

Incident

The Downing of Korean Air Lines Flight 007

Craig A. Morgan†

I. Problem

On September 1, 1983, a Korean Air Lines (KAL) Boeing 747 on a regularly scheduled flight from Anchorage, Alaska, to Seoul, South Korea, was shot down by a Soviet fighter. The Korean airliner had penetrated restricted Soviet airspace over a sensitive military base located on Sakhalin Island, on the northern Pacific coast of the U.S.S.R. All 269 people aboard the airliner were killed. The downing of the KAL jet resulted in the greatest loss of life and produced the strongest international reaction of any previous use of military force against civilian aircraft.

The response of effective elites to this incident demonstrates the development and clarification of normative expectations towards the use of force against civil aircraft intruding into territorial airspace. The incident is instructive for three reasons. First, issues raised by the use of such force have never been formally adjudicated. Second, the only relevant international agreement in effect at the time of the incident did not settle the issue. Third, the most recent preceding incident had resulted in international behavior seemingly inconsistent with that of the four prior incidents.¹

† Associate, Lewis and Roca, Phoenix, Arizona.

1. For other discussions of the international legal implications of this shooting, see Note, *Legal Argumentation in International Crises: The Downing of Korean Air Lines Flight 007*, 97 HARV. L. REV. 1198 (1984) (describing argument in international community based on treaty, custom, and principle); Fox, *International Law and the Interception of Civil Aircraft: Flight 007*, 88 DICK. L. REV. 237 (1984) (discussing four previous incidents involving civil aircraft and concluding that appropriate international action should be taken to formally prohibit the use of deadly force on civil aircraft regardless of their reconnaissance potential); Hassan, *A Legal Analysis of the Shooting of Korean Airlines Flight 007 by the Soviet Union*, 49 J. AIR L. & COM. 555 (1984) (discussing previous incidents involving military or civil aircraft and role of Chicago Convention of 1944, and suggesting that shooting was arguably permissible if clear warning was given and ignored and if there were grounds for reasonable belief that serious threat to national security existed); Phelps, *Aerial Intrusions by Civil and Military Aircraft in Time of Peace*, 107 MIL. L. REV. 255 (1985) (tracing historical development of sovereignty over airspace through practice and treaty, including post-World War II incidents involving military or civil aircraft, and suggesting that "national security exception" for shooting civil aircraft has not been accepted by the international community in any of the earlier incidents and concluding that it should not apply in this one). This Incident attempts a somewhat

The KAL 007 incident seems to indicate that the use of lethal force against intruding aircraft is subject to a set of widely shared normative expectations among participants in the international community. These expectations require that, at least in peacetime, lethal force not be used against civilian aircraft intruding into territorial airspace unless such aircraft display hostile intent. Civil aircraft are to be presumed non-hostile even when flying at night through restricted airspace over sensitive military installations. The subjacent state has an affirmative duty to identify properly such an aircraft as civilian. Whether an intruder's failure to respond to obvious warnings would constitute sufficient hostile intent to warrant the use of lethal force is still unclear. A number of states, however, apparently subscribe to what could be the emerging norm: the only appropriate response in such a situation is diplomatic, at least when the intruding aircraft appears to be unarmed.

A. *The 1944 Chicago Convention*

International law has long recognized the principle that every state has complete and exclusive sovereignty over the airspace above its territory.² The most important convention governing the use of airspace by civilian aircraft is the 1944 (Chicago) Convention on International Civil Aviation.³ Article I of the Chicago Convention provides that "[t]he

different approach. Rather than evaluating the legality of this incident in light of existing treaties, *opinio juris*, and prior practice, the focus is upon an assessment of this incident as a source of the normative expectations of effective elites in the international community.

2. See 21 ANNUAIRE DE L'INSTITUT DE DROIT INT'L 293, 295-302 (1906) (recognizing as customary international law state sovereignty over its airspace comparable to sovereignty over territorial waters). See generally Denaro, *States' Jurisdiction in Aerospace Under International Law*, 36 J. AIR L. & COM. 688 (1970) (discussing the historical development of the doctrine of "*aer clausum*"). Despite such suggestions, three major multilateral conventions since World War I have expressly rejected the airspace-territorial waters analogy and instead recognized the sovereignty of the subjacent state as a customary rule of international law. The Paris Conference of 1919 produced the International Convention for Air Navigation, U.S. Dep't. St. Pub. 2143 (1944), which states in Article I that "[t]he High Contracting Parties recognise that every Power has complete and exclusive sovereignty over the airspace above its territory" The Commercial Aviation (Inter-American) Convention, Feb. 20, 1928, 47 Stat. 1902, T.S. No. 840, 132 L.N.T.S. 303, states in Article I that "[t]he high contracting parties recognize that every state has complete sovereignty over the air space above its territory and territorial waters." The Convention on International Civil Aviation, *opened for signature* Dec. 7, 1944, 59 Stat. 1693, T.I.A.S. No. 1591, 15 U.N.T.S. 295 [hereinafter cited as Chicago Convention] provides in Article I that "[t]he contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory." As Denaro points out, *supra*, at 692-96, all of these conventions are cast in terms by which the contracting party recognizes the exclusive airspace sovereignty of all states, not just those parties to the convention, while limitations on that sovereignty and exemptions made to it apply only to contracting parties.

3. Chicago Convention, *supra* note 2. Article 80 binds contracting states to denounce adherence to the 1919 Paris and 1928 Havana Conventions. The United States, the Soviet Union, South Korea, and Japan—the principal participants in the KAL 007 incident—are all

Downing of KAL Flight 007

contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory.”⁴ In addition, the Chicago Convention expressly authorizes contracting states to establish restricted areas for military purposes and to prohibit all flights above such areas.⁵ The contracting states can formulate binding rules of air navigation for entering and leaving their airspace and for conduct while there.⁶ They can also prohibit the transport of “munitions of war or implements of war”⁷ or the use of photographic equipment.⁸ Moreover, contracting states agree to ensure that aircraft registered under their flag will observe the rules of subjacent states.⁹ In addition, they will not use civil aviation for “any purpose inconsistent with the aims of the Convention,”¹⁰ which is the development of international civil aviation in a safe and orderly manner.

The recognized right of airspace sovereignty does not, however, grant the subjacent state an unqualified authority to use force against any aircraft within its airspace. All signatories to the Chicago Convention agreed to “have due regard for the safety of navigation of civil aircraft” when issuing instructions to military aircraft to protect their respective airspace¹¹ and to aid aircraft in distress.¹² The only expressly authorized response by the subjacent state to violations of its airspace is to force the intruding aircraft in the restricted airspace to land.¹³ The text of the Convention nowhere addresses the use of force in intercepting civil aircraft. However, pursuant to the authority granted the International Civil Aviation Organization (ICAO) by Article 37 of the Convention, ICAO has adopted recommended practices for the interception of civil aircraft by a subjacent state.¹⁴ These guidelines specify identification, warning,

parties to the Chicago Convention. See E.A.S. No. 487 (list of states ratifying Chicago Convention). The Soviet Union submitted a “limited adherence” to the Convention, but the qualifications of its adherence are not relevant to the KAL Flight 007 incident. They dealt with objections to Article 2, which the Soviet Union took to imply a continued recognition of the legality of colonialization, and to Articles 92(a) and 93, which place restrictions on membership in terms of participation in World War II, which the Soviet Union characterized as outdated and discriminatory.

4. Chicago Convention, *supra* note 2, art. 1.

5. *Id.* art. 9(a).

6. *Id.* art. 11.

7. *Id.* art. 35.

8. *Id.* art. 36.

9. *Id.* art. 12.

10. *Id.* art. 4.

11. *Id.* art. 3(d).

12. *Id.* art. 25.

13. *Id.* art. 9(c).

14. *Id.* art. 37(c). This provision grants ICAO the authority to adopt “international standards and recommend practices and procedures dealing with . . . (c) Rules of the air and air traffic control practices.” Article 12 provides that such rules carry binding force over the high

and signalling procedures, provide that interception of civil aircraft should be "undertaken only as a last resort,"¹⁵ and recommend that intercepting aircraft "should refrain" from the use of weapons in all such cases.¹⁶ Neither the recommended practices nor the Convention, however, indicates how the subjacent state may respond to an intruding aircraft that ignores warnings and instructions to land.

The Chicago Convention reflects basic ambiguities concerning the right of a subjacent state to use force against intruding aircraft. There is an unresolved tension between recognizing the exclusive sovereignty of the state and protecting the safety of innocent airline passengers. This tension is underscored by the fact that the Chicago Convention applies only to civilian aircraft. "State aircraft," defined to include those "used in military, customs, and police services,"¹⁷ are expressly excluded.¹⁸ Thus, an apparently civilian aircraft entering restricted airspace could be regarded as a state aircraft and excluded from the protections of the Convention if it were thought to be performing a military function such as reconnaissance.¹⁹ Conversely, if the aircraft were not believed to be on a military mission, it could be regarded as a civilian aircraft in distress. In that case, the subjacent state would not only be prohibited by the Chicago Convention from using force to divert the aircraft, but would also be under an affirmative duty to render assistance.

seas, but serve merely as recommendations for flights in a contracting state's territorial airspace. However, under Article 12 each contracting state agrees "to the greatest possible extent" to keep its own regulations uniform with those recommended pursuant to the Convention, and Article 38 requires each state to notify ICAO immediately of any differences between its internally adopted national procedures and those recommended by the international body. Under these provisions, ICAO has adopted Rules of the Air, Annex 2 to the Chicago Convention, *reprinted in* 22 I.L.M. 1154 (1983). The Annex includes as Attachment A a provision entitled Interception of Civil Aircraft, *reprinted in* 22 I.L.M. 1185 (1983). The Soviet Union has indicated compliance with Annex 2, subject only to a qualification concerning the use of Greenwich Mean Time on local flights. Amend. 1 to Supp. to Annex 2, Part III, Jan. 31, 1980, *reprinted in* 22 I.L.M. 1189 (1983).

15. Rules of the Air, Chicago Convention, Annex 2, *supra* note 14, para. 2.1, *reprinted in* 22 I.L.M. at 1185.

16. *Id.* para. 7.1, *reprinted in* 22 I.L.M. at 1187.

17. Chicago Convention, *supra* note 2, art. 3(b).

18. *Id.* art. 3(a).

19. This does not necessarily mean that the aircraft would be fair game for the subjacent state regardless of the magnitude of any threat it might pose. The principle in international law of proportionality between threat and response would apply even if express treaty provisions did not. *See generally* W. REISMAN & M. MCDUGAL, INTERNATIONAL LAW IN CONTEMPORARY PERSPECTIVE: THE PUBLIC ORDER OF THE WORLD COMMUNITY 964-98 (1981). However, international law and practice has developed a basic distinction between the status of civil and state aircraft, with the latter entitled to a far more weighty presumption of hostile intent. *See generally* Hughes, *Aerial Intrusions by Civil Airlines and the Use of Force*, 45 J. AIR L. & COM. 595, 597 (1980).

Downing of KAL Flight 007

B. *The Previous Incidents*

Prior to the downing of KAL Flight 007, there had been five peacetime incidents in which civilian airliners were fired on by the military forces of a subjacent state, producing casualties.²⁰ The international community, however, reacted to these incidents inconsistently, indicating no clearly shared normative expectation. Furthermore, there were factual considerations in the KAL downing that were not present in the earlier incidents. Thus any community judgment of the earlier incidents may not provide a basis for assessing the expectations of participants in the KAL 007 incident.

The first of these prior incidents occurred on April 29, 1952, when an Air France plane en route from Frankfurt to Berlin was attacked by Soviet fighters.²¹ Six people aboard were injured, but the plane was able to land. The Soviet Union claimed that the plane was not flying in the approved corridor, had thus violated Soviet airspace without authorization, and had ignored signals to land. The shots fired by intercepting aircraft had been intended, according to the Soviet Union, only as a warning.²² The Allied High Commissioners issued a joint protest denying that the aircraft was outside the corridor and implying that it would not have mattered even if it were: "Quite apart from the question of fact, to fire, in any circumstances, even by way of warning, on an unarmed aircraft in time of peace, whatever that aircraft may be, is entirely inadmissible and contrary to all standards of civil behavior."²³

Second, on July 23, 1954, a Cathay Pacific airliner flying from Bangkok to Hong Kong was shot down by fighters from the People's Republic of China.²⁴ Following protests from the British government, the Chinese took responsibility for the incident, claiming that they had misidentified the aircraft, and expressed their willingness to consider compensation.²⁵

One year later, on July 27, 1955, Bulgarian fighters shot down an El Al Israel plane near the Graeco-Bulgarian border.²⁶ Protests and demands for compensation were lodged by the Israeli, British, American,

20. *Id.* at 600-14. For an analysis of state practice in response to both military and civil aerial intrusion prior to 1953, see Lissitzyn, *The Treatment of Aerial Intruders in Recent Practice and International Law*, 47 AM. J. INT'L L. 559 (1953).

21. Hughes, *supra* note 19, at 600.

22. *Id.* at 601.

23. *Id.*

24. *Id.* at 601-02.

25. *Id.* at 602.

26. *Id.* at 602-10.

French, and Swedish governments.²⁷ In an official statement, the Bulgarian government claimed that the airliner had violated its airspace and ignored signals to land. The statement, nonetheless, admitted that Bulgarian air defenses had "shown hastiness" by firing on the airliner before exhausting other means of forcing it to land.²⁸ The Bulgarian government promised to punish those responsible, take measures to prevent a recurrence, and pay compensation to the victims' families.²⁹ However, the Bulgarian government later refused to submit to the jurisdiction of the International Court of Justice in suits brought by Israel, the United States, and the United Kingdom.³⁰ Bulgaria thereby attempted to withdraw its admission of fault and promise of compensation.

The most serious incident prior to Flight 007 occurred on February 21, 1973, when a Libyan Airlines plane, which had apparently overshot its destination of Cairo, intruded over the Israeli-occupied Sinai and was shot down with a loss of 108 lives.³¹ The Israeli government apologized for the incident and undertook to pay compensation on an *ex gratia* basis.³² Nonetheless, Israel defended the action on the ground that the aircraft had intruded over a very sensitive area and had refused to heed warnings. According to the Israeli government, the intercepting aircraft had fired on the Libyan plane to damage it and force it to land, not to destroy it.³³ The Israelis offered as a partial justification contemporaneous reports that Arab terrorists supported by the Libyan government were planning to crash a civil airliner loaded with explosives into an Israeli city.³⁴ The ICAO Secretariat conducted an investigation of the incident. The ICAO Council, after examining the Secretariat's report, adopted a resolution on June 4, 1973, strongly condemning Israel.³⁵

27. *Id.* at 604.

28. *Id.*

29. *Id.*

30. Gross, *Bulgaria Invokes the Connally Amendment*, 56 AM. J. INT'L L. 357 (1962). There have been reports, however, that international pressure on the Bulgarians resulted in their paying \$200,000 in compensation to the Israelis. Margolich, *Legal Issues Hinge on Whether Airliner Was Warned*, N.Y. Times, Sept. 2, 1983, at A4, col. 1.

31. Hughes, *supra* note 19, at 611-12.

32. Lew, *Shot-down Airliners—Legal Implications*, 123 NEW L.J. 408-10 (1973). Israel reportedly paid over \$3 million in compensation. *The Worst, But Not the First*, TIME, Sept. 12, 1983, at 17.

33. Hughes, *supra* note 19, at 611-12. These factual claims are not, of course, without dispute. See, e.g., Hassan, *supra* note 1, at 569.

34. Lew, *supra* note 32, at 409. While this scenario did not appear implausible at the time, its use as a justification for the shooting is weakened by the fact that apparently the Libyan airliner was on its way out of Israeli airspace at the time it was shot. *Id.*

35. ICAO Council Res. of June 4, 1973, ICAO BULL., July 1973, at 13, reprinted in Hughes, *supra* note 19, at 612.

Downing of KAL Flight 007

The fifth incident occurred on April 20, 1978, and ironically involved a Korean Air Lines flight that intruded into Soviet airspace over a restricted military area south of Murmansk. The plane was shot down by a Soviet fighter and crash landed, causing two deaths.³⁶ This incident is noteworthy for its lack of strong adverse international reaction.³⁷ The President of South Korea, in fact, thanked the Soviet Union for the speedy return of the airliner's passengers and crew.³⁸ Neither South Korea nor the Soviet Union offered a public explanation of why the airliner was several hundred miles off course.³⁹

Prior to this fifth incident, a norm seemed to be emerging which clearly condemned the use of force against civilian aircraft under any but the most extreme circumstances. The muted reaction to the 1978 incident, however, appears difficult to reconcile with any widespread acceptance of such a norm. The lack of condemnation, in fact, could have been construed as vindication of the right to presume hostile intent of an aircraft from its prolonged presence in restricted air space over sensitive installations within a nation's borders. The 1973 Israeli incident is the only other incident in which the overflight of sensitive areas was claimed to justify a shooting. The area the Israelis claimed as sensitive, however, was in occupied territory, not in Israel proper, and the occupation of the Sinai was itself an issue of bitter international controversy. Israel's authority to designate such areas as critical to its security interests was therefore debatable.

These five incidents suggest that prior to 1983, international normative expectations prohibited shooting an intruding aircraft simply because it was in one's airspace. "Exclusive sovereignty" over airspace above a state did not justify employing force. In each of these incidents the territorial state felt it had to allege aggravating circumstances—such as failure to heed warnings or presence over sensitive areas—to justify using force. Beyond this rejection of a rather absolute position, the governing norms were unclear.

In analyzing the prevailing norm prior to the KAL 007 incident, the role of international expectations regarding Soviet behavior may be significant. In two of the five incidents discussed above, the Soviet Union shot down intruding planes. In neither did it acknowledge wrongdoing,

36. Hughes, *supra* note 19, at 613.

37. *Id.*

38. *Id.*

39. N.Y. Times, Sept. 1, 1983, at D19, col. 3. This lack of public explanation is particularly curious given the fact that although the Soviet Union obtained the wreckage, *id.*, it never released any physical evidence to substantiate its claim, made in the wake of the 1983 incident, that the Korean airliner shot down in 1978 had been engaged in reconnaissance activity.

apologize, or offer any compensation, even on an *ex gratia* basis. This is to be contrasted with the reactions of the subjacent states in each of the other three incidents. Consistent with this behavior, the Soviet Union could be expected to have acquired a reputation for being peculiarly sensitive to aerial intrusion.⁴⁰

C. *Formal Appraisals of the Norm*

There have been few formalized international appraisals of the legality of the use of force against civilian aircraft. No international tribunal has ruled on any of the above incidents. Only the 1973 Libyan airliner incident was submitted for examination by an international organization. ICAO issued a resolution condemning the subjacent state, Israel, without elaborating on the standard it had applied.

Moreover, disagreement persists about whether lethal force can ever be used against civilian airliners and, if so, under what circumstances. Particularly demonstrative of this lack of consensus are the memorials submitted to the International Court of Justice by the governments of Israel, the United States, and the United Kingdom in their action against Bulgaria for the 1955 incident.⁴¹ While all three states protested the shooting of the El Al airliner, they had different views of the norm to be applied. The United Kingdom took the position that: “[t]here 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.”⁴² Yet the British position may not be quite so absolute, since the British memorial concedes the right of a state to use force under Article 51 of the United Nations Charter if self-defense is legitimately invoked.⁴³

The United States and Israel took even more qualified positions than the United Kingdom. The United States stressed the need for adequate warning, arguing that “no pilot of a civil airliner would expect to be shot

40. Telephone interview with John Louis Magdelenat, Assistant Director of the Institute of Air and Space Law, McGill University (May 10, 1984) (notes on file with the *Yale Journal of International Law*).

41. See Hughes, *supra* note 19, at 604-10.

42. Memorial of the United Kingdom (Isr. v. Bulg.; U.S. v. Bulg.; U.K. v. Bulg.), 1955 I.C.J. Pleadings (Aerial Incident of July 1955) 331, 358, *reprinted in* Hughes, *supra* note 19, at 605.

43. *Id.* at 358, *reprinted in* Hughes, *supra* note 19, at 606. Article 51 of the Charter of the United Nations states: “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 the measures necessary to maintain international peace and security.”

Downing of KAL Flight 007

down without being given a safe alternative, and without the opportunity to keep himself, his passengers, and his crew from being killed.”⁴⁴ Israel emphasized the need to exhaust less drastic measures, stating that “in normal times there can be no legal justification for haste, and inadequate measures after interception of, and for the opening of firing on, a foreign civil aircraft, clearly marked as such.”⁴⁵ Thus, because these three positions could be read to imply that under at least some circumstances the shooting could be justified, no precise norm had emerged at this stage.

II. Facts

On September 1, 1983, KAL Flight 007 departed Anchorage, Alaska on a continuation of its service from New York City to Seoul, South Korea.⁴⁶ The plane was a Boeing 747 aircraft flying at night with 240 passengers and 29 crew aboard.⁴⁷ It was assigned route “Red 20,” the westernmost of five routes for crossing the north Pacific. “Red 20” allows aircraft to pass within fifty miles of the Soviet Union.⁴⁸ At some point east of Kamchatka, Flight 007 diverged west of its assigned route and entered Soviet airspace.⁴⁹ It crossed the southern Kamchatka Peninsula, left Soviet airspace as it flew over the Sea of Okotsk, and re-entered it while approaching Sakhalin Island.⁵⁰ It crossed the island and was within several miles of leaving Soviet airspace once again when it was

44. Memorial of the United States (Isr. v. Bulg.; U.S. v. Bulg.; U.K. v. Bulg.), 1955 I.C.J. Pleadings (Aerial Incident of July 1955) 210, *reprinted in* Hughes, *supra* note 19, at 605.

45. Memorial of Israel (Isr. v. Bulg.; U.S. v. Bulg.; U.K. v. Bulg.), 1955 I.C.J. Pleadings (Aerial Incident of July 1955) 89, *reprinted in* Hughes, *supra* note 19, at 605.

46. Flight 007 was one of five regularly scheduled weekly flights from New York to Seoul. N.Y. Times, Sept. 2, 1983, at A4, col. 3. It had made a 70-minute stop in Anchorage to change crew, refuel, and drop off four passengers. *Id.*; N.Y. Times, Sept. 8, 1983, at A12, col. 1.

47. N.Y. Times, Sept. 2, 1983, at A4, col. 3. The 240 passengers were from 13 different states, with the largest representations (in declining order) from South Korea, the United States, and Japan. N.Y. Times, Sept. 4, 1983, at A17, col. 1. All of the crew were South Korean nationals. N.Y. Times, Sept. 3, 1983, at A6, col. 5.

48. N.Y. Times, Sept. 3, 1983, at A6, col. 5; N.Y. Times, Sept. 28, 1983, at A3, col. 1.

49. Early speculation seemed to center on the belief that Flight 007 veered off course Red 20 in the vicinity of checkpoint NIPPI, southeast of the Kamchatka Peninsula, the fifth of nine way points along the route. N.Y. Times, Sept. 3, 1983, at A6, col. 6. Later suggestions were that the flight was already well off course when it reported its position at NEEVA, the third way point, located approximately 130 miles from the American base at Shemya Island in the Aleutians, more than 1400 miles from Anchorage. N.Y. Times, Sept. 23, 1983, at A3, col. 1. The investigation of the incident conducted by ICAO concluded that the flight began to deviate from its assigned path shortly after takeoff. DESTRUCTION OF KOREAN AIR LINES BOEING 747 OVER SEA OF JAPAN, 31 AUGUST 1983: REPORT OF ICAO FACT-FINDING INVESTIGATION, Attachment B to State Letter LE 4/19.4-83/130 (1983) [hereinafter cited as ICAO REPORT]. The point of divergence does not seem to have had much significance in the international debate over the incident.

50. N.Y. Times, Sept. 2, 1983, at A4, cols. 4-5.

struck by at least one air-to-air missile from a Soviet fighter.⁵¹ A missile hit the airliner at approximately 3:26 A.M. local time (1826 Greenwich Mean Time), two and one half hours after first entering Soviet airspace. The airliner lost altitude and within twelve minutes crashed into the Sea of Japan, leaving no survivors. The aircraft voice and flight recorders were never recovered, nor were any large sections of wreckage.⁵² Most of the remaining facts concerning the incident were disputed.⁵³

III. Conflicting Claims

A. *Claims Justifying the Shooting*

The Soviet Union justified its downing of the airliner on two grounds. First, there was ample evidence to support a reasonable belief that the airliner was engaged in reconnaissance over strategically sensitive areas in Soviet territory. According to the Soviets, the airliner had failed to respond to warnings or instructions to land. Second, the Soviet interceptors and air defense ground crews thought it was a military reconnaissance plane. The Soviet Union claimed that its action was fully justified and in keeping with international norms that allow a state to shoot down intruding military aircraft. Therefore, the Soviets concluded that they were under no obligation to apologize, admit liability, or provide compensation.⁵⁴

51. N.Y. Times, Sept. 2, 1983, at A4, cols. 5-6.

52. N.Y. Times, Sept. 13, 1983, at A10, col. 1; N.Y. Times, Nov. 6, 1983, at A8, col. 1.

53. Many of these factual disputes have continued and have produced a body of literature debating why the airliner flew the route that it did and whether the United States was culpable, either because it planned the intrusion in advance or became aware of it in time to give warning but did not. See, e.g., Pearson, *K.A.L. 007: What the U.S. Knew and When We Knew It*, THE NATION, Aug. 18-25, 1984, at 105; Pearson, *New Pieces in the Puzzle of Flight 007*, THE NATION, Aug. 17-24, 1985, at 104 (arguing that U.S. collection capabilities in the area mean that it must have known of the airliner's route and concluding that the most persuasive theory is that the airliner made a deliberate intrusion, with the knowledge of the U.S., in order to activate Soviet air defense systems); Golden, *Seeing a Conspiracy in the Sky*, 5 DISCOVERY 8 (1984) (refuting espionage theory on grounds of technical limitations of U.S. radar capabilities); Sayle, *KE007: A Conspiracy of Circumstance*, N.Y. REV. OF BOOKS, Apr. 25, 1985, at 44 (refuting espionage conspiracy theories on technological grounds and arguing that most likely explanation for airliner's course was an improperly set magnetic heading switch on the navigation computer); A. DALLIN, *BLACK BOX: KAL007 AND THE SUPERPOWERS* (1985) (evaluating a number of theories for the airliner's route and, while conceding difficulties with all of them, indicating some preference for that of a deliberate intrusion to activate Soviet air defense systems); R. ROHMER, *MASSACRE 747* (1984) (arguing that the intrusion was deliberately made in order to fly a shorter route and save fuel for a financially troubled airline); ST. JOHN, *DAY OF THE COBRA* (1984) (suggesting that the intrusion was caused by the Soviet Union through electronic means, hijacking, or substitution of route navigation cassettes inserted in the navigation computer, in order to intimidate Western powers by the subsequent shooting).

54. *Press Conference in Moscow*, Pravda, Sept. 10, 1983, at 4, reprinted in CURRENT DIG. SOV. PRESS, Oct. 5, 1983, at 5 [subsequent cites refer to CURRENT DIG. SOV. PRESS reprint].

Downing of KAL Flight 007

In order to show that air defense personnel were justified in thinking that the airliner was spying, the Soviets alleged the following: (a) the aircraft approached from an area where an American RC-135 reconnaissance plane was operating;⁵⁵ (b) the airliner did not respond to radio signals from Soviet air traffic control services or from the intercepting fighters, including attempts on the international emergency frequency;⁵⁶ (c) while over Kamchatka the intruding aircraft emitted “short coded radio signals” such as those used to transmit intelligence;⁵⁷ (d) shortly thereafter, the airliner radioed Tokyo flight control center that “We have safely passed over southern Kamchatka. The plane is proceeding normally;”⁵⁸ (e) the airliner actively sought to maneuver around air defense missile batteries and evade intercepting aircraft over Sakhalin Island;⁵⁹ (f) KAL 007 flew without air navigation lights; (g) the KAL aircraft ignored visual signals from intercepting fighters of flashing lights and rocking wings as well as 120 rounds of tracer fire;⁶⁰ and (g) it persisted in flying through highly sensitive airspace plainly marked on all navigation maps as restricted.⁶¹

The Soviets also argued that an accidental straying of the 747 was extremely unlikely given its sophisticated triple-redundant inertial navigation system and experienced crew.⁶² In addition, the Soviets claimed that information subsequently revealed supported their earlier conclusion that the deviation in flight path was deliberate and had been performed as part of an intelligence mission. The Soviet Union, for example, argued that the United States and Japan, by disclosing tape recordings of the radio transmissions of the Soviet fighter pilots, had shown their awareness of KAL 007’s peril, and yet they had neither warned the aircraft nor contacted Soviet authorities.⁶³ Similarly, the Soviet Union pointed out

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

56. Tass statements of Sept. 2 and 3, 1983, reprinted in CURRENT DIG. SOV. PRESS, Sept. 28, 1983, at 1.

57. Press Conference in Moscow, supra note 54, at 2.

58. Zakharov, *What is Behind the “Incident”?*, Pravda, Sept. 6, 1983, at 4, reprinted in CURRENT DIG. SOV. PRESS, Sept. 28, 1983, at 7 [subsequent cites refer to CURRENT DIG. SOV. PRESS reprint].

59. Press Conference in Moscow, supra note 54, at 2.

60. Romanov, *A Political Provocation With a Far-Reaching Aim*, Pravda, Sept. 5, 1983, at 5, reprinted in CURRENT DIG. SOV. PRESS, Sept. 28, 1983, at 4 [subsequent cites refer to CURRENT DIG. SOV. PRESS reprint]; Press Conference in Moscow, supra note 54, at 3.

61. Zakharov, supra note 58, at 7. Official navigation maps carry the following warnings for the Kamchatka and Sakhalin areas: “Aircraft infringing upon non-free flying territory may be fired on without warning.” N.Y. Times, Sept. 8, 1983, at A12, col. 1.

62. Bovin, *The Tragedy in the Sky and the Crime on the Ground*, Izvestia, Sept. 8, 1983, at 4, excerpted in CURRENT DIG. SOV. PRESS, Oct. 5, 1983, at 6 [subsequent cites refer to CURRENT DIG. SOV. PRESS reprint].

63. Bandura, *U.S. Wants “To Kill Soviet Peace Offensive,”* Izvestia, Sept. 10, 1983, at 5, excerpted in CURRENT DIG. SOV. PRESS, Oct. 5, 1983, at 7.

that U.S. air traffic controllers were responsible for the flight until Japanese controllers took over but that neither the Americans nor the Japanese attempted to warn the plane that it was off course.⁶⁴ The Soviets also argued that the flight had been delayed forty minutes in Anchorage to synchronize its penetration of Soviet airspace with the passage overhead of an American intelligence satellite. The Soviets also maintained that Flight 007 carried an extra eleven crew members, presumably needed to operate the reconnaissance equipment. Finally, they alleged that several American military planes and ships were off the Soviet coast at the time of the flight.⁶⁵

Beyond the primary claim that Flight 007 was on a spying mission, the Soviets also implied that the airliner was, in any case, mistaken for an RC-135 American reconnaissance plane. According to the U.S.S.R., the Korean airliner and an RC-135 patrolling off the coast of Kamchatka had approached each other at the same altitude and for ten minutes had flown so closely alongside each other that their radar images merged.⁶⁶ The RC-135 then flew north toward the Aleutians, and the airliner headed into Soviet airspace.⁶⁷ The Soviets alleged that the radar profile of a 747 is "analogous" to that of an RC-135,⁶⁸ with its contours in the dark "greatly resembl[ing]" it.⁶⁹ Moreover, the Soviets claimed that the encounter between the intruding aircraft and the interceptors took place under cloudy conditions and at a great distance,⁷⁰ producing such bad visibility that the 747, flying without lights and not responding to signals, was easily mistaken for an intruding military reconnaissance plane.

B. *Claims Condemning the Downing*

The United States was the primary voice for the proposition that the shooting was unjustified. Several other states, notably South Korea and Japan, joined in this position. The case against the downing was based on two principal claims. First, the airliner was not on a spying mission, did not act as if it were, and had, in fact, been shot down without

64. Romanov, *supra* note 60, at 5.

65. Kirsanov, *The Facts Expose Washington*, Pravda, Sept. 20, 1983, at 4, reprinted in CURRENT DIG. SOV. PRESS, Oct. 12, 1983, at 7. In the Soviet account, it was also mentioned that the pilot of the airliner, Chung Byung In, had boasted to friends of his role in performing special tasks for American intelligence and had even shown them some of the equipment on the plane. Borisov, *A Branch of American Intelligence*, Krasnaya Zvezda, Sept. 16, 1983, at 3, reprinted in CURRENT DIG. SOV. PRESS, Oct. 12, 1983, at 9.

66. *Press Conference in Moscow*, *supra* note 54, at 2.

67. *Id.*

68. *Id.*

69. *See supra* note 64.

70. *Press Conference in Moscow*, *supra* note 54, at 3, 5; N.Y. Times, Sept. 7, 1983, at A16, col. 2.

Downing of KAL Flight 007

adequate attempts to warn it. Second, a Boeing 747 is clearly distinguishable from an RC-135 even at night; reasonable attempts to identify the aircraft would have revealed the difference. The Soviet Union was therefore fully liable for the wrongful downing of the airliner and was thus liable for reparations.⁷¹

The United States conceded that the Korean airliner had violated Soviet airspace in a strategically sensitive region, and that there was no convincing explanation for the plane's deviation from the assigned route.⁷² Nonetheless, the United States denied that the airliner had been performing a reconnaissance mission or that the Soviet Union had reasonable cause to believe that it was on such a mission. Despite the aircraft's sophisticated equipment, the United States argued that a navigation error could not be ruled out as a possible, though unlikely, explanation. Ambassador Kirkpatrick cited twenty-one recorded incidents of such errors with similar equipment.⁷³ Hypothetically, if the pilot had confused the last three digits in latitude for the last three digits in longitude while programming one of his checkpoints into the computers, the plane would have flown over Sakhalin Island instead of along the correct route.⁷⁴ This appears to have been the explanation favored by U.S. officials.⁷⁵ Alternatively, the captain could have switched the automatic pilot from "computer mode" to "heading mode" in order to steer around a cloud or storm mass. If he had then forgotten to return the controls to computer mode, the plane would have continued in a straight line in whatever direction it was last pointed.⁷⁶

In disputing the Soviet factual account of the incident, the United States relied heavily on recordings of radio conversations between the four Soviet fighter pilots and their three ground control stations. These recordings were made available by Japanese intelligence services and allegedly covered the Soviet pursuit of the airliner during the last thirty minutes of its flight.⁷⁷ The Soviet Union did not seriously challenge the authenticity of the recordings, despite some disclaimers by some officials and by the Soviet media. Yuri Kornilov, a Tass commentator, reported that Soviet officials had declared that "these recordings could not be

71. Diplomatic Note from the U.S. Department of State, Sept. 16, 1983, *reprinted in* 22 I.L.M. 1196 (1983).

72. N.Y. Times, Sept. 6, 1983, at A15, col. 2.

73. Statement of Mrs. Kirkpatrick, Sept. 12, 1983, U.N. Doc. S/PV. 2476 (1983), at 63-65.

74. N.Y. Times, Sept. 4, 1983, at 18, col. 6.

75. N.Y. Times, Oct. 7, 1983, at A10, col. 4.

76. N.Y. Times, Sept. 11, 1983, at A16, col. 4.

77. N.Y. Times, Sept. 7, 1983, at A14, col. 1. Only the pilots' end of the conversations were made available; the words of the ground controllers did not appear on the tape or on the transcripts.

believed since they have been falsified from beginning to end.”⁷⁸ Yevgney Pozdnykov, counselor at the Soviet embassy in Ottawa, said they might have been recorded at another time, perhaps even during a drill several years earlier.⁷⁹ Despite these disclaimers, no senior Soviet official publicly questioned the legitimacy of the tapes, no alternative recordings or transcripts were offered, and no specific portion of them was ever challenged as inaccurate or falsified even though Ambassador Kirkpatrick offered to make copies of the cassettes available to any interested delegation.⁸⁰

The Soviets instead argued that the tapes both demonstrated that Japanese authorities were aware that Flight 007 was in peril⁸¹ and verified the accuracy of the Soviet account on at least two factual matters.⁸² Transcripts of the tapes⁸³ were offered by the United States to show that: (a) the pilot of the intercepting plane, who eventually shot down the airliner, had it in sight for twenty minutes before firing at it;⁸⁴ (c) he twice reported that KAL 007's strobe light was working⁸⁵ and once that its air navigation lights were on;⁸⁶ and (c) none of the Soviet pilots attempted to contact the airliner by using radio, by flashing lights, or by rocking their wings.⁸⁷ The pilot of the lead fighter stated in the transcript that he tried to use I.F.F. (Identify, Friend or Foe) signalling.⁸⁸ The U.S. countered this argument that civilian airliners are not equipped with this electronic capability so that its use was irrelevant.⁸⁹ The transcripts, as later revised by U.S. State Department linguistic experts, did reveal that the lead fighter pilot had fired canon bursts six minutes before firing the missiles

78. N.Y. Times, Sept. 13, 1983, at A10, col. 2. Pravda called the recordings a “forgery.” Pravda, Sept. 12, 1983, at 5, reprinted in CURRENT DIG. SOV. PRESS, Oct. 12, 1983, at 4.

79. N.Y. Times, Sept. 7, 1983, at A16, col. 7.

80. Statement of Mrs. Kirkpatrick, Sept. 6, 1983. U.N. Doc. S/PV. 2471 (1983), reprinted in 22 I.L.M. 1121 [hereinafter cited as Sept. 6 Kirkpatrick Statement].

81. Bovin, *supra* note 62, at 6.

82. The tapes were cited to support Soviet claims that Flight 007 suddenly decreased speed, causing a pursuing fighter plane to pass it, and that the interceptor fired canon bursts as a warning. N.Y. Times, Sept. 14, 1983, at A12, col. 4.

83. See N.Y. Times, Sept. 7, 1983, at A14, col. 1 (transcript as provided to the United Nations Security Council).

84. *Id.*

85. *Id.*

86. *Id.* The Soviet Union responded that this transmission was inaccurately attributed to the lead aircraft, and was actually a report by the pilot of the second fighter that he saw the lights of the first. N.Y. Times, Sept. 10, 1983, at 5, col. 3. The Soviet Union did not offer a response to the U.S. claim that at 1821:35 GMT the pilot of the lead interceptor, allegedly referring to its strobe light, reported that “the target’s light is blinking. . . .”

87. Sept. 6 Kirkpatrick Statement, *supra* note 80, reprinted in 22 I.L.M. at 1124.

88. N.Y. Times, Sept. 7, 1983, at 14, col. 2.

89. Sept. 6 Kirkpatrick Statement, *supra* note 80, reprinted in 22 I.L.M. at 1124.

Downing of KAL Flight 007

which downed the airliner.⁹⁰ Despite this fact, it was argued that the canon bursts could have been an attempt to down the plane without using missiles. Even if it was intended as a signal, the lack of response by the airliner should have prompted the use of other signals, none of which were tried.⁹¹

In addition, the transcript indicated that the airliner did not change course during the last thirty minutes of flight, although at one point it did slow down.⁹² This tended to discredit Soviet charges that the airliner radically altered course, altitude, and speed in order to evade pursuers.⁹³ Moreover, the last transmissions from Flight 007 to the Tokyo air controller, made while it was being pursued by Soviet fighters over Sakhalin Island and after the canon bursts had been fired, gave no indication that the pilot knew he was off course or in any danger.⁹⁴ This was taken to show that attempts to contact him had been unsuccessful or never made.

Taken in sum, these arguments were marshalled by the U.S. to indicate that the Korean airliner had not, in fact, behaved in a suspicious manner beyond the conceded fact that it was flying without authorization over a restricted area in Soviet airspace. Other allegations indicating that Flight 007 was part of an intelligence collection effort were dismissed.⁹⁵

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

91. See Statement of Mrs. Kirkpatrick, Sept. 12, 1983, U.N. Doc. S/PV.2476, reprinted in 22 I.L.M. 1145 (1983) [hereinafter cited as Sept. 12 Kirkpatrick Statement].

92. N.Y. Times, Sept. 7, 1983, at A14, col. 3. At approximately this same time, the pilot of the airliner said he was ascending from 32,000 feet to 35,000 feet. N.Y. Times, Sept. 2, 1983, at A4, col. 6. It is possible that the decrease in speed reported by the Soviet pilot, and later described by him as an evasive "trick," N.Y. Times, Sept. 14, 1983 at A12, col. 4, simply resulted from this climb to a higher altitude. According to the transcripts, the Soviet pilot did not report any change in the airliner's altitude. N.Y. Times, Sept. 7, 1983, at 14, col. 1. Yet, Marshall Ogorkov interpreted the pilot's communications as indicating changes in altitude. N.Y. Times, Sept. 10, 1983, at 4, col. 3.

93. Krasnaya Zvezda, Sept. 13, 1983, at 3, reprinted in CURRENT DIG. SOV. PRESS, Sept. 28, 1983, at 4; N.Y. Times, Sept. 10, 1983, at 4, col. 6.

94. N.Y. Times, Sept. 2, 1983, at A4, col. 6; N.Y. Times, Sept. 4, 1983, at 18, col. 2. See also U.N. Doc. S/PV.2473 of Sept. 7, 1983, and S/PV.2473/Corr.1 of Sept. 9, 1983, reprinted in 22 I.L.M. 1135-36 (1983) (statement of the Japanese representative).

95. Both the United States and Japan argued that their civilian air controllers had no way of knowing that Flight 007 was off course or in any danger until its last transmission, which was made after it had been hit by the missile. Furthermore, they argued that the military radar, even if it had detected the plane's route, could not identify it as a non-Soviet civilian airliner. The U.S. military radar in Alaska, which under special agreement between the Department of Defense and the Federal Aviation Administration monitors airliners departing south over the Pacific, observed that Flight 007 was on course as it left radar range approximately 200 miles from Alaska. N.Y. Times, Sept. 10, 1983, at 1, col. 5; Wash. Post, Sept. 2, 1983, at A9, col. 1. From that point on, air controllers in both the United States and Japan must rely upon position reports radioed from the pilot until he comes within range of Japanese air control radar. Flight 007 never came within range of that radar, and all of the pilot's position reports were normal prior to the time the airliner was shot down. *Id.*; Statement of

The United States further claimed that the 747 could not possibly have been mistaken for an RC-135 if reasonable care had been taken. According to the U.S., the RC-135 patrolling off the coast had neither entered Soviet airspace nor ever been closer than seventy-five nautical miles to Flight 007.⁹⁶ The two aircrafts' radar blips thus could not have "merged" on Soviet radar. A 747, moreover, is fifty feet longer than an RC-135, with a thicker fuselage and a distinctive hump on its back.⁹⁷ From the cockpit of a nearby intercepting aircraft, this difference would have been visible even at night—particularly since the night in question was clear with a half moon⁹⁸ and the airliner's lights were on. The United States also pointed out that the fighter pilot had observed Flight 007 for twenty minutes before firing. If he could not positively identify the plane from two kilometers away,⁹⁹ he should have moved closer.

IV. Conflicting Conceptions of Lawfulness

A. *Conceptions Justifying the Downing*

In several statements, the Soviet Union claimed the right to shoot down an intruding aircraft as an inherent "sovereign right of every

Mr. Kurodo, Sept. 9, 1983, U.N. Docs. S/PV.2473 & /PV.2473/Corr.1 (1983), reprinted in 22 I.L.M. 1135 (1983). The U.S. Air Force radar on Shemya Island, moreover, is about 550 miles from Kamchatka and does not cover the point where Flight 007 apparently entered Soviet airspace. Witkin, *F.A.A. Chief Says Jet Was Beyond Radar*, N.Y. Times, Sept. 19, 1983, at A7, col. 4. Japanese Air Self-Defense Force radar at Wakkanai, Hokkaido, recorded an aircraft flying southwest over Sakhalin Island. *Id.* Japanese intelligence services recorded communications between the Soviet fighter pilots and their ground controllers. Because these recordings did not alarm anyone at the time, the Japanese did not analyze the communications until after the fact. *Id.* The RC-135 aircraft which was patrolling outside Soviet airspace that night was on a routine reconnaissance patrol known as the Cobra Dane Spacetrack Radar System, which monitors Soviet missile tests in Kamchatka to ensure compliance with SALT agreements. Shribman, *U.S. Experts Say Soviet Didn't See Jet Was Civilian*, N.Y. Times, Oct. 7, 1983, at A10, col. 3. One such test was scheduled for that evening. Taubman, *U.S. Had Noticed Activity By Soviet*, N.Y. Times, Sept. 14, 1983, at A12, col. 6. The presence of the RC-135 was therefore purely coincidental. Moreover, it had no contact with Flight 007 and was never closer than 75 nautical miles to it. Korean authorities indicated that the number of assigned personnel working on Flight 007 was 23, not 18 as alleged by the Soviet Union, and that the extra six airline employees on the flight were on their way home or to other assignments. N.Y. Times, Sept. 3, 1983, at A6, col. 5. Korean Air Line officials denied that Flight 007 had been delayed in order to coordinate its flight with the passage of a reconnaissance satellite, pointing out that it was standard procedure to calculate separately departure time for each flight. ICAO REPORT, *supra* note 49, at 36. No direct response was made to Soviet claims that an American reconnaissance satellite passed overhead during Flight 007's penetration of Soviet airspace, or that the pilot, Chung Byun In, had boasted of spying.

96. Weisman, *Jet Spotted By Russians: U.S. Aides Say Soviet Could Have Initially Mistaken It and Commercial Craft*, N.Y. Times, Sept. 5, 1983, at A1, col. 6.

97. *See id.*

98. N.Y. Times, Sept. 10, 1983, at A6, col. 6.

99. N.Y. Times, Sept. 7, 1983, at A15, cols. 2-3.

Downing of KAL Flight 007

state”¹⁰⁰ to protect its “sacred” borders,¹⁰¹ which no one had the right to violate with impunity.¹⁰² In many of these statements, the Soviet Union stressed the consistency of its actions against KAL 007 with the Law on the USSR State Border adopted in November 1982.¹⁰³ This law authorizes the Soviet Air Defense Forces to use armed force “against violators of the USSR state border,” whether they threaten violence or not.¹⁰⁴ The Soviets did not attempt to explain why this domestic statute might be accepted as dispositive of the legal issues involved in the incident. It is significant, however, that despite such absolutist rhetoric, the Soviet Union nonetheless sought to justify the incident by claiming that the aircraft was performing a military function and had failed to respond to less severe measures. The justificatory norm actually asserted by the Soviets, therefore, was not that any intruder could be shot at will. Rather, the Soviet’s proposed norm was that airliners on state missions lose their protected status as commercial aircraft, if they violate territorial airspace, and can be destroyed at least after warnings are attempted. As noted above, international conventions and practice do support a distinction between intruding military aircraft and intruding civilian aircraft, with the former entitled to less protection.¹⁰⁵

Underlying the Soviet argument is the premise that an aircraft’s status is determined by its *function* and that a civilian airliner performing a reconnaissance mission may be treated as a military intruder.¹⁰⁶ Implicit

100. See, e.g., Pravda, Sept. 7, 1983, at 1, reprinted in CURRENT DIG. SOV. PRESS, Sept. 28, 1983, at 9.

101. N.Y. Times, Sept. 8, 1983, at A10, col. 4.

102. *Id.*

103. Law of the Union of Soviet Socialist Republics on the USSR State Border, Pravda, Nov. 26, 1982, at 1-3, reprinted in CURRENT DIG. SOV. PRESS, Jan. 19, 1983, at 15-20.

104. *Id.* art. 36. Despite the potential of this statute for a “shoot on sight” interpretation, the aircraft interception procedures issued by the Soviet Union to its military forces complied with those recommended by ICAO.

105. The Chicago Convention, in particular, expressly excludes military aircraft from its coverage. See *supra* notes 17-18 and accompanying text. International reaction to previous incidents, moreover, has been more condemnatory where civilian airliners have been shot than where the aircraft were military. See generally Lissitzyn, *supra* note 20, and Hughes, *supra* note 19. The Soviet argument that mistaking the 747 for a military RC-135 aircraft would be a mitigating factor implicitly recognized this distinction.

106. See, e.g., Pravda, Sept. 15, 1983, at 5, reprinted in CURRENT DIG. SOV. PRESS, Oct. 12, 1983, at 6 (“guarantees for flights of civilian planes over USSR territory . . . have no relation to the measures that our country takes with respect to spy planes”); Pravda, Sept. 10, 1983, at 4, reprinted in CURRENT DIG. SOV. PRESS, Oct. 5, 1983, at 1 (press conference conducted in Moscow by the Soviet Ministry of Defense and Ministry of Foreign Affairs, at which it was said that a straying civilian airliner is fundamentally different from one sent “with a pre-planned mission”). The underlying premise of the Soviet approach had been previously stated as follows: “Whatever category a plane formally belongs to, its character is *determined by the function it performs*, a plane used for military purposes will always be regarded as a reconnaissance plane, just like a transport plane used as a bomber cannot expect to be treated as a

in this legal conception are two assumptions: (a) aerial reconnaissance in itself constitutes a threat to the subjacent state sufficient to justify the use of violence in a manner endangering civilian lives; and (b) the territorial state has the right to ascribe a reconnaissance purpose to an aircraft found in restricted airspace when that aircraft does not respond to reasonable attempts to warn. This position finds some support in the provisions of the Chicago Convention¹⁰⁷ and in the apparent international acquiescence to the downing of the Korean Air Lines flight in 1978.¹⁰⁸

B. *Conceptions Condemning the Downing*

The United States argued that no state in peacetime has the right to down an aircraft, even over restricted territory, as long as the intruder does not threaten violence.¹⁰⁹ However, the United States emphatically claimed that the 747 was plainly identifiable as a civilian airliner and would have been so identified had appropriate warning procedures been followed. This argument indicates that the United States nonetheless recognized those international norms distinguishing between civilian and military aircraft.¹¹⁰

The norm asserted by the United States was that a state in peacetime may not use lethal force against an airliner, even if the airliner seems to be performing a reconnaissance mission in restricted airspace. The burden, furthermore, is on the intercepting state to correctly identify the aircraft as civilian. Mere suspicion about an aircraft's intentions does not justify treating it as military. This conception also finds support in the provisions of the Chicago Convention,¹¹¹ which not only disclaims the use of violence against civil airliners,¹¹² but also provides that the first interception maneuver should be a close visual inspection of the intruding aircraft.¹¹³

commercial aircraft." Korovin, *Aerial Espionage and International Law*, INT'L AFF. (Moscow) 49, 50 (1960) (emphasis added).

107. See *supra* notes 5-10 and accompanying text.

108. See *supra* notes 36-39 and accompanying text.

109. Sept. 12 Kirkpatrick Statement, *supra* note 91, reprinted in 22 I.L.M. at 1145. See also Shribman, *U.S. Experts Say Soviets Didn't See Jet Was Civilian*, N.Y. Times, Oct. 7, 1983, at A1, col. 1.

110. This implicit distinction is consistent with the response of the United States to the U-2 incident in 1960, during which the U.S. never protested the fact that an unarmed military reconnaissance plane over Soviet territory was shot down without warning and its pilot imprisoned. Lissitzyn, *Some Legal Implications of the U-2 and RB-47 Incidents*, 56 AM. J. INT'L L. 135, 135-36 (1962).

111. See *supra* notes 11-13.

112. *Id.*

113. Interception of Civil Aircraft, Chicago Convention, Annex 2, Attachment A, *supra* note 14, § 3, reprinted in 22 I.L.M. at 1185-86.

Downing of KAL Flight 007

Moreover, even if a state has a recognized right of self-defense that might in some cases justify action against a civilian airliner on a *combat* mission, the U.S. claimed that such justification would not apply to an airliner on a *reconnaissance* mission. In the latter case, it was argued, endangering civilian lives is an evil far disproportionate to the harm prevented and thus violates the international norm of proportionality.¹¹⁴ This norm was claimed as an established principle supported both by the decisions of international tribunals¹¹⁵ and by the response of the international community to similar incidents in the past.¹¹⁶ Particularly in light of modern intelligence collection methods, the incremental danger to a state's security posed by a civilian airliner on a reconnaissance mission is so slight that it could hardly justify the use of force endangering civilian lives.¹¹⁷ The appropriate response would be some form of diplomatic action.¹¹⁸

V. Outcome

The Soviet Union never apologized for the shooting, admitted any fault, or offered compensation to the families of the victims. Despite the considerable attention to the subject, no participant or observer has come forth with convincing evidence that the intrusion of the airliner into Soviet air space was deliberate or manifested a threat of violence.¹¹⁹

A subsequent investigation of the incident conducted by ICAO technical experts produced a report, made public on December 30, 1983,¹²⁰ which concluded that KAL 007 began to deviate from its planned route

114. Ambassador Kirkpatrick argued that this proportionality principle was particularly relevant to Flight 007, since the plane was allegedly within 60 seconds of leaving Soviet airspace when it was shot down and had already passed over the sensitive areas the Soviet Union wished to protect. Sept. 12 Kirkpatrick Statement, *supra* note 91, reprinted in 22 I.L.M. 1145 (1983).

115. See, e.g., Corfu Channel Case (U.K. v. Alb.), 1949 I.C.J. 4; Garcia Case (Mex. v. U.S.), 4 R. Int'l Arb. Awards 119 (1928). Both decisions indicated that needless or excessive endangering of life is a violation of international norms even if the state is exercising its recognized sovereign power.

116. The applicability of this norm to the Flight 007 shooting is, of course, weakened by the inconclusive international response to the 1978 incident.

117. See N.Y. Times, Sept. 26, 1983, at A6, col. 2.

118. The United States asserted that there had been 75 such incidents in which Soviet aircraft had strayed into U.S. airspace, and that none had ever been shot down. Statement of Mr. Lichenstein, Sept. 2, 1983, U.N. Doc. S/PV.2470 (1983), reprinted in 22 I.L.M. 1114 (1983). When an Aeroflot plane in 1981 deviated towards Connecticut from its off-coast route, the United States responded by suspending its landing privileges for two flights. *Id.*

119. The central question is not whether subsequent investigation revealed that the intrusion was deliberate, but rather, whether the actions of the Soviet Union should be deemed justified in light of the facts known at the time.

120. ICAO REPORT, *supra* note 49.

soon after departure from Anchorage.¹²¹ This deviation was probably a result of the insertion of an erroneous ramp position into one of the inertial navigation units before take off.¹²² The report also concluded that the airliner was not on a reconnaissance mission and did not deliberately deviate from its assigned track for any other reason.¹²³ The investigating committee determined that the civilian air traffic controllers who were responsible for the aircraft could not have known of its significant deviation, and that military authorities who might have been able to detect the deviation were neither responsible for the airliner's course nor likely to be aware of it.¹²⁴ Finally, the report concluded that the Soviets had assumed that KAL 007 was an intelligence aircraft and accordingly, "did not make exhaustive efforts to identify the aircraft through in-flight visual observations."¹²⁵

Motivated by this incident and the ensuing reactions, the ICAO Assembly voted in May, 1984, to propose an amendment to the Chicago Convention and submit it to the member states for ratification.¹²⁶ By late December, 1985, only twenty-two states out of the 102 needed to enact

121. *Id.* at 55.

122. *Id.* at 51-54. The report concludes that the combination of errors and oversights necessary to cause Flight 007 to deviate so far from its course 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." *Id.* at 56.

123. *Id.* at 35-36.

124. *Id.* at 38-40.

125. *Id.* at 56.

126. Protocol Relating to an Amendment of the Convention on International Civil Aviation, ICAO Doc. 9437, May 10, 1984 (copy on file with the *Yale Journal of International Law*) [hereinafter cited as Protocol]. The amendment would add a new Article 3b to the Convention as follows:

(a) The contracting States recognize 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 provision should not be interpreted as modifying in any way the rights and obligations of States set forth in the Charter of the United Nations.

(b) 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 interception of civil aircraft.

(c) 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 who has his principal place of business or permanent residence in that State. Each contracting State shall make any violation 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.

Downing of KAL Flight 007

the amendment had ratified it.¹²⁷ South Korea was among these twenty-two, having ratified the Convention on February 27, 1985. The United States, Soviet Union, and Japan were not among those who ratified the amendment. Even if fully ratified, the amendment will bind only those states who have ratified it.¹²⁸ This amendment is intended to address the problem of interception of civilian airliners and, according to at least one author, "clearly settles the issue concerning the use of force."¹²⁹ This result is far from clear. If adopted, the proposed amendment would indeed provide that "every state must refrain from resorting to the use of weapons against civil aircraft in flight."¹³⁰ However, this provision is quickly followed by an escape clause to the effect that the amendment "should not be interpreted as modifying in any way the rights and obligations of States set forth in the Charter of the United Nations."¹³¹ This escape clause thus makes clear reference to the elastic concept of self-defense. The proposed amendment, moreover, does not address the questions of when and on what basis a civilian airliner becomes a "state aircraft" not covered by the Convention, or what constitutes evidence of hostile intent. The remainder of the proposed amendment expands the power of the subjacent state to require aircraft to land,¹³² requires contracting states to punish pilots flying under their flag who refuse to obey an order to land,¹³³ and directs contracting states to prohibit the use of civilian aircraft "for any purpose inconsistent with the aims of this Convention."¹³⁴ Therefore, even if all relevant national elites eventually ratified the amendment, its terms would not fully resolve the traditional ambiguities in the applicable norm.

(d) 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.

127. Interview with officials of the Legal Bureau of ICAO, December 18, 1985 (notes on file with the *Yale Journal of International Law*).

128. *Id.*

129. Phelps, *supra* note 1, at 303.

130. Protocol, *supra* note 126, para. (a). This amendment may be compared to the words "should refrain" in the current ICAO recommended procedures. *See supra* note 16.

131. Protocol, *supra* note 126, para. (a).

132. The requirement to land on order would apply anywhere in the airspace of the subjacent state, not just in its designated restricted areas. Protocol, *supra* note 126, para. (b).

133. Protocol, *supra* note 126, para. (c).

134. Protocol, *supra* note 126, para. (d).

VI. International Appraisal

The downing of Flight 007 seems to have caused a stronger international response than any of the earlier five incidents. Most states and international organizations that indicated a position condemned the Soviet action as unjustified. Many of these expressly cited the principle of proportionality as the relevant international norm that had been violated. Canada, for example, stated: "The opening of fire on the Korean aircraft was in excess of what is commensurate with the gravity of the threat . . ."¹³⁵ This principle seemed to endorse the American position: an unarmed civilian airliner in peacetime could never pose a threat serious enough to justify using force which endangered innocent lives, so long as the airliner was being used for a non-violent purpose. Remaining states generally condemned the shooting without much elaboration on the legal principles upon which they based their decision.¹³⁶

On September 12, 1983, The U.N. Security Council voted on a resolution to declare the Soviet use of force "incompatible with the norms governing international behavior and elementary considerations of humanity."¹³⁷ Only a veto by the Soviet Union prevented its adoption.¹³⁸

135. Statement of Mr. Pelletier, Sept. 2, 1983, U.N. Doc. S/PV.2470 (1983), reprinted in 22 I.L.M. 1114, 1117 (1983). The Canadian view was shared by Italy (*Paper on Andreotti Talks With Shultz, Gromyko*, Foreign Broadcast Information Service [hereinafter cited as FBIS] (W. Eur.), Sept. 13, 1983, at L1); Zaire (Statement of Mr. Mapango ma Kemishanga, Sept. 2, 1983, U.N. Doc. S/PV.2470 (1983), reprinted in 22 I.L.M. 1120 (1983)); and Columbia (Statement of Mr. Holguin, Sept. 7, 1983, U.N. Docs. S/PV.2473 (1983) & S/PV.2473/Corr. 1 (1983), reprinted in 22 I.L.M. 1132 (1983)). See also the statements by France (Statement of Prime Minister Pierre Mauroy: *Reaction Continues on RoK Airliner Incident*, FBIS (W. Eur.), Sept. 6, 1983, at K1); West Germany (Statement of Mr. Reichardt: *Spokesman on South Korean Airliner Incident*, FBIS (W. Eur.), Sept. 2, 1983, at J1); and Japan (Statement of Chief Cabinet Spokesman Gotoda: *Gotoda, Nakasone Remarks Cited*, FBIS (Asia & Pac.), Sept. 2, 1983, at C3).

136. Spain, for example, called it a "grave violation of international law." *Government Urges Explanation on Plane Incident*, FBIS (W. Eur.), Sept. 6, 1983, at U2. The United Kingdom characterized it as an "inhuman act" and an "atrocious." *Thatcher on Greek EEC Speaker for UN KAL Debate*, FBIS (W. Eur.), Sept. 20, 1983, at Q3. In the past, however, the United Kingdom has made clear its position that shooting an unidentifiable civilian airliner in peacetime is unjustified unless necessary for self-defense. See *supra* notes 41-43 and accompanying text. Australia called the downing "appalling and inexcusable." *Haydon Asks U.S.S.R. Explanation*, FBIS (Asia & Pac.), Sept. 2, 1983, at M1. Egypt "deplored" the downing. *Government Deplores South Korean Plane Downing*, FBIS (Mid. East & Africa), Sept. 6, 1983, at D1. Brazil regarded the incident as deserving "rejection and condemnation." FBIS (Lat. Am.), Sept. 2, 1983, at D1.

137. U.N. Doc. S/15966/Rev. 1 (1983), reprinted in 22 I.L.M. 1148 (1983).

138. The vote was nine in favor, two opposed, with four abstentions. The Soviet Union and Poland opposed the resolution. The People's Republic of China, Guyana, Nicaragua, and Zimbabwe abstained. U.N. Doc. S/PV.2476 (1983), reprinted in 22 I.L.M. 1144 (1983).

Downing of KAL Flight 007

The Council of the International Civil Aviation Organization adopted a resolution on September 16, 1983, deploring the airliner's destruction, reaffirming that states should not use weapons when intercepting civil aircraft, and expressing concern that the Soviet Union had not yet acknowledged the "paramount importance" of the civilian lives lost. The resolution further recognized "that such use of armed force against international civil aviation is incompatible with the norms governing international behavior 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."¹³⁹ The Council adopted this resolution by a vote of 26 to 2 with 3 abstentions and 2 absences.¹⁴⁰ Only Czechoslovakia and the Soviet Union voted against the resolution.¹⁴¹ The ICAO Assembly endorsed the resolution on October 1, 1983, by a vote of 65 to 10 with 26 abstentions.¹⁴²

After consideration of the ICAO investigating report, the ICAO Council adopted a resolution on March 6, 1984, again condemning the downing of KAL 007 and "reaffirming" that "whatever the circumstances which, according to the Secretary General's report, may have caused the aircraft to stray off its flight plan route, such use of armed force constitutes a violation of international law, and invokes generally recognized legal consequences"¹⁴³

The International Federation of Air Line Pilots voted on September 6, 1983, to declare the Soviet Union an "offending state" and to call a sixty-day ban on all flights to Moscow.¹⁴⁴ Fourteen or more states participated to some degree in this boycott from September 12 until October 3, when it was called off because of the anticipated ICAO investigation and a Soviet promise of cooperation.¹⁴⁵

Greek opposition was apparently all that prevented the ten members of the European Economic Community from adopting a unified, strongly worded condemnation of the Soviet Union.¹⁴⁶ NATO Secretary General

139. Resolution adopted by the Extraordinary Session of the Council of the ICAO on September 16, 1983, *reprinted in* 22 I.L.M. 1150 (1983). The "generally recognized legal consequences" to which the resolution refers were not made clear.

140. *Id.*

141. *Id.*

142. *See* 22 I.L.M. at 1149 (1983).

143. Resolution adopted by the Council of ICAO on Mar. 6, 1984 (copy on file with the *Yale Journal of International Law*). Again, these legal consequences were left unclear.

144. Press Statement, *reprinted in* 22 I.L.M. at 1218 (1983).

145. *N.Y. Times*, Oct. 1, 1983, at A1, col. 6.

146. *Euro MP's Reject Greek Stance on KAL Jet Downing*, FBIS (W. Eur.), Sept. 14, 1983, at A1.

Joseph Luns said that representatives of the sixteen member countries "unanimously condemned" the shooting but did not feel that NATO was the appropriate organization to call for sanctions.¹⁴⁷

Voices raised in defense of the Soviet action were relatively few, coming mostly from Soviet-bloc states.¹⁴⁸ Most of the voices simply repeated the Soviet version of the events as reported by TASS.

Surprisingly neutral were Albania and Romania. Both countries gave domestic press coverage to both sides of the issue without publicly taking an official stance.¹⁴⁹ The People's Republic of China (PRC) stated that shooting an airliner simply because it had entered Soviet airspace without authorization would be "a serious violation of established norms," yet was careful to acknowledge "serious dispute over certain aspects of the incident."¹⁵⁰ As a result, the PRC would neither condemn nor endorse the Soviet action.¹⁵¹ A cautious stance was also adopted by India¹⁵² and Mexico.¹⁵³ Both countries implied that the disputed facts would determine the lawfulness of the shooting.

The international consensus seems to have been that the Soviet Union's actions violated international norms. This consensus rejected the claim that unauthorized presence in territorial airspace alone raises a presumption of hostile intent sufficient to warrant using violence against

147. *Meeting on Sanctions, Measures Against USSR*, FBIS (W. Eur.), Sept. 12, 1983, at C1.

148. The countries supporting the Soviet position were Afghanistan, *Front Statement on Korean Airline Incident*, FBIS (S. Asia), Sept. 15, 1983, at C2; Angola, *Debates Over Downing of ROK Airliner Reported*, FBIS (Mid. East & Africa), Sept. 16, 1983, at U2; Bulgaria, *Report on UN Envoy's Speech*, FBIS (E. Eur.), Sept. 13, 1983, at C2; Czechoslovakia, *Daily on Questions Regarding KAL Incident*, FBIS (E. Eur.), Sept. 19, 1983, at D1; Cuba, *Commentary Blames U.S.*, FBIS (Latin America), Sept. 6, 1983, at Q1; East Germany, *Continuing Commentary on Airliner Incident*, FBIS (E. Eur.), Sept. 12, 1983, at E1; Hungary, *U.S. Version of Air Disaster Losing Popularity*, FBIS (E. Eur.), Sept. 12, 1983, at F1; Laos, *TASS Statement Quoted on KAL Jet Incident*, FBIS (Asia & Pac.), Sept. 6, 1983, at I3; Mongolia, *Reaction to Soviet Downing of Korean Airline*, FBIS (Asia & Pac.), Sept. 12, 1983, at F1; Mozambique, *TASS Report, Pravda on Airline Tapes Cited*, FBIS (Mid. East & Africa), Sept. 15, 1983, at U4; Poland, *Reportage on Charge USSR Downed Airliner*, FBIS (E. Eur.), Sept. 16, 1983, at G1; and Vietnam, *Nhan Dan Carries TASS Statement on KAL Incident*, FBIS (Asia & Pac.), Sept. 6, 1983, at K2.

149. See, e.g., Albania, *Press Cites TASS, Others on Korean Plane Incident*, FBIS (E. Eur.), Sept. 9, 1983, at B1; Romania, *Scinteia Comments on South Korean Plane Incident*, FBIS (E. Eur.), Sept. 12, 1983, at H1.

150. *PRC Abstains on UN Vote*, FBIS (China), Sept. 13, 1983, at A1.

151. *Id.*

152. *Government Urges Investigation into KAL Incident*, FBIS (S. Asia), Sept. 16, 1983, at E1.

153. *Government Urges Investigation on KAL Incident*, FBIS (Latin America), Sept. 6, 1983, at M1.

Downing of KAL Flight 007

an intruding aircraft. The norm that a subjacent state bears an affirmative duty to correctly identify the function of a civilian airliner was recognized. Coupled with this was the notion that a subjacent state could shoot down such aircraft only under aggravating circumstances not present in the KAL 007 incident. Most notably, flying over sensitive military installations does not qualify as sufficiently aggravating, even where international navigation maps clearly warn of these installations and although the subjacent state has an express right under the Chicago Convention to prohibit aerial intrusion. Inferences drawn from the 1978 incident thus seem discredited when compared to this evolving pattern of practice. In addition, national elites seemed unwilling to recognize as normative any expectations of heightened Soviet sensitivity to aerial intrusion, even though previous incidents might have suggested such expectations.

Beyond this consensus, international opinion begins to diverge. According to the U.S. view, only the threat of violence justifies using violence. The possibility that an intruding civilian aircraft may be spying poses an insufficient threat. The only appropriate response in such a case is diplomatic. Many, perhaps most, states currently seem unwilling to recognize so categorical a norm. They take more qualified positions, implying that sometimes lethal force may be employed lawfully against an aircraft identified as civilian even if it does not present a direct threat of violence. This normative conception underlies, for example, the Mexican, Indian, and Chinese statements that unresolved factual disputes prevented taking sides. This more qualified norm may also be inferred from the ICAO Council resolution of March 6, 1984, which condemned the shooting with the observation that it was irrelevant to analyze what had caused the airliner to "stray" from its route. This leaves room for argument that a deliberate intrusion could be treated differently.

VII. Writer's Appraisal

The KAL 007 incident may be interpreted in two ways. Focusing on the outcome, legal realists may conclude that the incident has not changed norms regarding the use of force against intruding civil aircraft. The Soviet Union, these critics will point out, never apologized for the shooting, admitted any fault, or offered compensation. Moreover, only twenty-two of the 102 states needed to ratify the ICAO amendment to the Chicago Convention expressed support for what was an already timid and inconclusive amendment.

This interpretation, however, fails to see the incident in its proper historical perspective. Unlike the 1983 downing, the 1978 KAL incident

(which also involved the Soviet Union) did not prompt a strong international reaction. In addition, no amendment to the Chicago Convention by the ICAO Assembly was even proposed after the 1978 incident. Finally and most importantly, in 1978, the Soviets did not feel compelled to offer a detailed public justification for the shooting.

If the international appraisal of the lawfulness of the downing of KAL 007 is an accurate indication of international expectations, despite some qualified positions such as Mexico, India, and China, one can conclude that this incident has clarified relevant norms. Ratification of the proposed amendment to the Chicago Convention might help to give a formalistic textual base for these norms, but it is not necessary to create them. The principle of proportionality, as a limit upon a state's lawful use of sovereign force, has emerged as an appropriate standard for judging the lawfulness of response to aerial intrusions. Proportionality was affirmed in a way that both reduced the importance of a nation's security interest in preventing aerial peacetime reconnaissance and strengthened the value of protecting the lives of international travelers. Furthermore, in implicitly evaluating the issue of hostile intent, the international appraisal reinforced the distinction between acceptable treatment of intruding military and civilian aircraft. Finally, this incident may have strengthened the distinction between civilian aircraft performing reconnaissance functions and those presenting a threat of armed violence.

The subjacent state must now justify shooting an intruding aircraft and cannot rely on a presumption that the action was lawful merely because the aircraft violated territorial airspace. Such a shooting must be justified even when the foreign aircraft has penetrated a sensitive and clearly restricted area. Some overt demonstration of hostile intent is required to support the use of violence; the burden rests upon the intercepting state to take reasonable measures to determine that intent and to take measures short of lethal force to divert the plane. Specifically, the ICAO requirement to warn an intruding civilian aircraft has become a widely accepted norm, even though the relevant procedures are technically mere recommendations, and despite the fact that warnings may not be required for military aircraft not obviously in distress.

Moreover, a minority of states feel that during peacetime the threat of an intruding airliner's reconnaissance can never have a sufficiently hostile purpose to justify endangering innocent lives. This view may represent an emerging norm. Crucial to understanding its message is the increasingly important role of civilian aircraft as conduits of international commercial exchange. Since World War II, the volume of international air travel and transport has vastly increased, causing significant economic

Downing of KAL Flight 007

growth. The international community has thus increasingly viewed commercial airliners as instruments of international stability, world public order, and interdependence. At the time time, with the advent of more sophisticated intelligence and defense systems, the civilian airliner has lost importance as a potential means of aerial reconnaissance and weapons delivery.¹⁵⁴

Because of these developments, the use of force against civilian aircraft is becoming more difficult to justify. The presumption in favor of non-hostile intent becomes more stringent as the perceived threats of intruding civilian aircraft become less persuasive and as the costs of chilling international aerial commerce increase. The KAL 007 incident has clarified and consolidated norms that reflect these trends.

154. *See generally* J. BAMFORD, *THE PUZZLE PALACE: A REPORT ON AMERICA'S MOST SECRET AGENCY* (1982) (an analysis of the history and operations of the National Security Agency).