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Limitations on the Right to Use Force Against Civil Aerial Intruders: The Destruction of KAL Flight 007 in Community Perspective

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LIMITATIONS ON THE RIGHT TO USE FORCE AGAINST CIVIL AERIAL INTRUDERS: THE DESTRUCTION OF KAL FLIGHT 007 IN COMMUNITY PERSPECTIVE

INTRODUCTION

On September 1, 1983, a jet fighter of the Soviet Air Defense Forces[1] shot down a Korean Airlines Boeing 747[2] which had strayed into Soviet airspace.[3] The aircraft crashed into the Sea of Japan and the 269 persons aboard perished.[4] This note will examine the Soviet claim that the destruction of the Korean airliner was a lawful act taken in defense of sovereign Soviet airspace,[5] in conformity with article 51 of the Charter of the United Nations[6] and with states' practice and opinion, and in conformity with the expression of community norms as established from prior incidents regarding the use of force against intruding civil airliners.[7]

The focus of this note will be external. The Soviet Union has con-

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1. The Air Defense Forces are a separate branch of the Soviet military devoted solely to the protection of Soviet airspace. *See* VEDOMOSTI VERKHOVNOGO SOVETA SSSR [GAZETTE OF THE SUPREME SOVIET OF THE USSR] No. 48, item 891 (1982) (LAW ON THE STATE BOUNDARY OF THE U.S.S.R.), in COLLECTED LEGISLATION OF THE USSR AND UNION REPUBLICS (W. Butler ed. & trans. 1979), *reprinted in* 22 I.L.M. 1055 (1983). Article 27 provides: "The protection of the USSR state boundary on land, sea, rivers, lakes and other waters shall be entrusted to the border guard and in airspace, to the Anti-Aircraft Defense Forces . . . ." *Id.* at 1065-66. The airliner was shot down by a Soviet SU-15 interceptor under the air defense command at Sakhalin Island. N.Y. Times, Sept. 10, 1983, at A1, col. 6.

2. The airliner, Korean Airlines (KAL) Flight 007, operated five times a week between New York and Seoul. Statement of Mr. Kim, Permanent Observer of the Republic of Korea to the United Nations, 38 U.N. SCOR ( ) at , U.N. Doc. S/PV. 2470 (1983), *reprinted in* 22 I.L.M. 1114 (1983) [hereinafter cited as Kim Statement].

3. At approximately 1600 hours Greenwich Mean Time (GMT), the airliner strayed into Soviet airspace over Kamchatka Peninsula. From that time on it was monitored on radar by Soviet military authorities. The airliner remained in Soviet airspace until it was destroyed by the Soviet interceptor at 1826 hours GMT. *See* Letter of Charles Lichenstein, Acting Permanent Representative of the United States, to the President of the United Nations Security Council, 38 U.N. SCOR ( ) at , U.N. Doc S/15947 (1983), *reprinted in* 22 I.L.M. 1109 (1983).

4. The passengers included 47 Americans, 44 Chinese, 28 Japanese, 15 Filipinos, six Thais, four Australians, one Swede, one Indian, one Canadian and one whose nationality has not been determined. The 29 crew members were nationals of South Korea. Kim Statement, *supra* note 2, at 1114.

5. N.Y. Times, Mar. 7, 1984, at A12, cols. 3-4.

6. U.N. CHARTER art. 51.

7. *See infra* notes 76, 78, 79, 107, 110, 125.

ducted an internal investigation and concluded that the Defense Forces acted in conformity with Soviet border law.[8] A claim of lawfulness under international law, however, is subject to examination by the community of nations regarding the act's conformity with community-recognized prescriptions and expectations.[9]

At the request of the United States,[10] the Republic of Korea,[11] Canada,[12] Australia[13] and Japan,[14] a special session of the United Nations Security Council concerning the tragedy was convened on September 2, 1983.[15] The world community condemned the Soviet Union for its use

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8. At a rare press conference in Moscow held on September 9, 1983, Marshall Ogarkov, chief of the Soviet General Staff, stated that the Defense Forces acted:

> in quick compliance with the constitutional rights and laws on border protection. Protection of the borders, including a sovereign country's airspace, is a sovereign right of each government. The Soviet military forces protecting the peaceful labor of the Soviet Union are always at a high level of military preparedness and during the entire history of the Soviet Government they've always honorably fulfilled their duties. And, if necessary, they will execute their missions and will accomplish their combat missions correctly.

N.Y. Times, Sept. 10, 1983, at A4, cols. 5-6. The statements at the press conference were made in reliance "on the facts and conclusions presented by the commission." *Id.* at col. 1. The Soviet Union established an investigation commission on the incident, which included "responsible specialists and experts of different departments, in particular, the State Aviation inspection of the U.S.S.R." *Id.*

9. *See* M. MCDOUGAL & F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER 219 (1963); J. BRIERLY, THE LAW OF NATIONS 320-21 (5th ed. 1955).

10. *See* Lichenstein Letter, *supra* note 3. The United States took the position that "this unprovoked resort to the use of force by the Soviet military authorities in contravention of international civil aviation organization standards and the basic norms of international law must be deplored and condemned by the international community and by world public opinion." *Id.* at 1110.

11. *See* Letter from the Permanent Observer of the Republic of Korea to the President of the Security Council, 38 U.N. SCOR ( ) at , U.N. Doc. S/15948 (1983), *reprinted in* 22 I.L.M. 1111 (1983). South Korea strongly condemned "this unprovoked barbaric act committed by the Soviet Union in blatant violation of basic norms of international law and practice in international civil aviation . . . ." *Id.*

12. *See* Letter from the Chargé d'Affaires of the Permanent Mission of Canada to the President of the Security Council, 38 U.N. SCOR ( ) at, U.N. Doc. S/15949 (1983), *reprinted in* 22 I.L.M. 1112 (1983). Canada deplored the Soviet actions as "flagrant and unacceptable violations of the norms and practices of international civil aviation and international law." *Id.*

13. *See* Letter from the Acting Permanent Representative of Australia to the President of the Security Council, 38 U.N. SCOR ( ) at , U.N. Doc. S/15948 (1983), *reprinted in* 22 I.L.M. 1113 (1983). Australia deplored the Soviet action as being "incompatible with civilized behavior between States." *Id.*

14. *See* Letter from the Permanent Representative of Japan to the President of the Security Council, 38 U.N. SCOR ( ) at , U.N. Doc. S/15948 (1983), *reprinted in* 22 I.L.M. 1113 (1983).

15. 38 U.N. SCOR ( ) at , U.N. Doc. S/P.V. 2470 (1983), *reprinted in* 22 I.L.M. 1114

of military force against an unarmed commercial airliner.[16] The Canadian delegate stated:

> The deliberate in-flight destruction of this civilian, unarmed, easily identifiable passenger aircraft by sophisticated fighter aircraft of the Soviet Union, no matter where it occurred, is nothing short of murder. It is a flagrant attack on the safety of international civil aviation which should never have occurred and must not be allowed to occur again.[17]

The Australian delegate noted that "[t]here is no circumstance in which any nation can be justified in shooting down an unarmed civilian aircraft serving no military purpose. The fact that the aircraft may have strayed into Soviet airspace provides no justification whatsoever for an attack on the aircraft."[18]

The Soviet Union was charged with violating the legal norms and standards of international civil aviation regarding the use of force against intruding civil aircraft,[19] the internationally recognized principles of proportionality[20] and elementary considerations of humanity.[21]

(1983).

16. Among the countries that deplored the Soviet action were the United States, the Republic of Korea, Japan, Canada, Australia, France, China, the Netherlands, New Zealand, the United Kingdom, Zaire, Liberia, Sweden, Belgium, Italy, Singapore, Colombia, Fiji, Ecuador, Paraguay and the Federal Republic of Germany. For the text of the statements to the Security Council, see *id.*

17. *Id.* at 1117.

18. *Id.* at 1118.

19. *See supra* notes 11-13; Convention on International Civil Aviation, *opened for signature* Dec. 7, 1944, annex 2, 61 Stat. 1180, T.I.A.S. No. 1551, 15 U.N.T.S. 295 (*entered into force* April 4, 1947) [hereinafter cited as Chicago Convention], sets forth the procedures to be used when intercepting a foreign aircraft not properly within the airspace of the intercepting country. The recommended procedures include radio communications, rocking of wings and irregular flashing of lights. Attachment A to annex 2 provides that "interception should be limited to determining the identity of the aircraft and providing any navigational guidance necessary for the safe conduct of the flight. Intercepting aircraft should *refrain from the use of weapons in all cases . . . of interception of civil aircraft.*" *Id.* (emphasis added).

20. The Canadian delegate stated:

> It is widely accepted, in international law that the principle of proportionality applies. The action of the Soviet Union in dealing with this incident is without doubt in total contravention of this principle . . . . It would be ludicrous for the Soviet Union to pretend that it had to massacre 269 civilians, travelling on a civilian aircraft, to protect its sovereignty. The opening of fire on the Korean aircraft was in excess of what is commensurate with the gravity of the threat represented by the presence of a civilian aircraft in Soviet air space and, therefore, the Soviet Union has infringed a basic principle of international law.

38 U.N. SCOR ( ) at , U.N. Doc. S/P.V. 2470 (1983), *reprinted in* 22 I.L.M. 1117 (1983). The delegate from Fiji contended:

21. Footnote 21 appears at p. 180.

It was urged to offer a full and detailed account of the incident, to offer an apology and complete compensation for the loss of the aircraft and to the families of the victims, to adequately punish those responsible and, finally, to give credible guarantees against the recurrence of such violent actions against unarmed civil airplanes.[22] A detailed investigation of the incident by the International Civil Aviations Organization (ICAO)[23] was requested.[24]

The Soviet Government expressed regret over the death of innocent people, but asserted that "[t]he entire responsibility for this tragedy rests wholly and fully with the leaders of the United States of America."[25] The United States was accused of intentionally sending Flight 007 on a pre-planned intelligence-gathering mission over an area of strategic importance to the Soviet Union.[26]

It would be incredible for the Soviet Union to suggest that in this incident, in order to protect its sovereignty over its airspace, it was necessary to retaliate in the manner in which it did.

The right of all States to enforce respect for the sovereignty of their air space, like the enforcement of all rights and laws, is governed by the principle of 'proportionality' in international law. The Soviet action in shooting down the civilian aircraft is clearly a violation of that basic principle of international law.

38 U.N. SCOR ( ) at , U.N. Doc. S/P.V. 2472 (1983), *reprinted in* 22 I.L.M. 1113 (1983). For a comprehensive discussion of the principle of proportionality, see M. MCDOUGAL AND F. FELICIANO, *supra* note 9, at 217-30.

21. The French delegate asserted that the Korean airliner was knowingly destroyed "in disregard of elementary humanitarian considerations . . . recognized by the international community." 38 U.N. SCOR ( ) at , U.N. Doc. S/P.V. 2470 (1983), *reprinted in* 22 I.L.M. 1119 (1983). The Belgian delegate accused the Soviet Union of committing "an inhuman act, and a violation of the most elementary rules of conduct among civilized nations, which no motives can justify without injecting an inadmissible element of cynicism into international relations." *Id.* at 1129. The United States delegate asserted that the general and well-recognized principles of humanity "would rule out shooting down a passenger plane, a clearly marked airliner engaged in international civil aviation." *Id.* at 1115.

22. *See* Statements of the delegates from the Republic of Korea, Canada and the United Kingdom, *id.* at 1114-19.

23. The ICAO was established under article 43 of the Chicago Convention, *supra* note 19. Among the purposes of the ICAO are to insure the safe and orderly growth of international civil aviation and to promote safety of flight in international air navigation. *Id.* art. 44. The authority to conduct investigations relating to international civil aviation is granted to the Council of the ICAO. *Id.* art. 55(e). The Council is authorized to "[i]nvestigate, at the request of any contracting State, any situation which may appear to present avoidable obstacles to the development of international air navigation; and, after such investigation, issue such reports as may appear to be desirable." *Id.*

24. *See* Statements of the Japanese, Canadian, French and British delegates, 38 U.N. SCOR ( ) at , U.N. Doc. S/P.V. 2470 (1983), *reprinted in* 22 I.L.M. 1117-19 (1983).

25. 22 I.L.M. 1129 (1983) (statement of the Soviet Government read to the Security Council by the Soviet delegate).

26. *Id.* The area over which the airliner flew is of strategic importance to the Soviet

According to the Soviet Union, the airliner entered Soviet airspace over the Kamchatka Peninsula at the same time "another spy plane of the United States Air Force, an RC-135,"[27] was in the same area.[28] So-

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Union. To carry out military operations in time of war, the Soviet Pacific Fleet must pass through the Le Pérouse Strait, a narrow waterway separating Sakhalin Island from Japan. *See* Middleton, *Area Where Russians Say Plane Intruded is Critical Part of Their Far East Defenses,* N.Y. Times, Sept. 2, 1983, at A1, col. 5. *See also* Pearson, *K.A.L. 007: What the U.S. Knew and When We Knew It,* NATION, Aug. 18-25, 1984, at 105. The author, a doctoral candidate at Yale who is doing his dissertation on the Defense Department's Worldwide Military Command and Control System (Wimex), spent a year investigating the details of the Flight 007 incident to try to authenticate a rumor that the Wimex computers, which provide the National Command Authorities (as well as the President, the Secretary of Defense and the Joint Chiefs of Staff) with timely information and worldwide intelligence on a day-to-day basis, were not functioning at the time Flight 007 was destroyed. *Id.*

He alleges, and the United States has not denied, that United States intelligence agencies had detected preparations by the Soviet Union for a major test of its new SS-X-25 intercontinental ballistic missile on the night of August 31, 1983 in the "highly sensitive part of Kamchatka for which K.A.L. 007 was heading." *Id.* at 114. Mr. Pearson contends that various United States military and intelligence agencies had to have known that Flight 007 was off course prior to the attack over Sakhalin, that these agencies knew that the airliner was heading toward Soviet territory while a major Soviet missile test was underway and that these agencies had the time and means to communicate with the airliner and correct its course, but did not do so. *Id.* at 105.

His conclusion is that

> a conscious policy decision was made by the U.S. government—at what level it is not clear—to risk the lives of 269 innocent people on the assumptions that an extraordinary opportunity for gleaning intelligence information should not be missed and that the Soviets would not dare shoot down a civilian airliner.

Id. at 106. The Reagan administration, the New York Times and the Washington Post have denied the allegations contained in Mr. Pearson's article. *See* Taubman, *Article on Downing of Jet is Disputed,* N.Y. Times, Oct. 28, 1984, at A3, col. 1. *But see* Wicker, *A Damning Silence, id.,* Sept. 7, 1984, at A27, col. 5, wherein the author severely criticizes the United States press for ignoring Mr. Pearson's authoritative and excrutiatingly detailed article, which "establish[ed] to a reasonable certainty that numerous agencies of the U.S. Government knew or should have known, almost from the moment Flight 007 left Anchorage, Alaska, that the plane was off course and headed for intrusion into Soviet air space, above some of the most sensitive Soviet military installations." *Id.* Mr. Wicker concludes that "the deliberate silence—or the shocking failure—of so many U.S. detection systems argue that President Reagan and the security establishment have greater responsibility for the fate of Flight 007 than they admit—or that a complacent press has been willing to seek." *Id.*

27. N.Y. Times, Sept. 3, 1983, at A1, col. 1 (reprint of statement in *Tass*). The United States acknowledged that a RC-135 was flying in international airspace near Kamchatka at the time, but asserted that the plane was on a routine mission, unaware of the Korean airliner's presence and that the Soviet Union was well aware of these flights. When the airliner was shot down at 1826 GMT over Sakhalin Island the RC-135 had been on the ground at its Alaska base for more than an hour. 38 U.N. SCOR ( ) at , U.N. Doc. S/P.V. 2470 (1983). *But see* Pearson, *supra* note 26, at 112-13. One of the main tasks of the RC-135, a sophisticated electronic surveillance aircraft, is to operate off the

28. Footnote 28 appears at p. 182.

viet interceptors were sent aloft and signaled to the intruding aircraft that it was flying in Soviet airspace, but the warnings were ignored.[29] The intruder was again intercepted by Soviet fighter planes as it approached Sakhalin Island and again attempts were made to establish contact with it, including call signals on the international emergency frequency of 121.5 megacycles.[30] When the intruder did not respond to these signals, a Soviet interceptor fired warning shots with tracer shells along the route of the intruder plane.[31] "Since even after this the intruder plane did not obey the demand to fly to a Soviet airfield and tried to evade pursuit, the interceptor-fighter plane . . . fulfilled the order of the command post to stop the flight."[32]

The Soviet Union contended that the interceptors could not know that the intruder was a civilian aircraft because it was flying without navigation lights in the dark of night in conditions of poor visibility

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Kamchatka Penninsula to verify Soviet compliance with the SALT agreements. *Id.* Another important mission of the RC-135 is to document the "electronic order of battle" of Soviet defense forces by collecting and analyzing electronic signals. *Id.* This information would allow United States bombers and missiles to more effectively evade Soviet air defenses in the event of war. *Id.* at 113. Mr. Pearson suggests that one possible explanation of the RC-135's presence in that area at that time was to "collect whatever intelligence about Soviet defenses [the] K.A.L. 007's intrusion yielded." *Id.* He concludes that whatever the reason for the presence of the RC-135 in the area of Kamchatka, "it must have observed the Korean airliner and had ample time to take steps to correct its course, but it did not do so." *Id.* at 115.

28. *See* 38 U.N. SCOR ( ) at , U.N. Doc. S/P.V. 2472 (1983), *reprinted in* 22 I.L.M. 1127 (1983).

29. *Id.* However, neither the ICAO Council's subsequent investigation nor the tapes played at the Security Council revealed any evidence that the airliner received any communication from the Soviet interceptors. *See infra* notes 152, 153, 156 and accompanying text.

30. 22 I.L.M. 1185 (1983). The Council of the ICAO has promulgated rules of the air to be followed when interception of civil aircraft becomes necessary and it has urged the contracting states to adhere strictly to these rules. The Chicago Convention provides that the contracting states "undertake, when issuing regulations for their state aircraft, that they will have due regard for the safety of navigation of civil aircraft." Chicago Convention, *supra* note 19, art. 3(d). As interceptions of civil aircraft are, in all cases, potentially hazardous, the Council has formulated special rules to be followed in this type of situation. Section 5.1 of attachment A to the Rules of the Air provides: "When an interception is being made, the intercept control unit and the intercepting aircrafts should . . . attempt to establish two-way communication with the intercepted aircraft in a common language on the emergency frequency of 121.5 MHz . . . ." 22 I.L.M. 1186 (1983).

31. *See* 22 I.L.M. 1128 (1983).

32. N.Y. Times, Sept. 8, 1983, at A10, col. 4 (statement of Soviet Foreign Minister Andrei Gromyko at the Conference on Security and Cooperation in Europe held in Madrid).

and it was not responding to the interceptors' signals and warnings.[33] The Air Defense command at Sakhalin Island concluded that the intruder was "a reconnaissance aircraft performing special tasks . . ."[34] on the basis that: (1) the intruder flew over strategically important areas of the Soviet Union; (2) the intruder refused to obey repeated warnings from the interceptors and (3) the Soviet ground control picked up short coded radio signals of the type usually used in transmitting intelligence information.[35] Thus, it was alleged that the interceptors defended the sovereign airspace of the U.S.S.R. in conformity both with Soviet border law[36] and international law.[37]

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33. Marshall Ogarkov insisted that "the Soviet side took every responsible step to force the plane to land on one of our Soviet airfields. However, the plane stubbornly ignored all the warnings from the Soviet plane and did not want to answer radio contact." *Id.*, Sept. 10, 1983, at A4, col. 1.

34. *Id.* In June 1984, the British magazine *Defense Attaché* published an unsigned article contending that Flight 007 was intentionally sent over Soviet territory to "turn on" the Soviet air defense system so that the ensuing electronic signals could be recorded and monitored by the Space Shuttle, which was ideally situated in its orbit at the relevant time to collect the data. *See* ECONOMIST, June 16, 1984, at 34. *Defense Attaché* subsequently paid a substantial sum of money to Korean Air Lines and issued a public apology for suggesting in the article that "Korean Air Lines or any of its staff on the aircraft" took part in a spy mission. N.Y. Times, Nov. 20, 1984, at A5, col. 2. It is interesting to note that the apology for the article did not say that there was no foundation for suggesting that the United States or any of its agencies were involved in an intelligence-gathering mission.

35. N.Y. Times, Sept. 10, 1983, at A4, col. 1.

36. Article 36 of the State Border Law provides:

> [t]he border guard and Anti-Aircraft Defense Forces shall, in effectuating the protection of the USSR state boundary, use weapons and combat equipment in order to repel . . . violators of the USSR state boundary . . . in the air. . . when the cessation of the violation or detention of the offenders cannot be effectuated by other means.

22 I.L.M. 1074 (1983). *But see* the statement of the British delegate who argued that, since the airliner was about to leave Soviet airspace within a few minutes, its destruction cannot be considered as a necessary measure for "stopping the violation when this could not be effectuated by other means." 38 U.N. SCOR ( ) at , U.N. Doc. S/P.V. 2476 (1983), *reprinted in* 22 I.L.M. 1114 (1983).

The Swedish delegate stated:

> [i]t is a well known fact that the Soviet Union has severe rules of its own for the protection of the State boundary, enabling Soviet units to use force even against civilian aircraft. Such rules and instructions are not in accordance with generally accepted norms of international law relevant to civilian transportation.

38 U.N. SCOR ( ) at , U.N. Doc. S/P.V. 2471 (1983), *reprinted in* 22 I.L.M. 1127 (1983). *Cf.* Preamble to Soviet Border Law: "The protection of the state boundary of the USSR shall be the most important integral part of defending the socialist Fatherland. The state boundary of the USSR is inviolable. *Any attempts to violate it shall be resolutely suppressed,*" U.S.S.R. BOUNDARY LAW, *supra* note 1, preamble (emphasis added), *with* article 2.1 of attachment A of annex 2: "Interception of civil aircraft should be avoided and

37. Footnote 37 appears at p. 184.

I. SELF-DEFENSE UNDER THE UNITED NATIONS CHARTER

The right to self-defense is reserved in article 51 of the Charter.[38] The relevant portion of article 51 reads: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security."[39] The permissible scope of this provision has been the subject of debate among legal scholars.[40] One view holds that an armed attack is a condition precedent to the lawful use of force in self-defense.[41] Other scholars argue that article 51 was meant only to be declaratory of the already existing customary law of self-defense.[42]

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should be undertaken only as a last resort. If undertaken, the interception should be limited to determining the identity of the aircraft and providing any navigational guidance necessary for the safe conduct of the flight. *Intercepting aircraft should refrain from the use of of weapons in all cases of interception of civil aircraft*" 22 I.L.M. 1186 (1983) (emphasis added).

37. On March 6, 1984, the Council of the ICAO, by secret ballot, voted twenty to two, with nine abstentions, to strongly deplore the destruction of Flight 007. *See* ICAO Council Resolution of March 6, 1984, *infra* note 141. In response to the resolution Boris Rygenkov, the Soviet delegate to the ICAO Council, insisted that the Soviet Union's "measures to protect its airspace were in accord with the rules and procedures of international law . . . . Every warning measure was taken to have the violation handled and the airplane landed." N.Y. Times, Mar. 7, 1984, at A12, cols. 3-4.

38. U.N. CHARTER art. 51.

39. *Id.*

40. *E.g., compare* Kunz, *Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations*, 41 AM. J. INT'L L. 872 (1947), wherein the author argues that the right of self-defense under article 51 "does not exist against any form of aggression which does not constitute 'armed attack'. . . . The 'threat of aggression' does not justify self-defense under Article 51 . . . . The 'imminent' armed attack does not suffice under Article 51." *Id.* at 878, *with* M. MCDOUGAL & F. FELICIANO, *supra* note 9, at 237 n.261, wherein Professor McDougal maintains:

> Professor Kunz . . . [is] in effect purporting to discover in Article 51 words not written there in printer's ink. [He] interpret[s] the phrase 'if an armed attack occurs' as if it read 'if, and only if,' an armed attack occurs. A proposition that 'if A, then B' is *not* equivalent to, and does *not* necessarily imply, the proposition that 'if, and only if A, then B.' *Id.* (emphasis in original).

41. *See, e.g.*, Brownlie, *The Use of Force in Self-Defence*, 37 BRIT. Y.B. INT'L L. 219, 266 (1962); Kunz, *Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations*, 41 AM. J. INT'L L. 872, 878 (1947).

42. *See, e.g.*, S. MALAWER, *Anticipatory Self-Defense Under Article 51 of the United Nations Charter* in STUDIES IN INT'L L. 191, 197-98 (2d ed. 1977).

A. *The Strict View of Article 51*

Proponents of the strict interpretation of self-defense read article 51 in connection with article 2, paragraph 3, which instructs members to settle their disputes by peaceful means without endangering international peace,[43] and article 2, paragraph 4, which outlaws the threat or use of force against the territorial integrity or political independence of any state,[44] in order to assert that the use of force in self-defense is lawful *if, but only if* "an armed attack occurs."[45] This view narrows the traditional conception of self-defense which permits defensive action even before an armed attack occurs if there is an instant and overwhelming necessity.[46] The strict constructionists argue that article 51 was intended to limit the traditional right of self-defense to actual armed attack.[47] Professor Jessup wrote:

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43. Article 2, paragraph 3 states: "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered." U.N. CHARTER art. 2, para. 3.

44. Article 2, paragraph 4 states: "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations." *Id.* art. 2, para. 4.

45. L. HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 232-33 (1968). Professor Henkin argues:

> The fair reading of Article 51 permits unilateral use of force only in very narrow and clear circumstances, in self-defense if an armed attack occurs. Nothing in the history of its drafting . . . suggests that the framers of the Charter intended something broader than the language implied. [N]either the failure of the Security Council . . . nor the development of terrible weapons, suggests that the Charter should now be read to authorize unilateral force when an armed attack has not occurred.

Id. See also Brownlie, *supra* note 41, at 219. After an extensive discussion of the subject the author concludes that "the beginning of an armed attack is a condition precedent for resort to force in self-defense." *Id.* at 266.

46. *See* Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L L. 82, 89 (1938).

47. *See* Wright, *The Cuban Quarantine*, 57 AM. J. INT'L L. 546, 560 (1963). Professor Wright, an adherent to the narrow view of self-defense, argued that the United States quarantine of Cuba in October 1962 to prevent the delivery of nuclear missiles into Cuba from the Soviet Union was an unlawful exercise of the right of self-defense because, inter alia:

> the United States has [not] lived up to its legal obligations . . . to submit threats to the peace to the United Nations before taking unilateral action, and to refrain from [the] use or threat of force . . . except . . . against armed attack, under authority of the United Nations, or with the consent of the state against which the force is used.

Id. at 563. *But see* McDougal, *The Soviet-Cuban Quarantine and Self-Defense*, 57 AM. J. INT'L L. 597 (1963) and Chayes, *Law and the Quarantine of Cuba*, 41 FOREIGN AFF. 550 (1963) (both authors present the argument that the United States acted in conformity with the Charter during the crisis).

> This restriction in Article 51 very definitely narrows the freedom of action which states had under international law. A case could be made out for self-defense in the 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.[48]

Resort to the use of force in self-defense was narrowly limited to an armed attack as a precondition because the Charter was interpreted as providing a mechanism for the peaceful settlement of disputes. Article 33 requires the parties to a dispute to seek a solution by "peaceful means."[49] Failing that, the parties are obliged to refer the dispute to the Security Council, which may take such action as it deems necessary.[50] The threat or use of force under any circumstances short of an armed attack, therefore, is unlawful.

Under the restrictive view of article 51, the quarantine imposed by the United States in October 1962, upon the importation of nuclear missiles into Cuba from the Soviet Union, was not a lawful exercise by the United States of the threat to use force in self-defense.[51] Professor

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48. P. JESSUP, A MODERN LAW OF NATIONS 166 (1948). *See also* Badr, *The Exculpatory Effect of Self-Defense in State Responsibility*, 10 GA. J. INT'L & COMP. L. 1, 16 (1980). The author argues that the right of self-defense under the Charter is only permissible in response to an armed attack. "[O]nly the most violent and massive forms of armed aggression qualify as armed attack and justify the use of force in self-defense under Article 51." *Id.*

49. Article 33, paragraph 1 reads: "The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall . . . seek a solution by negotiation, inquiry, mediation . . . or other peaceful means of their own choice." U.N. CHARTER art. 33, para. 1.

50. U.N. CHARTER art. 37. Article 37 reads:

> 1. Should the parties to a dispute . . . fail to settle it by the means indicated [in article 33], they shall refer it to the Security Council.
> 2. If the Security Council deems that the continuance of the dispute is in fact likely to endanger the maintenance of international peace and security, it shall decide whether to take action under Article 36 or to recommend such terms of settlement as it may consider appropriate.

Id.

51. *See* Wright, *supra* note 47. On October 23, 1962, President Kennedy ordered the Secretary of Defense to take appropriate measures to prevent the delivery of the nuclear missiles to Cuba, "employing the land, sea and air forces of the United States in cooperation with any forces that may be made available by other American States." The United States argued that the introduction of offensive missiles into Cuba by the Soviet Union constituted an unlawful threat to the security of the United States and that the response of the United States met the customary international law prerequisites of self-defensive

Quincy Wright, a strict constructionist of article 51, maintained that the nuclear missiles were requested by the Castro government for defensive purposes and under recognized principles of international law, "a sovereign state is free to take, within its territory, measures which it deems necessary for its defense . . . . and other states are free to assist it in such defense."[52] He argued that the quarantine imposed by the United States was a unilateral intervention in the domestic affairs of Cuba and the threat to use military force to prevent the missile delivery was a breach of the United States obligations under the Charter.[53]

Such a restrictive interpretation of article 51 is unrealistic and must be rejected for three reasons. First, the fundamental predicate for the restrictive right of self-defense—a reasonably operational Security Council—has never come to pass.[54] Article 51 of the Charter envisions a Security Council with the effective authority to resolve international disputes, thereby precluding resort to force. But the Security Council has proven itself ineffective due to the political biases of its members.[55]

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action, i.e., necessity and proportionality. *See* Note, *The Cuban Missile Crisis and the U.N. Charter: An Analysis of the United States Position*, 16 STAN. L. REV. 160 (1963); 4 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 523-24 (1965); McDougal, *supra* note 47; Chayes, *supra* note 47.

52. Wright, *supra* note 47, at 550.

53. *Id.* at 564. *But see* McDougal, *supra* note 47. Professor McDougal argued that the threat against which the United States reacted came from the Soviet Union, not Cuba. The missiles, had they been installed, would have been directly pointed at all the states within the region, an area of undoubted strategic concern to the United States. Their deployment would have caused a serious disruption in the whole world balance of power between the totalitarian and non-totalitarian states. *Id.* at 601. Since the employment of force by the United States was clearly limited in intensity and magnitude to that necessary to remove the provoking threat, he concluded that "the action taken by the United States was in accord with traditional general community expectations about the requirements of self-defense." *Id.* at 603.

54. *See* Schwarzenberger, *The Fundamental Principles of International Law*, 87 RECUEIL DES COURS 195, 338 (1955):

> The reduction of self-defense to an interim right was made on the assumption that the international quasi-order, which was to be established by the United Nations, would normally work. The Security Council was to exercise the utmost freedom in determining what amounted to a threat to peace, breach of peace or act of aggression, including armed attack. If, therefore, the Security Council fails to fulfill its appointed function, this task falls back on the individual members of the United Nations.

Id. See also Levenfeld, *Israel's Counter-Fedayeen Tactics in Lebanon: Self-Defense and Reprisal Under Modern Int'l Law*, 21 COLUM. J. TRANS. L. 1, 20 (1982).

55. *See* Vallat, *The Peaceful Settlement of Disputes*, in CAMBRIDGE ESSAYS IN INTERNATIONAL LAW 155 (1965). The author states:

> Whether recourse to the Security Council or the General Assembly is advisable in a particular case depends on a number of general considerations . . . . First and foremost is the consideration that both the Security Council and the

Secondly, there is no indication that the drafters of the Charter intended so narrow an interpretation of article 51. Professor McDougal stated:

> There is not the slightest evidence that the framers of the United Nations Charter, by inserting one provision which expressly reserves a right of self-defense, had the intent of imposing by this provision new limitations upon the traditional right of states. In fact, Professor Bowett summarizes, the preparatory work suggests "only that the article should safeguard the right of self-defense, not restrict it." Thus, Committee 1/I stressed in its report, approved by both Commission I and the Plenary Conference, that "the use of arms in legitimate self-defense remains admitted and unimpaired."[56]

The third reason for rejecting the literal interpretation of article 51 is that it is unrealistic in the modern world to require a state to submit to an armed attack before that state may lawfully take defensive measures to protect itself.[57] As Professor Rostow succinctly ob-

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> General Assembly are political organs and will be influenced, if not actually guided, by political motives. Members are likely to be influenced as much, or more, by group loyalties, their general international policies and their own special interests as by the merits of the case . . . . [I]n all cases there is a strong tendency for Members of the United Nations to put political factors first and to subordinate the interests of justice and international law to these factors.

Id. at 159-60. *See also* J. SPANIER, GAMES NATIONS PLAY 243 (2d ed. 1975). Professor Spanier argues that the United Nations "only registers the power politics of the state system," and its decisions "are not made according to some impartial, nonpolitical, and therefore purportedly morally superior standard of justice." *Id.* Professor McDougal argues that "to wait for organs of the world community to determine the necessity of acting [in self-defense] is a utopian concept." M. MCDOUGAL & F. FELICIANO, *supra* note 9, at 219.

56. McDougal, *supra* note 47, at 599. On July 13, 1945, in the course of the hearings on the Charter before the Senate Committee on Foreign Relations, John Foster Dulles, one of the official advisers to the United States delegation at San Francisco, stated:

> there is nothing whatever in the Charter which impairs a nation's right of self-defense . . . . At San Francisco, one of the things which we stood for most stoutly, and which we achieved with the greatest difficulty, was a recognition of the fact that the doctrine of self-defense . . . could stand unimpaired and could function without the approval of the Security Council.

12 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 84-85 (1965).

57. Professors McDougal and Feliciano observe that a denial of:

> a right of self-defense in any and all contexts not exhibiting overt violence and even against the most intense uses of non-military instruments—may, under the same conditions of the present world, amount to requiring a target state to be the sedentary fowl in an international turkey-shoot.

McDougal & Feliciano, *Legal Regulation of Resort to International Coercion: Aggression and Self-Defense in Policy Perspective*, 68 YALE L.J. 1057, 1120-21 n.182 (1959).

served, "[i]nternational law, after all, is not a suicide pact."[58] No rational person could suggest that the United States, or any nation, must first wait for nuclear missiles to be detonated on its territory before it may lawfully respond with defensive measures employing force. When coercion against a state consists of military measures just short of an armed attack the coerced state should, and must, be entitled to protect itself.[59]

It is submitted, therefore, that article 51 is only a declaratory article intended to preserve the customary right of self-defense and was not intended to render that right effectively null and void.[60]

B. Self-Defense Under Customary International Law

Discussion of the right to use force in self-defense under customary international law must begin with the classic formulation offered by Secretary of State Daniel Webster in a letter to Great Britain's

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58. Rostow, *Law 'Is Not a Suicide Pact'*, N.Y. Times, Nov. 28, 1983, at A24, col. 1. Professor Rostow argued that the United States, by its threat to use force to prevent the Soviet missiles from reaching Cuba in 1962, "applied an established principle of the international law of self-defense. The target of an illegal use of force need not wait before defending itself until it is too late to do so. International law, after all, is not a suicide pact." *Id.*

59. *See* MacChesny, *Some Comments on the "Quarantine" of Cuba*, 57 AM. J. INT'L L. 592, 595 (1963), wherein the author states:

> Nothing in the history of Article 51 requires a construction limiting self-defense to a response to an armed attack. Realism, common sense, and the destructive nature of modern weapons demand the retention of this customary right under adequate safeguards until the community system makes its use no longer necessary.

Id. See Feinstein, *Self-Defence and Israel in International Law: A Reappraisal*, 11 ISRAEL L. REV. 516, 530 (1976). The author argued:

> [t]he political necessities of contemporary international life demand a broad scope for self-defence. To confine such a right to armed attack alone, in a system clearly lacking effectual methods of collective security, could quite possibly result in restricting the lawful right of a state to secure itself against extermination. To wait for an actual attack, the state could be so stunned by it that it might be no longer able to offer resistance.

Id.

60. It necessarily follows from an application of the restrictive interpretation of article 51 that the destruction of Flight 007 was an unlawful use of force by the Soviet Union. Assuming *arguendo* that the airliner was intentionally sent over Soviet territory for intelligence-gathering purposes, the requirement of an *armed attack* as a condition precedent to the lawful employment of force was not met. Since the Soviet Union has repeatedly insisted that the destruction of Flight 007 was a lawful response to the aerial trespass, "which was deliberately staged to foment anti-Soviet psychosis and promote militarist programs," Schmemann, *Soviet is Pressing Case on K.A.L. 007*, N.Y. Times, Aug. 31, 1984, at A3, col. 1, its justification must be premised on the customary international law doctrine regarding the use of force in self-defense.

Lord Ashburton during the *Caroline* dispute.[61] During the Canadian Rebellion of 1831, a group of insurgents seized arms and guns from a United States arsenal. Preparations were made to cross from the United States island of Niagara into British-held territory on the steamer *Caroline*. To prevent the crossing, an English force boarded the steamer within United States waters. The *Caroline* was set afire and adrift down Niagara Falls.[62] The British Government invoked the right of self-defense to justify the action taken by the English soldiers.[63] Secretary Webster, in turn, demanded that the British Government show the existence of a:

> . . . necessity of self-defence, 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 nothing unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.[64]

Although the legality of the act was factually disputed, both parties were in agreement as to the applicable legal principle stated by Secretary Webster.[65] The recognition and acceptance of Webster's formulation on the right to use force in self-defense—based on instant, overwhelming necessity[66]—makes it all the more valuable as a precedent.[67]

Customary international law provides that the employment of force in self-defense is subject to two limitations which may be described as necessity and proportionality.[68] Initially, there must exist an

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61. *See* Jennings, *supra* note 46.
62. *Id.* at 82-84.
63. *Id.* at 85.
64. *Id.* at 89.
65. Lord Ashburton stated: "Agreeing, therefore, on the general principle and on the possible exception to which it is liable, the only question between us is, whether this occurrence came within the limits fairly to be assigned to such exceptions . . . . " *Id.* at 92 n.36.
66. *Id.* at 89.
67. *Id.* at 92.
68. *See* McDougal, *supra* note 47, at 597-98:

> In broadest formulation, this right of self-defense, as established by traditional practice, authorizes a state which, being a target of activities by another state, reasonably decides, as third-party observers may determine reasonableness, that such activities imminently require it to employ the military instrument to protect its territorial integrity and political independence, to use such force as may be necessary and proportionate for securing its defense. In a still primatively organized world in which expectations are low about the effective

actual or threatened infringement of the rights of the defending state and a failure on the part of the infringing state to stop or prevent the infringement.[69] Under these conditions a state may lawfully resort to acts of self-defense which are strictly confined to the object of stopping or preventing the infringement and reasonably proportionate to what is required for achieving this object.[70] These are the general formulations governing community expectations concerning self-defense and, as such, raise questions as to their applicability in a particular situation: Who initially determines that a situation of necessity exists which requires the offended state to resort to the use of force to protect its essential rights? Who determines whether the degree of force employed in a particular situation was proportionate to the threat imposed against the offended state?

In the absence of an effective community organization capable of protecting individual members, the offended state itself must initially determine whether a threat of sufficient magnitude exists requiring it to employ the military instrument.[71] "To wait for authority to act from any outside body," Professor Brierly observed, "may mean disaster."[72]

The initial determination made by a state to employ force in self-defense must, however, be subject to a subsequent appraisal by third-party decisionmakers, whose aim is to further the common interest in maintaining at least a minimum level of world order:[73]

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capability of the general community to protect its individual members, this right has been regarded as indispensible to the maintenance of even the most modest minimum order.

Id. See also M. McDOUGAL & F. FELICIANO, *supra* note 9, at 217: "The principle requirements which the 'customary law' of self-defense makes prerequisite to the lawful assertion of [self-defense] are commonly summarized in terms of necessity and proportionality." *Id.*

69. *See* Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81:2 RECUEIL DES COURS 455, 463-64 (1952).

70. *Id.* Professor Bowett offers a similar characterization of the right of self-defense:

1. The right of self-defense lies against conduct by states which is delictual as being in breach of a duty established by international law.
2. The exercise of the right of self-defense presupposes the absence of any alternative means of protection for certain essential rights of the state which are endangered.
3. The danger to those rights must be serious, and must be actual or imminent.
4. The measures of self-defense taken must be reasonable, limited to the necessity of protection, and proportionate to the danger.

D. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 269 (1958). *See also* McDougal & Feliciano, *supra* note 57.

71. *See* M. McDOUGAL & F. FELICIANO, *supra* note 9, at 218.

72. J. BRIERLY, *supra* note 9, at 320.

73. *See* M. McDOUGAL & F. FELICIANO, *supra* note 9, at 219: "[I]t has . . . been gener-

> The practice of states decisively rejects the view that a state need only declare its own action to be defensive for that action to be defensive as a matter of law . . . . It is clear that the defensive or non-defensive character of any state's action is universally regarded as a question capable of determination by an objective examination of the relevant facts.[74]

The world community honors the right of a state to use force in self-defense, other than in response to an armed attack, with fundamental limitations. Actions taken by a state for the purpose of self-defense are subject to examination by third-party decisionmakers to determine the degree to which those actions conform to community expectations. An examination of prior incidents involving the use of force against civil aerial intruders is necessary in order to determine community expectations concerning self-defense and the treatment of intruding civil airliners as evidenced by states' practice and opinion.

II. PRIOR AERIAL INCIDENTS

On June 27, 1955, Bulgarian interceptors shot down an Israeli (El Al) commercial airliner, on a flight from London to Tel Aviv, over the Greco-Bulgarian border.[75] All fifty-one passengers and seven crew members died and the aircraft was destroyed.[76]

The following day, the Bulgarian Government issued a communiqué stating that anti-aircraft defenses, which had been unable to identify the aircraft, opened fire on the airliner after it entered Bulgarian airspace without warning.[77]

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ally agreed that both this first provisional decision by a claimant target state and the measures it actually takes are subject to review for their necessity and proportionality by the general community of states." *Id.*

74. *See* J. BRIERLY, *supra* note 9, at 320-21. In the post-World War II war crimes trials at Tokyo (as at Nuremberg), the defense argued, inter alia, that a nation resorting to measures in self-defense was to be the sole judge of the matter and that the question could not be submitted to any tribunal. The Tribunal rejected this argument, saying that "the right of self-defense does not confer upon the State resorting to war the authority to make a final determination upon the justification for its action." O. TAKAYANAGI, THE TOKYO TRIALS AND INTERNATIONAL LAW 36-37 (1948).

75. N.Y. Times, Aug. 4, 1955, at 1, col. 7.

76. *Id.*, July 29, 1955, at 1, col. 1. The passengers included British, Canadian, South African, United States, French and Swiss nationals. *See* Hughes, *Aerial Intrusions by Civil Airliners and the Use of Force*, 45 J. AIR L. 595, 603 (1980).

77. *Israeli Airliner Shot Down by Bulgarian Fighters—Loss of 58 Lives— Bulgarian Apology and Offer of Compensation*, 10 KEESINGS CONTEMPORARY ARCHIVES 14359E (Aug. 6-13, 1955) (hereinafter cited as KEESINGS). It is significant to note that the communiqué of July 28th deliberately misstates the manner in which the airliner was destroyed. As later revealed, Bulgarian interceptors, which were clearly in a position to

The Israeli Government strongly protested the attack, calling the act of the interceptors "a wanton disregard for human life and for elementary obligations of humanity."[78] The world community joined Israel in denouncing the attack.[79] The French Government described the Bulgarian action as "an act of war."[80] Israel demanded that those responsible for the attack be punished and that full compensation be paid for the loss of the aircraft and to the families of the victims.[81] Bulgaria was requested to give assurances against the recurrence of this type of response in the future.[82]

The United States, the United Kingdom and Israel submitted applications to the International Court of Justice (I.C.J.) instituting proceedings on the El Al incident against Bulgaria.[83] The legal positions taken by these states in their memorials are relevant as a source of *opinio juris* on the use of force against civil aerial intruders.

All three memorials relied strongly on the principles enunciated by the I.C.J. in the *Corfu Channel* case.[84] That judgment was cited as evidence that international law condemns peacetime actions by states that unnecessarily or recklessly risk the lives or property of nationals of other states.[85]

The British and American memorials also cited the case of *Garcia*

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identify the airplane, were responsible for the downing. *See* Hughes, *supra* note 76, at 603.

78. *See* Hughes, *supra* note 76, at 603.

79. *See id.* The Protest Note of the British states: "H.M. Government cannot accept that any Government is in its right in shooting down a civil aircraft in time of peace." *Id.* at 604. The United States declared that "the brutal attack" on the Israeli airliner was a "grave violation of all principles of international law." *Id.* Israel, France and Sweden also sent Protest Notes. *Id.*

80. *Id.* at 610.

81. *Id.* The United States, British, French, and Swedish Notes also called for the same response by Bulgaria. *Id.*

82. *Id.* at 605.

83. *See* Memorial of the United States (U.S. v. Bulg.), 1959 I.C.J. Pleadings (Aerial Incident of July, 1955) 22-24; Memorial of the United Kingdom (U.K. v. Bulg.), 1959 I.C.J. Pleadings (Aerial Incident of July, 1955) 34-37; Memorial of Israel (Isr. v. Bulg.), 1959 I.C.J. Pleadings (Aerial Incident of July, 1955) 5-7.

84. Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4 (Merits Judgment of Apr. 9). In Corfu Channel, British warships proceeding through the Channel were heavily damaged by mines laid in Albanian territorial waters. Even though there was no evidence indicating that Albania had laid the mines, the Court held Albania responsible for the damage caused for having failed to give notice of the minefield in its territorial waters. By virtue of its supervision of the Channel, Albania had knowledge of the minefield. The duty which Albania had to warn ships of the presence of the minefield was based "on certain general and well-recognized principles," including "elementary considerations of humanity, even more exacting in peace than in war." *Id.* at 22.

85. *See* Memorial of the United States, *supra* note 83, at 214.

v. United States,[86] decided by the United States-Mexican General Claims Commission in 1927. The *Garcia* case involved a United States officer who opened fire on a raft which was crossing in an unauthorized area from the United States to the Mexican side of the border. The raft carried several members of a Mexican family; a small child was killed by the shots.[87] The Commission held that the officer's act was illegal under international law and laid down four requirements to be met before the shooting of unarmed civilians may be justified:

> (a) the act of firing . . . should not be indulged in unless the delinquency is sufficiently well-stated;
> (b) it should not be indulged in unless the importance of preventing . . . the delinquency by firing is in reasonable proportion to the danger arising from it;
> (c) it should not be indulged in whenever other practicable ways of preventing or repressing the delinquency might be available;
> (d) it should be done with sufficient precaution not to create unnecessary danger. . . .[88]

Garcia was cited as additional support for the proposition that certain elementary considerations of humanity exist and are of a legal nature.[89]

The United Kingdom categorically rejected the right to use force against civil airliners:

> The Government of the United Kingdom submits that there can be no justification in international law for the destruction, by a State using armed force, of a foreign civil aircraft, clearly identifiable as such, which is on a scheduled passenger flight, even if that aircraft enters, without previous authorization, the airspace of the territory of that State.[90]

It also submitted that the use of armed force against a civil airliner could not be justified as a legitimate exercise of self-defense under article 51 of the Charter, even if the airliner enters another state's airspace without warning.[91] The British position regarding a proper remedy was that the offended state should proceed through diplomatic channels with the state whose nationality the aircraft

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86. Garcia Case (Mex. v. U.S.), 4 R. Int'l Arb. Awards 119 (1928).
87. *Id.* at 121-24.
88. *Id.* at 123.
89. *See* Hughes, *supra* note 76, at 606.
90. Memorial of the United Kingdom, *supra* note 83, at 358.
91. *Id.*

bears.[92]

The general position taken by the United States was that, regardless of the explanation for the aircraft's entering Bulgarian airspace, no pilot of a civil airliner would expect to be shot down without being given a safe alternative, and without the opportunity to keep himself, his passengers and his crew from being killed.[93]

The United States argued that the issue of the legality of the use of force in this situation could not even arise unless the offended state raised an articulable security necessity, which Bulgaria did not claim: "To have any semblance of international legal validity such evidence would be essential."[94] Firing on the airliner was unnecessary, the United States maintained, because the Bulgarian interceptors had an opportunity to identify it and report to the ground authorities. Clearly, governments owe a duty of safety to overflying passengers and crew and a duty not to kill, destroy or tolerate destruction and pilferage.[95]

The Israeli position was similar in spirit. Israel argued "that in normal times there can be no legal justification for haste and inadequate measures *after* interception of, and for the opening of fire on, a foreign civil aircraft, clearly marked as such."[96] Once Bulgaria decided to use force against the airliner, it was subject to the duty to take into consideration the elementary obligations of humanity, and not to use a degree of force in excess of what is commensurate with the reality and the gravity of the threat (if any).[97]

Israel maintained that there are two proper remedies available to the offended state.[98] The first remedy is to require the intruding airliner to return to its authorized position. Israel stressed that all actions and instructions must not cause an undue degree of physical danger to the aircraft and its occupants.[99] The second remedy is for the offended state to take the matter up through the appropriate diplomatic channels.[100]

Unfortunately, the I.C.J. never reached the merits of the various arguments as to the legality of the use of force against intruding civil airliners under international law. The cases were removed from the

92. *Id.* at 363.
93. Memorial of the United States, *supra* note 83, at 210.
94. *Id.* at 242.
95. *Id.* at 239.
96. Memorial of Israel, *supra* note 83, at 89.
97. *Id.* at 79.
98. *Id.* at 87.
99. *Id.*
100. *Id.*

Court's list for lack of jurisdiction over Bulgaria.[101] But the Bulgarian Government did assume responsibility for the tragedy. On August 3, 1955, the Bulgarian Government issued a statement based upon the findings of a Ministerial Commission of inquiry.[102] Bulgaria admitted that the air defenses had "shown hastiness"[103] and had failed to take all necessary measures to force the aircraft to change direction. It promised to "discover and punish those responsible for the catastrophe,"[104] to take "all measures to prevent a repetition of such incidents,"[105] and to pay compensation to the families of the fifty-eight victims.[106]

The most serious incident measured in terms of loss of life prior to the Flight 007 tragedy occurred on February 21, 1973.[107] A Libyan airliner on a flight from Tripoli to Cairo overflew Cairo and intruded twelve miles into Israeli-occupied Sinai.[108] Israeli interceptors shot the airliner down and the 108 persons aboard died.[109]

Cairo Radio described the incident as a "monstrous and savage crime which is . . . not only a violation of international law but of all human values . . . it is premeditated murder of unarmed civilians including women and children."[110]

Israel argued that the Libyan airliner violated airspace over occu-

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101. *See generally* Gross, *Bulgaria Invokes the Connally Amendment*, 56 AM. J. INT'L L. 357 (1962).

102. KEESINGS, *supra* note 77, at 14359E.

103. *Id.*

104. *Id.*

105. *Id.*

106. *See* Hughes, *supra* note 76, at 604-05. An earlier incident reveals a pattern of response similar to that taken by Bulgaria—initial reluctance to assume responsibility with a subsequent promise to pay compensation. On July 23, 1954, a Cathay Pacific commercial airliner on a flight from Bangkok to Hong Kong strayed into China's airspace and was shot down by Chinese interceptors. The crippled airliner ditched into heavy seas and a number of passengers drowned. The captain of the aircraft stated that the interceptors attacked without the slightest warning. *Id.* at 601-02. The reaction from the West was one of uniform condemnation and outrage. Both the United States and the United Kingdom demanded that the Chinese Government pay compensation for the damage caused by the attack. N.Y. Times, July 25, 1954, at 3, col. 1. China initially remained silent concerning its responsibility for the attack, but subsequently agreed "to consider appropriate compensation for the loss of life and damage to property." *Id.*, July 27, 1954, at 6, col. 1. The Chinese Government asserted that the airliner had been fired on by accident as it was mistaken for a Koumintang aircraft on a mission of aggression. *Id. See also* Hughes, *supra* note 76, at 602.

107. *See* N.Y. Times, Feb. 22, 1973, at A1, cols. 5-6.

108. *Id.*

109. The airliner burst into flames and disintegrated during an attempt to crash-land in the Sinai desert. *Id.* at A6, col. 1.

110. *Id.* at A4, col. 6.

pied Sinai, a very sensitive area of Israeli territory.[111] It further alleged that the pilot of the airliner refused to heed repeated warnings which were conveyed in accordance with international procedures[112] and that the interceptors intended only to damage the airliner to force it to land, not to destroy it.[113] Shimon Peres, Israel's Minister of Transport at that time, stated that "Israel acted in accordance with international law, defended its airspace and did what was required after serious consideration."[114]

Mr. Ahmed Nouh, Egyptian Civil Aviation Minister, denounced the interceptors' action and produced tapes of the Libyan airliner's conversations with Egyptian air traffic controllers, which tended to confirm allegations that the Israeli interceptors attacked without warning.[115] Since Egyptian controllers were monitoring the same radio frequency as the airliner, it was argued that any radio warning given by the interceptors would have been picked up and recorded in Cairo. The tapes also revealed that the pilot realized he had lost direction and was communicating with Egyptian ground control just before the shots were fired.[116]

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111. The Israeli Cabinet issued a communiqué which stated that the airliner flew over Israeli military concentrations along the Suez Canal and over a military airfield in the Sinai, "a most highly sensitive and controlled military area." *Id.*, Feb. 22, 1973, at A4, cols. 1-2.

112. The late Prime Minister Golda Meir expressed regret that the Libyan airliner did not "respond to repeated warnings that were given in accordance with international procedure." *Id.*, Feb. 23, 1973, at A1, col. 6. Then Israeli Defense Minister Moshe Dayan described the incident as a tragedy but asserted that the crew of the airliner must bear the responsibility because they "ignored repeated instructions to land." *Id.* The Israeli Cabinet stated that the jetliner was intercepted as a "last resort" after its pilot acknowledged warnings but ignored them. *See supra* note 111.

113. *See* Hughes, *supra* note 76, at 612. A similar claim was made by the Soviet Union when its interceptors shot down an Air France plane which allegedly intruded into Soviet airspace over East Berlin on April 29, 1952. The Soviet Union maintained that the airliner violated Soviet air regulations and refused to obey the orders of the interceptors to land. Furthermore, it asserted that the shots fired by the single interceptor were intended as a warning to the Air France plane to land and were not meant to down the intruder. Lissitzyn, *The Treatment of Aerial Intruders in Recent Practice and International Law*, 47 AM. J. INT'L L. 559, 574 (1953). The Allied High Commissioners in Germany issued a joint protest in which they stated that, regardless of the interceptors' intent, "to fire, in any circumstances, even by way of warning, on an unarmed aircraft in time of peace, wherever that aircraft may be, is entirely inadmissible, and contrary to all standards of civilized behavior." *Id.*

114. Hughes, *supra* note 76, at 611-12.

115. N.Y. Times, Feb. 23, 1973, at A1, col. 6.

116. The airliner had lost its way due to instrument failure and the crew believed they were over Egyptian territory and were being followed by Egyptian MIGs. *Id.* at A4, col. 1.

Israel subsequently agreed to pay compensation to the families of the victims "in deference to humanitarian considerations"[117] and agreed to cooperate with an international investigation of the incident,[118] but continued to maintain that the Israeli Air Force acted "in strict conformity with international law."[119] Israel's Defense Minister at the time, Moshe Dayan, argued that Israel may have made "an error of judgment . . . but that does not put us on the guilty side."[120] The investigation conducted by the ICAO Council, however, concluded otherwise.[121] On June 4, 1973, the ICAO Council adopted a resolution which found "no justification for the shooting down of the Libyan civil aircraft"[122] and "strongly condemn[ed]"[123] Israel's action as "a flagrant violation of the principles enshrined in the Chicago Convention . . . and a serious danger against the safety of international civil aviation."[124]

The most recent incident prior to the Flight 007 incident also involved the Soviet Union and an off-course South Korean airliner. On April 20, 1978, a KAL Boeing 707 on a polar flight from Paris to Seoul made a forced landing on a frozen lake deep in Soviet territory after being fired at by Soviet interceptors.[125] Two of the 113 passengers were killed and eleven others were injured.[126] When it was intercepted, the airliner was flying ninety degrees off course in a Soviet high security zone closed to foreigners.[127]

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117. *Id.*, Feb. 26, 1973, at A1, col. 4 (statement issued by the Israeli Government).

118. Then Israeli Defense Minister Dayan stated that Israel was willing to cooperate with any international organization and to give "the fullest possible accounting of the incident." *Id.*, Feb. 25, 1973, at A1, col. 1.

119. *Id.*, Feb. 26, 1973, at A1, col. 4.

120. *Id.*, Feb. 25, 1973, at A1, col. 1.

121. On March 5, 1973, the Council of the ICAO instituted a fact finding technical investigation into the destruction of the Libyan airliner. *See* Hughes, *supra* note 76, at 612.

122. ICAO Council Resolution of June 4, 1973, *reprinted in* 12 I.L.M. 1180 (1973).

123. *Id.*

124. *Id.* The Egyptian Government denounced the attack on the airliner as "an act of mass murder violating all international laws and human considerations." N.Y. Times, Feb. 22, 1973, at A12, col. 5. At an extraordinary session of the ICAO Council on Feb. 28, 1973, the Soviet delegate denounced Israel's action as "a criminal act of international terrorism" and called on the Council "to strongly condemn this criminal act." 22 I.L.M. 1130 (1983).

125. N.Y. Times, Apr. 23, 1978, at A1, col. 3. *See* Hughes, *supra* note 76, at 613.

126. N.Y. Times, Apr. 23, 1978, at A1, col. 3.

127. *Id.* The Korean airliner landed near the town of Kem, 390 miles northeast of Leningrad. The Soviet newspaper *Tass* stated that the incident resulted from the failure of the crew to abide by international flight rules and their failure to obey the demands of the Soviet Defense Forces. The *Tass* statement also alleged that Soviet authorities feared the airliner was on an intelligence mission. *Id.*, Apr. 27, 1978, at A15, cols. 5-6

The Soviet Union alleged that the pilot of the airliner "refused to obey the demands of Soviet fighter planes of the air defence to follow them in order to land at an airfield."[128] The pilot and navigator of the airliner, while in the Soviet Union before being released, pleaded guilty to violating Soviet airspace and the international rules of flying, and confirmed that they had understood the orders of the Soviet interceptors but had not obeyed them.[129]

The Soviet Union was not publicly condemned by the world community for its action. In fact, South Korean President Park Chung Hee expressed his gratitude to the Soviet Union for the speedy return of the passengers.[130] On May 1, 1978, South Korean Foreign Minister Park Tong Jin thanked the Soviet Union for the release of the airliner's pilot and navigator.[131]

Prior incidents involving the use of force against civil aerial intruders and the limitations on the right to use force in self-defense under customary international law indicate that certain standards of treatment are required of an offended state before force may lawfully be employed against an intruding civil airliner.[132]

(reprint of the *Tass* statement).

128. *Id.*, Apr. 30, 1978, at A15, col. 1. *See* Hughes, *supra* note 76, at 615.

129. N.Y. Times, Apr. 30, 1978, at A1, col. 5. *But see* Lohr, *Pilot in the '78 Incident Recalls His Experience, id.*, Sept. 9, 1983, at A11, cols. 5-6. Kim Chang Kyu, the pilot of the Korean airliner shot down in the 1978 incident, stated that "[a]fter I was shot down, the Russians made the same claims we're hearing now . . . . They said, 'We tracked you for more than two hours, flew around the plane, fired tracers in front of you'—all that. It all sounds exactly the same." *Id.* In speaking of his own encounter with the Soviet interceptors he stated that he saw a Russian interceptor only once, behind and to the right of him. He then slowed his speed and flashed the landing lights in accordance with international standards. He also attempted to establish radio contact with the interceptor but asserted that "Soviet fighter pilots have only one channel, from air to ground." *Id.*

130. *Id.*, Apr. 24, 1978, at A10, col. 4.

131. Hughes, *supra* note 76, at 614.

132. *Id.* at 620. The author maintains that

> [t]he use of force against intruding civil airliners is narrow, limited by international customary law. Firing on such an aircraft can be considered lawful only if . . .
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> 1. It is necessary to effect a landing for the security of the offended territorial state;
> 2. The importance of discontinuing the intrusion by firing upon the aircraft is in reasonable proportion to the danger to the territorial state arising from it; and, most importantly,
> 3. All other practicable means of discontinuing the intrusion have been exhausted—the aircraft has refused to comply with clear and appropriate instructions to return to authorized airspace or follow interceptors to a designated airfield adequate for the type of aircraft involved.

Id. If any of the above criteria are not satisfied, the offending territorial state cannot lawfully bring down the intruder with armed force. *Id.*

First, an offended state does not have an unqualified right to use force against an intruding airliner. In none of the prior incidents did the offended state simply assert that the intruder was shot down for its unauthorized entry. Aggravating circumstances were claimed in each instance.[133] Under elementary considerations of humanity, the world community requires a state to refrain from destroying an unarmed civil intruder without at least giving the pilot of the airliner, by appropriate signals, an opportunity to either return to its authorized airspace or follow the interceptors to land.[134]

Second, there must be a demonstrable security necessity justifying the offended state's decision to employ the military instrument.[135] Prima facie, a commercial passenger airliner which enters the airspace of another state without authorization does not pose a threat to that state's sovereignty justifying a response to the trespass with the use of armed military force.[136] In the Libyan incident of 1973, Israel, invoking the security necessity element raised by the United States in its memorial in the Bulgarian incident,[137] asserted that the destruction of the Libyan airliner was lawful because the airliner intruded into Israeli airspace over a highly sensitive area of its territory and refused to heed repeated warnings.[138] By finding that there was no justification for shooting down the Libyan airliner,[139] the ICAO impliedly rejected Israel's proffered justification.

In the 1978 KAL incident, the Soviet Union, like Israel in 1973, alleged a security necessity and a failure to heed warning signals as

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133. *See supra* notes 77, 111, 128 and accompanying text.

134. *See* Memorial of the United States, *supra* note 83, at 210. *See also* Lissitzyn, *supra* note 113, at 586-87. Professor Lissitzyn states that "[i]n its efforts to control the movements of intruding aircraft the territorial sovereign must not expose the aircraft and its occupants to unnecessary or unreasonably great danger—unreasonably great, that is, in relation to the reasonably apprehended harmfulness of the intrusion." *Id.*

135. Hughes, *supra* note 76, at 620; Memorial of the United States, *supra* note 83, at 242.

136. Professor Lissitzyn maintains that "[i]n times of peace, intruding aircraft whose intentions are known to the territorial sovereign to be harmless *must not be attacked even if they disobey orders to land, to turn back or to fly on a certain course.*" Lissitzyn, *supra* note 113, at 587 (emphasis added).

137. Memorial of the United States, *supra* note 83, at 242.

138. *See supra* notes 111-112 and accompanying text.

139. *See* ICAO Council Resolution of June 4, 1973, *supra* note 122. On March 6, 1984, the Council of the ICAO adopted a resolution which similarly found no justification for the use by the Soviet Union of armed military force against the unarmed South Korean civil airliner. The resolution recognized that the use of armed force is a grave threat to international civil aviation and is incompatible with the prescriptions and practices recognized and honored by the world community. ICAO Council Resolution of March 6, 1984, *reprinted in* N.Y. Times, Mar. 7, 1984, at A11, col. 3.

justification for its action.[140] The captain and navigator of the Korean airliner admitted that they received, understood and disregarded the signals given by the Soviet interceptors.[141] This incident addresses the issue left open in the memorial of the United States: Is it lawful for a state to employ force against a civil aerial intruder when the offended state asserts an articulable security necessity and the intruding airliner refuses to comply with instructions from the intercepting aircraft? It is submitted that under these circumstances the question must be answered in the affirmative, with the following qualification: the pilot of the intruding airliner must be given clear and unambiguous signals that he is operating in unauthorized airspace and be afforded the opportunity either to return to his scheduled flight path or to follow the interceptors to land.[142] In all of the prior incidents the offended states alleged that the intruding airliners were given warnings from the interceptors and that the intruders ignored these warnings.

Moreover, force may not be employed against an intruding airliner unless all other means of terminating the unauthorized entry have been exhausted. In the Bulgarian incident of 1955, Bulgaria admitted

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140. *See* N.Y. Times, Apr. 27, 1978, at A15, col. 5. *But see* HOUSE COMM. ON COMMUNIST AGGRESSION, 83D CONG., 2D SESS., THIRD INTERIM REPORT, BALTIC STATES: A STUDY OF THEIR ORIGIN AND NATIONAL DEVELOPMENT; THEIR SEIZURE AND INCORPORATION INTO THE U.S.S.R. 242-43, 372 (Comm. Print 1954), which describes the destruction of a Finnish commercial airliner by Soviet fighter planes. On June 15, 1940, a Finnish Aero Company commercial airliner enroute to Helsinki from Tallinn, Estonia was "attacked without warning" by two Soviet fighter planes over the Gulf of Finland. *Id.* The crew and passengers of the airliner were killed and the mailbags and other items from the wreckage picked up by Estonian fishing boats at the scene were seized by a Soviet submarine crew. "The presence of a Soviet submarine at the scene lent strength to the report that the attack had been planned well in advance." *Id.* at 242.

It is submitted that the destruction of a commercial airliner on a domestic flight without warning can never be viewed as a lawful use of force by the attacking state. Such an act must be universally condemned as one of naked aggression if there is to be even a modicum of hope in maintaining a minimum degree of world public order.

141. *See* N.Y. Times, Apr. 30, 1978, at A1, col. 5. Although the pilot subsequently denied that he was given signals from the Soviet interceptors, it is submitted that his acknowledgement at the time of the incident that internationally recognized signals were received and ignored explains the minimal condemnation from the world community. Zbigniew Brzezinski, President Carter's national security adviser at the time, acknowledged that the Soviet interceptors had opened fire on the Korean airliner only after other means had failed. Pearson, *supra* note 26, at 106.

142. Hughes, *supra* note 76, at 620. The international rules of the air provide:

> When an interception is being made, the intercept control unit and the intercepting aircraft should . . . attempt to establish two-way communication with the intercepted aircraft in a common language on the emergency frequency 121.5 MHz . . . intercepting aircraft should refrain from the use of weapons in all cases of interception of civil aircraft.

Rules of the Air, annex 2, attachment A, *reprinted in* 22 I.L.M. 1186-87 (1983).

that its air defense forces had failed to take all necessary measures to force the airliner to change direction.[143] It is submitted that the recognition by Bulgaria of a failure to exhaust all necessary measures short of force rendered it liable for the resulting damage. This limitation is consistent with the recognized principle that international law condemns actions by states which unnecessarily or recklessly involve risk to the lives or property of nationals of other states. While this limitation does not absolutely prohibit the use of force as a remedy, it does restrain a state from resorting to force when an effective alternative exists which will prevent unnecessary destruction of lives and property.

III. THE SOVIET CLAIM OF LEGALITY UNDER THE LIMITATIONS REGARDING TREATMENT OF CIVIL INTRUDERS

The Soviet Union alleges four reasons justifying its use of force against Flight 007:

1. The airliner flew in Soviet airspace over militarily sensitive areas of Soviet territory without authorization;[144]

2. The airliner refused to heed the repeated signals and warnings communicated by the Soviet interceptor planes;[145]

3. The Soviet interceptors did not know that the intruder was a civil airliner because it was flying without navigation lights[146] and

4. The airliner was deliberately sent by the United States on an intelligence-gathering mission over a sensitive area of Soviet territory.[147]

It is not disputed that Flight 007 intruded into Soviet airspace and remained there for almost two and one half-hours. Nor is it disputed that the Soviet Union enjoys exclusive sovereignty over the airspace above its territory. Article 1 of the Chicago Convention recognizes "that every State has complete and exclusive sovereignty over the airspace above its territory"[148] and this exclusive right is recognized as a

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143. *See* KEESINGS, *supra* note 77, at 14359E.

144. *See supra* note 35 and accompanying text; *see also infra* note 150.

145. *See supra* note 33.

146. N.Y. Times, Sept. 10, 1983, at A4, col. 5.

147. *Id.*

148. Chicago Convention, *supra* note 19, art. 1. The recognition of an exclusive right in the territorial airspace is hardly a new concept. States have exerted competence in the airspace above their territories since ancient times. Following an extensive review of the historical claims that states have exercised over airspace, Professor John Cooper concluded:

> sovereign States have since Roman times created, recognized, regulated and protected certain exclusive private rights of the surface owner in usable space above his lands. Accepting . . . that such acts of the State can be exercised only by virtue of its rights of sovereignty within its national territory, it follows that

fundamental tenet of international law.[149]

Flight 007 flew over the Kamchatka Peninsula and Sakhalin Island, two areas of Soviet territory that contain naval bases and other military sites.[150] Consistent with articles 6 and 9 of the Chicago Convention, the Soviet Union may lawfully prohibit the aircraft of other states from flying over its territory without express authorization.[151]

> States claimed, held, and in fact exercised sovereignty in the airspace above their national territories long prior to the age of flight, and that the recognition of an existing territorial airspace status by the Paris Convention of 1919 was well founded in law and history.

Cooper, *Roman Law and the Maxim "Cujus Est Solum" in International Air Law*, in EXPLORATIONS IN AEROSPACE LAW 102 (1968). The first international agreement recognizing a state's exclusive sovereignty over its airspace was the International Convention Relating to the Regulation of Aerial Navigation, Oct. 13, 1919, art. 1, 3 U.S.T. 3768, 11 L.N.T.S. 173 (Paris Convention). Article 1 provides: "The High Contracting Parties recognise that every power has complete and exclusive sovereignty over the airspace above its territory." *Id.* For a comprehensive discussion of the history and negotiations behind the Paris Convention, see Cooper, *United States Participation in Drafting Paris Convention 1919*, in EXPLORATIONS IN AEROSPACE LAW 137 (1968).

149. Hughes, *supra* note 76, at 595; Cooper, *Air Transport and World Organization*, 55 YALE L.J. 1191, 1195. Professor Cooper, who served as one of the advisors to the United States Delegation to the 1944 Chicago Conference, stated:

> On many points the Chicago Conference failed to agree. But no one challenged the doctrine of sovereignty of the airspace. It may certainly now be accepted as the primary rule of the international law of the air, and must be so considered by any world organization. Any change in this doctrine can come into effect only if the States concerned agree to surrender part of their recognized sovereignty.

Id. See also B. CHENG, THE LAW OF INTERNATIONAL AIR TRANSPORT 120 (1962).

150. *See* Middleton, *supra* note 26. The Soviet Union maintains launching sites for ballistic missiles and tests these missiles in the two areas flown over. Pearson, *supra* note 26, at 118. The airliner also flew over the Soviet submarine pens at Petropavlosk on the Kamchatka Penninsula, home port for an estimated thirty strategic missile submarines, or about half the sea-based deterrent force of the Soviet Union. *Id.*

151. Article 6 of the Chicago Convention provides that scheduled international air services may not operate in the airspace of another state "except with the special permission or other authorization of that State . . . ." Chicago Convention, *supra* note 19, art. 6. Article 9 provides that each State may uniformly prohibit the aircraft of other states from flying over certain areas of its territory "for reasons of military necessity or public safety." *Id.* art. 9. *See also* Cooper, *supra* note 149, at 1193:

> Flowing from national sovereignty of the airspace, each State has complete control . . . of the airspace over its territory . . . . In practice it has been universally admitted since World War I that the aircraft of one State can enter the airspace over . . . another state, in time of peace, only when authorized. This authorization may be by multilateral convention . . . bilateral convention . . . or by permit issued by one State to a particular . . . aircraft of another State. In every case, however, the authority to operate in the national airspace . . . must be granted by direct license of the State concerned.

Id.

Since the airliner was operating in Soviet airspace without authorization, it must be concluded that Flight 007 violated the sovereign right of the Soviet Union to exclude the airliner from operating in its airspace.

The allegation that Flight 007 failed to respond to the internationally recognized signals and warnings given by the Soviet interceptors is not supported by evidence. The United States played to the Security Council, without objection by the Soviet Union as to authenticity, tapes of the conversations between the interceptor pilots and Soviet ground control.[152] The tapes revealed that the interceptors made no attempt to communicate with the airliner or to visually signal it to land in accordance with internationally accepted procedures. The only statement made by the pilot of an interceptor concerning communication with the airliner was that "the target isn't responding to IFF."[153] IFF is an electronic interrogation signal by which military aircraft identify friends or foes. Neither Flight 007 nor any other civilian airliner could have responded to the IFF signal, however, because commercial airliners are not equipped to do so.[154]

The Soviet Union refused to cooperate with the subsequent ICAO investigation of the incident.[155] The ICAO Council concluded, in the

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152. 38 U.N. SCOR (2471st mtg.), U.N. Doc. S/P.V. 2471, at 5 (prov. ed. 1983). Ambassador Kirkpatrick stated: "[w]hat we are about to play back for you is the intercepted tape of the actual [Soviet] air-to-ground reports . . . . Nothing was cut from this tape. The recording was made on a voice actuated recorder and, therefore, it covers only those periods of time when conversation was heard." *Id.*

153. *Id.* at 7. *But see* Pearson, *supra* note 26, at 120. The author states that the reference to "I.F.F." came from a United States translation of the Russian language transmissions; he notes that the final report issued by the ICAO investigating team translated the same message as "the target isn't responding *to the call.*" *Id.* (emphasis added). He suggests that if the ICAO translation is correct, the Soviet pilot may well have used the international hailing frequency in accordance with accepted interception procedures, yet the Korean airliner did not respond. *Id.* Major General George J. Keegan, Jr., now retired Chief of United States Air Force Intelligence, has stated that the SU-15 that shot down Flight 007 was equipped with radio equipment compatible with international hailing frequencies. *Id. Contra* Lohr, *supra* note 129. If, however, the Soviet interceptors used the military call signal IFF, "it is clear the Russians believed they were dealing with a hostile military aircraft." Pearson, *supra* note 26, at 120.

154. Ambassador Kirkpatrick maintained that "neither the Korean airliner nor any other civilian airliner could have responded to IFF, because commercial aircraft are not equipped to do so." *Id.* at 11.

155. In its Resolution of March 6, 1984, *see supra* note 139, the ICAO Council resolved that it:

> *[d]eeply deplore[d]* the Soviet failure to cooperate in the search and rescue efforts of other involved States and the Soviet failure to cooperate with the ICAO investigation of the incident by refusing to accept the visit of the investigation team . . . and by failing so far to provide the Secretary General with informa-

absence of any evidence to the contrary, that the crew of Flight 007 was unaware of the interception by Soviet fighters and that Soviet authorities assumed Flight 007 was an intelligence aircraft without making exhaustive efforts to identify it.[156] It is submitted that the Soviet interceptors did not attempt to establish contact with the airliner by the internationally accepted methods.

The allegation that Flight 007 was flying without navigation lights is directly refuted by the tapes.[157] On three occasions the interceptors reported seeing the airliner's navigation lights blinking.[158] During the course of the interception, the Soviet pilots flew behind, alongside and in front of the airliner, coming as close as two kilometers at times.[159] The United States maintained that, under the circumstances, it would be easy to identify the unique and large outline of a Boeing 747 passenger airliner. It asserted that:

> either the Soviet pilot knew what he was firing at, or he did not

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tion relevant to the investigation.

Id. (emphasis added).

156. *See* Summary of Findings and Conclusions of the ICAO Investigation Team, *reprinted in* 22 I.L.M. 1192 (1983). *But see* Pearson, *supra* note 26, at 120, wherein the author suggests that the Soviet interceptors did attempt to identify the intruder and that the pilot of Flight 007 was aware of the interceptors.

157. *See supra* note 152, at 6-10 (transcript of the intercepted Soviet air-to-ground reports).

158. *Id.* The crucial reference in the tapes to "lights" has been reported in the United States as meaning that the Soviet pilot had seen Flight 007's lights. A different interpretation, however, is just as plausible. *See* Pearson, *supra* note 26, at 120. At 1818:19 GMT, the pilot of the SU-15 reported to ground control that he was "executing" an instruction given by ground control at 1818:12. At 1818:34, the pilot reported that "[t]he [strobe] light is flashing." *Id.* Rather than being an acknowledgement that the Soviet pilot had seen Flight 007's lights burning:

> [I]t is more likely that it was the SU-15's lights that were flashing, as the next step in the interception procedure. Indeed, in the revised transcripts of the transmissions released by the State Department on September 11, 1983, the pilot reported just a few seconds later, at 1819:08, "They do not see me." Apparently, the Soviet pilot was instructed to flash his lights; he did so, but the Korean pilot did not respond.

Id. The first explicit reference by the interceptors to the airliner's lights occurred at 1821:35 ("The target's light is blinking"), which was after a Soviet interceptor had attempted radio contact (1813:16), flashing lights (1818:19) and firing warning shots along the airliner's path (1820:49). *Id.* It seems reasonable to infer that, after the warning shots were fired, the pilot of Flight 007 realized he was being intercepted and flashed his lights as a signal that he was aware of the interceptors and would comply with their instructions. In the intervening six minutes before the airliner was destroyed, it slowed its speed and changed direction, actions which the Soviet interceptors construed as taking evasive maneuvers. *Id.*

159. *See* U.N. Doc., *supra* note 152, at 11. *See also* N.Y. Times, Sept. 9, 1983, at A6, col. 5.

> know his target was a civilian passenger airliner. If the latter, then he fired his deadly missiles without knowing or caring what they would hit. Though he could easily have pulled up to within some number of meters of the airliner to assure its identity, he did not bother to do so.[160]

The Soviet authorities were aware of the intruding aircraft for some two and one-half hours and ordered it to be destroyed minutes before it was to enter international airspace over the Sea of Japan.[161] Since the evidence reveals that the airliner's navigation lights were illuminated and the sophisticated military interceptors were following the aircraft long enough and close enough to identify it as a commercial airliner, the Soviet Union was obligated, under principles of customary international law and community expectations as evidenced by states' practice and opinion in prior incidents, to observe elementary considerations of humanity and refrain from employing an unnecessary or disproportionate degree of force.[162] In light of the fact that the interceptors easily could have identified the intruder as a commercial airliner, it is submitted that the destruction of the airliner and the death of 269 civilians was neither a necessary nor proportionate response to the aerial trespass.

On September 16, 1983, an investigation of the incident was instituted at an extraordinary session of the ICAO Council.[163] The investi-

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160. *See* U.N. Doc., *supra* note 152, at 11. The pilot of the intercepting Soviet fighter plane was subsequently criticized in a Soviet magazine as being "trigger happy." Halloran, *Soviet Critical of Pilot Who Downed Korean Plane*, N.Y. Times, Jan. 8, 1984, at A1, col. 1. Nevertheless, United States intelligence agencies later found no indication that the Soviet interceptors knew Flight 007 was a commercial airliner before the attack. Pearson, *supra* note 26, at 118. The SU-15 fighter that shot down Flight 007 was behind and below the airliner at the time the missiles were fired. Identification would have been most difficult from that position. *Id.*

161. 38 U.N. SCOR (2473d mtg.), U.N. Doc. S/P.V. 2473/Corr. 1 (1983), *reprinted in* 22 I.L.M. 1134 (1983). The Egyptian delegate stated that when the plane was hit, it was very close to the edge of Soviet airspace and virtually over international waters. *Id.* It must be noted, however, that United States intelligence agencies also must have been aware of Flight 007's deviation well before it entered Soviet airspace:

> There can be little doubt that on the night of August 31, the extremely sophisticated, continuously vigilant U.S. and allied intelligence presence in the area was cranked up to the maximum to monitor the impending test of a secret and suspicious missile. *All electronic eyes and ears were directed toward the exact place where K.A.L. 007 first intruded in Soviet territory, at precisely the time it was closest to the RC-135. . . . Far from slipping unnoticed, K.A.L. 007 had flown onto center stage.*

Pearson, *supra* note 26, 117-18 (emphasis added).

162. *See supra* notes 20 and 21.

163. *See* N.Y. Times, Sept. 17, 1983, at A1, col. 6.

gation included field visits to the United States, the Republic of Korea and Japan.[164] The Soviet Union refused to accept the visit of the investigation team or to provide information which the Council deemed relevant.[165]

On March 6, 1984, the Council adopted a resolution based on the investigation report.[166] While acknowledging that the precise cause of the deviation could not be conclusively established, the resolution stated that "no evidence was found to indicate that the deviation was premeditated or that the crew was at any time aware of the flight's deviation."[167]

The allegation that Flight 007 was fulfilling a spy mission for the United States is hardly credible. The intelligence-gathering arsenal of the United States includes state-of-the-art satellites, ground stations, ships, submarines and reconnaissance aircraft.[168] There seems to be little need for the use of commercial airliners of another state as intelli-

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164. ICAO News Release, Dec. 13, 1983.

165. *See* ICAO Council Resolution of March 6, 1984, *supra* note 139.

166. *Id.* On Sept. 12, 1983, the United Nations Security Council failed to adopt a resolution which deeply deplored the destruction of Flight 007 because the Soviet Union, a Permanent Member of the Security Council, vetoed it. However, the resolution was approved by the United States, Great Britain, France, Jordan, Malta, the Netherlands, Pakistan, Zaire and Togo. The resolution declared "that such use of armed force against international civil aviation is incompatible with the norms governing international behavior and elementary considerations of humanity." U.N. Doc. S/15966/Rev. 1 (1983), *reprinted in* 22 I.L.M. 1146 (1983). It is significant that while the Soviet Union refused to cooperate with the ICAO Council in its investigation or to adopt the Security Council resolution condemning the use of force against civil aircraft, the Soviet Government, in 1973, accused Israel of committing a criminal act of international terrorism for its armed attack against the Libyan airliner and urged the ICAO to strongly condemn Israel's "barbaric act." *See* 22 I.L.M. 1130 (1983).

167. *See* ICAO Council Resolution of March 6, 1984, *supra* note 139. There is circumstantial evidence which suggests that the crew of the Korean airliner was aware of its intrusion. Less than one minute after the Soviet interceptors fired warning shots in the path of the airliner, the interceptors reported seeing the "target's" lights flashing. Within the next five minutes, the airliner slowed down and changed direction. Pearson, *supra* note 26, at 120. It is also significant to note that during this time the pilot of Flight 007 reported to Tokyo air-traffic control that he had climbed to 35,000 feet from his previous altitude of 33,000 feet. There had in fact been no such ascent. *Id.*

168. *See* N.Y. Times, Sept. 26, 1983, at A6, col. 2. *See also* Pearson, *supra* note 26, at 113-18. Although it may be extremely doubtful that KAL 007 was intentionally sent on a preplanned mission over Soviet territory to gather intelligence information itself, there are a number of significant unanswered questions which should be addressed. The fact that a major Soviet nuclear test was scheduled that fateful night at the exact spot over which Flight 007 intruded casts doubt on United States allegations that it was at all relevant times unaware of Flight 007's deviation. "The accumulating weight of evidence discrediting official U.S. government explanations of the KAL 007 incident demand [sic] a full-scale Congressional investigation." *Id.*

gence-gathering instruments. Of course, any state which used or actively encouraged such a strategy must share the responsibility for any damage or injury resulting from unnecessarily exposing civilian lives to potential danger and violating international prescriptions.[169] But in the absence of any evidence to the contrary, the allegation that Flight 007 was engaged in an intelligence-gathering mission must be rejected.

CONCLUSION

There is no evidence to suggest that the Soviet interceptors "made all possible efforts to secure identification of the intruding aircraft"[170] or that the crew of Flight 007 was aware of any of the interceptions reported by the Soviet Union.[171] Under these circumstances, as the ICAO Council Resolution stated, such use of armed force "constitutes a violation of international law, and . . . is a grave threat to the safety of international civil aviation, and is incompatible with the norms governing international behaviour and with the rules . . . enshrined in the Chicago Convention and its Annexes and with elementary consideration of humanity."[172]

The Liberian delegate eloquently placed the incident in its proper

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169. *See, e.g.*, Garcia Case, 4 R. Int'l Arb. Awards 119 (1928); Corfu Channel, 1949 I.C.J. 4; Hughes, *supra* note 76, at 620. *See also* Lissitzyn, *supra* note 113, at 587. Professor Lissitzyn stated:

> This standard [restraining a state from using armed force against civil aircraft] may be regarded as a special application to aviation of a more general standard of international law restraining states, in the exercise of their otherwise undoubted sovereign powers, from unnecessarily or unreasonably endangering the lives and property of foreign nationals.

Id. If it is found that the United States was aware of the deviation of Flight 007 and that it had the time and the means to communicate with the crew to warn them before Soviet airspace was violated and did not do so, then the United States must bear some responsibility for the tragedy that ensued because it too would have violated the customary international proscriptions against unnecessarily exposing civilian lives to potential danger. As one author has explained:

> Congress owes it to the passengers of K.A.L. 007, their families, the people of the United States and the world community to conduct a full and thorough investigation, to let the truth be known. In a democratic society, there must be limits to the damage that can be inflicted in the name of "national security."
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> We cannot control the paranoia of a Soviet society that shoots when in doubt, whether on orders from above or on impulse from below. We can and should, however, take responsibility for our own contribution to this tragedy and the tensions, fears and international disorder that it has promoted.

Pearson, *supra* note 26, at 124.

170. *See* Summary of Findings and Conclusions of the ICAO Investigation Team, *supra* note 156.

171. *Id.*

172. ICAO Council Resolution of March 6, 1984, *supra* note 139.

perspective at the Security Council's special session:

> As long as all nations, large and small, rich and poor, superpower and lesser power, share a common living space we also share a responsibility to the world community regarding our actions and conduct. If we are truly and sincerely working for peace how can the Soviet action be convincingly explained? Peace is not achieved by bullets or grandiose statements issued in the assemblies, congresses and presidiums of the world, but rather on the level of daily human interaction. The Soviet Union owes the entire world, and the Korean people in particular, a factual explanation of the incident, in the name of human decency and dignity . . . . Everyone who has flown in an aircraft—including everyone in this chamber—can identify with the fate of the helpless air passengers, with no warning having been given, so swift is the act of modern warfare. We are left behind to agonize over their fate and to hold our breath, wondering whether this will happen again. In the name of our common humanity, in the name of international law and order, we ask the Soviet Union to give the world the whole story, realizing as we do from their own Tolstoy's *War and Peace* that the worst thing is for good men to keep silent when a wrong has been done.[173]

Gerard Michael McCarthy

173. 38 U.N. SCOR (2471st mtg.), U.N. Doc. S/PV. 2471, at 36-38 (prov. ed. 1983), *reprinted in* 22 I.L.M. 1126-27 (1983).