

Journal of Air Law and Commerce

Volume 62 | Issue 4

Article 5

1997

The Korean Airlines Incident on September 1, 1983, and Some Measures Following It

Masahiko Kido

Follow this and additional works at: <https://scholar.smu.edu/jalc>

Recommended Citation

Masahiko Kido, *The Korean Airlines Incident on September 1, 1983, and Some Measures Following It*, 62 J. AIR L. & COM. 1049 (1997)
<https://scholar.smu.edu/jalc/vol62/iss4/5>

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

**THE KOREAN AIRLINES INCIDENT ON SEPTEMBER 1,
1983, AND SOME MEASURES FOLLOWING IT**

MASAHIKO KIDO*

TABLE OF CONTENTS

I. INTRODUCTION.....	1049
II. UNITED NATIONS SECURITY COUNCIL	1050
III. ICAO—THE INTERIM REPORT (1983-84)	1052
IV. ICAO—THE FINAL REPORT (1992-93).....	1055
V. SOME SPECULATIONS	1060
VI. MEMORANDUM OF UNDERSTANDING CONCERNING AIR TRAFFIC CONTROL (JULY 29, 1985)	1062
VII. THE AMENDMENT OF THE CHICAGO CONVENTION	1063
A. ARTICLE 3 Bis	1063
B. THE ANNEXES-RULES CONCERNING THE INTERCEPTION	1067
VIII. CONCLUSION.....	1069

I. INTRODUCTION

ON SEPTEMBER 1, 1983, a Korean Airlines Boeing 747 (Flight KE 007) ("KAL"), en route from Anchorage, Alaska, to Seoul, South Korea, deviated from its chartered course and passed into Soviet airspace over the Kamchatka Peninsula and Sakhalin Island. Soviet military aircraft shot Flight 007 down and all 269 persons died as KAL sank into the Sea of Japan, southwest of Sakhalin Island. The victims consisted of 29 flight crew members and 240 passengers. The passengers were from the following countries: Korea (76), United States (62), Japan (28), Taiwan (23), Philippines (16), Hong Kong (12), Canada (8), Thailand (5), Australia (2), United Kingdom (2),

* Professor of Law Faculty, Matsuyama University; Honorary Professor of Ehime University; Member of Japan Branch, International Law Association.

Malaysia (1), India (1), Sweden (1), Dominican Republic (1), Iran (1), and Vietnam (1).¹

II. UNITED NATIONS SECURITY COUNCIL

The acting permanent representative of the United States sent a letter dated September 1, 1983, to the United Nations, addressed to the President of the United Nations Security Council, requesting an urgent meeting of the Security Council to consider the incident.² The request was supported by letters from Korea, Japan, Canada, and Australia.³

All of these events occurred during the cold war, and the United States and other western countries decided to use this incident to turn international public opinion against communism. When the Security Council met on September 2, the Korean delegation condemned the Soviet military action as a clear violation of the legal norms and generally accepted standards of international civil aviation. The delegation also requested that the Soviet Union take at least five steps, which included the following:

¹ Legal articles concerning the incident include the following: *Chronique des Faits Internationaux*, 88 REVUE GÉNÉRALE DE DROIT INT'L PUBLIC 435 (1984); Gerald F. FitzGerald, *The Use of Force against Civil Aircraft: The Aftermath of the KAL Flight 007 Incident*, ANNUAIRE CANADIEN DE DROIT INT'L 291 (1984); Gilbert Guillaume, *La destruction, le 1er septembre 1983, de l'avion des Korean Airlines (vol KE 007)*, 151 REVUE FRANÇAIS DE DROIT AÉRIEN 215 (1984); Farooq Hassan, *A Legal Analysis of the Shooting of Korean Airlines Flight 007 by the Soviet Union*, 49 J. AIR L. & COM. 555 (1984); Peter Martin, *Destruction of Korean Air Lines Boeing 747 over Sea of Japan, 31 August 1983*, 9 AIR LAW 138 (1984); Michael Milde, *Interception of Civil Aircraft vs. Misuse of Civil Aviation (Background of Amendment 27 to Annex 2)*, 11 ANNALS OF AIR & SPACE L. 105 (1986) [hereinafter Milde, *Interception of Civil Aircraft*]; Michael Milde, *KE 007—'Final' Truth and Consequences*, 42 ZEITSCHRIFT FÜR LUFT-UND WELTRAUMRECHT 357 (1993) [hereinafter Milde, *'Final' Truth*]; Jean Claude Piris, *L'interdiction du Recours à la Force Contre les Aéronefs Civils: L'amendement de 1984 à la Convention de Chicago*, 30 ANNUAIRE FRANÇAIS DE DROIT INT'L 711 (1984) [hereinafter Piris, *L'interdiction du Recours à la Force Contre les Aéronefs Civils*]; Jean Claude Piris, *De Quelques Controverses Juridiques Consécutives à la Destruction du Boeing 747 de la KAL le 1er Septembre 1983*, 90 REVUE GÉNÉRALE DE DROIT INT'L PUBLIC 815 (1986) [hereinafter Piris, *De Quelques Controverses Juridiques Consécutives à la Destruction du Boeing 747*]; Ghislaine Richard, *KAL 007: The Legal Fallout*, 9 ANNALS OF AIR & SPACE L. 147 (1984); Jacqueline de la Rochère, *L'affaire de L'accident du Boeing 747 de Korean Airlines*, 29 ANNUAIRE FRANÇAIS DE DROIT INT'L 749 (1983); Note, *Legal Argumentation in International Crises: The Downing of Korean Air Lines Flight 007*, 97 HARV. L. REV. 1198 (1984).

² *United Nations Security Council Consideration*, 22 I.L.M. 1109, 1110 (1983).

³ *Id.* at 1111-13.

- (1) [provide] a full and detailed account of exactly what happened;
- (2) [provide] a full apology and complete compensation;
- (3) punish all those who were directly responsible;
- (4) guarantee unimpeded access to the crash site; and
- (5) [guarantee] against the recurrence of such violent actions.⁴

Objecting to those claims, the U.S.S.R. delegate cited the Soviet news agency, Tass, and said:

The intruder plane had deviated from the existing international route in the direction of the Soviet Union's territory by up to 500 kilometers and spent more than two hours over the Kamchatka Peninsula, the area of the Sea of Okhotsk and the Island of Sakhalin Over the Sakhalin Island, a Soviet aircraft fired warning shots with tracer shells along the flying route of the plane It is appropriate to recall that instances of deliberate violation of the State frontiers of the Soviet Union by American planes, including in the Far East, are far from rare It was obviously thought possible to attain special intelligence aims without hinderance using civilian planes as a cover.⁵

On September 6, in the Security Council, the American delegate dramatically explained the outline of the incident by using transmission tapes between the Soviet interceptor and the ground controllers, which were furnished in cooperation with the government of Japan.⁶ The recording stated:

"I'm flying behind."

. . . .

"The target is 80 degrees to my left."

. . . .

"The ANO [air navigation lights] are burning. The [strobe] light is flashing."

. . . .

"I have executed the launch."

"The target is destroyed."⁷

Afterward, the fifteen state delegations entered into a heated discussion on the subject.⁸

⁴ *Id.* at 1114.

⁵ *Id.* at 1115-16.

⁶ *Id.* at 1121-25.

⁷ *Id.* at 1122 n.a4.

⁸ *Id.* at 1125-36.

On September 12, a draft of a resolution of the Security Council, co-sponsored by seventeen states, declared "that such use of armed force against international civil aviation is incompatible with the norms governing international behaviour" and elementary considerations of humanity.⁹ But the resolution was rejected by a veto of the U.S.S.R.¹⁰

III. ICAO—THE INTERIM REPORT (1983-84)

The ICAO Council held an extraordinary session on September 15-16, 1983, and adopted two resolutions. The first resolution deplored "the destruction of an aircraft in commercial international service resulting in the loss of 269 innocent lives."¹¹ It recognized "that such use of armed force against international civil aviation is incompatible with the norms governing international behaviour and elementary considerations of humanity and with the rules, Standards and Recommended Practices enshrined in the Chicago Convention and its Annexes and invokes generally recognized legal consequences."¹² It went on to reaffirm "the principle that States, when intercepting civil aircraft, should not use weapons against them."¹³ And the resolution directed "the [ICAO] Secretary General to institute an investigation to determine the facts and technical aspects relating to the flight and destruction of the aircraft" and urged "all parties to co-operate fully in the investigation."¹⁴ It further directed "the Secretary General to urgently report to the Council on the status of adherence to, and implementation of, the provisions of the Chicago Convention, its annexes and other related documents as they bear upon this incident."¹⁵ This resolution was adopted by a vote of twenty-six in favor to two against (Czechoslovakia and U.S.S.R.), with three abstentions (Algeria, China, and India).¹⁶

In the second resolution, the Council decided "to instruct the Air Navigation Commission (ANC) to undertake without delay "a number of technical tasks relating to the implementation of

⁹ *Id.* at 1138.

¹⁰ *Id.* at 1138-48.

¹¹ *International Civil Aviation Organization Consideration*, 22 I.L.M. 1149, 1150 (1983) [hereinafter *ICAO Consideration*].

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at 1151.

¹⁵ *Id.*

¹⁶ *Id.* at 1150.

all provisions contained in the annexes of the Chicago Convention.¹⁷ This resolution was adopted by a vote of six in favor to four against, with seventeen abstentions.¹⁸ At its twenty-fourth session, from September 20 to October 10, 1983, the ICAO Assembly endorsed these decisions of the Council (sixty-five in favor to ten against, with twenty-six abstentions).¹⁹

The investigation team, instituted under the authority of the ICAO Secretary General, consisted of five staff members who visited the interested states to uncover information concerning the incident. But the Soviet government refused to accept a visit by the investigation team²⁰ and sent only insufficient information conducted by the government's own investigation.²¹ The data that the United States government brought forward was also unsatisfactory.

On December 13, 1983, the report of the investigation (the "Lambert Report")²² was presented to the Council, and was referred to the ANC for technical study. The ANC thoroughly examined the contents of the Lambert Report from January 24 to February 16, 1984, noting the following comments about the report:

[T]he [ANC] has not attempted to offer any firm conclusions regarding the various aspects of the incident because the information presented to the Commission in relation to the total period of flight KE007 was incomplete and some of the information received by ICAO had differences which could not be cleared up. Furthermore, the Commission found it difficult to validate and endorse the conclusions connected with the scenarios postulated in the Secretary General's report because any one of them contained some points which could not be explained satisfactorily.²³

The resolution adopted by the Council on March 6, 1984, recognized the following: First, it noted that "no evidence was found to indicate that [KAL's] deviation [from its flight plan] was premeditated or that the crew was at any time aware of the

¹⁷ *Id.* at 1152.

¹⁸ *Id.*

¹⁹ FitzGerald, *supra* note 1, at 293.

²⁰ Milde, *'Final' Truth*, *supra* note 1, at 359.

²¹ See *International Civil Aviation Organization: Action with Regard to the Downing of the Korean Air Lines Aircraft*, 23 I.L.M. 864, 910-21 (1984) [hereinafter *Downing of the Korean Air Lines Aircraft*]. A summary of this information is found in Martin, *supra* note 1, at 141ff.

²² Lambert is the Secretary General of ICAO.

²³ *Downing of the Korean Air Lines Aircraft*, *supra* note 21, at 934-35.

flight's deviation."²⁴ Second, it condemned "the use of armed force which resulted in the destruction of the Korean airliner and the tragic loss of 269 lives" and deeply deplored "the Soviet [government's] failure to cooperate [both] in the search and rescue efforts of other involved States and the Soviet failure to cooperate with the ICAO investigation of the incident."²⁵

The Lambert Report²⁶ ultimately discarded several possibilities for KAL's flight route deviation "as being too unlikely to warrant further consideration."²⁷ These reasons included the following:

- (1) unlawful interference;
- (2) crew incapacitation;
- (3) deliberate crew action associated with fuel savings incentives; and
- (4) extensive cockpit avionics/navigation system failures or malfunctions.²⁸

The Lambert Report "did not further consider the hypothesis entertained by the U.S.S.R. Accident Investigation Commission that there was a deliberate delay in [KAL's] departure from Anchorage and a premeditated deviation from the flight plan route for intelligence gathering purposes."²⁹

Concerning the cause of the deviation from the planned route by some 500 kilometers, the Lambert Report presented two theories regarding the lack of the Digital Flight Data Recorder (DFDR) and the Cockpit Voice Recorder (CVR). The first is the "Heading Mode" theory.³⁰

The track from Anchorage VOR to Cairn Mountain NDB is 246 degrees. It was assumed that a heading of 246 degrees could have been selected to take the aircraft towards Bethel before the aircraft had reached the minimum reception altitude, and that the autopilot mode selector was inadvertently left in heading mode for the flight's duration. The subsequent flight path would then have been subject to the upper winds, and the inertial navigation system would have indicated waypoint passage at approximately the estimated times despite being displaced from the assigned track. [A] magnetic heading of 246 degrees from a

²⁴ *Id.* at 937.

²⁵ *Id.*

²⁶ *Id.* at 865-923.

²⁷ *Id.* at 868.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

position after . . . take-off near Anchorage produced a track that passed closer to Bethel than was the case with the actual flight. A simulated flight reached the area . . . south of Sakhalin Island, at a time close to that of the actual flight, though 80 to 100 NM south.³¹

The second theory is the "Mis-input 10" theory.³² "If in the initial insertion of the co-ordinates for the present (ramp) position, a 10 degree error in longitude consisting of an incorrect W139 degrees instead of W149 degrees had been made, the error would have been accepted by the INS [Inertial Navigation System]."³³ This error "would have produced a track to the area of [KAL's] destruction that was also consistent with the radar track information provided by the U.S.S.R. and by Japan."³⁴

The Lambert Report details the simulations introduced by the above theories, but in conclusion, the report stated that "[e]ach of those postulations assumed a considerable degree of lack of alertness and attentiveness on the part of the entire flight crew but not to a degree that was unknown in international civil aviation."³⁵ Concerning the interception and the shooting-down by the Soviet military aircraft, the Lambert Report mentioned the following:

(1) U.S.S.R. authorities assumed that [KAL] was an intelligence aircraft and, therefore, did not make exhaustive efforts to identify the aircraft through in-flight visual observation;

(2) ICAO was not provided any radar recordings, recorded communications, or transcripts associated with the [interception]; therefore, it was not possible to fully assess the comprehensive nature of the application of intercept procedures, signalling, and communications;

(3) No evidence indicated that the flight crew of [KAL] was, at any time, aware of the flight's deviation from its planned route, [of the interception by the Soviet military aircraft, and] of the reason for a rapid decompression.³⁶

IV. ICAO-THE FINAL REPORT (1992-93)

In less than a decade, the political atmosphere in the world had changed drastically. In December 1991, the Soviet Union

³¹ *Id.* at 902.

³² *See id.* at 868.

³³ *Id.* at 903.

³⁴ *Id.* at 909.

³⁵ *Id.*

³⁶ *Id.* at 869, 909.

was divested into fifteen states, with its diplomatic relation succeeding to the Russian Federation. Later in 1992, "a meeting between the Korean, [American], Japanese and Russian authorities was convened in Moscow."³⁷ During this meeting, the parties agreed to request that the ICAO complete its 1983-84 investigation and to give full support and to make available all documentation to the ICAO.³⁸

On December 18, 1992, the 137th Session of the Council decided to complete the fact-finding investigation,³⁹ while the "black box," the cockpit voice recorder (CVR) and digital flight data recorder (DFDR) tapes, were handed over to the Korean Government by President Yeltsin on October 1992 and to the ICAO in Paris by the Russian government in January 1993.⁴⁰ But afterward, it was revealed that the real "crown jewels" were not given.⁴¹

An investigation team was formed, comprised of four staff members and two consultants. Beginning in January 1993, the team searched for new materials by visiting the United States, Korea, Japan, and Russia. The team also met the divers who were involved in the search and retrieval of the flight recorders.

Based on the activities of the ICAO investigation team, the *Report of the Completion of the ICAO Fact-Finding Investigation—Appendix*⁴² was published in June 1993. This *1993 Report's* composition followed the *1983 Interim Report*. The *1993 Report* did not contain information that was more important than the *1983 Interim Report* in spite of many citations of the newly gained data from DFDR and CVR.⁴³ Therefore, the *1993 Report* could not lead to a decisive conclusion about the origin of the incident. Also, it is noteworthy that the *1993 Report* repeatedly emphasized its finality.

³⁷ Milde, *'Final' Truth*, *supra* note 1, at 363.

³⁸ *Id.*

³⁹ ICAO Council Working Paper, C-WP/9781, *Report of the Completion of the Fact-Finding Investigation Regarding the Shooting Down of Korean Airlines Boeing 747 (Flight KE 007) on 31 August 1983* (May 5, 1993) [hereinafter *1983 Interim Report*] (on file with the *Journal of Air Law and Commerce*).

⁴⁰ ICAO Council Working Paper, C-WP/9781, *Destruction of Korean Air Lines Boeing 747 on 31 August 1983—Report of the Completion of the ICAO Fact-Finding Investigation* (June 1993) [hereinafter *1993 Report*] (on file with the *Journal of Air Law and Commerce*).

⁴¹ Milde, *'Final' Truth*, *supra* note 1, at 362-63.

⁴² This appendix is part of the *1993 Report*, *supra* note 40.

⁴³ The *1993 Report* notes, "This report complements the report of the ICAO fact-finding investigation in 1983." *Id.*

Concerning the deviation from the planned route, the 1993 *Report* supported the first of the two theories listed in the 1983 *Interim Report*—the “Heading Mode” theory. The “conclusions” of the report are as follows:

3.7 KE 007 turned to a magnetic heading of about 245 degrees which it reached three minutes after lift-off and then maintained until the attack.⁴⁴

3.9 The maintenance of a constant magnetic heading and the resulting track deviation were due to the crew’s failure to note that the autopilot had either been left in heading mode or had been switched to INS when the aircraft was beyond the range (7.5NM) for the INS to capture the desired track.⁴⁵

3.10 The maintenance of a constant magnetic heading was not due to any aircraft system malfunction.⁴⁶

3.15 The failure to detect the aircraft’s deviation from its assigned track for over five hours indicated a lack of situational awareness and flight deck coordination on the part of the crew.⁴⁷

3.21 There were no indications that the crew of KE 007 deliberately maintained a constant magnetic heading.⁴⁸

3.23 The proximity of an RC-135 (a United States intelligence aircraft) and KE 007 northeast of Kamchatka Peninsula resulted in confusion and the assumption by U.S.S.R. that the aircraft proceeding towards U.S.S.R. was an RC-135.⁴⁹

3.24 U.S.S.R. military aircraft attempted to intercept KE 007 over Kamchatka Peninsula.⁵⁰

3.27 The time factor became paramount in the U.S.S.R. command centers as the intruder aircraft was about to coast out from Sakhalin Island.⁵¹

3.28 Exhaustive efforts to identify the intruder aircraft were not made, although apparently some doubt remained regarding its identity.⁵²

3.33 The military radar installations of the Japanese Defense Agency were aware that an aircraft was tracking into U.S.S.R. airspace over Sakhalin Island. According to the representatives of Japan, they were not aware that it was a civil aircraft off its intended track.⁵³

⁴⁴ *Id.* at 59.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 60.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

In addition to the 1993 Report, *Information Paper No. 1*⁵⁴ and a revised *Information Paper*, from the Russian Federation,⁵⁵ were published. *Information Paper No. 1* contained the CVR transcript, the radio communications recorded in Anchorage and Tokyo, and the transcript of communications of the U.S.S.R. Air Defense Command Centers on Sakhalin Island.⁵⁶ Note, however, that since all of these materials involved military secrets of the interested states, their reliability remained uncertain. With that word of caution, it is interesting to note the most important conversations contained in the materials:

<i>Time</i>	<i>From</i>	<i>Transmission</i>
17h55m (G.M.T.)	CC ⁵⁷	First, send 121 and 805 ⁵⁸ to intercept target 60-65. If the border is violated, destroy the target. ⁵⁹
18h8m	CC	How many jet trails are there, if there are four jet trails, then it's an RC-135. ⁶⁰
18h10m	CC 805 805 805	805, can you determine the type? Unclear. ⁶¹ (interference) It is flying with flashing lights. ⁶² The target is not responding to the call (IFF). ⁶³
18h15m	CC	[M]ay (be) a passenger (aircraft). All necessary steps must be taken to identify it. ⁶⁴
18h17m	CC	805, the target has violated the State border, destroy the target! ⁶⁵

⁵⁴ Information Paper No. 1, from Secretary General to the Representatives on the ICAO Council (July 6, 1993) (on file with the *Journal of Air Law and Commerce*).

⁵⁵ Information Paper No. 2, from the Secretary General to the Representatives on the ICAO Council (June 14, 1993) (on file with the *Journal of Air Law and Commerce*).

⁵⁶ The Soviet transcript is available in English.

⁵⁷ "CC" is the abbreviation of "Command Centre."

⁵⁸ 121 and 805 are Su-15 fighters from Sokol.

⁵⁹ Information Paper No. 1, *supra* note 54, at 83.

⁶⁰ *Id.* at 122.

⁶¹ *Id.* at 61.

⁶² *Id.* at 62.

⁶³ *Id.* at 63.

⁶⁴ *Id.* at 86.

⁶⁵ *Id.* at 66.

- 18h18m 805 The air navigation light is on, the flashing light is on.⁶⁶
- 18h19m CC Fire a warning burst with cannons and rock wings to show the direction to Sokol.⁶⁷
-
- 18h26m01s 805 The target is destroyed.⁶⁸

The following is a part of the KAL CVR Transcript.⁶⁹

- 18h26m02s (3) (Sound-Explosion?)
- 6s (3) What's happened?
- 8s (3) What?
- 34s (2) Attention emergency descent.
- 46s (2) Put out your cigarette. This is an emergency descent.
- 55s Put the mask over your nose and mouth and adjust the head hand.
- 27m09s All compression.
- 10s Rapid compressions descend to one zero thousand.
- 43s Put the mask over your nose and mouth and adjust

After some eleven minutes, the following was transmitted:

- 18h38m from CC They lost the target, Comrade Colonel, in the area of Moneron.⁷⁰

The "heading mode" hypothesis that the report supported is not fully persuasive. On this point, I will express some speculations later in this Article. Whatever it may be, it is an undeniable fact that one of the major factors causing the deviation was the carelessness or negligence of the crew of the Korean aircraft which the report stated repeatedly. Also, the use of force by the Soviet military aircraft against KAL without identifying or even warning the intruding aircraft is an abuse of the right of self-defense.⁷¹ Furthermore, the presence of an RC-

⁶⁶ *Id.* at 67.

⁶⁷ *Id.* at 128.

⁶⁸ *Id.* at 72.

⁶⁹ *Id.* at 3-16. Note that "(1)" indicates channel 1 (First Officer); "(2)" indicates channel 2 (third crew member and PA); "(3)" indicates channel 3 (cockpit area microphone).

⁷⁰ *Id.* at 90.

⁷¹ Margaret Shapiro, *Russians Blame KAL Downing on Airliner's Pilots*, WASH. POST, Aug. 31, 1993, at A12. Years after the incident, the events were reported as follows:

135, an American intelligence aircraft, caused the U.S.S.R. Air Command to mistake KAL as the spy aircraft.

The three states specified above are the interested parties in this incident. In the political and military atmosphere at the time of this occurrence—nearing the end of the Cold War—these three states, wanting to avoid mutual fault, and building upon the new peaceful relation among them, hurried in drawing up the final report. In other words, political compromise based on the national interests of these states led to an end of this tragedy without clearing the truth of the incident.

V. SOME SPECULATIONS

As mentioned above, the cause of the deviation from the assigned route by KAL was not completely clear, and the situations under which the Soviet military aircraft intercepted and attacked KAL were not explained in detail. Some speculation regarding these questions was presented by Japanese writers, such as Kunio Yanagida and Ichiro Naito. The former published three books: two versions of *Gekitsui—Daikankohkuhki Jiken*⁷² and *Black Box—Tsuiseki, Daikankohkuhki Jiken*.⁷³ Ichiro Naito revealed the report *Sakhalin Daikankohkuhki Gekitsui Jiko*⁷⁴ in his book *Shinsetsu—Nippon Kohkuhki Jikobo*.⁷⁵

Yanagida named the cause of the deviation the “Mis—NAV change,” or the “Mis-operation of INS” theory. He said that the INS that is now used in the aircraft takes more than fifteen minutes for self-controlling (erecting) the fixed and constant bear-

The downing of Korean Air Lines Flight 007 was caused by “a series of . . . blunders and mistakes” by the jumbo jet’s pilots and the former Soviet Union “bears no guilt,” the first Russian commission to investigate the tragedy said today . . . The Russian commission was set up a year ago by Yeltsin after a visit to Seoul. At the time, Yeltsin called the KAL tragedy “the criminal act of a criminal regime.”

Id.

⁷² This book, translated as SHOOTING DOWN—THE KOREAN AIRLINES INCIDENT, was published twice in 1984.

⁷³ This book, translated as BLACK BOX—PURSUIT, THE KOREAN AIRLINES INCIDENT, was published in 1985.

⁷⁴ The report is translated as *The Accident of Shooting Down of the Korean Airlines in Sakhalin*.

⁷⁵ This book, translated as THE TRUE THEORY—A LIST OF THE AIRCRAFT INCIDENTS RELATING TO JAPAN, contains the report at page 163.

ing of the rotation axis.⁷⁶ The order of operation in the INS before the start of the aircraft is as follows:⁷⁷

(1) switching the mode select on stand-by (STBY), input the latitude and the longitude of the airport spot, Anchorage 2N.⁷⁸

(2) changing the switch to Alignment (Align), input each waypoint of the air-route to go, one by one.⁷⁹

(3) confirming that the lamp "Ready Nav" changes the green color, turn the switch to Navigation (NAV).⁸⁰

For these operations, it takes more than fifteen minutes.⁸¹

On the day of the incident, the crew entered the cockpit later than the appointed time. For that reason, it was presumed that the tracking of the body of the aircraft began before the input in INS was finished, causing the direction of INS to incorrectly change. As a result, KAL inadvertently kept the flight on the mistaken course until it trespassed into U.S.S.R. airspace over Sakhalin.⁸² Naito said the probability of this occurring was ninety-five percent.⁸³ Naito vividly explained the situation under which KAL was shot down.⁸⁴

On September 1, at 5:00 p.m., KAL trespassed into U.S.S.R. airspace over Kamchatka Peninsula, and to intercept it, four U.S.S.R. military aircraft (Su-15) scrambled. But they went back to their airbase, failing to find KAL. Then, KAL, flying over the Sea of Okhotsk and Sakhalin Island, communicated twice with the Tokyo Working NF for North Pacific (channel 3) 17h08m-09m and 18h14m-27m.⁸⁵ At this time, three U.S.S.R. fighters, two Su-15s and one MiG-23 scrambled. From about 17h56m, all details of the conversations by the U.S.S.R. fighters were caught in the radar-sight of the Japanese Air Defense Force at Wakkanai,⁸⁶ and the voices of all fighter pilots were identified.⁸⁷ By this means, it became clear that three of four fighters went back to their base, failing to intercept anything. The remaining MiG-

⁷⁶ See *id.*

⁷⁷ See *id.*

⁷⁸ See *id.*

⁷⁹ See *id.*

⁸⁰ See *id.*

⁸¹ See *id.*

⁸² KUNIO YANAGIDA, BLACK BOX—TSUISEKI, DAIKANKOHRUKI JIKEN 289-94, 352-56; ICHIRO NAITO, SAKHALIN DAIKANKOHRUKI GEEKITSUI JIKO 191-266.

⁸³ NAITO, *supra* note 82, at 180-84.

⁸⁴ *Id.* at 167-80, 184-86.

⁸⁵ Information Paper No. 1, *supra* note 54, at 36-39.

⁸⁶ YANAGIDA, *supra* note 82, at 41-49.

⁸⁷ NAITO, *supra* note 82, at 168-73.

23 fighter found KAL and attacked without identifying it as military or civil. Two shots of air-to-air missiles failed, but twenty percent of the almost 300 shots of 23mm-cannons hit KAL. In about twelve minutes, enlargement of small tears caused by the hit and failure of the engines caused the aircraft to plunge into the sea. The cockpit recorded the voice "rapid (de)—compression" in one minute eight seconds after the attack, and the drifts on the coast of Hokkaido-Nemuro were small. These facts show that KAL was not substantially damaged by the missile, as the ICAO reports stated, but was shot down by cannons of small caliber.⁸⁸

VI. MEMORANDUM OF UNDERSTANDING CONCERNING AIR TRAFFIC CONTROL (JULY 29, 1985)

In order to prevent the recurrence of an aerial incident similar to KAL, in 1985, delegations from Japan, the United States, and the U.S.S.R. discussed enhancing the safety of flights in the northern part of the Pacific Ocean three times.⁸⁹ On July 29, 1985, they signed a *Memorandum of Understanding Concerning Air Traffic Control*.⁹⁰ For the purpose of assisting civil aircraft in an emergency situation the parties agreed that "Anchorage and Tokyo ACCs would initiate communication with Khabarovsk ACC to provide all available information regarding aircraft assigned to a NOPAC [North Pacific] route;"⁹¹ "[a] new, dedicated direct speech circuit would be established between Tokyo and Khabarovsk ACCs, using the currently-existing telephone cable" ⁹² and "a study would be conducted regarding the possibility of using the radio broadcasting station in Petropavlovsk-Kamchatkii as a nondirectional radio beacon."⁹³

This memorandum became effective on October 8, 1985, upon a trilateral exchange of diplomatic notes.⁹⁴ The agreement among air traffic control centers at Tokyo, Anchorage, and Khabarovsk regarding the procedures necessary to implement the terms of this memorandum was signed on November

⁸⁸ *Id.* at 167-68, 184-85.

⁸⁹ Memorandum of Understanding Concerning Air Traffic Control, July 29, 1985, 25 I.L.M. 74 (1986).

⁹⁰ *Id.* at 74-77.

⁹¹ *Id.* at 75.

⁹² *Id.* at 76.

⁹³ *Id.* at 76-77.

⁹⁴ *Id.* at 74.

19, 1985.⁹⁵ The agreement became effective on January 28, 1986.⁹⁶

VII. THE AMENDMENT OF THE CHICAGO CONVENTION

A. ARTICLE 3 BIS

On September 15-16, 1983, the extraordinary session of the ICAO Council adopted two resolutions: Appendix A and Appendix B. In Appendix A, the Council directed the Air Navigation Commission (ANC) "to review the provisions of the Chicago Convention, its Annexes and other related documents and consider possible amendments to prevent a recurrence of such a tragic incident."⁹⁷ In Appendix B, the Council, "convinced of the need to improve the existing international rules or to adopt new rules aimed at ensuring the safety of civil aircraft," decided "to instruct the [ANC] to . . . review all the provisions contained in Attachment A to Annex 2 to the Chicago Convention concerning interception of civil aircraft."⁹⁸

The initial proposal for amending the Chicago Convention, made by the French delegation, was expanded by an Austrian proposal made to the ICAO Assembly at its twenty-fourth session from September to October of 1983. These two countries then prepared a joint proposal and presented it to the ICAO Council. In addition, the proposals were made by the United States, U.S.S.R., Ecuador, and Korea.⁹⁹

The subject matter of the France-Austrian joint proposal which was made during the Executive Committee discussion was divided into three paragraphs:

- (a) to define the obligation of non-use of armed force;
- (b) to define the right to enforce the landing of civil aircraft trespassing in its territory; and
- (c) to make the necessary rules to ensure the landing of its own civil aircraft on foreign territory by the order of a foreign authority.¹⁰⁰

⁹⁵ *Id.* at 77.

⁹⁶ *Id.*

⁹⁷ ICAO Consideration, *supra* note 11, at 1151.

⁹⁸ *Id.* at 1152.

⁹⁹ FitzGerald, *supra* note 1, at 297; Piris, *L'interdiction du Recours à la Force Contre les Aéronefs Civils*, *supra* note 1, at 728-30.

¹⁰⁰ The progress of consideration in the twenty-fifth session is in 9 ANNALS OF AIR & SPACE L. 454-67 (1984); FitzGerald, *supra* note 1, at 297-306; Piris,

The joint proposal provided that each contracting country must refrain from resorting to the use of force against civil aircraft, and in the case of interception, the safety of aircraft and the lives of persons on board should not be endangered.¹⁰¹ The United States' proposal was similar.¹⁰² The main aim of the Western countries was to mandate that the obligation of non-use of force is the established principle of international law. To enact the proposal, countries such as the United States and the U.K. gave in to the demands of U.S.S.R. and Jamaica in the second and third paragraphs.

On the other hand, the Soviet proposal emphasized the absoluteness of the national sovereignty on airspace and importance of national security by providing:

[E]ach contracting State . . . undertakes to ensure that such aircraft shall not violate the sovereignty of other States over the airspace above their territory and shall not be used for any purpose inconsistent with the aims of this Convention [E]very contracting State in whose airspace a civil intruder aircraft is present shall refrain from using weapons against such aircraft.¹⁰³

But the Soviet proposals were criticized by Western countries because the proposals may have justified the shooting-down of other aircraft like that in the KAL incident.

After the language of the proposals were discussed more closely, "should not," "shall not," "must not," "abstain," or "forbear" were excluded, and "must refrain from" was adopted.¹⁰⁴ Also, the choice of "weapons" or "force" were adopted.¹⁰⁵

The text of paragraph A stated:

The contracting States recognized that every State must refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of aircraft must not be endangered. This provi-

L'interdiction du Recours à la Force Contre les Aéronefs Civils, *supra* note 1, at 718-28; Richard, *supra* note 1, at 152-60; and M. MUKAI, MINKANKOHKUHKI ENO BURYOKUKOHSHI 47-66 (1993) [English translation is THE USE OF FORCE AGAINST CIVIL AIRCRAFT].

¹⁰¹ Piris, *L'interdiction du Recours à la Force Contre les Aéronefs Civils*, *supra* note 1, at 728.

¹⁰² *Id.* at 729.

¹⁰³ *Id.*; MUKAI, *supra* note 100, at 50-53.

¹⁰⁴ Piris, *L'interdiction du Recours à la Force Contre les Aéronefs Civils*, *supra* note 1, at 721-23; Piris, *De Quelques Controverses Juridiques Consécutives à la Destruction du Boeing 747*, *supra* note 1, at 824.

¹⁰⁵ Piris, *De Quelques Controverses Juridiques Consécutives à la Destruction du Boeing 747*, *supra* note 1, at 825.

sion shall not be interpreted as modifying in any way the rights and obligations of States set forth in the Charter of the United Nations.¹⁰⁶

Paragraph B defined the right of the territorial state to enforce the trespassing aircraft to land on its territory, in order to correspond to the obligation of the non-use of weapons in the first paragraph. Every state agreed that the right was established in the present international law. Because aerial sovereignty was stressed in the course of the adjustments between the joint proposal and the proposal of the U.S.S.R., the right to enforce landing was enlarged to include the expulsion of trespassing aircraft from the territory.¹⁰⁷ The text was as follows:

The contracting States recognize that every State, in the exercise of its sovereignty, is entitled to require the landing at some designated airport of a civil aircraft flying above its territory without authority or if there are reasonable grounds to conclude that it is being used for any purpose inconsistent with the aims of this Convention; it may also give such aircraft any other instructions to put an end to such violations. For this purpose, the contracting States may resort to any appropriate means consistent with relevant rules of international law, including the relevant provisions of this Convention, specifically paragraph (a) of this Article. Each contracting State agrees to publish its regulations in force regarding the interception of civil aircraft.¹⁰⁸

Paragraph C provided for the necessary measures to enforce compliance with an order of the foreign authority. The joint proposal stated, "Each contracting State agrees to establish all necessary provisions in its national laws to make it mandatory for any aircraft" ¹⁰⁹ On the other hand, the United States' proposal stated, "Each contracting State shall take appropriate measures to ensure that aircraft" ¹¹⁰ The final proposal provided that "each contracting state shall establish all necessary provisions in its national laws or regulations."¹¹¹ The obligation to make the necessary measures to operate civil aircraft was imposed either on the state of the registration or on the state of

¹⁰⁶ International Civil Aviation Organization, *Amendment of Convention on International Civil Aviation with Regard to Interception of Civil Aircraft*, 23 I.L.M. 705, 706 (1984) [hereinafter *Civil Aviation*]; FitzGerald, *supra* note 1, at 304-05.

¹⁰⁷ Piris, *L'interdiction du Recours à la Force Contre les Aéronefs Civils*, *supra* note 1, at 723-24; MUKAI, *supra* note 100, at 53-54.

¹⁰⁸ *Civil Aviation*, *supra* note 106, at 706; FitzGerald, *supra* note 1, at 305.

¹⁰⁹ *Civil Aviation*, *supra* note 106, at 706.

¹¹⁰ *Id.*

¹¹¹ *Id.*

the operator. The term "state of operator" was new. In accepting the proposals of the U.S.S.R. and India, the convention imposed sanctions against civil aircraft that fail to comply with the rules of the state of registration or the state of the operator.¹¹² The proceedings and possibility of severe penalties against the violator of an order were modeled after Article 7 of the Hague Treaty and Article 7 of the Montreal Treaty. The general understanding was that the content of the severe penalties may be judged individually by each state in conforming with the purpose of the Treaty.¹¹³

The text stated:

Every civil aircraft shall comply with an order given in conformity with paragraph (b) of this Article. To this end each contracting State shall establish all necessary provisions in its national laws or regulations to make such compliance mandatory for any civil aircraft registered in that State or operated by an operator having his principal place of business or permanent residence in that State. Each contracting State shall make any violations of such applicable laws or regulations punishable by severe penalties and shall submit the case to its competent authorities in accordance with its laws or regulations.¹¹⁴

When the above three paragraphs were accepted, Poland, as a socialist state, proposed the fourth paragraph as follows: "The States undertake to take appropriate measures with the aim of preventing violations by civil aircraft of the air sovereignty of other States, correcting possible unauthorized deviation of such aircraft and discouraging the use of civil aviation for illegal purposes inconsistent with the aims of the Convention."¹¹⁵

This paragraph was supported by the U.S.S.R. and the Eastern European states. But the Western states objected that it might lead the state to shoot down the trespassing aircraft in order to evade its responsibility.

On May 8, Ghana presented an additional amendment that "[t]his provision shall not be interpreted as modifying in any way the obligation of all contracting states set out in paragraph (a), (b) and (c) of this Article."¹¹⁶ The chairman of the committee persuaded both the Western states, the Soviets, and the East-

¹¹² See *id.*

¹¹³ Piris, *De Quelques Controverses Juridiques Consécutives à la Destruction du Boeing 747*, *supra* note 1, at 725; MUKAI, *supra* note 100, at 54-56.

¹¹⁴ *Civil Aviation*, *supra* note 106, at 706.

¹¹⁵ *Id.*

¹¹⁶ FitzGerald, *supra* note 1, at 303-04.

ern European states to accept it in order to attain a two-third majority vote for the adoption of this article.¹¹⁷

The text of paragraph D stated:

Each contracting State shall take appropriate measures to prohibit the deliberate use of any civil aircraft registered in that State or operated by an operator who has his principal place of business or permanent residence in that State for any purpose inconsistent with the aims of this Convention. This provision shall not affect paragraph (a) or derogate from paragraph (b) and (c) of this Article.¹¹⁸

Article 3 Bis, as an amendment to the Chicago Convention, was adopted on May 10, 1984, and was sent to the contracting states for ratification. The number of states chronologically ratified it as follows:¹¹⁹

<i>Year</i>	<i>Number of States Ratifying Article 3 Bis</i>
1984	2
1985	20
1986	11
1987	10
1988	7
1989	3
1990	8
1991	3
1992	4

At present, the total number is seventy. The ratifications of 102 states are necessary to place the treaty in effect. This number of ratifying states indicates the degree of concern the contracting states have towards the safety of international civil aviation.

B. THE ANNEXES-RULES CONCERNING THE INTERCEPTION

On September 16, 1983, the ICAO Council decided to instruct the ANC to review the conditions of implementation of the standards contained in paragraph 2.13 of Annex 11, in paragraph 3.3.1.1.2.1(d) of Annex 2 to the Chicago Convention, and in all the provisions contained in Attachment A to Annex 2 of the Chicago Convention concerning the interception of civil air-

¹¹⁷ *Id.* at 304; Piris, *De Quelques Controverses Juridiques Consécutives à la Destruction du Boeing 747*, *supra* note 1, at 725-26; MUKAI, *supra* note 100, at 56-59.

¹¹⁸ *Civil Aviation*, *supra* note 106, at 706.

¹¹⁹ MUKAI, *supra* note 100, at 113-17.

craft.¹²⁰ These resolutions were expressly endorsed by the twenty-fourth session of the ICAO Assembly on October 1, 1983.¹²¹

The ANC reviewed the provisions on the subject of identification and interception of a civil aircraft for over a year since June 1985, and made the amendments of Annexes 2, 6, 10, 11 and the many rules of the procedures concerning the interception. Under the consideration of ANC, the most important question is whether the concerned states accepted the upgrading of the special recommendation in attachment A to Annex 2 to the status of standards and recommended practice. In this connection, the great powers such as the United States and the U.S.S.R., requiring freedom of military aviation, confronted the majority states that desired the safety of civil aviation. The latter states agreed with the proposed upgrading, but eight states, including the United States and U.S.S.R., disagreed.¹²²

After a long and contentious debate, the Standards (3.8.1, 3.8.2 and new Appendix B) were adopted as the new rules concerning interception. On the proposal by the United Kingdom, the wording of Article 3(d) of the Chicago Convention was introduced to paragraph 3.8.1. The proposed Amendment 27 to Annex 2 was adopted by twenty-two votes in favor, four opposed (Czechoslovakia, Egypt, United States, and U.S.S.R.), and six abstentions.¹²³ Since no state registered a disapproval of the amendment by the date prescribed by the Council, it became effective on July 27, 1986, and was applicable on November 20, 1986.¹²⁴

The principal points in Amendment 27 to Annex 2 are as follows:¹²⁵

In the new Standards, interception of civil aircraft shall be governed by appropriate regulations and administrative directives issued by the contracting States in compliance with Article 3(d) of the Chicago Convention under which contracting States undertake when issuing regulations for their State aircraft to have due regard for the safety of navigation of civil aircraft (3.8.1).

¹²⁰ ICAO Consideration, *supra* note 11, at 1150-53; Milde, *Interception of Civil Aircraft*, *supra* note 1, at 106-10.

¹²¹ ICAO Consideration, *supra* note 11, at 1149.

¹²² See Milde, *Interception of Civil Aircraft*, *supra* note 1, at 108-20.

¹²³ *Id.* at 120.

¹²⁴ *Id.* at 120-22; MUKAI, *supra* note 100, at 71.

¹²⁵ MUKAI, *supra* note 100, at 69-77.

In the new Appendix B, interception is the last means and is restricted to the case of identification of the concerned aircraft, except the case of need to return the concerned aircraft to the scheduled route, to direct it from outside of the territorial airspace, to evacuate it from the prohibited, restricted or dangerous zone, or instruct to land at the designated airport.

In the amended Attachment A, the wording of "non-use of weapons" was changed to "refrain from the use of the light (flame) tracer as the optical signal (8.1).

VIII. CONCLUSION

The Korean Airlines incident on September 1, 1983, called our attention to the unlawfulness of the use of force against civil aircraft, especially in the context of international airline flights. ICAO published the *1983 Interim Report* and the *1993 Final Report* to investigate the cause of deviation from the scheduled route by KAL and to explain the situation under which the Soviet fighters shot it down. But the *1993 Report* followed the outline of the *1983 Report* and could not wholly explain the incident. Nevertheless, many materials such as the DFDR, the CVR and the others from the U.S.S.R., or Radio Communications-Record from Japan and the United States, were offered, and quoted, by the investigation team of ICAO. The speculations of two Japanese writers, Yanagida and Naito, are the most plausible explanations of the incident.

The cause of deviation was due to the failure to fully check the assigned track on each waypoint for over five hours. It assumed lack of alertness and attentiveness on the part of the flight crew. The *1983 Report* stated that such a default was common in international civil aviation. But the interception and shooting-down of KAL by the Soviet fighter, without identification and warning, are unlawful and must be criticized severely.

On July 29, 1985, the agreement that provided the arrangement for communication between Japan, the United States, and the U.S.S.R. concerning civil aviation in the northern Pacific was signed. It has been useful in preventing international aerial tensions there, in particular since the end of the cold war.

ICAO directed ANC to review the provisions of the Chicago Convention, its annexes, and other related rules for the safety of civil aviation. Article 3 Bis of the Convention, signed on May 10, 1984, is not yet in effect. The amendments to annexes and other rules were effective on November 20, 1986, but these new rules are unsatisfactory for the prevention of the recurrence of

aerial incidents. The measures taken following the KAL incident are insufficient for the safety of civil aviation.

Public interest in the safety of international civil aviation sometimes conflicts with the individual interest each state has in its own territory. Nonetheless, despite the reality of international politics, we are obliged to seek the safety of international civil aviation.