The KAL 007 Incident As An Event In
The Evolution of International Law

BY

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I. INTRODUCTION

A. THE FACTS.

The issue of violation of national air space by intruding aircraft, in peacetime, has been raised to a new level of consciousness in the world community the the recent destruction of a civilian wide-bodied passenger airliner by Soviet military aircraft after it had overflown Soviet territorial waters and portions of the Soviet Union Asian land mass. August 31, 1983 at 1400 hours Greenwich Mean Time (GMT) when a Korean Air Lines Boeing 747, Flight 007, departed from John F. Kennedy International Airport for a flight to Seoul, Republic of Korea. It made one scheduled stop at Anchorage, Alaska for refueling and a crew change. It carried 269 passengers and crew for the final flight to Seoul.¹ The passengers represented 14 different nations and included Lawrence P. McDonald, a Democratic member of the U.S. House of Representatives.²
Shortly after departure from Anchorage, Korean Airlines Flight-007 began deviating to the right, north, of its assigned flight path. This gradual deviation caused it to penetrate the airspace above the territorial waters of the Soviet Union as well as portions of Soviet territory on the Kamchatka Peninsula and Sakhalin Island. Upon contacting air traffic control in Tokyo, Japan, the pilot of KAL-007 gave his position as east of Hokkaido, Japan when in fact he was off course by more than 100 miles. This transmission occurred at 1709 hours (GMT), well after Soviet radar had begun tracking KAL-007, and approximately 78 minutes before Soviet fighters attacked the airliner.

Soviet radar units began tracking the airliner at approximately 1600 hours (GMT). On two separate occasions, Soviet fighters were dispatched to intercept the intruder. At 1812 hours (GMT) a Soviet pilot reported that he had visual contact with the aircraft. At 1826 hours (GMT) the Soviet pilot reported that he had fired an air to air missile and that the target was destroyed. Twelve minutes later the Korean airliner disappeared from the radar screen.

The last transmission from KAL-007 advised Tokyo Air Traffic control that they were undergoing rapid decompression. There was no indication that the aircraft had been hit by an air to air missile.
KAL-007 crashed and sank in the Sea of Japan somewhere southwest of Sakhalin Island. There were no survivors. Search and rescue efforts by the Soviet Union, Japan, Republic of Korea, and the United States resulted in the recovery of fragmentary pieces of the airliner, several items of personal property belonging to passengers, and portions of the bodies of three adults and one child.

8. INTERNATIONAL CONDEMNATION.

World reaction to the destruction of a civilian airliner by Soviet military aircraft was swift and highly critical. In outlining the American response to the attack President Ronald Reagan called it a "crime against humanity" and an "atrocity." On September 2 the Australian Minister of Foreign Affairs, Bill Hayden, stated:

There is no circumstance in which any action can be justified in shooting down an unarmed civilian aircraft serving no military purpose. The fact that an aircraft may have strayed into Soviet airspace and the fact that the Soviet Union refused to recognize the existence of the Republic of Korea provide no justification for an attack on the aircraft.

A spokesman for the French government said that the attack on the airliner "placed in question the principals which govern international relations and respect for human life", while the
Italian government referred to it as "a mad gesture of war." Similar protests and statements were issued by governments throughout the world including the Vatican and the People's Republic of China.

In a letter to the President of the United Nations Security Council, Charles M. Lichenstein, the Acting Permanent Representative of the United States Stated:

The United States Government considers this action of Soviet military authorities against a civil air transport vehicle a flagrant and serious attack on the safety of international civil aviation.

This action by the Soviet Union violated the fundamental legal norms and standards of international civil aviation. These norms and standards do not permit such use of armed force against foreign civil aircraft. There exists no justification in international law for the destruction of an identifiable civil aircraft, an aircraft which was tracked on radar for two-and-one half hours, and which was in visual contact of Soviet military pilots prior to being deliberately shot down.

It is the considered position of the Government of the United States of America that this unprovoked resort to the use of force by the Soviet military authorities in standards and the basic norms of international law must be deplored and condemned by the international community and by world public opinion.
C. SOVIET EXPLANATIONS.

The initial Soviet response on September 1, 1983 was that an unidentified aircraft had twice violated Soviet airspace and had ignored attempts by Soviet interceptors to guide it to a Soviet airfield for a landing. The report further said that the aircraft was operating without navigation lights. There was no mention of the airliner being attacked and destroyed by Soviet aircraft. The next day the Soviets announced that their aircraft had fired tracer shells to warn the aircraft but that it ignored the warning and continued its flight.\textsuperscript{15} It was not until September 6 that the Soviets announced that after attempts to communicate with the intruder on the international emergency frequency, 121.5 megacycles (MHz) and after tracer shells had been fired across the path of the intruder did the pilot fulfill "the order of the command post to stop the flight."\textsuperscript{16}

The Soviet News Agency TASS asserted that the attack on the airliner was "fully in keeping with the law on the state border of the USSR" and that the Soviet Union would "continue to act in keeping with [Soviet] legislation" as the Soviet Union had a right to protect its borders and its airspace.\textsuperscript{17}

In a preliminary report of the Soviet Accident Investigation Commission, the Soviets concluded that the deviation by KAL-007 was a "preplanned intelligence gathering and
provocative mission" by the United States and Korea. The Soviet report alleged that KAL-007 had been in contact with a United States Air Force RC-135 reconnaissance aircraft and that the two aircraft flew together for sometime. The report noted that the aircraft was flying over strategic areas of the Soviet Union.

Concerning the interception, the Soviet report stated:

The second interception took place in the vicinity of Sakhalin Island. The intruder aeroplane was still flying with its navigation and strobe lights switched off and the cabin lights extinguished. Interception procedures were initiated at 22.16 Moscow time on 31 August 1983 (06.16 local time on 1 September 1983) when the intruder aeroplane crossed the State frontier. During the interception the intercepting aircraft flashed its lights repeatedly and rocked its wings to attract the attention of the intruder aircraft's crew. At the same time the interceptor endeavoured to establish radiocommunication on the emergency frequency of 121.5 MHz.

The intruder aeroplane did not respond to the actions of the interceptor.

On the order of the ground control unit the interceptor, in addition of the procedures already described, fired four warning bursts of tracer shells from its guns at 22.20 Moscow time on 31 August 1983 (06.20 Sakhalin time on 1 September 1983). Altogether 120 shells were fired. The intruder aircraft did not react to this action either.
Having concluded that the unknown intruder aeroplane was an intelligence aircraft, the Area Air Defence Command decided to terminate its flight. On instructions from the ground control unit the pilot of the SU-15 interceptor launched two rockets at the intruder aeroplane at 22.24 Moscow time on 31 August 1983 (06.24 Sakhalin time on 1 September 1983) over the territory of the USSR and turned back to its base aerodome.21

In justifying the interception and attack, the report stated:

The intruder aeroplane's penetration of USSR airspace resulted in the violation of Soviet law, the 1944 Chicago Convention and the Standards of ICAO [International Civil Aviation Organization]. The actions of the crew of the intruder aeroplane, which conflicted with the provisions of national and international legal rules governing the conduct of international flights by civil aircraft, in conjunction with other circumstances, led to the conclusion that this violation of the State frontier of the USSR was preplanned.22

The Soviet report concluded:

The action of the Soviet anti-aircraft defence interceptors were conducted in strict conformity with current Soviet legislation and the provisions set out in AIP [Airman's Information Publication] USSR. The intruder aeroplane ignored the actions of the intercepting fighters and altered its heading altitude and flight speed, which proves that the crew was in full control of the flight. In view of the complete refusal of the intruder aeroplane to obey the instructions given by the Air Defense aircraft, the intruder aeroplane's flight was terminated on orders from the ground.23
The Soviet explanation was contradicted by intercepted tape recording of transmissions between the interceptors and their ground control unit. These tapes were played before the United Nations Security Council on September 6, 1983 by the U.S. Ambassador, Gene Kirkpatrick. The tapes revealed that contrary to the Soviet reports, the interceptor pilot reported on three separate occasions that the airliner's navigation lights were on. At no time did the pilot report firing any tracer rounds as a warning. The only reported firing was the launch of two missiles. The Soviets alleged that the interceptor pilots tried to communicate with the airliner by visual signal and radio. Yet, at no time did the tapes indicate that the interceptor pilots reported to the ground control unit any attempt to communicate with the airliner by radio or aerial maneuver. Ambassador Kirkpatrick suggested that Soviet military aircraft are technically incapable of communicating on the international emergency frequency. The tapes showed that the interceptor which attacked KAL-007 had the airliner in sight twenty minutes before firing the missiles. At no time did the pilot on his own initiative or at the request of the ground control unit attempt to visually identify the aircraft as civilian or military nor was there even an attempt to examine the aircraft's markings. The only recorded attempt at identification was the use of electronic interrogation by the IFF (identify friends or foes) system.
However, only military aircraft carry this system and a civilian airliner would not respond to electronic interrogation of this type.24

D. RESPONSE BY THE INTERNATIONAL COMMUNITY.

The Soviet explanation was rejected by the majority of nations. Many nations, in accordance with international practice, imposed sanctions against the Soviet Union. The United States reacted by suspending negotiations in a number of cultural, economic, and scientific areas.25 The ban on the Soviet airline, Aeroflot, was reaffirmed and several Aeroflot offices in the United States were closed.26 Canada, Japan, Switzerland, most NATO countries, and a number of other nations imposed a ban on Aeroflot landings for periods ranging from 14 to 60 days.27

In the private sector, the International Federation of Air Line Pilot's Associations, representing some 57,000 affiliated members from 67 countries, passed a recommendation that its members not fly to the Soviet Union for a period of 60 days. Numerous national airline pilot associations followed suit with Finish, British, Dutch, West German, Irish, French, and Spanish pilots refusing to fly to the Soviet Union.28
On September 12, 1983 nine members of the United Nations Security Council approved a draft resolution that provided in part:

Gravely disturbed that a civil airliner of the Korean Airlines on an international flight was shot down by Soviet military aircraft, with the loss of all 269 people aboard,

Expressing its sincere condolences to the families of the victims of the incident, and urging all parties concerned, as a humanitarian gesture, to assist them in dealing with the consequences of this tragedy,

Reaffirming the rules of international law that prohibit acts of violence which pose a threat to the safety of international civil aviation,

Recognizing the importance of the principle of territorial integrity as well as the necessity that only internationally agreed procedures should be used in response to intrusions into the airspace of a State,

Stressing the need for a full and adequate explanation of the facts of the incident based upon impartial investigation,

Recognizing the right under international law to appropriate compensation,

1. Deeply deplores the destruction of the Korean airliner and the tragic loss of civilian life therein;

2. Declares that such use of armed force against international civil aviation is incompatible with the norms governing international behaviour and elementary considerations of humanity;
3. Urges all States to comply with the aims and objectives of the Chicago Convention on International Civil Aviation;29

The draft was approved by the United States, United Kingdom, France, Jordan, Malta, Netherlands, Pakistan, Togo, and Zaire. It was opposed by Poland and the Soviet Union which for the 116th time used its veto in the Security Council.30

Another international organization to consider the KAL-007 incident was the International Civil Aviation Organization (ICAO), headquartered in Montreal, Canada. The ICAO was created by Article 43 of the Convention on International Civil Aviation of 1944,31 hereinafter referred to as the Chicago Convention, for the purpose of aiding in the planning and development of international civil aviation.32 The ICAO working through its two sub-groups, the Air Navigation Commission33 and the Air Transport Committee,34 has created a framework for the functioning and control of international aviation among member nations. An affiliate organization of the United Nations,35 the ICAO is the only major international organization devoted to the development of international aviation.

The ICAO considered the KAL-007 incident at the request of Canada and of the Republic of Korea. The ICAO Council met in Extraordinary Session on September 15 and 16, 1983 to consider
the incident. 36 On September 17, the Council adopted a resolution which provided in part:

HAVING CONSIDERED the fact that a Korean Air Lines civil aircraft was destroyed on September 1, 1983, by Soviet military aircraft.

EXPRESSING its deepest sympathy with the families bereaved in this tragic incident.

URGING the Soviet Union to assist the bereaved families to visit the site of the incident and to return the bodies of the victims and their belongings promptly.

DEEPLY DEPLORING the destruction of an aircraft in commercial international service resulting in the loss of 269 innocent lives.

RECOGNIZING 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.

REAFFIRMING the principle that States, when intercepting civil aircraft, should not use weapons against them.

CONCERNED that the Soviet Union has not so far acknowledged the paramount importance of the safety and lives of passengers and crew when dealing with civil aircraft intercepted in or near its territorial airspace.

EMPHASIZING that this action constitutes a grave threat to the safety of international civil aviation which makes clear the urgency
of undertaking an immediate and full investigation of the said action and the need for further improvement of procedures relating to the interception of civil aircraft, with a view of ensuring that such tragic incident does not recur.

(1) DIRECTS the Secretary General to institute an investigation to determine the facts and technical aspects relating to the flight and destruction of the aircraft and to provide an interim report to the Council within 30 days of the adoption of this Resolution and a complete report during the 110th Session of the Council.37

The International Civil Aviation Fact Finding Investigation called for by the resolution was completed in December 1983. In considering the reasons why the airliner may have been off course, the report dismissed as too unlikely to warrant further investigation the possibilities of unlawful interference, crew incapacitation, and extensive avionics/navigation systems failure or malfunction. They also dismissed as too unlikely the theory raised by some that the airliner was deliberately flying off course to save fuel.38 The report found no records of any such previous deviations based upon Soviet reports or observations by Japanese civil and defense force radar.39 The report also dismissed Soviet allegations that the airliner was on an intelligence gathering mission. The Soviets had alleged that KAL-007 delayed its departure time to coordinate with American
intelligence aircraft and satellites. The report found that the departure was timed instead to coordinate with a navigational satellite's orbital position.40 The investigation concluded that the most likely explanation for the course deviation of KAL-007 was crew error through the improper use and programing of navigational equipment. The report noted that this type of error assumed "a considerable degree of lack of alertness and attentiveness on the part of the entire flight crew but not to such a degree that is unknown in international civil aviation."41

The ICAO also investigated the evidence concerning the identification, signalling, and communication procedures used by the Soviets during the interception and found:

1) Interceptions of KE007 were attempted by USSR military interceptor aircraft, over Kamchatka Peninsula and in the vicinity of Sakhalin Island.

2) The USSR authorities assumed that KE007 was an "intelligence" aircraft and; therefore, they did not make exhaustive efforts to identify the aircraft through in-flight visual observations.

3) KE007's climb from FL 330 to FL 350 during the time of the last interception, a few minutes before its flight was terminated, was interpreted as being an evasive action thus further supporting the presumption that it was an "intelligence" aircraft.
4) ICAO was not provided any radar recordings, recorded communications or transcripts associated with the first interception, attempt or for the ground-to-interceptor portion of the second attempt, therefore, it was not possible to fully assess the comprehensiveness or otherwise of the application of intercept procedures, signalling and communications.

5) In the absence of any indication that the flight crew of KEOO7 was aware of the two interception attempts, it was concluded that they were not.42

Based upon the ICAO Fact-Finding Investigation, the ICAO's 33 member governing council voted 20 to 2, with 9 abstentions, to condemn the Soviet Union's destruction of KAL-007 as not being in accord with accepted international practice. The resolution also condemned the Soviet failure to cooperate in the search and rescue efforts of other involved nations and their lack of cooperation with the ICAO investigation of the incident. Following the vote, the Soviet delegate withdrew a counter-resolution accusing the United States and Japan of withholding information on the incident.43

II. THE HISTORICAL CONTEXT.

A. SOVEREIGNTY.

The destruction of KAL-007 and its 269 passengers and crew is rooted in one of the most widely accepted principals in
international law that every state has complete and exclusive sovereignty over the airspace above its territory and territorial waters. This principle has long been accepted by all nations and while essential to the problem of aerial intrusions, it is not the primary issue.

The real issue involves not a question of sovereignty in the strict sense but the nature of the response to aerial intruders by the overflown state. By its terms, complete and exclusive sovereignty implies an absolute right to take whatever action the offended state deems appropriate. However, this has not been the case both according to custom and agreement. Responses became dependent upon the civilian or military status of the aircraft, if the aircraft is in distress, the apparent hostile or peaceful intentions of the aircraft, the existence of a state of war or peace, and the existing political climate.

Historically, responses to unauthorized aerial intrusions have included indifference, forcing the intruder to leave the airspace or to land, control of the intruders movements until it exits the overflown state's airspace, and hostile action against the intruder. Along with such immediate remedies, resort to the local courts of the offended sovereign, international judicial and administrative actions, and diplomatic measures have also been utilized.
Prior to World War I there were four main theories regarding aerial sovereignty. The complete sovereignty theory provided for absolute sovereignty over the airspace above a state. The free air theory envisioned the air as being the same as the high seas and open to all for use. The territorial air or navigable airspace theory provided that a state had rights in the subjacent airspace up to a certain height and above that height the air was free to every state. The innocent passage theory provided for complete sovereignty subject to the right of innocent passage for civil aircraft of all nations.44

At the 1906 Institute of International Law a proposal on aerial sovereignty was accepted by the Institute that was based in part on the free air and complete sovereignty theories. It is provided for complete freedom of the air, subject to a right of self defense for the overflown state. This same approach was again approved by the Institute in 1911 when it also added that civil aircraft should bear marking identifying their civil nature and national origin.45

At the time prior to World War I, there was a strong desire on the part of many to make travel through the air free to all nations. It was recognized that the benefits to commerce and communication would be greatly enhanced by complete freedom. At
the same time it was also recognized that the airways presented a great opportunity for military purposes.46

With powered flight becoming more prevalent many nations began to reconsider the free-air theory. Aerial intrusions, while not serious, were occurring with greater frequency. Incidents of violence were rare, although it was reported that Russian border guards fired on a German balloon as it approached their borders.47 Incidents involving aerial intrusions were often handled in local courts as a violation of national law. Occasionally, the aircraft would be impounded and customs duties collected.48

An increase in the number of aerial intrusions along the border between France and Germany, as well as increased tensions between the two countries caused them to enter into an agreement in 1913 regarding aerial intrusions. It provided that military aircraft could only overfly the territory of the other country if they had first obtained special permission. The only exception was if the aircraft was in distress. Civil aircraft were generally permitted to overfly the territory of the other party in non-prohibited areas.49

World War I brought civil aviation to a halt in Europe. The skies belonged to military aircraft. Aerial flight became a question of air power with each nation vying for control of the skies. Among the belligerent powers the concept of sovereignty was lost to military aims. Instead, sovereignty evolved along with the rights of neutrals and belligerents in time of war.

Unlike maritime practice there was no right of belligerent entry into neutral airspace. The consequences to people and property below an aerial conflict in neutral skies was deemed to be too great. Allowing a belligerent to enter neutral airspace and conduct intelligence operations or combat operations against their opponent might also affect the neutrality of the neutral state in the eyes of the other belligerent. Neutral states took the position that they had complete sovereignty over their airspace and that entry by a belligerent aircraft would not only be a violation of their neutrality but of their sovereignty as well. The neutral states held that they had the right to prevent entry, by force if necessary, and the right to intern the aircraft and its crew for the duration of the war. This position was actively pursued and there were numerous incidents where aircraft were fired upon and shot down by neutrals. An exception did develop for aircraft in distress but they were still liable for internment.
Although the concept of sovereignty over airspace was closely tied to the right of neutrals in time of war, the practice in World War I established that a neutral nation had complete sovereignty over its airspace and could take action, including hostile action, to counter violations of its territorial airspace. In addition, the sudden increase in air power brought about by World War I demonstrated the need for a closer examination of the role of international civil and military aviation. The skies were no longer free. Nations began to realize the tremendous economic and military advantages in airpower. With aviation's increasing importance came the need for regulation and definition. To this end, the Convention for the Regulation of Air Navigation of 1919,53 the Paris Convention met.

Article 1 of the Paris Convention provided:

The High Contracting Parties recognize that every Power has complete and exclusive sovereignty over the air space above its territory.

For the purpose of the present Convention the territory of a State shall be understood as including the national territory, both that of the Mother Country and of the colonies, and the territorial waters adjacent thereto.54
Article 1 purported to recognize the customary law of the time. While this is partially true, it is important to note that the customary law in regard to sovereignty did not arise from pre-World War I practice regarding civil aviation, but came about as the result of the treatment of belligerent aircraft by neutrals during the war. Thus, attempts to regulate civil aircraft in time of peace arose out of the customary law established during wartime and reflected world concern for protection from hostile intrusions.

The impact of the war and the concern for security was reflected in the remainder of the Convention. Military aircraft were forbidden to enter foreign airspace without express authorization. If authorization was granted they were accorded the same rights as warships. If they entered unintentionally or due to distress they were not accorded these rights. Civil aircraft, except those engaged in scheduled service, were afforded the right of innocent passage in time of peace. This right was limited by Article 3 which provided that for military purposes or in the interest of public safety a state could prohibit aircraft from overflying certain designated areas provided no discrimination was shown in favor of their own aircraft. According to Article 4, an intruding aircraft finding itself above a prohibited area shall upon discovering
that fact give a distress signal and land at the nearest airfield of the overflown state. \textsuperscript{59} Annex H on customs allowed the overflown state to supervise the aircraft and impose penalties for violations of national law. \textsuperscript{60}

The Paris Convention was the first serious attempt at international regulation of aviation. It provided the framework for the growth of civil aviation between the two world wars. It further defined the rights of sovereignty over airspace as applied to overflights by civil and military aircraft.

The Paris Convention had serious shortcomings. Only 38 states became parties to the Convention. \textsuperscript{61} Germany was excluded as she was from most world affairs in 1919. The United States signed the Paris Convention but did not ratify it. The Soviet Union did not sign the Paris Convention and continued to adhere to its position that no aircraft was allowed to enter its airspace under any circumstances. \textsuperscript{62}

The primary failure of the Paris Convention, in the context of aerial intrusions, was its lack of discussion regarding the limits of response to an aerial intrusion by the overflown state. Civil aviation was in the embryo stage of development prior to World War I and as a result, a body of customary law concerning civil aviation had not developed. The only customary law
regarding aerial intrusions was the practice that grew up around the treatment of belligerent aircraft entering neutral airspace. The established customary law allowed for neutrals to prevent the entry of belligerent intruders by force if necessary and furthermore, force could be used without warning. This was hardly a standard that fitted itself to the concept of civil aviation. The only provision directly dealing with aerial intrusion was Article 4. Although Article 4 called for a civil intruder upon discovering itself over a prohibited area to immediately land, it did not specify what steps the overflown state was entitled to take in such circumstances. The Paris Convention provided a prohibition but failed to define the means of enforcement or recourse for the overflown state.

D. WORLD WAR II - THE CHICAGO CONVENTION OF 1944.

Between the wars, there were no major reported incidents involving aerial intrusions by civil or military aircraft of major importance. Consequently, very little developed in terms of customary law regarding sovereignty and aerial intrusions. A great many states passed national laws affirming the right to complete and exclusive sovereignty over their airspace and a number of states provided for monetary fines and imprisonment for offending pilots. The imposition of penalties was often based upon whether or not the overflight was
intentional or unintentional. This practice seemed to recognize that aerial navigation was not perfect and that pilot error, mechanical failure, weather, and other circumstances could result in the unintentional violation of aerial borders. It was reasoned that aerial intrusions resulting from these factors should not be made the subject of penalties, even if it were only a token fine.

As in World War I, the development of civil aviation in World War II assumed a lesser priority as a consequence of the emphasis on military air power. Most of the nations capable of commercial air traffic were active belligerents. The primary use of aviation was in support of the war effort. Civil aviation, such as it existed in Europe, was used primarily to further war aims. As in World War I belligerent aircraft were prohibited from entering neutral airspace and were subject to being fired upon if they refused to leave or to land. There was no firm requirement that belligerent aircraft should be warned before being fired upon although some neutrals required warning shots to be fired prior to hostile action being commenced.

With the end of World War II in sight, the Allied and neutral nations met to determine the nature of civil aviation
following the termination of hostilities. The result was the Convention on International Civil Aviation of 1944, the Chicago Convention. Like the Paris Convention, the Chicago Convention reaffirmed the principal that every state has "complete and exclusive sovereignty over the airspace above its territory." Territory was defined as the "land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such state." The Convention was made applicable only to civil aircraft but it did prohibit the overflight by state aircraft of another nation's territory without permission. The Convention provided for a general right of transit and stops for non-traffic purposed for non-scheduled air traffic. For scheduled airlines to operate over the territory of another state, special permission was required. For reasons of military necessity or public safety, contracting states were allowed to restrict or prohibit flights by aircraft over certain designated areas of their territory. Aircraft entering a restricted or prohibited area could be required by the overflown state to land as soon as practicable at a designated airfield within its territory. Aircraft engaged in international air traffic were also required to bear nationality and registration markings for identification purposes.
The Chicago Convention did not grant any rights to intruding military aircraft as did the Paris Convention which accorded them the same rights as foreign warships. Like the Paris Convention it failed to discuss how aerial intruders were to be treated by the overflown state. While Article 9 allows for the overflown state to require the intruder to land, it does not specify how that is to be accomplished. More importantly the issue of force is not discussed. In addition, Article 9 deals with flights over restricted or prohibited areas. It does not address the situation involving aerial intrusions into non-restricted and non-prohibited areas. This suggests that intruders into non-restricted and non-prohibited area cannot be required to land but are merely under a duty to return to their original flight plan or exit the territorial airspace of the overflown state by the most expeditious means possible.

It is difficult to understand why the Chicago Convention did not address these issues. The importance attached to the issue of sovereignty coupled with the rapid expansion of civil aviation following World War I, should have suggested the problems associated with aerial intrusions. The science of navigation was by no means perfected. Human and mechanical error, as well as poor weather conditions, often resulted in aircraft being hundreds of miles off course with the pilot completely unaware of
the fact. The only precedent regarding aerial intrusions was the treatment of aerial intrusions by belligerent aircraft into neutral airspace as established by customary practice in World War I. These practices would hardly form an appropriate standard for dealing with civil intruders, and for that matter, military intruders in time of peace.

Another failure of the Chicago Convention was the lack of participation by the Soviet Union. The Soviet delegation headed by Andrei Gromyko was recalled just days before the opening of the Convention. The Soviets gave as the reason for their non-participation the fact that the conference was to be attended by delegates from Spain, Portugal, and Switzerland, countries which did not maintain diplomatic relations with the Soviet Union.79 Efforts by the United States to get the Soviets to participate failed. The United States, which favored complete freedom of the air, hoped to have the Soviets participate in the conference as they still maintained their position that no other nation's aircraft could enter Soviet airspace without specific authorization.80

Aside from their stated reasons, two theories have been advanced to explain their reluctance to participate in an attempt to regulate international civil aviation. First, the Soviets may
have wished to develop their national air lines before entering into an agreement that would perhaps interfere with the development of their own commercial aviation industry. There may be some merit to this argument as the war with Germany had completely devastated the Soviet Union. All of their efforts, particularly in the area of aviation, were directed toward supporting the war effort.\textsuperscript{81} It was impossible for the Soviet Union to develop their civil aviation industry under these conditions.

The second and the most likely theory is that the Soviets did not wish to be bound by any international regulation of air navigation. They had refused to sign the Paris Convention, and instead enacted laws forbidding the entry of non-Soviet aircraft. The spectre of international aviation regulation impacting on their airspace did not appeal to the Soviets.\textsuperscript{82} Likewise, the prospect of an international body charged with the regulation of international civil aviation as proposed by Great Britain, Canada, and India did not sit well with the Soviets.\textsuperscript{83} They seemed determined to carve out their own rules for the regulation of Soviet territorial airspace.
Perhaps the most critical drawback of the Chicago Convention lay in its timing. The Paris Convention had convened at a time when the echo of hostile fire could still be heard in Europe, a time when World War II was still raging. Naturally, only the allied and neutral nations were in attendance. The outcome in Europe, while favoring the Allies, was still not firmly decided. Japan was slowly being forced to retreat toward her home islands but most military experts predicted that final victory would not be achieved for some time and at a great cost. The fact that the Chicago Convention met at a time when most of the world was still at war could perhaps account for its failure to deal with the issue of aerial intrusions in time of peace. During the war, attacks on strictly civil aircraft had not been frequent and did not involve the issue of sovereignty. It was perhaps inconceivable to the delegates that hostile actions would take place against civil aviation in peacetime. Experience had not indicated that possibility. The Delegates in all likelihood never considered the possibility of an occurrence like the KAL-007 disaster.

III. THE POST WORLD WAR II ERA - THE BEGINNING OF INTERNATIONAL CUSTOM AND PRACTICE - THE INCIDENTS.

The years following the end of World War II saw a dramatic rise in the number of aerial intrusions by civil and military
aircraft. Responses to these intrusions ranged from no action to attacks by military aircraft on the intruder. As with many other aspect of world affairs, aerial intrusions were affected by the tensions between the Soviet Union and the free world following World War II. The absence of Soviet participation in the Chicago Convention began to impact on international aviation.

A. YUGOSLAVIAN - UNITED STATES.

Little more than one year after the end of World War II, the problem of aerial intrusions became a major issue. On two separate occasions fighters from Yugoslavia attacked unarmed U.S. Army C-47 transport aircraft. The first incident occurred on August 9, 1946 when Yugoslav fighters forced a C-47 to crash in Yugoslavia following an aerial attack. A Turkish officer was wounded in the attack. The second incident occurred on August 19 when an unarmed C-47 was shot down and all five of its crew members killed.

There was never any question that both aircraft had entered Yugoslav airspace. The United States maintained that the intrusion was due to bad weather. The Yugoslav government held that the intrusions were for hostile reasons. The parties also disagreed as to the nature of the attack. The American position
asserted that at no time did the Yugoslav interceptors direct either C-47 to land but instead that they had attacked without warning. The Yugoslav response was silent as to the first incident but alleged that they had invited the second C-47 to land and were ignored.89

The United States took the position that the Yugoslav action in firing on an unarmed military transport was "an offense against the law and the principal of humanity" and that an aircraft in distress due to weather conditions should be accorded the right of innocent passage,90 The United States further demanded compensation for the loss and the release of crew members being detained by Yugoslavia.91

Although the Yugoslav government maintained its position that the American pilots had refused to land,92 it did modify its position in regard to its future response to aerial intrusions. In a letter to the U.S. Ambassador, Marshal J.B. Tito informed the American government that they would no longer fire on transport aircraft even if their intrusion into Yugoslav airspace was intentional. If an aerial intrusion occurred, the intruder would be invited to land and if he refused, steps would be taken through appropriate diplomatic channels. Hostile action would not be taken against the intruder.93
The Yugoslav response established two principles in regard to military intruders. First, that military aircraft in time of peace would not be fired upon without first being accorded the opportunity to land. Second, that unarmed military transport aircraft would not be fired upon in time of peace under any circumstances. Intrusions by unarmed military transport aircraft would be handled through diplomatic channels without resort to the use of force if the aircraft refused to land. By analogy, it can be speculated that Yugoslavia would not fire upon a civil intruder and at most, it would invite a civil intruder to land with a refusal to land being treated as a diplomatic incident.

B. U.S.S.R. - FRANCE.

The first serious incident involving a civil aircraft occurred on April 29, 1952 when an Air France airliner on a flight from Frankfurt to Berlin along the Berlin Corridor was attacked by two Soviet fighters. The French stated that the two MIG-15's had buzzed the airliner before making four separate attacks with cannon and machine gun fire. The attack resulted in injuries to several passengers and one crew member. French reports stated that the attack occurred inside the Berlin Corridor. The Soviets argued that the airliner had violated East German airspace and had refused to obey orders to land after warning shots had been fired across its nose.
The Allied High Commissioners in Germany in their response to the Soviet attack stated: "Quite apart from these questions of fact, to fire in any circumstances, even by way of warning, on an unarmed aircraft in time of peace, wherever that aircraft may be, is entirely inadmissible and contrary to all standards of civilized behavior."

The Soviets did not seem to draw any distinction between the civil or military nature of the aircraft. The prime consideration appeared to be that an aircraft had allegedly violated Soviet controlled airspace. In a latter incident involving a Soviet attack on a Swedish military aircraft, the Soviets noted that:

...if a foreign aircraft violates the State frontier and if a foreign aircraft penetrates into the territory of another Power, it is the duty of the airmen of the State concerned to force such aircraft to land on a local airfield and, in case of resistance, to open fire on it.

The Swedish government in reply to the Soviet statement said that:

In fact, there are fundamental differences. While the orders of the Swedish Air Force are to turn off foreign aircraft by means of a warning, the Soviet Air Force has, according to its orders, to try to force the foreign aircraft to land. While the instructions of the Serdish Air Force mean that the foreign aircraft is not fired upon if it changes its course and flies away, the Soviet instructions seem to imply that the foreign aircraft is fired upon if it flies away instead of landing.
Throughout the rest of the decade of the 1950's numerous incidents occurred involving confirmed and alleged penetrations of Soviet territorial or Soviet controlled airspace. In the majority of incidents there was a factual dispute between the parties as to whether or not a violation of territorial airspace had taken place, if warning shots had been fired, if the intruder had opened fired first, and if the intruder had failed to obey instructions to land. Based upon these incidents, the Soviet position became clear. They would not tolerate violations of their sovereign airspace regardless of whether the area was militarily sensitive or of the character of the aircraft. Hostile action would be taken against any civil or military intruder that refused to obey instructions to land.

C. CHINA - GREAT BRITIAN.

The 1950's saw two more serious incidents involving intrusions by civil airliners. On July 23, 1954 a British Cathay Pacific airliner flying from Bangkok to Hong Kong was shot down by Chinese fighters. The airliner ditched in the sea and a number of passengers drowned in addition to two passengers killed in the attack. The airliner's pilot said that they were attacked without warning and that the fighters were aiming at his fuel tanks.
The Chinese reported that they did not know that they had shot down an airliner. They claimed that as a result of recent armed incidents with Nationalist Chinese forces they mistook the airliner for a National Chinese military aircraft. They believed the aircraft to be in a mission to raid their military base at Port Yulin. In a note to the British government, they stated that "the occurrence of this unfortunate incident was entirely accidental." In addition to their apology, the Chinese agreed to pay compensation for all losses.

By implication, the Chinese position appeared to be that if they had been aware of the aircraft's civil nature they would not have attacked. They did not adhere to the Soviet position that they were free to take whatever action they deemed appropriate against an intruder. Their statements suggested that had it been an unarmed military aircraft and not on "a mission of aggression" they may have taken the Yugoslav approach or at least fired warning shots before attacking.

D. BULGARIA - ISRAEL.

One of the most widely discussed aerial incidents involving an aerial intrusion by a civil aircraft occurred on July 27, 1955 when an Israeli El Al airliner was shot down by Bulgarian interceptors killing all 51 passengers and 7 crew members. The
airliner was enroute from London to Israel via Paris, Vienna, and Istanbul. The initial announcement by the Bulgarian government stated that the airliner had entered Bulgarian airspace and was fired upon by anti-aircraft fire from the ground. The report said that they opened fire because they were unable to identify the aircraft.

Israel and a number of other governments protested to Bulgaria demanding a full explanation and compensation for the loss of life. On July 30, 1955 an Israel investigation team was allowed to examine the wreckage. Their findings revealed that the airliner had been shot down not by anti-aircraft fire as claimed by Bulgaria but by fighter aircraft. In addition, they reported that Bulgarian authorities had been extremely uncooperative and had tampered with the wreckage in order to remove incriminatory evidence.

On August 3 the Bulgarian government issued a statement admitting that the airliner had been shot down by fighter aircraft and that they would be willing to pay compensation. The statement went on to claim that the airliner penetrated Bulgarian airspace to a point 25 miles in depth and had ignored signals to land prior to its being shot down.
Bulgaria later changed its position and disclaimed all responsibility in the incident. They proposed instead to make ex gratia payments in Bulgarian currency to the families of the victims. In response to this change, the United States, Israel, and Great Britain filed applications before the International Court of Justice against Bulgaria. While Bulgaria refused to submit to the jurisdiction of the Court, and the cases were later dismissed, the Memorial submitted by each government provide the most comprehensive statements to date regarding aerial intrusions.

The United States, which had nine citizens killed in the attack, concluded that regardless of the airliner's reasons for entering Bulgarian airspace the action by Bulgaria was completely unwarranted and in violation of all accepted international practices.

The Israeli Memorial advanced an argument similar to the American position. The Memorial noted that although Bulgaria was not a party to the Chicago Convention, the rules established by the Convention reflected accepted international practice with which Bulgaria must comply. It went on to note that Israel, by virtue of Article 6 of the Chicago Convention, was not entitled to operate its airlines over Bulgarian airspace without
permission. They argued that a distinction must be made between operating a scheduled airline service over another sovereign's territory and innocently overflying the territory. The latter type of infringement being not uncommon and at times unavoidable. The Israeli Memorial argued that even if sovereign airspace was violated, Bulgaria was still subject to the limitations of international law in defending its sovereignty. One of these limitations was on the use of force. In arguing that Bulgaria had exceeded the acceptable limits on the use of force the Israelis noted:

The basis of this contention is the rule that when measures of force are employed to protect territorial sovereignty, whether on land, on sea or in the air, their employment is subject to the duty to take into consideration the elementary obligations of humanity, and not to use a degree of force in excess of what is commensurate with the reality and the gravity of the threat (if any). In all systems of law, including international law, this is the test for measuring the degree of violence which may justifiably be used to protect rights recognized by the law, and particularly the degree of violence used when performing acts by their very nature dangerous.

Furthermore, the Israelis maintained that "the careless opening of fire on this aircraft was by its very nature so dangerous an act that a basic principle of international law was
infringed," the Israeli Memorial set forth that there were only two options' open to the offended state in time of peace.

When a State party to the Chicago Convention in time of peace encounters instances of an infringement of its airspace, such as the intrusion of international scheduled air services contrary to Article 6, or intrusion of any aircraft into a duly established prohibited area contrary to Article 9 of the Convention, it normally reacts in one or both of two ways. In the first place, if this is physically possible, it indicates to the aircraft in the appropriate manner, and without causing an undue degree of physical danger to the aircraft and its occupants, that it is performing some unauthorized act. In taking this action that State may also, always exercising due care, require the intruder either to bring the intrusion to an end (i.e. to return to its authorized position, within or without the airspace of the State in question), or to submit itself to examination after landing, at a place, in the territory of the State in question, duly properly and effectively indicated to it in the appropriate manner. In the second place, and subsequently, it may deal with the infringement of its sovereignty by making the appropriate demarche through the diplomatic channel.

The Israeli Memorial qualified this statement to the extent that "...in normal times there can be no legal justification for haste and inadequate measures after interception of, and for the opening of fire on, a foreign civil aircraft, clearly marked as such."
Great Britain in its Memorial categorically rejected the use of force against a civil airliner under any circumstances. Citing both the Paris and the Chicago Conventions, the British Memorial noted:

No justification for the use of force against civil aircraft on a scheduled flight which enters, without authorization, the airspace of another State, can be derived from the Convention for the Regulation of Aerial Navigation signed at Paris on October 13, 1919, or the Convention on International Civil Aviation, signed at Chicago on December 7, 1944. Both Conventions provide that Contracting States may establish areas in which, for military reasons or in the interests of public safety, the entry of aircraft of the other Contracting States may be prohibited (Article 3 of the Paris Convention and Article 9 of the Chicago Convention). Under Article 4 of the Paris Convention, an aircraft finding itself above a prohibited area established under Article 3 of that Convention must, as soon as it is aware of the fact, give the signal of distress provided for in paragraph 17 of Annex (D) to the Paris Convention, and land as soon as possible outside the prohibited area at one of the nearest aerodromes of the State whose territory it has entered. Under paragraph (c) of Article 9 of the Chicago Convention, each Contracting State under such Regulations as it may prescribe, may require any aircraft entering one of the restricted or prohibited areas for the establishment of which paragraph (a) of Article 9 provides "to effect a landing as soon as practicable thereafter at some designated airport within its territory." The Government of the United Kingdom submit that since the Conventions on Aerial Navigation do not sanction the use of force against aircraft flying above prohibited or restricted areas,
no Contracting State can be in any stronger position against civil aircraft on scheduled flights which overfly other areas of their territory without permission.115

The British argued that the only time armed force could be used against foreign aircraft or ships was in the legitimate exercise of the right to self defense.116

For the British the only possible remedy for a violation of territorial airspace by a civil aircraft was for the overflown State to first request redress from the owners of the aircraft and if this does not work, to take the matter up through appropriate diplomatic channels. In reaching this conclusion the British relied upon the position assumed by the Yugoslav government after the Downing on August 19, 1946 of an unarmed American military transport.117

In arriving at their conclusions regarding the international standards applicable to aerial intrusions the three governments acknowledged that very little law existed in the area of aerial intrusions. The United States Memorial noted: "It may be said that there is no existing treaty or international code in terms prohibits a government from ordering the killing of innocent passengers in an innocent civil transport aircraft that has strayed without prior authorization into the territorial airspace of the killing government."118
In support of their positions all three nations relied upon the International Court of Justice's ruling in the Corfu Channel Case.119 In Corfu Channel the government of Albania had mined that portion of the Corfu Channel that lay within its territorial waters. The mining occurred in time of peace and was done without warning of any other governments of the action. On October 22, 1946 two British destroyers were heavily damaged when they struck several mines.120 The Court held that Albania was under a duty to warn vessels of the presence of the mine field located within its territorial waters. This obligation arose not out of written agreements but out of "certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than war; the principle of maritime communication; and every State's obligation not to knowingly allow its territory to be used for acts contrary to the rights of other States"121

Based upon Corfu Channel it was argued that States are under an obligation to not use hostile force against the rights of other states, particularly in peacetime, and if they are going to use hostile force they must first give warning. The three parties maintained that Bulgaria had violated the first principle and failed to heed the second.

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All three Memorials relied on the maritime principle that in time of distress or out of necessity, a ship may enter the territorial waters of another state. Noting that an aircraft off its course is similar to a ship off its course at sea, the United States argued that such an aircraft should be aided just the same as a ship is aided. Further, the duty not to harm "straying mariners and ship passengers" should be extended to aircraft. The British noted that this right had not been extended to aircraft but by analogy there is a right of entry for an aircraft in distress just as there is for a ship in distress. The British Memorial argued that Article 22 of the Paris Convention and Article 25 of the Chicago Convention both recognized a duty on the part of the contracting states to aid an aircraft in distress and implicit within that duty was the obligation to treat a civil airliner off course and over the territory of another state as an aircraft in distress.

The validity of the legal arguments put forth by the United States, Britain, and Israel, as with so many other cases involving aerial intrusions, were never put to the test. Bulgaria declined to submit to the courts jurisdiction and the cases were ultimately dismissed.
In 1960 there were two aerial intrusions of significance in terms of their legal implications. Both involved military aircraft. The first incident occurred on May 1, 1960 when the Soviet Union shot down an American U-2 reconnaissance aircraft flying over the Soviet Union on an intelligence mission. The U-2 was shot down without warning deep within Soviet territory at an altitude of 60,000-68,000 feet. The United States did not protest the attack or the conviction and imprisonment of the pilot, Francis Gary Powers. The lack of American protest indicated that the United States accepted the proposition that intentional intrusions by military aircraft could be countered with the use of force. Further, the overflown state was not required to give a warning or request the intruder to land before resorting to the use of force when the intrusion is intentional and for hostile or intelligence purposes.

The second incident occurred on July 1, 1960 when a United States Air Force RB-47 was shot down by Soviet aircraft. As with most of the incidents involving military aircraft, the Soviet Union alleged that the aircraft intruded into Soviet airspace, was ordered to land, and opened fire first before Soviet fighters shot it down. The United States refuted the Soviet claim, stating that the RB-47 was outside Soviet territorial airspace at the time of the attack.
Little of value can be drawn from the incident itself due to the factual dispute. The RB-47 incident is important in light of the pronouncements made by Soviet representatives which clearly defined the Soviet position on the treatment of aerial intruders. During the United Nations Security Council debate on the RB-47 attack, a Soviet representative stated: "The Soviet Government is known to have given the order to its armed forces to shoot down American military aircraft, and any other aircraft, forth in the event their violation of the airspace of the Soviet Union..." From this it is clear that the Soviet Union will meet all aerial intruders with force.

F. ISRAEL - LIBYA.

The next major incident involving an aerial intrusion occurred on February 21, 1973 when Israeli fighters shot down a Libyan airliner over the Israeli occupied Sinai Peninsula about 12 miles from the Suez Canal. Following the attack the airliner crash landed and burned, killing 106 people.

The Israelis argued that the Libyan aircraft had entered Israeli airspace in the occupied Sinai and flew over a number of sensitive military installations and a key airfield. The aircraft was more than 100 miles off of its course. The Israeli fighters approached the airliner and instructed it to
land. One of the fighter pilots stated that he and the airliner pilot exchanged hand signals three times indicating that he wanted him to land. The airline pilot responded with a gesture indicating that he was flying on and would not land. Following this exchange the fighters again signalled by dipping their wings but they were ignored. At this point the Israeli fighters attacked.132

According to the Libyan co-pilot they were aware of what the Israeli fighters wanted them to land but because of the poor relations between Israel and Libya they decided not to comply.133 Contrary to the co-pilots statement, the Libyans maintained that the Israelis attacked without warning. The inflight recorder indicated that the pilot believed he was in Egypt and that the interceptors were Egyptian.134 They attributed the aircraft being off course to instrument failure.135

The Israeli government justified its action based upon security considerations and the airliners refusal to follow orders to land. According to Major General Mordochai Hod, Chief of Staff of the Israeli Air Force, "the more the pilot objected and tried to get away, the more suspicious he became."136 He went on to state that they feared the airliner may have been on a spy mission over Israel's secret air base at Bir Gafgfa.137 They
maintained that their attack was designed to cripple the aircraft so as to force it to land. They did not intend to destroy it. The Israeli government later announced that it would compensate the victims out of humanitarian concerns, but not based upon any implications of guilt.\footnote{137}

The Israeli government's justification for its action was in keeping with the position they advanced concerning the Bulgarian aerial incident in 1955. The Israeli argument for downing the Libyan jet was based upon the security exception. The situation in the Sinai was anything but normal. Relations between Egypt, Libya, and Israel were tense and the threat of war was ever present. With hostile neighbors on all of her borders, Israel was deeply concerned about its security. The actions of the Libyan jet were viewed as hostile and a threat to the security of Israeli military forces in the Sinai.\footnote{139} Based upon past actions of the Libyan government it would not have been inconceivable, but highly improbable, that a civilian airliner would be used for intelligence gathering activity or other hostile activity.

World reaction to the Israeli attack was one of condemnation. Many nations including the Soviet Union condemned Israel.\footnote{140} The United States, which had advanced the security

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exception in its arguments during the Bulgarian incident, did not support Israel's justification for the attack.\textsuperscript{141} When the International Civil Aviation Organization considered the Israeli action, the United States joined in the resolution condemning Israel.\textsuperscript{142} Even though the American delegation had attempted to change the text of the resolution from "condemnation" of the Israeli action to "deploring" the Israeli action, the United States clearly rejected Israel's claim for a security exception.\textsuperscript{143} It was apparent that if a security exception existed, the standard was extremely high. Further, undermining the Israeli position was its blatant inconsistancy with the position it had taken in the Bulgarian incident. On that occasion the government of Israel decried the downing of its civilian airliner by the hasty and impudent action of Bulgarian pilots. By contrast the Israeli government, as reflected in the statement of General Hod, apparently determined after sober reflection that the Lybian airliner should be attacked.

G. U.S.S.R. - SOUTH KOREA.

Military force with deadly consequences was again applied to a civil airliner on April 20, 1978 when a Korean Air Lines Boeing 707 was forced to land by Soviet fighters after intruding into Soviet airspace. The Korean airliner was flying from Paris to Seoul via a polar route with a refueling stop in Anchorage, Alaska.\textsuperscript{144}
According to Soviet reports the airliner entered Soviet airspace northeast of Murmansk. It then flew over the Kola Peninsula which was a sensitive Soviet military area. The port of Murmansk and the submarine base at Silveromorsk were in the overflown area. After the airliner refused to follow the Soviet fighters they opened fired to force it down. Two passengers were killed and eleven wounded before the airliner made a forced landing on a frozen lake.

The official Soviet investigation concluded that the airliner had failed "to abide by the international rules of flight" and had refused to follow the interceptors to an airfield for the purpose of landing. The pilot and navigator pleaded guilty to violating Soviet airspace and the international rules of flying. They said that they understood the orders of the Soviet interceptors but declined to obey them. Criminal charges were not brought against them after they appealed to the Presidium of the USSR Supreme Soviet.

Passengers on board the airliner disputed the Soviet claims. According to their statements the fighters followed the airliner for only about fifteen minutes before opening fire. They observed no signalling by Soviet aircraft nor did they observe any warning shots being fired.

The Republic of Korea, which did not have diplomatic relations with the Soviet Union, did not protest the Soviet action. In fact they expressed their gratitude for the release
of the passengers and requested the release of the pilot and
navigator. The only explanation offered by South Korea was the
navigator's assertion that there was a defect in the directional
gyro which had caused the plane to fly off course.150

Contrary to the admissions made by the crew while they were
in Soviet custody, the Korean pilot gave a different version of
the facts when interviewed following the KAL-007 incident. In an
interview with the New York times he stated that he saw the
Soviet fighter only once before it fired and that it was off to
his right and behind him. He believed this to be strange as
international guidelines called for an interceptor to fly to the
left and front of an intruder to enable the intruder pilot, who
sits on the left, to see them. He went on to state that when his
co-pilot told him that he saw a fighter with Soviet markings, he
slowed his airspeed and began blinking his landing lights to
indicate to the interceptor that he was willing to follow his
directions. He also tried to establish radio contact but was
unsuccessful. It was at this point that the Soviet fighter fired
a missile that blew away nearly fifteen feet of one of the
wings.151 The remarkable difference in his statement at the time
of the incident and his statement some five years later can
perhaps be explained by the fact that his first statement was
made while he was in the custody of Soviet officials facing
criminal charges for a violation of Soviet airspace.
IV. THE CURRENT STATE OF THE LAW.

A. CUSTOM AND PRACTICE.

Based upon the foregoing aerial incidents and the responses to these incidents it is apparent that civil and military aircraft are treated differently by custom and by necessity. In the case of military aircraft there is a much lower threshold in terms of the use of force may be applied without warning against a military aircraft that has intruded into the territory of another state on a definite and deliberate military mission.

It is generally recognized that the use of armed force against foreign ships or aircraft is not justified in international law unless it is used in the legitimate exercise of the right of self defense. A necessary prerequisite to the use of force is the existence of circumstances clearly establishing an immediate military threat. Prima facie a civilian airliner should not pose a military threat to a sovereign state. Thus, justification for shooting down a civil airliner flight must be based upon a factual determination that such a flight posed an immediate danger to the territorial sovereign.152

A mere refusal to land, after being ordered to do so, would not appear to meet the test posed by this customary standard of
International Law. The critical factual element which must be present is that of actual hostility, either in progress or clearly imminent.

The use of force becomes questionable, but is still an option, when it appears that a military aircraft is in distress or that the intrusion is unintentional. In such instances the appropriate response would be to either order the aircraft to leave the territorial airspace or order it to land at a designated airfield within the overflown state. It is only when the aircraft refuses to obey instructions or takes some form of hostile action that the use of force is permissible. Customary practice and, by analogy, the treatment of belligerent intruders by neutrals in time of war supports this approach. However, it may be argued that the amount of force used must be in proportion to the threatened danger.

An exception to this practice exists for military transport aircraft. This exception, as established by the previously discussed aerial incidents involving Yugoslav fighters and unarmed American military transport aircraft, does not permit the use of force against unarmed military transports which do not manifest any hostile intent. If a military transport ignores
signals to land and attempts to escape, the remedy would be to make the necessary protests through diplomatic channels and not to shoot down the intruder.

The reason for a difference in treatment between civil and military aircraft as well as the lesser threshold for the use of force is obvious. Every state has the right and the obligation to protect itself and its people from hostile action, to include intelligence gathering activity. Given today's technology, a single aircraft can carry highly sophisticated intelligence and weapons systems that are capable of doing great damage to the security of another state. This is grounded in the long standing and universally recognized right of self-defense.

In the case of civil aerial intruders the use of force is almost universally condemned except under the most extreme circumstances. In those instances where force has been used against civil aircraft it has always been justified by the overflown state as a last resort following attempts to get the intruder to leave the territorial airspace or to land. Whether true or not, the Soviet Union has claimed this justification each time it has attacked a civil airliner. The only instance where the failure to leave or land following a warning by the interceptors was not claimed was the attack by the People's
Republic of China on the British Cathay Pacific airliner. The Chinese claimed instead that they believed the intruder was a Nationalist Chinese warplane on a mission of aggression. If this were true, it would have justified their action. From these incidents, it may be concluded that with civil aerial intruders there is no per se right to use force based upon the mere violation of territorial or territorial airspace, regardless of whether the intrusion was intentional or unintentional.

Although overflown states have sought to justify attacks on civil airliners on the basis of a failure to follow instructions from interceptors or an attempt to escape, this has never been accepted by the world community as justifying the use of force. Bulgaria, Yugoslavia, Israel, and the Soviet Union have all used this justification, but in each case it has been rejected by the majority of nations as unacceptable.

In their memorial concerning the Bulgarian incident the British categorically rejected the use of force against civil aircraft under any circumstances. They reasoned that as Article 9 of the Chicago Convention did not provide for the use of force against aircraft that flew over restricted areas, it must be taken to mean that the use of force is forbidden. This is a strong argument, but in fact, neither the Chicago Convention nor
its predecessor, the Paris Convention, specifically prohibit the use of force against civil aircraft.

In their Memorials in the Bulgarian incident, the United States and Israel claimed that in certain circumstances the use of force might be justified if there was an overriding security interest at stake. Based upon international practice and opinion, the security interest involved must be more than the mere flight of an intruder over prohibited or restricted areas. In Israel's attack on the Libyan airliner, the Israelis claimed that the airliner overflew a secret air base and other sensitive areas. In addition, Libya, while not at war with Israel, was openly supporting hostile activity against Israel and continually called for the destruction of Israel. Even under these circumstances, the ICAO, as well as world opinion, rejected Israel's claim and condemned her action. The United States, which put forward the security exception, has never exercised it as an option despite the fact that civil aircraft of the Soviet Union have on numerous occasions overflown sensitive military facilities in the United States. Based upon established precedent, the security interest at stake must be of extreme importance before hostile force can be used. It is even questionable whether or not it would be accepted at all as a justification for the use of force against a civil intruder.

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Even if there was a case where a security interest was so overwhelming as to justify the use of force, the rationale of the Corfu Channel\textsuperscript{155} case would require that a warning be given prior to the use of force and that the loss of life as a result of any force be weighed against the security interest involved. The requirement of proportionality must be satisfied before the use of force against a civil intruder can be justified. In peacetime this would be an extremely difficult requirement to meet. It is doubtful that the damage to a nation's security interest arising out of the overflight of a sensitive area would outweigh the loss of life associated with an attack on a civil airliner.

B. THE EFFECT OF THE CHICAGO CONVENTION.

Notwithstanding the serious weakness of the Chicago Convention in regard to specificity in defining rights and responsibilities of nations when dealing with intruding aircraft of foreign nations, the convention does provide a structured framework for the development of procedures and rules to be followed under such circumstances. The convention, principally under the provisions of Article 12, refers to enactment by member states of rules of the air, along with the adoption of standards and recommended practices which are to be made with a view towards international compatibility and consistency.\textsuperscript{157}
Articles 37 and 54(1) provide that the goal of members enacting such standards and practices should be the highest degree of uniformity. While the authority for enactment of such measures derives from an international convention, their content and enforceability are acknowledged to be municipal, applicable only within the territorial airspace of the enacting nation.

Thus, while the convention leaves the precise formulation of rule, practices and standards to individual member governments, and as previously stated, the Chicago Convention does not specifically rule out the use of force against civil aircraft, the convention does, in Annex 2, make a strong case against the use of force against civil aerial intruders.158 The rules regarding interception of civil aircraft provide:

2.1 Interception of civil aircraft should be avoided and should be undertaken only as a last resort. If undertaken, the interception should be limited to determining the identity of the aircraft and providing any navigational guidance necessary for the safe conduct of the flight.

2.2 To eliminate or reduce the need for interception of civil aircraft, all possible efforts should be made by intercept control units to secure identification of any aircraft
which may be a civil aircraft, and to issue any necessary instructions or advice to such aircraft, through the appropriate air traffic services units. To this end, it is essential that means of rapid and reliable communications between intercept control units and air traffic services units be established and that agreements be formulated concerning exchanges of information between such units on the movements of civil aircraft, in accordance with the provisions of Annex 11.159

and

7.1 Intercepting aircraft should refrain from the use of weapons in all cases of interception of civil aircraft.160

Although the prohibitive language in regard to the use of force is qualified by the word "should," thereby allowing for an argument that the use of force is till an option, the general theme of Annex 2 is that interception should only be utilized in rare instances and with the safety of the civil intruder as an important consideration.161

Based upon customary international law as established by the previously discussed incidents, the analogies that can be drawn from the Corfu Channel case, the Chicago Convention, and Annex 2 to the Chicago Convention, the use of force against civil aircraft is not justified. The only exception that has been recognized is if there is a vital security interest at stake. Considering the reaction to the Israeli downing of a Libyan jet, the threshold for a valid security interest is extremely high. Thus far no nation that has shot down a civil airliner has
successfully convinced world opinion that the security exception was a sufficient justification for such extreme action.

Quite apart from the consideration of whether the intruding aircraft is acting through error or by intention is the question of the appropriateness of any effort to hail and order the intruding aircraft to land. It is far from clear that any precise method of warning aircraft or any specific procedure has been adopted by sufficient members of the international community to constitute a general principle of international law. It is clear however, that Article 38 of the Statute of the International Court of Justice enumerates international custom as a source of international law. The consistent practice of the various countries of the world, as illustrated by the incidents discussed heretofore may provide a sufficient basis to conclude that an intruding civilian passenger airliner may be shot down only after interception and warning in accordance with internationally recognized interception procedures.\textsuperscript{162}

C. THE LEGALITY OF THE ATTACK ON KAL-007.

Does the weight of international legal authority support the Soviet attack on KAL-007? KAL-007 did violate Soviet territorial airspace in violation of Soviet law and Article 6 of the Chicago Convention.\textsuperscript{163} It committed no other violations. For the reasons discussed heretofore, this mere violation of Soviet
territorial airspace alone could not justify the use of force against KAL-007.

That conclusion is not, however, to say that the Soviet Union necessarily violated its obligations under international law. Such a finding must necessarily depend upon the version of the factual circumstances of the incident taken as accurate. There are three major factual issues which appear determinative. One, was the airliner warned before it was destroyed? Two, if appropriate warnings were given, were they ignored by the Koreans? Three, was there any real security threat posed by the intruding aircraft?164

As part of their justification for the attack on KAL-007, the Soviets, in their attempt to invoke the security interest exception by claiming that KAL-007 flew over sensitive military areas of the Soviet Union, has steadfastly maintained that the airliner was shot down because local military authorities believed it to be a military reconnaissance aircraft rather than a civilian airliner.165 Soviet authorities also maintained that warning bursts of cannon fire were directed across the path of the intruding aircraft before it was shot down by missile fire. The United States at first disputed that contention but later
issued a revised State Department statement confirming that the Soviet pilot reported to his Base six minutes before the final attack that he had fired such warnings. Thus, the factual determination of the use of an appropriate warning before attacking the airliner, of the Korean aircraft's response to such a warning, if one was given, remains unclear in the absence of sufficient factual information. They have however, offered no credible evidence that the airliner was engaging in aerial spying or carrying out any type of hostile mission. Their claim that the airliner delayed its departure in order to coordinate with a United States spy satellite was rejected by the ICAO Fact Finding Investigation. Their allegation that the airliner was flying a joint mission with one of the American RC-135 reconnaissance aircraft, which routinely operate in the area, is also unsupported by the evidence. At the time of the incident the Soviet Union was at peace and there was no hostile action taking place in the area. The security interest exception, as demonstrated by the Libyan airliner incident, invisions more than the mere overflight of a militarily sensitive area. The Soviet security interest pales when compared to the Israeli security interest invoked in the destruction of the Libyan airliner.
The Soviet explanation of the facts surrounding the destruction of KAL-007 is also weak. Given the inconsistencies between Soviet statements and the evidence provided by the radio intercepts, their claims that they attempted to make contact with KAL-007 are probably no more than fabrications. Their explanation and justification for the attack was a carbon copy of almost every other incident in which their interceptors have attacked an aerial intruder.

Apart from a defense based upon the facts of the incident the Soviets have based their defense of the destruction of the Korean airliner upon their long-held view that they have adhered to their own municipal law and therefore any supposed contrary international standard is irrelevant. Beginning with the Paris Convention, the Soviets have opposed any attempt by international agreement to regulate aerial navigation. The current law on the State Frontier states that: "The whole territory of the USSR except the airways, State border entry gates, terminal areas, aerodrome takeoff and landing zones listing in AIP (Airmen's Information Publication), USSR, shall be considered prohibited for foreign aircraft, if it is not specified otherwise." In her speech before the United Nations Security Council, U.S. Ambassador Gene Kirkpatrick noted that a
Soviet newscast stated that the Soviet Union "like any self-respecting state, [they] are doing no more than looking after [their] sovereignty which [they] shall permit no one to violate."170

The Soviet view on the sovereignty of their airspace is in accord with the majority of nations. However, their treatment of aerial intruders is not. The accepted international practice is to treat an aerial intrusion by a civil aircraft as a diplomatic incident, unless there is found to be a legitimate security interest involved which would justify the use of hostile force. By their actions, the Soviets have demonstrated that they do not adhere to this standard in their treatment of aerial intruders. In light of past Soviet actions, the KAL-007 incident should not have come as a surprise. Since 1919, the Soviets have put the world on notice that their airspace is inviolate. The Soviet Union's records on aerial intrusions makes it clear that they will not tolerate violations of their aerial sovereignty. Aerial intruders, civil or military, who either deliberately or unintentionally intrude into Soviet airspace will be intercepted and ordered to land. If they ignore the interception, either intentionally or unintentionally, they will be shot down regardless of the potential loss of life involved. The Soviet view was clearly articulated in its explanation of the downing
of a Swedish aircraft in 1952 and an American bomber in October of the same year when the world was told that Soviet Airmen are under a state duty to shoot down any intruding aircraft if such aircraft first fails to respond to a warning. The Soviet position has been best explained by Dimitri Simes of the Carnegie Endowment for International Peace. Mr. Simes stated that: "Their image of the Korean plane is different from ours; for us, it is a tragedy of 269 innocent people. Their emphasis is not on what they did to the plane but, on what the plane did to their airspace." 

V. CONCLUSION.

A. THE PROPOSED AMENDMENT TO THE CHICAGO CONVENTION.

The unfortunate fact appears to be that at present conventional international law, both that of treaty and the customary practice of nations, does not provide for the situation wherein an intruding aircraft enters the airspace of a foreign country and disobeys an order to land. There does exist generally accepted provisions for accepting the concept of sovereignty over airspace by subjacent states as well as rules by which foreign aircraft should seek authorization before entering foreign airspace. It is less clear whether an unauthorized intrusion by an aircraft subjects itself to immediate destruction by interceptor aircraft of the offended state. The weight of opinion appears to hold that unauthorized entry does not, alone, make fair game of an intruding aircraft.
Another conclusion which may be drawn from the 007 incident is that consistent state practice and individual national legislation in regard to interception procedures have acquired the force of customary rules of international law. That is, the technical rules contained in Annex 2 of the Chicago Convention regarding interception are now declarative of and consistent with international practice in civil aviation. However, as discussed earlier the interception procedures do not specifically state what should happen if the intruder, by intention or error, should refuse to land. Such a broad principle lends weight to the contention that an intruding aircraft may, under the proper circumstances, be shot down. The proper circumstances must be such that allow the subjacent state to invoke the doctrine of self defense. That doctrine may normally only be applied if there is an urgent national security threat which arises by virtue of the intrusion.

In response to the general international outcry which followed the KAL 007 incident and in an effort to codify and make more specific international legal rights and responsibilities in regard to civil aerial intrusions, the ICAO Assembly met April 24 through May 11, 1984. On May 10, 1984, the ICAO Assembly unanimously adopted an amendment to the Convention which will
become effective upon approval by two thirds of the contrasting states. The amendment, when adopted by 102 contracting states, will become the new Article 3bis:

(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 shall 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 (1) of this Article. Each contracting State agrees to publish its regulations in force regard the 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 provision 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 penal tilies and shall submit the case to its competent authorities in accordance with its laws or regulations.

(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 paragraphs (b) and (c) of this Article.174

Although many participants in the Extraordinary Session called to adopt the above amendment expressed the view that the use of force when intercepting civil aerial intruders was a firmly established principle of international law, the fact that such an amendment was in the space of only a few days unanimously adopted, illustrated the depth of feeling in the international community that there is an urgent need to establish some solid international concensus in this area. It also serves to illustrate and support the view of many commentators that this has been an area of international law which has long been incomplete and ill defined. By its explicit language, paragraph 3bis. (a) prohibits the use of weapons against civil aircraft. It further provides in the case of interception the lives of the passengers must be safeguarded. That provision
appears to require the intercepting aircraft to refrain from maneuvers which might endanger both the intruding aircraft and its passengers. The reference to the Charter of the United Nations merely reaffirms the long held right of a state to use force in self-defense. In light of the highly improbable and impractical use of a civil airliner to conduct armed attacks paragraph 3bis. (a) appears to virtually rule out the use of armed force against a civil intruder. Whether or not a country will again attempt to equate alleged intelligence gathering by a civil intruder with a security threat sufficient to justify resort to armed force, as did the Soviet Union, remains to be seen.

The effect of paragraph 3bis. (b) will be to allow the overflown state the right to require the intruding aircraft to land. This would expand the present provisions of the convention which extends such a right only when the intruder has overflown a restricted or prohibited area. This paragraph is largely a restating of established practice.

Paragraph 3bis. (c) is essentially an enabling provision which lends the weight of municipal law to the convention. The member states are required to add the compulsion of local law to the duty of the intruder to obey the convention.
Paragraph 3bis. (d) is a concession to the position of the Soviet Union that KAL 007 was an intelligence gathering mission at the time it was shot down. Member states are required to take measures to insure that aircraft operated under their registry or by an operator who has his principle place of business in that state from engaging in any activity, such as intelligence gathering, inconsistent with the purposes of the convention.

Upon adoption by the required member of states of the proposed amendment there will be in place a clearly defined set of rights and responsibilities in regard to the treatment of intruding civil airlines. Whether or not such a document can prevent the occurrence of another KAL 007 tragedy is unknown. The circumstance under which force can be justified have been clearly defined and narrowed. The unresolved issue, one which will never be resolved by written formulations, is the subjective conclusion the overflown state will reach when confronted with an intruding aircraft under a given set of circumstances. The two underlying principles of international law at work in regard to aerial trespass are not fully reconciled by the amendment. There still is no provision granting a subjacent state the right to shoot down an intruding aircraft which refused to obey orders to land and neither is there any explicit provision in international law, in treaty or custom,
which explicitly prohibits such action. The proposed amendment leaves open the question of the use of force when an intruding aircraft is identified as military, whether such identification is made in a competent or a haphazard manner, and the aircraft fails to heed signals or instruction to land. In applying the language of the proposed amendment to the facts of the KAL 007 incident in retrospect the Soviet action would have been viewed by any objective observer as a violation of international law, unless one accepts the Soviet contention that it believed the aircraft to be a military intelligence gathering airplane and that it used accepted measures to correctly identify the aircraft before attacking it and followed customary practices in hailing and warning the aircraft. The weight of available evidence fails to support the Soviet version of the facts, therefore the proposed amendment to the convention would prohibit the use of force in a future KAL 007 incident.

8. THE KAL 007 INCIDENT AND INTERNATIONAL LAW.

A broader issue arose by the reaction of the international community to the 007 incident concerns the proper role of international law in such a crisis. A general public perception of international law as the province of very high minded and idealistic intellectuals and as the highly politicized tool of competing nations was not improved by the methods of either side in this incident. From the outset the parties pressed with equal
force every possible argument in an effort to rally world opinion. In the course of this public relations campaign each side fully mixed formal legal argumentation with gross political rhetorical discourse. The method used to describe and redescribe the factual occurrence with whatever degree of detail or generality which was most consistent with the particular treaty provision or point of customary international law being offered as authoritative or controlling. This was done with little apparent consideration to the effect such practice might have on the credibility and coherence of international law itself.175

The distortion and stretching of legal norms or standards attempted in the aftermath of the KAL 007 incident have probably contributed to the widely held view that international law is a set of various doctrines that can be used by anyone to justify anything.176 However, a counter argument may be made that such harm is counterbalanced by a realization that the credibility of the parties places limits upon the manipulation of the law. In this crisis there was, after all, considerable agreement among the parties on the applicability of relevant legal norms. The dispute revolved around conflicting factual accounts, the particulars of which indicated a clear adherence to or violation of a specific norm.
Thus, it may be concluded that the resort to this form of post hoc legal justification was not totally harmful, but rather the means by which it was undertaken. Legal positions were asserted long before sufficient factual information was available to either side. At a time when the electronic media dictates the pace of developments in international events, a form of instantaneous legal justification has arisen.\textsuperscript{177}

The use of premature legal justification results in an oversimplification of norms of international behavior. This results in each situation appearing to be controlled by diametrically opposed but equally authoritative norms. In addition, the public understanding of the incident is further distorted. By setting out a framework of legal interpretation early in the aftermath of the event, an air of objectivity is then conferred upon a particular legal justification promoted by a government. In that manner purely political discourse and legal argumentation are blurred in a manner which promote misunderstanding and distortion of disputes.

Such practice was followed by the parties to the KAL 007 incident. Each side was quick, largely through the electronic media, to formulate oversimplified and highly exaggerated accounts of the event. The incident was portrayed, in stark contrast, as the deliberate murder of innocent civilians on the one hand, and as a
justified defensive action by a sovereign nation whose security was in jeopardy. After such posturing by each side the later more complete reports which corrected some important details in the earlier accounts of the incident had little impact on public opinion.

The argumentation following the KAL 007 incident never approached resolution and degenerated quickly into blatant political discourse. That blurring in the distinction between international legal methodology and political manipulation may be viewed as destructive to the development and acceptance of international law as an honest broker of disputes. The more such argumentation superficializes the norm and practices of international law, the less useful they will be and less often will they be used a framework for evaluating disputes. Thus, the legacy of the KAL 007 incident has two components; one positive and hopeful, and one negative and worrisome, one; the proposed amendment to Chicago Convention is a positive response by all the parties to formalize the rights and responsibilities of nations in regard to intruding aircraft, and; two, the hasty resort to over-simplified legal argumentation to paint easily understood and highly exaggerated depictions of the event may impair the development and legitimacy of international law.

2. Id. at 6.


5. Id. at 3.


8. Id. at 1.


15. Id. at 8.


17. Id.


19. Id. at 3.


21. Id. at F-6.

22. Id. at F-7.

23. Id. at F-15.


26. Id.


28. Id.


32. Id. Article 44.

33. Id. Article 56-57.

34. Id. Article 54.

35. 9 M. Whiteman, Digest of International Law 393 (1968).


32. Id. Article 44.
33. Id. Article 56-57.

34. Id. Article 54.

35. 9 M. Whiteman, Digest of International Law 393 (1968).


37. Id. at 10-11.


39. Id. at 33.

40. Id. at 36.

41. Id. at 3.

42. Id.

43. N.Y. Times, Mar 7, 1984, at A4, Cal. 2

44. IP Kennan, A. Lester & P. Martin, Shawcross and Beaumont on Air Law 189 (3d ed. 1966) [hereinafter cited as Showcross & Beaumont].

45. 9M. Whiteman, supra, at note 36. 309.


48. Id.

49. Id. at 561.


51. Id. at 504.

52 Lissitzyn, supra, note 50, at 562.


54. Id. at Article 1.


57. Id. at Articles 2 & 15.

58. Paris Conventions of 1919, supra, note 57.

59. Id.

60. Lissitzyn, supra, note 50 at 565.
61. Id.

62. Lissitzyn, supra, note 50 at 565.

63. These states include Great Britain and the Dominions, nineteen European states, eight Latin American states, Iran, Iraq, Japan, and Siam. D. Johnson, supra, note 45, at 35-36.


65. For a discussion of several incidents involving aerial intrusions between the wars see Lissitzyn, supra, note 50, at 566-567.

66. W. Wagner, supra, see note 66, at 53.

67. Lissitzyn, supra, note 50, at 566.

68. Id.


70. J. Spaight, supra, note 53, at 395.

71. Lissitzyn, supra, note 50, at 567. See also J. Spaight, supra, note 53, at 420-460 for a discussion of belligerent and neutral rights as practiced during World War II.

72. Chicago Convention of 1944, supra, note 32.
73. Id. at Art. 1.

74. Id. at Art. 2.

75. Id. at Art. 3.

76. Id. at Art. 5.

77. Id. at Art. 6.

78. Id. at Art. 9.

79. Id. at Art. 20.

80. But see Lissitzyn, supra, note 50, at 568 note 47 citing Chauveau, Droit Aerin (1951), p. 49 where it is suggested that Article 8 implies that an aerial intruder can be shot down in cases of resistance of attempted escape.

81. W. Wagner, supra, note 66, at 91.

82. Id. at 92.

83. Id.

84. Id.

85. Id. See also J. VanZandt, The Chicago Civil Aviation Conference 292, 20 Foreign Policy Rep. 290 1945).
84. Spaight, supra, note 53, at 394-418.

85. 15 Dep't St Bull., 415-419 (1946).

86. Id. at 501-505.

87. Id.

88. Id. at 418.

89. Id. at 501-505.

90. Id. at 416-418.

91. Id.

92. In regard to the first incident the American pilot noted that the Yugoslav fighters had wobbled their wings. He took this as a signal to gain his attention. The Yugoslav said it was meant as a signal to land. Id. at 502, 505

93. Id. at 505.


95. Lissitzyn, supra, note 50, at 574.

96. Id. at 575.

97. Id. at 576.
98. For a discussion of other incidents involving aerial intrusions by military aircraft into Soviet airspace see Lissitzyn, supra, note 50, at 574-580.


100. Id.

101. Id.


103. Id.

104. Id.

105. Id.


107. Id. at 198.

108. Id. at 83.

109. Id. at 86.

110. Id. at 87.
111. Id. at 84.

112. Id. at 85.

113. Id. at 86-87

114. Id. at 89.

115. Id. at 363-64.

116. Id. at 358.

117. Id. at 363.

118. Id. at 212.


120. Id. at 12-13.

121. Id. at 22.

122. Id. at 119-120, Garcia case (Mex. v. U.S.), 4 Int'l ARB.


123. Id. at 121

124. A number of claims were brought against the Soviet Union in

the International Court of Justice for Soviet Union refused

to accept jurisdiction. For a brief discussion of some of

these cases see M. Whiteman, supra, note 48, at 340-341.

126. Id.

127. Id. at 139-140.

128. Id. at 138.


130. Id. at 136,160.

131. Id. at 160.

132. Id. at 137.

133. Id.

134. Id. at 160.

135. Id. at 137.

136. Id.

137. Id.

138. Id. at 160.

139. Id. at 137.
140. Id.

141. Id.

142. 28 ICAO Bull. 13 (July 1973). See also 68 Dep't St. Bull., 369, 1973, for the initial resolution calling for an investigation into the Libyan incident.


144. Facts or File, 302 (1978).

145. Id.

146. Id.


148. Id.

149. Facts of File, supra, note 154.

150. Id.


156. 1949 I.C.J. 1

157. Hassan, supra, Note 152, at 719.


159. Id. at 43.

160. Id. at 46.

161. See also Id. at 44 (requiring a civil airliner to land should only be done in exceptional cases).


164. Hassan, supra, Note 152, at 724.

166. Hassan, supra, Note 162, at 585.


171. Hassan, supra, Note 162, at 572.


173. Hassan, supra, Note 162, at 586.


176. Id. at 1212.

177. Id.