high seas when it has reasonable grounds to suspect its national character as displayed on the fuselage. In making the interception, it must comply with international norms derived from custom and treaties.

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361 *Chicago Convention, supra* note 83 at art. 21 (emphasis added).

362 Brownlie, *supra* note 38 at 467.

363 *San Remo Manual, supra* note 242 at ¶ 112.

364 *Ibid.* at ¶ 113.

# CHAPTER V.

## THE REQUIREMENT OF 'DUE REGARD' FOR THE SAFETY OF CIVIL AVIATION

States exercising their freedoms over the high seas must show 'due regard' for the lawful interests of other states.[365] Article 3(d) of the Chicago Convention specifically requires that states, when issuing regulations for their state aircraft, will have 'due regard' for the safety of navigation of civil aircraft.[366] Nowhere is the requirement for 'due regard' more germane than when a state aircraft intercepts a civil aircraft over the high seas. The interception can occur during an armed conflict or in time of peace. In stating the requirement of 'due regard,' Article 3(d) both codifies an existing customary norm and creates a treaty obligation applicable in times of peace and during armed conflict.[367] However, international terrorism presents a new type of conflict in which "the concepts of both 'war' and 'peace' have become blurred and no longer lend themselves to clear definition."[368]

Whether the interception occurs during a combat operation or as part of a law enforcement measure, international law is undergoing a development in which the governing rules are converging into a single set of procedures. As this development has been underway for sometime, the emergence of a customary norm should not be surprising. Given the

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365 *UNCLOS*, *supra* note 84 at art. 87(2); *HSC*, *supra* note 109 at art. 2.

366 *Chicago Convention*, *supra* note 83 at art. 3(d).

367 Bourbonniere & Haeck, *supra* note 211 at 912-13.

368 *Commander's Handbook*, *supra* note 115 at 4.1.

extraordinary sensitivity of the interception of civil aircraft over the high seas there is an obvious need for uniformity of standards.

## A. The Criterion of Reasonable Suspicion

Interceptions must be limited to particular aircraft reasonably suspected of engaging in a prohibited activity.[369] Traditionally, belligerents could systematically stop and search on the high seas all neutral ships and aircraft for contraband.[370] In the war on terror, however, the exercise of such a right on a global scale would be impractical, unnecessarily hazardous, and highly disruptive to international civil aviation.[371] The UNCLOS provides that a warship encountering a foreign ship on the high seas is not justified in boarding the ship unless the warship has *reasonable grounds* to suspect that the ship is engaged in a criminal activity or is a stateless ship.[372] The UNCLOS also applies the same rule *mutatis mutandis* to a civil aircraft which may not be intercepted in the absence of *reasonable grounds* for suspecting its misuse. The *San Remo Manual* provides that in a conflict at sea a civil aircraft may be intercepted only when it is reasonably suspected of being subject to capture for engaging in prohibited activities.[373] Whatever the reason for the interception, it is now settled that the concept of 'due regard' requires that the interception be based on reasonable grounds for suspicion.

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[369] Churchill and Lowe suggest that Article 51 of the U.N. Charter requires this result. Churchill & Lowe, *supra* note 116 at 422-23.

[370] *Ibid.* at 422.

[371] In one year alone, France stopped and searched 4,775 ships on the high seas suspected of carrying arms to Algeria during the emergency of 1956-62, which triggered vigorous protests from affected states. *Ibid.* at 217.

[372] *UNCLOS*, *supra* note 84 at art. 110(1).

[373] *San Remo Manual*, *supra* note 242 at ¶ 125; see also *ibid.* at ¶ 70 (prohibiting attacks on neutral civil aircraft unless they are "believed on reasonable grounds" to be carrying contraband).

The commentary to the *San Remo Manual* highlights a critical consideration:

> [T]hough there have to be reasons for suspicion they will, in general, have to be less compelling than in the case of vessels. An aircraft *per se* constitutes a considerable danger. If its character is not clearly established . . . the belligerent's interest in positive identification justifies the interception and/or diversion.[374]

It is therefore imperative that the aircraft's true character (purpose) be firmly established.

The enemy character of a civil aircraft may be "determined by registration, ownership, charter or other criteria."[375] Most of this information is contained in the flight plan, which civil aircraft engaged in international navigation must be file with the appropriate air traffic service. The flight plan must contain information as to registration, destination, passengers, cargo, emergency communication channels, identification modes and codes, cruising speed and level, the route to be followed, estimated travel time, and fuel endurance.[376] During flight, the aircraft must also provide periodic updates on its progress.[377] In addition, the civil aircraft must carry certificates as to registration, airworthiness, passengers, and cargo.[378]

While all of this information may be helpful in determining the character of an aircraft, it will not likely be sufficient to detect its true mission. Additional information may be needed, information that can only be obtained during an interception. Thereafter, the information thus acquired about the suspicious aircraft will determine how far the

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[374] *Ibid*.at ¶ 115.2 (explanation).

[375] *Ibid.* at ¶ 117.

[376] Annex 2, *supra* note 177 at § 3.3; *San Remo Manual*, *supra* note 242 at ¶¶ 76, 129.

[377] Annex 2, *supra* note 177 at § 3.3.2.

[378] *Chicago Convention*, *supra* note 83 at art. 29.

interception should proceed. It is important to stress that in all cases the principle of 'due regard' for the safety of potentially innocent aircraft must be observed.

## B. The Role of Article 3 *bis*

As discussed previously, Article 3 *bis* of the Chicago Convention generally prohibits the use of weapons against civil aircraft.[379] However, the article implicitly recognizes that states may lawfully intercept civil aircraft, provided that, "in case of interception, the lives of persons on board and the safety of aircraft must not be endangered."[380] States may also require civil aircraft to land at designated airports.[381] Naturally, these airports should be suitable for the type of aircraft involved.[382] Otherwise, the civil aircraft "may not be diverted from its declared destination."[383]

In forcing an intercepted aircraft to land, states may "resort to any appropriate means consistent with the relevant rules of international law, including the relevant provisions" of the Chicago Convention.[384] Article 3 *bis* does not identify the "appropriate means" that may be used during the interception. Nor does it identify "the relevant rules of international law"

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379 See text accompanying note 268. The ICAO Assembly voted in 1984 to amend the Chicago Convention by adopting Article 3*bis*, which came into force on October 1, 1998, for the states that have ratified the new article. The vote came in response to the destruction of Korean Airline Flight 007 by Soviet fighters on August 31, 1983, resulting in the deaths of 269 passengers and its crew. The Korean airliner had innocently strayed into Soviet airspace and was mistaken for a U.S. military reconnaissance aircraft spotted earlier in the region. The investigation disclosed that the Korean airliner had its navigation lights on and its strobe lights on, but the Soviet fighter did not make any effort to identify the aircraft, to communicate with it, or to request it to land. Michael Milde, "KE 007 – 'Final' Truth and Consequences," Abhandlugnen, 357 at 358; Bin Cheng, "The Destruction of KAL Flight KE007" 49, 54.

380 *Chicago Convention*, *supra* note 83 at art. 3 *bis* (a); see also *ibid.* at subsection (b).

381 *Ibid.* at art. 3 *bis* (b).

382 *San Remo Manual*, *supra* note 242 at ¶ 125.

383 *Ibid.*

384 *Chicago Convention*, *supra* note 83 at art. 3 *bis*.

or "the relevant provisions of this Convention," except in subparagraph (a), where it prohibits the use of weapons against civil aircraft; it asserts that "the lives of persons on board and the safety of aircraft must not be endangered"; and it refers to the duties and obligations of states under the U.N. Charter. [385]

The relevant rules of international law would include fundamental principles governing the law of armed conflict, such as military objective, necessity, proportionality, and distinction. These principles would undoubtedly require that the interceptions of civil aircraft conform to "elementary considerations of humanity," which, according to the International Court of Justice, are "even more exacting in peace than in war."[386] Naturally, the use of force during an interception must be proportional to the threat and adequate to the situation; the loss of life to civilians or other protected persons must not be "disproportionate to the military advantage gained or anticipated."[387]

Subsection (b) of Article 3 *bis* requires each contracting state "to publish its regulations in force regarding the interception of civil aircraft."[388] The publication of these regulations affords pilots of civil aircraft an opportunity to familiarize themselves with them beforehand so that they will know how to respond if their aircraft is intercepted. Subsection (c) requires every civil aircraft to comply with an order given "in conformity" with subparagraph (b).[389] The importance of this provision in facilitating successful interceptions

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385 *Chicago Convention*, *supra* note 83 at art. 3 *bis* (a); see also *ibid.* subsection (b).

386 *The Corfu Channel Case (United Kingdom v. Albania)*, Merits [1949] I.C.J. Rep. 4 at 22.

387 *San Remo Manual*, *supra* note 242 at ¶ 57.

388 *Chicago Convention*, *supra* note 83 at art. 3 *bis* (b).

389 *Ibid.* at subsection (c).

cannot be overstated. The pilots of civil aircraft must follow the instructions of the intercepting aircraft, provided that the orders conform to the previously published regulations in force.

Although subsection (b) of the Article 3 *bis* specifically addresses the interception of civil aircraft over a state's territory, there is no reason why the same "appropriate means" and the same "relevant rules of international law" should not apply over the high seas. Interceptions of civil aircraft over the high seas would not occur in a vacuum. The same interests in the safety of air navigation over a state's territory are present over the high seas.

The *San Remo Manual* urges states to "promulgate and adhere to safe procedures for intercepting civil aircraft as issued by the competent international organisation."[390] There is only one such organization—the ICAO.[391] The U.S. *Commander's Handbook* states that, "[a]lthough there is a right of visit and search by military aircraft, *there is no established international practice as to how that right is to be exercised.*"[392] This conclusion, however, is no longer correct. The ICAO has published standards governing on the interception of civil aircraft.

### C. ICAO Standards on the Interception of Civil Aircraft

Annex 2 to the Chicago Convention contains standards relating to the interception of civil aircraft. These standards contain detailed procedures for interception, including approach, visual signals and maneuvering, and sample voice transmissions. The purpose of

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[390] *Ibid.* at ¶ 128.

[391] *Ibid.* at ¶ 128.1 (explanation).

[392] *Commander's Handbook, supra* note 115 at ¶ 7.6.2 (emphasis added).

these standards is to facilitate communication between the intercepting aircraft and the intercepted aircraft, and to reduce misunderstandings. The benefit of these standards is that they provide uniform procedures with which pilots of civil aircraft are required to comply, especially when interpreting and responding to visual signals.[393] Accordingly, national regulations modeled on these standards will conform to the obligation of 'due regard.'[394]

### *1. Procedures for Interception*

The prescribed methods are intended "to avoid any hazard to the intercepted aircraft" by taking "due account of the performance limitations of the civil aircraft," and by not "crossing the aircraft's flight path or performing any other maneuver that could cause hazardous turbulence for the intercepted aircraft, particularly if the intercepted aircraft is a light aircraft."[395]

#### a) Approach

In the initial phase of the interception, the intercepting aircraft should approach the intercepted aircraft from behind:

> The element leader [of more than one intercepting aircraft], or the single intercepting aircraft, should normally take up a position on the left (port) side, slightly above and ahead of the intercepted aircraft, within the field of view of the pilot of the intercepted aircraft, and initially not closer than 300 meters. Any other participating aircraft should stay well clear of the intercepted aircraft, preferably above and behind. After speed and position have been

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393 Annex 2, *supra* note 177 at § 3.8.2. In fact, "[e]ach contracting state undertakes to ensure the prosecution of all persons violating the regulations applicable." *Chicago Convention, supra* note 83 at art. 12.

394 Annex 2, *supra* note 177 at § 3.8.1.

395 *Ibid.* Attachment A, at § 3.1.

established, the aircraft should, if necessary, proceed with Phase II of the procedure.[396]

In the next phase, the element leader, or the single intercepting aircraft, will begin closing in on the intercepted aircraft at the same level until it comes as close as is necessary to obtain the information it needs.[397] If the intercepting aircraft is satisfied with this information, the element leader or single intercepting aircraft should break away in a shallow dive and the other participating aircraft should stay well clear of the intercepted aircraft and rejoin their leader.[398] When the intercepting aircraft must intervene in the navigation of the intercepted aircraft, it should do so from the same position—the left (port) side—unless other conditions or terrain make it necessary for the intercepting aircraft to take up a similar position on the opposite side, i.e. slightly above and ahead of the intercepting aircraft, on the right side.[399]

b) Visual Signals and Maneuvering

Annex 2 provides three visual signals that the intercepting aircraft should initiate during the interception and the responses the intercepted civil aircraft must make indicating its understanding and its intent to comply: (1) "You have been intercepted. Follow me,"[400]

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396 *Ibid.*, at § 3.2 (Phase I).

397 *Ibid.* (Phase II).

398 *Ibid.* (Phase III).

399 *Ibid.* at § 3.3.1.

400 *Ibid.* at Appendix 1, Table 2.1, Series 1 ("DAY or NIGHT - By rocking the aircraft and flashing navigational lights at irregular intervals... from a position slightly above and ahead of, and normally to the left of, the intercepted aircraft... and, after acknowledgement, a slow level turn, normally to the left... on the desired heading."). The intercepted aircraft signals the response "Understood, will comply" by "[r]ocking the aircraft, flashing navigational lights at irregular intervals and following." *Ibid.*

(2) "You may proceed,"[401] and (3) "Land at this aerodrome."[402] The intercepted aircraft may also initiate three signals indicating its inability or unwillingness to comply: (1) "Aerodrome you have designated is inadequate",[403] (2) "Cannot comply",[404] and (3) "In distress."[405]

c) Sample Voice Transmissions

Annex 2 also provides five sample phrases for the intercepting aircraft, along with a pronunciation guide: (1) "CALL SIGN," meaning "What is your call sign?", (2) "FOLLOW", meaning "Follow me", (3) "DESCEND", meaning "Descend for landing", (4) "YOU LAND", meaning "Land at this aerodrome", and (5) "PROCEED", meaning "You may proceed."[406] The intercepted aircraft is provided nine sample phrases, along with a pronunciation guide: (1) "CALL SIGN (call sign)", meaning "My call sign is (call sign)", (2) "WILCO", meaning "Will comply" or "Understood", (3) "CAN NOT", meaning "Unable

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401 *Ibid.* at Series 2 ("DAY or NIGHT - By an abrupt break-away manoeuvre from the intercepted aircraft consisting of a climbing turn of 90 degrees or more without crossing the line of flight of the intercepted aircraft." The intercepted aircraft signals the response "Understood, will comply" simply by "[r]ocking the aircraft." *Ibid.*

402 *Ibid.* at Series 3 (DAY or NIGHT – Lowering landing gear (if fitted), showing steady landing lights and overflying runway in use...."). The intercepted aircraft signals the response "Understood, will comply" by "[l]owering landing gear (if fitted), showing steady landing lights and following the intercepted aircraft and if, after overflying the runway in use ... landing is considered safe, proceeding to land." *Ibid.*

403 *Ibid.* at Table 2.2, Series 4 ("DAY or NIGHT – Raising landing gear (if fitted) and flashing landing lights while passing over runway in use ... at a height exceeding 300 m (1 000 ft) but not exceeding 600m (2 000 ft) ... above the aerodrome level, and continuing to circle runway in use.... If unable to flash landing lights, flash any other lights available."). The intercepting aircraft responds "Understood, follow me" by raising its landing gear and using the Series 1 signals prescribed for intercepting aircraft, if it desires to lead the intercepted aircraft to another aerodrome. *Ibid.* If the intercepting aircraft wishes to respond "Understood, you may proceed", then the intercepting aircraft uses the Series 2 signals prescribed for intercepting aircraft. *Ibid.*

404 *Ibid.* at Series 5 ("DAY or NIGHT - Regular switching on and off of all available lights but in such a manner as to be distinct from flashing lights."). The intercepting aircraft responds "Understood" by using Series 2 signals prescribed for intercepting aircraft. *Ibid.*

405 *Ibid.* at Series 6 ("DAY or NIGHT – Irregular flashing of all available lights."). The intercepting aircraft responds "Understood" by using Series 2 signals prescribed for intercepting aircraft. *Ibid.*

406 *Ibid.* at Appendix 2, at Table 2.1.

to comply", (4) "REPEAT", meaning "Repeat your instruction", (5) "AM LOST", meaning "Position unknown", (6) "MAYDAY", meaning "I am in distress", (7) "HIJACK", meaning "I have been hijacked", (8) "LAND (place name), meaning "I request to land at (place name)", and (9) "DESCEND", meaning "I require descent."[407]

*2. Actions by Intercepted Aircraft*

As soon as the intercepted aircraft realizes it has been intercepted, it must *immediately* comply with the instructions given by the intercepting aircraft, interpreting and responding to visual signals in the prescribed manner.[408] The intercepted aircraft must also immediately notify the appropriate air traffic services unit and attempt to establish radio communication with the intercepting aircraft by making a general call on the emergency frequencies of 121.5 MHz or 243 MHz.[409]

If the intercepted aircraft receives any instructions by radio that conflict with those given by the intercepting aircraft by visual signals, the intercepted aircraft must request immediate clarification, while continuing to comply with the visual instructions given by the intercepting aircraft.[410] The reason for this requirement is that the intercepting aircraft may not be in radio communication with the source giving the conflicting instructions. Because interceptions in all cases are potentially hazardous, the intercepted aircraft must comply with the intercepting aircraft's instructions. For the same reason, the intercepted aircraft must give priority to radio instructions received from the intercepting aircraft over instructions

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[407] *Ibid.*

[408] *Ibid.* at Appendix 2 at § 2.1(a).

[409] *Ibid.* at § 2.1(b)-(c).

[410] *Ibid.* at § 2.2.

received by radio from any other source.[411] If radio contact is established during an interception but the pilots cannot communicate in a common language, the pilots should use the prescribed voice transmissions.[412]

The ICAO Council has also published the *Manual Concerning the Interception of Civil Aircraft*,[413] which "consolidates in a single document all of the ICAO provisions and special recommendations relevant to the interception of civil aircraft."[414] This manual provides a ready reference on the subject.[415]

## D. Applicability to State Aircraft

When ICAO adopted the standards contained in Annex 2, the United States and the Russian Federation each expressed the view that the adoption of these standards "was *ultra vires* and would treat them accordingly."[416] It is therefore in order to ask whether these rules legally regulate the conduct of military aircraft during the interception.

The Chicago Convention does not apply to state aircraft and only the contracting states may issue regulations for their state aircraft.[417] Article 3(d) of the Convention declares, "[t]he contracting States undertake, when issuing regulations for their state aircraft,

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411 *Ibid.* at § 2.3.

412 *Ibid.* at § 3.

413 ICAO, *Manual Concerning the Interception of Civil Aircraft*, Doc 9433-AN/926 (2nd ed. 1990).

414 *Ibid.* at foreword.

415 *Ibid.*

416 Milde, "Misuse of Civil Aviation," *supra* note 184 at 120.

417 *Chicago Convention*, *supra* note 83 at art. 3(a), (d).

that they will have due regard for the safety of navigation of civil aircraft."[418] Although the Convention does not declare the content of the obligation, the concept of 'due regard' must be interpreted "in harmony with other norms of international law."[419] The obvious authority to promulgate rules to safeguard international civil aviation is ICAO. As Professor Milde observes, "[w]hile Article 3(d) of the Convention was not a source of legislative authority of the ICAO Council, it did not constitute an obstacle to adoption of Standards relating to the safety of civil aviation in the situations of interception."[420] The standards contained in Annex 2 are binding on civil aircraft. In the case of state aircraft, they are merely recommendations intended to protect the safety of civil aircraft and their occupants.[421] Annex 2 urges states to implement the standards in their national regulations, and it invites states to notify ICAO of any differences which may exist between their national regulations and the standards contained in Annex 2.[422]

State aircraft following the ICAO flight procedures satisfy the requirement of 'due regard.' As a matter of policy, U.S. military aircraft operating within international airspace will ordinarily comply with ICAO flight procedures.[423] The failure to follow the ICAO

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418 *Chicago Convention*, *supra* note 83 at art. 3(d).

419 Bourbonniere & Haeck, *supra* note 211 at 929.

420 Milde, "Misuse of Civil Aviation," *supra* note 184 at 109; see also *ibid.* at 117.

421 Annex 2, *supra* note 177 at Attachment A, § 1.

422 *Ibid.*

423 DoDD 4540.1, *supra* note 181 at ¶¶ 4.2.1, 5.3.1. However, when U.S. military aircraft conduct classified missions or politically sensitive operations, aircraft flight commanders need not follow the ICAO flight procedures but may operate under the "due regard" option, in which they will be their own air traffic control agency for purposes of separating their aircraft from other air traffic. *Ibid.* at ¶ 5.3.2.2. The U.S. Department of Defense thus employs the term 'due regard' as a term of art, regarding it as a method to operate under when not following ICAO flight procedures. See U.S., Air Force Instruction, 13-201, *Space, Missile, Command and Control* (20 September 2001) at ¶ 1.7.1. The decision to operate under 'due regard' is solely a command and aircraft commander prerogative. *Ibid.* at ¶ 1.7.2.

standards on interceptions entails unnecessary risk. These standards provide several distinct advantages. They help overcome potential language and cultural barriers, making interceptions simpler and safer. Although state aircraft are not bound to follow ICAO rules and procedures, the pilot of an intercepted civil aircraft must comply with these standards, and respond to visual signals in the prescribed manner.[424] Equally important, these standards meet the requirement of 'due regard' and will, if followed, shield a state from criticism on its conduct during the interception.

The final chapter will address the remedies an aggrieved state may pursue for violations of international law whenever its civil aircraft is intercepted without a proper legal justification or in a manner that is incompatible with the concept of 'due regard.'

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[424] Annex 2, *supra* note 177 at §. 3.8.2; *ibid.* at § 4.1.3.1.

# CHAPTER VI.

## REMEDIES FOR THE ABUSE OF RIGHTS

Any interference with a foreign civil aircraft over the high seas may justifiably be regarded as a serious matter.[425] In all cases such interference is potentially hazardous and disruptive. While states may lawfully intercept foreign civil aircraft over the high seas, they may do so only in exceptional circumstances, to protect their vital interests. If the current public order of the high seas is to remain viable, any infringement of the general principles of freedom of overflight and of exclusive flag-state jurisdiction should be subject to careful scrutiny. As Philip Jessup observed, since "under the law of the United States, the individual is protected against unreasonable searches and seizures, so the individual ship- or aircraft-owner would need like protection against an abuse of power by international forces."[426]

### A. Interceptions Made on Inadequate Grounds

Under the UNCLOS, if the grounds for suspicion leading to the interception of a ship prove to be unfounded, the ship-owner must be "compensated for any loss or damage that may have been sustained."[427] This provision could reasonably apply to the interception of an aircraft. The UNCLOS also provides that, if "the seizure of a ship or *aircraft*" has been "effected without adequate grounds, the State making the seizure shall be liable ... for any

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[425] McDougal & Burke, *supra* note 122 at 898 (asserting the same sentiments for ships).

[426] Jessup, *supra* note 260 at 221.

[427] *UNCLOS*, *supra* note 84 at art. 110(3).

loss or damage caused by the seizure."[428] Placing the risk of an unwarranted interception on the state making the interception seems entirely appropriate.

However, in order to claim compensation, the intercepted aircraft must not have committed any act justifying its interception.[429] The aircraft cannot claim compensation if, by its failure to comply with ICAO rules and procedures, it provided reasonable grounds for suspicion on account of not having been registered, not bearing appropriate external markings, its failure to file a complete flight plan with the appropriate air traffic control service, or the pilot's refusal to respond appropriately to reasonable requests for information in accordance with ICAO rules. The decision to intercept the aircraft must be judged from the perspective of those who were "in the circumstances ruling at the time" of the interception.[430]

## B. Disputes Between States

If the state making an unlawful interception does not make reparations to the aircraft-owner for loss or injury, the aircraft's state of registry may seek redress on behalf of the aircraft's owners:[431]

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[428] *Ibid.* at art. 106 (emphasis added).

[429] *Ibid.* at art. 110(3).

[430] *San Remo Manual, supra* note 242 at ¶ 40 (on the determination of a military objective).

[431] The U.S. *Commander's Handbook* lists five possible remedies that an aggrieved nation may pursue "[i]n the event *of a clearly established violation of the law of armed conflict*":

1. Publicize the facts with a view toward influencing world public opinion against the offending nation.
2. Protest to the offending nation and demand that those responsible be punished and/or that compensation be paid.
3. Seek the intervention of a neutral party, particularly with respect to the protection of prisoners of war and other of its nations that have fallen under the control of the offending nation.

> It is an elementary principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law, committed by another State, from whom they have been unable to obtain satisfaction through ordinary c hannels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights — its right to ensure, in the person of its subjects, respect for the rules of international law.[432]

The state seeking compensation has the burden of proving the existence of an international obligation and its breach, while the responding state has the burden of establishing any justification or excuse for the violation.[433] A state charged with a violation of an obligation may offer an *ex gratia* payment without admitting liability.[434] Because no liability is conceded, "[t]he level of compensation paid on an *ex gratia* basis is essentially within the discretion of the state offering the payments."[435]

Most international disputes are settled by direct negotiations between the parties:[436] When direct negotiations fail, it is a remarkable feature of public international air law that aggrieved states may bring a dispute to a central authority for adjudication.

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4. Execute a belligerent reprisal action [citation omitted].
5. Punish individual offenders either during the conflict or upon cessation of hostilities.

*Commander's Handbook*, *supra* note 115 at ¶ 6.2 (emphasis in original).

[432] *Mavrommatis Palestine Concessions Case (Greece v. United Kingdom)*, (1924) P.C.I.J. (ser. A) No. 2 at 12.

[433] A.L.I, Restatement of the Law 3rd, Foreign Relations of the United States (St. Paul, MN: American Law Institute, 1989) "Interstate Claims and Remedies" § 902 comment a [Restatement 3rd].

[434] *Ibid.* at comment h.

[435] U.S., Dep't St. Bull., 2138 (September 1988), at 38, reprinted in *Agora: The Downing of Iran Air Flight 655*, (1989) 83 Am. J. Int'l L. 320 at 323 [*Agora*].

[436] Restatement 3rd, *supra* note 433 at § 902 comment d.

## C. Dispute Resolution at the ICAO Council

The Chicago Convention not only grants to the ICAO Council quasi-lawmaking power, but it also assigns to the Council an important quasi-judicial function:[437]

> If any disagreement between two or more contracting States relating to the interpretation or application of this Convention and its Annexes cannot be settled by negotiation, it shall, on the application of any State concerned in the disagreement, be decided by the Council.[438]

The ICAO Council may thus authoritatively settle disputes regarding the interpretation and application of any provision in the Convention.

Despite its quasi-judicial role, the Council is essentially a political body and not a judicial organ.[439] The persons sitting on the Council do not act in their individual capacity, but as national representatives of their respective governments.[440] For this reason, they are neither independent nor judicially detached. They may seek instructions from their respective governments on how they should vote or if they should abstain from voting altogether.[441] The political aspect of the body is also reflected in the Council's composition, which is weighted in favor of certain states. Article 50(b) requires that the Assembly, in electing the Council, give "adequate representation to ... the States of Chief importance in air

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437 Cheng, *supra* note 185 at 52, 100-01

438 *Chicago Convention*, *supra* note 83 at art. 84.

439 To assist it in the consideration of a dispute, the ICAO Council has adopted procedural "Rules for the Settlement of Differences." ICAO, *Rules for the Settlement of Differences*, Doc. 7782/2 (9 April 1957) (amended 10 November 1975). After deliberating, the Council may adopt a decision by a majority vote of its members, *Chicago Convention*, *supra* note 83 at art. 52, provided that no member of the Council may vote "in the consideration by the Council of any dispute to which it is a party. *Ibid.* at art. 84.

440 Gerald F. Fitzgerald, "The Judgment of the International Court of Justice in the Appeal Relating to the Jurisdiction of the ICAO Council" (1974) 12 Can. Y.B. Int'l L. 153 at 168-69.

441 Michael Milde, "Dispute Settlement in the Framework of the International Civil Aviation Organization," in Karl-Heinz Boeckstiegel ed., *Settlement of Space Law Disputes* (Cologne: Heymann, 1980) 87 at 90 (citation omitted) [Milde, *Dispute Settlement*]; Fitzgerald, *supra* note 440 at 169.

transport ... [and] the States ... which make the largest contribution to the provision of facilities for international civil air navigation."[442]

None of this is to imply a criticism of the representatives who may be called upon to take a decision, but it is presented to "accurately reflect the realities and working methods well established in ICAO."[443] If a party to a dispute is dissatisfied with a decision of the Council, it may appeal it to the International Court of Justice.

## D. Proceedings before the International Court of Justice

Article 84 of the Convention also provides a right of an appeal from a decision of the ICAO Council:

> Any contracting State, may, . . . appeal from the decision of the Council to an *ad hoc* arbitral tribunal agreed upon with the other parties to the dispute or to the Permanent Court of International Justice. Any such appeal shall be notified to the Council within sixty days of receipt of notification of the decision of the Council.[444]

Two aspects of this provision need clarification. The reference to the Permanent Court of International Justice now means the International Court of Justice, which has assumed its duties.[445] In addition, an appeal to an *ad hoc* arbitral tribunal is available only to a contracting state which has not accepted the Statute of the International Court of Justice.[446] Because all members of the United Nations are *ipso facto* parties to the Statute of the

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442 *Chicago Convention*, *supra* note 83 at art. 50(b).

443 Milde, "Dispute Settlement," *supra* note 441 at 90.

444 *Chicago Convention*, *supra* note 83 at art. 84.

445 *Statute of the International Court of Justice*, 3 Bevans 1179, 59 Stat. 1031 at art. 37 [*I.C.J. Statute*].

446 Milde, "Dispute Settlement," *supra* note 441 at 89; see also Cheng, *supra* note 185 at 104.

International Court of Justice,[447] the reference to an *ad hoc* arbitral tribunal is for them inoperative.[448]

Other air law treaties, such as the 1963 Tokyo Convention, the 1970 Hague Convention, and the 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation,[449] also contain a provision conferring appellate jurisdiction on the International Court of Justice from the decisions of the ICAO Council.[450] However, these treaties permit contracting states to enter reservations regarding the appellate jurisdiction of the International Court of Justice. The Chicago Convention does not allow reservations of any kind, and no reservations have been made to it. Accordingly, the appellate jurisdiction of the International Court of Justice for disputes under the Chicago Convention is compulsory for all 188 contracting states.[451]

***- India v. Pakistan Dispute***

The broad scope of both types of jurisdiction—that of the ICAO Council and that of the International Court of Justice—are illustrated by the Court's 1972 judgment of an appeal filed by India from a decision of the ICAO Council.[452] The issue on appeal was whether the ICAO Council had jurisdiction to decide if the Chicago Convention applied in time of war to

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447 *Charter of the United Nations*, at art. 93(1).

448 Milde, "Dispute Settlement," *supra* note 441 at 89.

449 *Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation*, 23 September 1971, 24 U.S.T. 564 [*Montreal Convention*].

450 *Tokyo Convention*, *supra* note 159 at art. 24(1); *Hague Convention*, *supra* note 248 at art. 12(1); *Montreal Convention*, *supra* note 449 at art. 14(1).

451 *I.C.J. Statute*, *supra* note 445 at art. 36(1) ("The jurisdiction of the Court comprises ... all matters specially provided for ... in treaties or conventions in force.").

452 *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)* [1972] I.C.J. Rep. 46 [*India v. Pakistan*].

a dispute between India and Pakistan. Pakistan had filed a complaint with the Council in 1971, alleging that India violated the Chicago Convention when it abruptly suspended Pakistani flights over its territory.[453] India suspended the flights after one of its aircraft had been hijacked, flown to Pakistan, and blown up, "allegedly with the complicity of the Pakistani government."[454]

India responded to Pakistan's complaint by asserting that the Convention was no longer in force between them. According to India, Pakistan had breached its obligations under the Convention in its conduct over the hijacking.[455] Moreover, the Convention had terminated or was suspended between them in 1965 when they were engaged in an armed conflict lasting nearly three weeks. Air traffic resumed after this conflict with the signing of the Tashkent Declaration, which permitted overflight but no landing rights.[456] India contended that the Chicago Convention had never been revived between it and Pakistan but was replaced by a 'special régime' over which the Council could have no jurisdiction.[457] The ICAO Council rejected these preliminary objections and reaffirmed its competence to hear the dispute. India appealed this ruling.

The International Court of Justice voted 14-2 to uphold the ICAO Council's jurisdiction to decide the case.[458] The Court stated that the case was "one of mutual charges

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[453] *Ibid.* 51 at ¶ 10.

[454] Paul S. Dempsey, "Flights of Fancy and Fights of Fury: Arbitration and Adjudication of Commercial and Political Disputes in International Aviation" (2004) 32 Ga. J. Int'l & Comp. L. 231 at 272.

[455] *India v. Pakistan, supra* note 452 at 62 at ¶ 29.

[456] Demspey, *supra* note 454 at 273.

[457] *India v. Pakistan, supra* note 452 at 62 at ¶ 29.

[458] *Ibid.* 70 at ¶ 46.

and counter-charges of breach of treaty which cannot ... fail to involve questions of the interpretation and application of the treaty instruments in respect of which the breaches are alleged."[459] Moreover, the parties' differences on their freedom of action in time of war proved the existence of a disagreement relating to the interpretation or application of the Convention.[460] Accordingly, the Court held that the ICAO Council was vested with jurisdiction to decide disputes under the Chicago Convention in time of war or national emergency.

The Court also rejected Pakistan's objections to its appellate jurisdiction. Pakistan contended that, since India's principal contention is that the Convention did not apply between them, it could not invoke the jurisdictional clause of Article 84 for the purpose of appealing to the Court.[461] The Court answered that India had only contended that the Convention was suspended between herself and Pakistan,[462] and, "in the proceedings before the Court, it is the act of a third entity—the Council of ICAO—which one of the Parties is impugning and the other defending."[463] In reply to Pakistan's contention that the Court could not hear the appeal because the Council's decision was not a final decision on the merits, the Court replied that the Chicago Convention gave member states, "and through them the Council, the possibility of ensuring a certain measure of supervision by the Court over those

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459 *Ibid.* 66 at ¶ 37.

460 *Ibid.* 68-69 at ¶¶ 40-43.

461 *Ibid.* 52 at ¶ 14.

462 *Ibid.* 53 at ¶ 16(a). The Court noted that Pakistan's argument precluding the appeal could be turned against her. Since Pakistan was asserting on the merits that the Convention was still in force, it might be questioned whether she could deny the application of the jurisdictional clause in Article 84. *Ibid.* 54 at ¶ 16(c).

463 *Ibid.* 60 at ¶ 26.

decisions ... for the good functioning of the Organization," by reassuring the Council that "means exist for determining whether a decision as to its own competence is in conformity ... with the provisions" of the Convention.[464] The Court thus held that it had jurisdiction to hear appeals on preliminary matters as well as on the merits of a dispute. The dispute was later settled between the parties themselves.

The Court's appellate jurisdiction, coupled with uncertainty as to how it may rule, has been a catalyst for parties to enter negotiations and settle their disputes on mutually acceptable terms. This observation is borne out by two cases involving the United States.

***- Iran v. United States Dispute***

On 3 July 1988, the US warship Vincennes shot down Iran Air Flight IR655 over the Persian Gulf by firing two surface-to-air missiles, killing everyone on board. As the ICAO investigation found, the warship launched the missiles in the mistaken belief that the civil aircraft was a military aircraft with hostile intentions.[465] The United States did not accept legal responsibility for the incident, but it stated that it would make *ex gratia* compensation directly to the families of the victims, without making any payments to or through the Government of Iran, with which it had no diplomatic relations.[466]

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[464] *Ibid.*

[465] See ICAO, *Report of ICAO Fact-Finding Investigation* (November 1988), reprinted in (1989) 28 I.L.M. 896.

[466] *Agora, supra* note 435 at 321-22.

The U.S. State Department's legal advisor summarized the principles of international law governing the potential liability for injuries and property damage arising out of military operations as follows:

> *First,* indemnification is not required for injuries or damage incidental to the lawful use of force. *Second,* indemnification is required where the exercise of armed force is unlawful. *Third,* states may, nevertheless, pay compensation *ex gratia* without acknowledging, and irrespective of, legal liability.[467]

He also explained the rationale for the *ex gratia* payments:

> Offering compensation is especially appropriate where a civilian airliner has been shot down. The 1944 Convention on International Civil Aviation (the Chicago Convention) ... constitutes a solemn undertaking to promote the safe and orderly development of international civil aviation. Indeed, the safety of international civil aviation is of the highest priority to the international community. When that safety is impaired and innocent lives are lost, nations should consider taking appropriate action to compensate those who suffer as a result.[468]

The government of Iran nonetheless applied to the ICAO Council seeking a declaration condemning the United States for breaches of international law and its legal duties under the Chicago Convention, as well as a declaration that the United States must pay

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[467] *Ibid.* at 322-24. In his testimony, the legal advisor recounted several instances where other countries had paid compensation on an *ex gratia* basis:

> In 1973 Israel shot down a Boeing 727 airliner that mistakenly flew over the Israeli-occupied Sinai, killing 106 passengers. . . . Israel made an ex gratia payment. . . . In 1954 the People's Republic of China (P.R.C.) shot down a U.K.-registered Cathay Pacific plane in the vicinity of Hainan Island, which was en route from Bangkok to Hong Kong. The P.R.C. apologized and indicated that its pilots had mistakenly identified the plane as a military aircraft from Taiwan. The P.R.C. paid compensation to the United Kingdom to be disbursed to the victims' families. Among the victims were six U.S. nationals. . . . Very few instances exist in which a nation responsible for shooting down a civilian airliner has refused to pay compensation. The two most notorious examples both involve the Soviet Union. In 1978 the Soviets fired upon and forced the crash landing of a Korean airline 707 airplane, killing two passengers. In 1983 a Soviet fighter pilot shot down Korean Air Lines #007, killing 269 passengers. The Soviets have refused to accept [U.S.] claims for the deaths of 60 U.S. nationals on that flight, which resulted from the Soviets' indefensible action, or to accept the claims of other governments.

*Ibid.* at 322-23.

[468] *Ibid.* at 323.

compensation for moral and financial damages.[469] In a resolution dated 7 December 1988, the Council stated only that it "*[d]eeply deplores* the tragic incident which occurred as a consequence of event and errors in identification of the aircraft which resulted in the accidental destruction of an Iran Air airliner and the loss of 290 lives."[470]

Not satisfied with the ICAO action, Iran appealed to the International Court of Justice. In its memorial, the United States conceded that several treaties had conferred jurisdiction on the Court "to decide disputes relating to the interpretation and application of the subject convention once certain conditions are satisfied," but it denied that the applicable conditions had been satisfied, asserting, in particular, that the ICAO resolution was not a 'decision' of the ICAO Council.[471] In any event, the United States and Iran entered into negotiations, and, in a joint letter dated 22 February 1996, they informed the Court that they had concluded an agreement in full and final settlement of the case.[472] If the parties had elected to continue the appeal, the International Court of Justice would likely have had to reach a decision on the merits probably on the basis of the law of armed conflict.[473]

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469 "Application Instituting Proceedings at the International Court of Justice on the Aerial Incident of 3 July 1988" *(Islamic Republic of Iran v. United States of America)* (17 May 1989), reprinted in (1989) 28 I.L.M. 843.

470 ICAO, Resolution adopted by the Council of the International Civil Aviation Organization (at the 20th Meeting of its 126th Session) (17 March 1989), reprinted in (1989) 28 I.L.M. 898.

471 Preliminary Objections Submitted by the United States in the Case Concerning the Aerial Incident of 3 July 1988 *(Islamic Republic of Iran v. United States of America)* (4 March 1991) [1991] I.C.J. Pleadings at 2-3.

472 *Case Concerning the Aerial Incident of 3 July 1988 (Iran v. United States)*, Order of 22 February 1996, [1996] I.C.J. Rep. 9 at 10.

473 David K. Linnan, "Iran Air Flight 655 and Beyond: Free Passage, Mistaken Self-Defense, and State Responsibility" (1991) 16 Yale J. of Int'l L 245 at 266.

***- Libya v. United States Dispute***

The prospect of a Court decision motivated the United States and Libya to settle their differences relating to the destruction of Pan Am Flight 103 on 21 December 1988 by the explosion of a bomb over Lockerbie, Scotland. Following its investigation, the United States in 1991 indicted two Libyans and immediately demanded their extradition to the United States to stand trial.[474] Libya refused to comply with the request, whereupon the United States brought the matter to the U.N. Security Council, which eventually adopted Resolution 748 ordering Libya to extradite the two suspects.[475] The Court denied Libya's request for interim measures, expressly reserving for its final judgment its ruling on the legal effect of Resolution 748 or any other question raised in the proceedings.[476] Eventually the United States and Libya settled their dispute through negotiations,[477] leading to a trial by a Scottish tribunal at The Hague.

The International Court of Justice has not had any other occasion to hear an appeal on a dispute arising from a public air law treaty. Yet, as these cases show, an aggrieved state may always appeal to the Court for redress. Hence, every party to a dispute must be prepared to publicly justify its actions. If a state can justify an interception, it will not be held liable. Otherwise it must make full compensation for the damage caused.

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[474] *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States)* Order of 14 April 1992, [1992] I.C.J. Rep. 114 at ¶30 [*Libya v. United States*].

[475] UN SCOR, 47th Sess., 3063rd mtg., UN Doc. S/RES/748 (1992), online: United Nations <http://daccess-ods.un.org/TMP/2675065.html>.

[476] *Libya v. United States, supra* note 474 at 127 ¶¶ 43, 45.

[477] *Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States)* Order of 10 September 2003, [2003] I.C.J. Rep. 149.

## CONCLUSION

The purpose of this study was to survey and determine the role of international law in the interception of foreign civil aircraft over the high seas. The events of September 11, 2001, marked a new development in international terrorism, namely, the misuse of civil aircraft as a major weapon. In addition, the clandestine movement of WMD by various means, including aircraft, heightens the threat to international peace and security. In 2002, the United States declared its intent to act preemptively, if necessary, to address threats to its security before they materialize. In 2003, the United States also unveiled the Proliferation Security Initiative, a cooperative effort by several states to interdict the movement of WMD. To underscore the seriousness of these threats, the U.N. Security Council has repeatedly called on states to cooperate in the war on terror and to exchange information relating to the movement of terrorists and of WMD by terrorist groups.

Under the current legal regime, the high seas are open to all nations as a public highway. Every state enjoys the freedom of overflight as well as exclusive jurisdiction over its own aircraft. To safeguard the safety of civil air navigation, the ICAO Council has adopted 'Rules of the Air,' binding over the high seas, an area covering some 70 percent of the earth's surface, for all 188 contracting states. However, the freedom of the high seas and the exclusive flag-state jurisdiction over its aircraft are norms subject to the criterion of reasonableness.

Military aircraft—symbols of a nation's military power and prestige—are immune from most international regulations. In particular, they may not be boarded by foreign officials without the consent of the aircraft commander. Military, customs, and police

aircraft may intercept foreign aircraft over the high seas. The identity of these aircraft is therefore critical. In this respect, state practice is well-developed and leaves little doubt as to what constitutes a military aircraft, despite the absence of a formal definition in a treaty, such as the Chicago Convention.

There can be no doubt that, in certain circumstances, states may lawfully intercept foreign civil aircraft over the high seas without the consent of its state of registry. The U.N. Security Council in its resolutions has effectively rendered international terrorists *hostes humanis generis*, thereby creating a virtual obligation for every state to cooperate in the war on terror. International law concerning piracy, hijacking of civil aircraft, as well as stateless aircraft, provides additional grounds for the lawful interception of civil aircraft over the high seas. To make the interception lawful, the intercepting state must have reasonable grounds for suspecting that the particular aircraft is engaged in a prohibited activity.

International law also provides reasonably clear standards on how these interceptions may be carried out. The intercepting aircraft must exercise 'due regard' for the safety of the intercepted civil aircraft and employ force only as a last resort. Although military aircraft are not bound by the 'Rules of the Air' and other safety-related standards adopted by the ICAO, including standards governing the interception of civil aircraft, they should to the maximum extent possible act in accordance with them. If the ICAO standards are followed, they will shield a state from allegations that the interception itself was incompatible with the principle of 'due regard.'

Every interception is potentially subject to review by the ICAO Council, the U.N. Security Council, and the International Court of Justice. A state resorting to interception

over the high seas must therefore always weigh the consequences of its actions and be prepared to justify its act.

# BIBLIOGRAPHY


## TREATIES

*Charter of the United Nations.*

*Convention for the Suppression of Unlawful Seizure of Aircraft*, 16 December 1970, 22 U.S.T. 1641.

*Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation* , 23 September 1971, 24 U.S.T. 564.

*Convention on International Civil Aviation*, 7 December 1944, 15 U.N.T.S. 295, T.I.A.S. 1591.

*Convention on Offenses and Certain Other Acts Committed on Board Aircraft*, 14 September 1963, 704 U.N.T.S. 219, 20 U.S.T. 2941, T.I.A.S. 6748.

*Convention on the High Seas*, 29 April 1958, 450 U.N.T.S. 82.

*Convention on the Territorial Sea and the Contiguous Zone*, 29 April 1958, 516 U.N.T.S. 205.

*Convention Relating to the Regulation of Aerial Navigation*, 13 October 1919, (1922) L.N.T.S. No. 297 at 173 (no longer in force).

*General Pact for the Renunciation of War,* 27 August 1928, reprinted in (1928) 22 Am. J. Int'l L. Supp. 171-73.

*North Atlantic Treaty*, 4 April 1949, 34 U.N.T.S. 243.

*Protocol Additional to the Geneva Conventions of 12 August of 1949 and the Relation to the Protection of Victims of International Armed Conflict (Protocol I)*, 8 June 1977, 1125 U.N.T.S. 3, reprinted in (1977) 16 I.L.M. 1391.

*Statute of the International Court of Justice*, 3 Bevans 1179, 59 Stat. 1031.

*United Nations Convention on the Law of the Sea*, 10 December 1982, 1833 U.N.T.S. 3.

## INTERNATIONAL JUDICIAL DECISIONS

*Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)* [1972] I.C.J. Rep. 46.

*Case Concerning the Aerial Incident of 3 July 1988 (Iran v. United States)*, Order of 22 February 1996, [1996] I.C.J. Rep. 9.

*Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Judgment of 27 June 1986, [1986] I.C.J. Rep. 14.

*Case Concerning Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States)* Order of 14 April 1992, [1992] I.C.J. Rep. 114.

———. Order of 10 September 2003, [2003] I.C.J. Rep. 149.

*Mavrommatis Palestine Concessions Case (Greece v. United Kingdom)*, (1924) P.C.I.J. (ser. A) No. 2.

*Nottebohm, Second Phase (Liechtenstein v. Guatemala)* [1955] I.C.J. Rep. 4.

*S.S. "Lotus" (France. v. Turkey)*, (1927) P.C.I.J. (Ser. A) No. 10.

*The Corfu Channel Case (United Kingdom v. Albania)*, Merits [1949] I.C.J. Rep. 4.

**UNITED NATIONS DOCUMENTS**

U.N., *Status of the United Nations Convention on the Law of the Sea, of the Agreement relating to the implementation of Part XI of the Convention and of the Agreement for the implementation of the provisions of the Convention relating to the conservation and management of straddling fish stocks and highly migratory fish stocks* (as of 28 April 2006), online: United Nations <www.un.org/depts/los/reference_files/status2006.pdf>.

UN SCOR, 21st Sess., 1277th mtg., UN Doc. S/RES/221 (1966), online: United Nations <http://daccess-ods.un.org/TMP/3030737.html>.

UN SCOR, 28th Sess., 1740th mtg., UN Doc. S/RES/337 (1973), online: United Nations <http://daccess-ods.un.org/TMP/5859179.html>.

UN SCOR, 45th Sess., 2963rd mtg., UN Doc. S/RES/678 (1990), online: United Nations <http://daccess-ods.un.org/TMP/4946161.html>.

UN SCOR, 45th Sess., 2938th mtg., UN Doc. S/RES/665 (1990), online: United Nations <http://daccess-ods.un.org/TMP/9961158.html>.

UN SCOR, 47th Sess., 3063rd mtg., UN Doc. S/RES/748 (1992), online: United Nations <http://daccess-ods.un.org/TMP/2675065.html>.

UN SCOR, 47th Sess., 3137th mtg., UN Doc. S/RES/787 (1992), online: United Nations <http://daccess-ods.un.org/TMP/5071411.html>.

UN SCOR, 51st Sess., 3683rd mtg., UN Doc. S/RES/1067 (1996), online: United Nations <http://daccess-ods.un.org/TMP/958198.3>.

UN SCOR, 56th Sess., 4370th mtg., UN Doc. S/RES/1368 (2001), online: United Nations <http://www.un.org/TMP/9798191.html>.

UN SCOR, 56th Sess., 4385th mtg., UN Doc. S/RES/1373 (2001), online: United Nations <http://daccess-ods.un.org/TMP/9542914.html>.

UN SCOR, 59th Sess., 4908th mtg., U.N. Doc. S/RES/1526 (2004), online United Nations <http://daccessdds.un.org/TMP/4650590.html>.

UN SCOR, 59th Sess., 4956th mtg., UN Doc. S/RES/1540 (2004), online: United Nations <http://daccess-ods.un.org/TMP/8051902.html>.

UN SCOR, 59th Sess., 5053rd mtg., UN Doc. S/RES/1566 (2004), online: United Nations <http://daccess-ods.un.org/TMP/886220.6>.

UN SCOR, 60th Sess., 5244th mtg., UN Doc. S/RES/1617 (2005), online: United Nations <http://daccess-ods.un.org/TMP/6426752.html>.

### INTERNATIONAL CIVIL AVIATION ORGANISATION DOCUMENTS

ICAO. Document, LC/29-WP/2-1, Attachment 1, Secretariat Study on *"Civil/State Aircraft.* (3 March 1995).

———. Document 9630-LC/189, Legal Committee 29th Session Report, 4-15 July 1994 (Montreal, Canada).

———. *International Standards, Rules of the Air*, Annex 2 to the Convention on International Aviation (9th ed. July 1990).

———. *Manual Concerning the Interception of Civil Aircraft*, Doc 9433-AN/926 (2nd ed. 1990).

———. *Report of ICAO Fact-Finding Investigation* (November 1988), reprinted in (1989) 28 I.L.M. 896.

———. Resolution adopted by the Council of the International Civil Aviation Organization (at the 20th Meeting of its 126th Session) (17 March 1989), reprinted in (1989) 28 I.L.M. 898.

———. *Rules for the Settlement of Differences*, Doc 7782/2 (9 April 1957) (amended 10 November 1975).

### NORTH AMERICAN AEROSPACE DEFENSE COMMAND DOCUMENTS

NORAD. *About Us*, online: NORAD< http://www.norad.mil/about_us.htm>.

### NORTH ATLANTIC TREATY ORGANIZATION DOCUMENTS

NATO. Press Release, PR/CP (2001) 122, "Statement by the North Atlantic Council" (11 September 2001), online: NATO <http://www.nato.int/docu/pr/2001/p01-122e.htm>.

———. Press Release, PR/CP (2001) 124, "Statement by the North Atlantic Council" (12 September 2001), online: <http://www.nato.int/docu/pr/2001/p01-124e.htm>.

"States Parties to the Convention on International Civil Aviation, (1995) 30 Annals of Air & Space L. Part I, at 51.

### ORGANIZATION OF AMERICAN STATES DOCUMENTS

OAS, *Resolution on Terrorist Threat to the Americas* (21 September 2001), reprinted in (2001) 40 I.L.M. 1273.

### MANUALS ON THE LAW OF ARMED CONFLICT

International Institute of Humanitarian Law, *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (New York, Cambridge U. Press, 1995).

U.K. Ministry of Defence, *The Manual of the Law of Armed Conflict* (New York: Oxford U. Press, 2004).

U.S. Department of the Navy, *The Commander's Handbook on the Law of Naval Operations* (NWP 1-14M) (October 1995).

**NATIONAL LEGISLATION AND REGULATIONS**

U.S. *Authorization for the Use of United States Armed Forces*, Pub. L. No. 107-40, 115 Stat. 224 (2001).

———. *International Regulations for Preventing Collisions at Sea*, 33 U.S.C. §§ 1601-1606 (2006).

———. *Registration and Recordation of Aircraft*, 49 U.S.C. § 44102 (2006).

———. *Security Control of Air Traffic*, 14 C.F.R. Part 99 (2006).

———. *Space, Missile, Command and Control*, Air Force Instruction 13-201 (20 September 2001).

———. *Special Maritime and Territorial Jurisdiction of the United States*, 18 U.S.C. § 7 (2006).

———. *Use of Airspace by US Military Aircraft and Firings Over the High Seas*, Department of Defense Directive 4540.1 (13 January 1981) (certified current as of 8 December 2003).

**NATIONAL DOCUMENTS**

Canada, *Canada Treaty Information on Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, online: Canada<http://www.treaty-accord.gc.ca/Details.asp?Treaty_ID=102898>.

———. *Canada Treaty Information on Protocol Relating to Amendment to the Convention on International Civil Aviation (Article 3 bis)*, online: Canada<http://www.treaty-accord.gc.ca/Details.asp?Treaty_ID=103574>.

Iran. "Application Instituting Proceedings at the International Court of Justice on the Aerial Incident of 3 July 1988" (Iran v. United States) (17 May 1989), reprinted in (1989) 28 I.L.M. 843.

U.S. Congressional Research Service, *Terrorist Attack on USS Cole: Background and Issues for Congress* (Order Code RS20721) (Washington, D.C., The Library of Congress, 2001), online: George Washington University <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB55/crs20010130.pdf>.

———. Congressional Research Service, *U.S. Use of Preemptive Military Force* (Order Code RS 21311) (Washington, D.C., The Library of Congress, 2002), online: U.S. State Department <http://fpc.state.gov/documents/organization/13841.pdf >.

———. Congressional Research Service, *Weapons of Mass Destruction Counterproliferation: Legal Issues for Ships and Aircraft* (Order Code RL32097) (Washington, D.C., The Library of Congress, 2003) at 3, online: Federation of American Scientists <http://www.fas.org/spp/starwars/crs/RL32097.pdf>.

———. *Department of Defense Report to Congress on the Conduct of the Persian Gulf War – Appendix on the Role of the Law of War* (10 April 1992), reprinted in 31 I.L.M. 612.

———. "Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council," U.N. Doc. S/2001/946 [Letter dated 7 October 2001], reprinted in (2001) 40 I.L.M. 1281, online: United Nations <http://www.un.int/usa/s-2001-946.htm>.

———. National Commission on Terrorist Attacks upon the United States, *The 9/11 Commission Report: Final Report of the National Commission on the Terrorist Attacks upon the United States* (Washington, D.C.: United States Government Printing Office, 2004).

———. Office of the Press Secretary, *The Proliferation Security Initiative: Statement of Interdiction Principles* (4 September 2003) at princ. 2, online: U.S. State Department <http://www.state.gov/t/isn/rls/fs/23764.htm>.

———. Preliminary Objections Submitted by the United States in the Case Concerning the Aerial Incident of 3 July 1988 (Iran v. United States) (4 March 1991).

———. Presidential Proclamation No. 5928 (27 December 1988), 54 Fed. Reg. 777.

———. State Department, *Identic Notes of the Government of the United States relating to the Multilateral Treaty for the Renunciation of War* (23 June 1928), reprinted in (1928) 22 Am. J. Int'l L. Supp. 109-110 (emphasis added).

———. *What is the Proliferation Security Initiative?*, online: U.S. State Department <http://usinfo.state.gov/products/pubs/proliferation/proliferation.pdf>.

———. State Department Bulletin 2138 (September 1988), reprinted in *Agora: The Downing of Iran Air Flight 655*, (1989) 83 Am. J. Int'l L. 320.

———. The White House, *Declaration of National Emergency by Reason of Certain Terrorist Attacks* (Proclamation No. 746) (14 September 2001) 337 Weekly Comp.Pres. Doc. 1310.

———. The White House, *The National Security Strategy of the United States of America* (September 2002), online: The White House <http://www.whitehouse.gov/nsc/nss.pdf>.

———. The White House, *The National Security Strategy of the United States of America* (March 2006), online The White House <http://www.whitehouse.gov/nsc/nss/2006/nss2006.pdf>.

———. The White House, *The National Strategy to Combat Weapons of Mass Destruction* (December 2002), online: The White House <http://www.whitehouse.gov/news/releases/2002/12/WMDStrategy.pdf>.

———. The White House, *United States Ocean Policy* (10 March 1983), reprinted in 22 I.L.M. 464.

**BOOKS AND TREATISES**

Boeckstiegel, Karl-Heinz ed. *Settlement of Space Law Disputes* (Cologne: Heymann, 1980).

Brownlie, Ian. *International Law and the Use of Force by States* (Oxford: Clarendon Press, 1963).

———. *Principles of Public International Law*, 6th ed. (Oxford: Oxford U. Press, 2003).

Cheng, Bin. *The Law of International Air Transport* (London: Stevens & Sons, Ltd, 1962)

Churchill, R.R. & A. V. Lowe. *The Law of the Sea*, 3rd ed. (Manchester: Manchester U. Press, 1999).

Dinstein, Yoram. *War, Aggression & Self-Defence*, 4th ed. (Cambridge: Cambridge U. Press, 2005).

Jessup, Philip C. *A Modern Law of Nations* (New York: Macmillan Co., 1948).

McDougal, Myres S. & William T. Burke, *The Public Order of the Oceans: A Contemporary International Law of the Sea* (New Haven: Yale U. Press, 1962).

McDougal, Myres S. & Florentino P. Feliciano. *Law and Minimum World Public Order: The Legal Regulation and International Coercion* (New Haven: Yale U. Press, 1961).

Murchison, John Taylor. *The Contiguous Airspace Zone in International Law* (Ottawa: Department of National Defence, 1956).

Schindler, Dietrich and Jiri Toman. *The Laws of Armed Conflict: A Collection of Conventions, Resolutions and Other Documents* 4th ed. (Leiden/Boston: Martinus Nijhoff Publishers, 2004).

Shubber, Sami. *Jurisdiction over Crimes On Board Aircraft* (The Hague: Martinus Nijhoff, 1973).

Taubenfeld, Howard J. "International Actions and Neutrality" (1953) 47 Am. J. Int'l L. 377.

Vlasic, Ivan A. *Explorations in Aerospace Law* (Montreal: McGill U. Press, 1968).

**ARTICLES**

Aldrich, George H. "Prospects for United States Ratification of the Additional Protocol I to the 1949 Geneva Conventions" (1991) 85 Am. J. Int'l L. 1.

Barry, Ian Patrick. "The Right of Visit, Search and Seizure of Foreign Flagged Vessels on the High Seas pursuant to Customary International Law: A Defense of the Proliferation Security Initiative" (2004-2005) 33 Hofstra L. Rev. 299.

Borkowski, George M. "Use of Force: Interception of Aircraft—*Interception of Egyptian Airliner by the United States*, Oct. 10, 1985; *Interception of Libyan Airplane by Israel*, Feb. 3, 1986" (1986) 27 Harv. Int'l L.J. 761.

Bourbonniere, Michel & Louis Haeck, "Military Aircraft and International Law: Chicago Opus 3" (2000-2001) 66 J. Air L. & Com. 885

Byers, Michael. "Policing the High Seas: The Proliferation Security Initiative" (2004) 98 Am. J. Int'l L. 526.

Cheng, Bin. "The Destruction of KAL Flight KE007" 49, 54.

Cooper, John C. "A Study on the Legal Status of Aircraft" in Ivan A. Vlasic, ed., *Explorations in Aerospace Law* (Montreal: McGill U. Press, 1968).

———. "National Status of Aircraft" (1950) 17 J. Air L. & Com. 292.

Dempsey, Paul S. "Flights of Fancy and Fights of Fury: Arbitration and Adjudication of Commercial and Political Disputes in International Aviation" (2004) 32 Ga. J. Int'l & Comp. L. 231.

Doswald-Beck, Louise. "The San Remo Manual on International Law Applicable to Armed Conflicts at Sea" (1995) 89 Am. J. Int'l Law 192.

Fenwick, C.G. "'Piracy' in the Caribbean" (1961) 55 Am. J. Int'l L. 426.

Fitzgerald, Gerald F. "The Judgment of the International Court of Justice in the Appeal Relating to the Jurisdiction of the ICAO Council" (1974) 12 Can. Y.B. Int'l L. 153.

Garvey, Jack I. "The International Institutional Imperative for Countering the Spread of Weapons of Mass Destruction: Assessing the Proliferation Security Initiative" (2005) J. of Conflict and Security L. 125.

Graham, Thomas Jr. "National Self-Defense, International Law, and Weapons of Mass Destruction" (2003) 4 Chi. J. Int'l L. 1.

Helfman, Tara. "Neutrality, the Law of Nations, and the Natural Law Tradition: A Study of the Seven Years' War" (2005) 30 Yale J. Int'l L. 549.

Jennings, R.Y. "The *Caroline* and *McLeod* Cases" (1938) 32 Am. J. Int'l L. 82

Joyner, Daniel H. "The Proliferation Security Initiative: Nonproliferation, Counterproliferation, and International Law" (2005) 30 Yale J. Int'l L. 507.

Kamp, Karl-Heinz. "Preemption: Far From Forsaken" (March/April 2005) Bulletin of the Atomic Scientists 26.

Linnan, David K. "Iran Air Flight 655 and Beyond: Free Passage, Mistaken Self-Defense, and State Responsibility" (1991) 16 Yale J. of Int'l L 245.

Lissitzyn, Oliver J. "The Treatment of Aerial Intruders in Recent Practice and International Law" (1953) 47 Am. J. Int'l L. 559.

Maerlie, Morten Bremer & Lars van Dassan. "Europe, Carry Your Weight" (November/December 2004) Bulletin of the Atomic Scientists 19.

Milde, Michael. "Dispute Settlement in the Framework of the International Civil Aviation Organization," in Karl-Heinz Boeckstiegel ed., *Settlement of Space Law Disputes* (Cologne: Heymann, 1979).

———. "Interception of Civil Aircraft vs. Misuse of Civil Aviation (Background of Amendment 27 to Annex 2)" (1986) 11 Annals of Air & Space L. 105.

———. "KE 007 – 'Final' Truth and Consequences," Abhandlugnen, 357.

———. "Status of Military Aircraft in International Law" (Lecture presented to the Third International Law Seminar, Singapore, 29 August 1999).

———. "United Nations Convention on the Law of the Sea—Possible Implications for International Air Law" (1983) 8 Annals of Air & Space L. 167.

Phelps II, Major John T. "Aerial Intrusions by Civil and Military Aircraft in Time of Peace" (1985) 107 Mil. L. Rev. 255.

Shrewsbury, Major Stephen M. "September 11th and the Single European Sky: Developing Concepts of Airspace Sovereignty" (2003) 68 J. Air. L. & Com. 115.

Taylor, Chester D. "International Flight of Military Aircraft in Peacetime: A Legal Analysis" (1968) 28 Fed. B.J. 36.

Wedgewood, Ruth. "Responding to Terrorism: The Strikes Against Bin Laden" (1999) Yale J. Int'l L. 559.

**SPEECHES, BRIEFINGS, AND TESTIMONY**

Bush, George W. "Address Before a Joint Session of the Congress On the United States Response to the Terrorist Attacks of September 11," (20 September 2001) 37 Weekly Comp. Pres. Doc. 1347.

———. "Remarks at Wawel Royal Castle in Krakow, Poland" (31 May 2003), online: The White House <http://www.whitehouse.gov/news/releases/2003/05/20030531-3.html>.

Fleisher, Ari. White House Press Briefing (11 December 2002) (WL).

Rice, Condoleezza Rice. "Remarks on the Second Anniversary of the Proliferation Security Initiative" (31 May 2005), online: U.S. State Department <http://www.state.gov/secretary/rm/2005/46951.htm>.

Taft, William H. "Written Statement Before the Senate Armed Services Committee on April 8, 2004, Concerning Accession to the 1982 Law of the Sea Convention and Ratification of the 1994 Agreement Amending Part XI of the Law of the Sea Convention" online: U.S. Senate <http://armed-services.senate.gov/statemnt/2004/April/Taft.pdf>.

**INTERNET NEWS SOURCES**

BBC News. "German Court Rejects Hijack Law" (15 February 2006), online: BBC News <http://news.bbc.co.uk/go/pr/fr/-/2/hi/europe/4715878.stm>.

———. "On This Day, 7 August 1998" *BBC News*, online: BBC News <http://news.bbc.co.uk/onthisday/hi/dates/stories/august/7/newsid_3131000/3131709.stm >.

———. "On This Day, 26 February 1993" BBC News, online: BBC News <http://news.bbc.co.uk/onthisday/hi/dates/stories/february/26/newsid_2516000/2516469.stm>.

CNN. "7/7 Report Faults Terror Planning" *CNN News* (11 May 2006), online: CNN News <http://edition.cnn.com/2006/WORLD/europe/05/11/london.bombings/index.html>.

———. "Al Qaeda Suspects Held in Spain" *CNN News* (19 May 2004), online: CNN News <http://edition.cnn.com/2004/WORLD/europe/05/19/madrid.arrests/>.

———. "Madrid Bombings: One Year On" *CNN News* (11 March 2005), online: CNN News <http://edition.cnn.com/SPECIALS/2004/madrid.bombing/>.

———. "Spain: U.S. Apologizes over Scud Ship" *CNN.com* (12 December 2002), online: CNN.com <http://archives.cnn.com/2002/WORLD/asiapcf/east/12/12/missile.ship/index/html>.

Grant, Rebecca. "Khobar Towers" *Air Force Association Magazine* (June 1998), online: Air Force Association < http://www.afa.org/magazine/june1998/0698khobar.asp>.

PBS. "Al Qaeda'a Fatwa" PBS Online NewsHour (23 February 1998), online: PBS Online NewsHour <http://www.pbs.org/newshour/terrorism/international/fatwa_1998.html>.

———. "Bin Laden's Fatwa" *PBS Online NewsHour* (August 1996), online: PBS Online NewsHour <http://www.pbs.org/newshour/terrorism/international/fatwa_1996.html>.

———. "Hunting Bin Laden" PBS Frontline (May 1998), online: PBS Frontline <http://www.pbs.org/wgbh/pages/frontline/shows/binladen/who/interview.html>.

**OTHER MATERIALS**

American Law Institute. Restatement of the Law 3rd, Foreign Relations of the United States (St. Paul, MN: American Law Institute, 1989).

*Hague Rules Concerning the Control of Wireless Telegraphy in Time of War and Air Warfare* (17 February 1923), Part II, reprinted in Dietrich Schindler and Jiri Toman, *The Laws of Armed Conflict: A Collection of Conventions, Resolutions and Other Documents* 4th ed. (Leiden/Boston: Martinus Nijhoff Publishers, 2004).