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International Law and the Interception of Civil Aircraft: Flight 007

James R. Fox*

The downing of Korean Airlines Flight 007 by a Soviet interceptor on September 1, 1983,¹ caused the international civil aviation community to face a recurring problem: military interception of off-course civilian aircraft.² Such incidents raise a legal problem because of the tension between one of the most basic principles of international law, sovereignty over territorial airspace,³ and the limitation placed on the exercise of that sovereignty by customary international law and the Chicago Convention.⁴ In practical terms, an intruding aircraft can be very threatening; at the same time a commercial airliner is very vulnerable. Four previous incidents bear directly on the recent tragedy.⁵ The problem of aerial intrusions is not uncommon, and, in all but a few instances in the last three decades, intrusions have been countered through diplomatic channels.⁶ Indeed a review

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1. The United States issued a detailed account of the Flight 007 incident shortly after its occurrence. This account, including transcripts of U.S. interceptions of the Soviet fighters' transmissions, was presented at the United Nations Security Council meeting. See Robinson, *U.S. Says Soviets Knew Korean Airlines 747 Was Commercial Flight*, 119 *Aviation Week Space Tech.* 18, Sept. 12, 1983 [hereinafter cited as Robinson].

2. On September 12, 1983, the United Nations Security Council passed a resolution deploring the destruction of the Korean airliner and welcoming the International Civil Aviation Organization's (ICAO) activities investigating the matter. The Soviets vetoed the resolution. *N.Y. Times*, September 13, 1983 at A1, col.2 (includes text of the Resolution). ICAO began its formal work on the matter with an extraordinary session of its Council called at the request of the Republic of Korea. Ott, *ICAO Studying Its Rules of Interceptions*, 119 *AVIATION WEEK SPACE TECH.* 24 (Sept. 12, 1983).

3. For the U.S. position see, M. WHITEMAN, 9 *DIGEST OF INTERNATIONAL LAW* 309 (1968). For the Soviet position see A. Kislov & S. Krylov, *State Sovereignty in Airspace in Legal Problems of Space Exploration*, S. Doc. No.26, 87th Cong., 1st Sess. 1037 (1961). The principle is codified as Article 1 of the Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, T.I.A.S. No. 1591, 15 U.N.T.S. 295 [hereinafter cited as Chicago Convention].

4. See Chicago Convention, Articles 5,9,23,37, and Annex 2.

5. Previous articles have reviewed the history of this problem. See generally Lissitzyn, *The Treatment of Aerial Intruders in Recent Practice and International Law*, 47 *AM. J.INT'L L.* 559 (1953) [hereinafter cited as Lissitzyn]; Hughes, *Aerial Intrusion by Civil Airliners and the Use of Force*, 45 *J.AIR L.COM.* 595 (1980) [hereinafter cited as Hughes].

6. In 1982, the *New York Times* reported 17 incidents (both civilian and military). For

of the many instances of stray civilian aircraft suggests that a vast majority of the nations of the world disavow the use of force. The following exceptional incidents, however, have provoked the international civil aviation community to develop standards of conduct within customary international law the Chicago Convention and the International Civil Aviation Organization (ICAO).

The first major incident⁷ involving the shooting down of a commercial airliner occurred when an Israeli Constellation with fifty-eight people aboard was destroyed when it strayed into Bulgarian airspace.⁸ This incident led to what every international lawyer dreams of—a case brought before the International Court of Justice. The disappointing outcome of the case was the court's refusal to decide the matter because of lack of jurisdiction over Bulgaria. However, the Memorials⁹ submitted by the plaintiffs are indicative of various national policies. The British rejected the use of force against a civilian plane categorically.¹⁰ Both the United States and Israel espoused the use of force only when there is a "security necessity."¹¹

The second incident was not fatal, but illustrates one of the positions taken by the Soviet Union on interception of civilian aircraft. French fighters intercepted a Soviet plane carrying Soviet President Leonid Breznev when the plane strayed into a prohibited zone declared by the French in the Algerian Civil War. The plane ignored various signals from the intercepting fighters until warning shots were fired in front of the plane. Needless to say, the Soviets protested the incident, expressing outrage that any nation would fire on a Soviet airliner. The Soviets called the French action "an act of international banditry."¹²

The incident that provoked the greatest international outcry was the shooting down of a Libyan Arab Airlines Boeing 727 by Israel when it strayed over the Sinai on February 21, 1973. The death of 106 people combined with the general international animosity toward Israel to provide the impetus for the development of a facially more humane norm of conduct.

The only exception taken to this stated norm of conduct was the position of the United States. Though supportive of the development

a detailed list of Communist Bloc violations of U.S. Airspace see 129 CONG. REC. 12535-37 (1983).

7. For several incidents involving both civilian and military intrusions in the period shortly after World War II, see Lissitzyn, *supra* note 5; Hughes, *supra* note 5.

8. See Ministry of Communications of the State of Israel, Report of the Commission of Inquiry on the Shooting Down of EL AL Aircraft 4X-AKC on July 27, 1955.

9. Aerial Incident of July 1955, Israel v. Bulgaria, United States v. Bulgaria, United Kingdom v. Bulgaria, I.C.J. Pleadings [hereinafter cited as Aerial Incident].

10. *Id.* (Memorial of the U.K.).

11. *Id.* (Memorials of the U.S. and Israel).

12. N.Y. Times, February 10, 1961, at A1, col.8.

of more restrictive standards for the interception of intruding civil aircraft, the United States attempted to soften the condemnation of Israel in the United Nations,¹³ President Nixon hosted the visit of Prime Minister Golda Meir a week after the incident without commenting publicly on it.¹⁴ This position contrasts sharply with the United States' current stand.¹⁵

Following the Israeli/Libyan incident, the Soviets condemned Israel:

The Soviet Delegation [was] convinced that ICAO could not remain aloof from the barbaric act committed by Israel a week ago. They could not agree with those who were trying to prevent it from making its own assessment of what had actually happened. ICAO was a specialized agency of the United Nations, pledged to the promotion of air safety in all parts of the world, and this was a terrible catastrophe, which was clearly the result of premeditated action by the Israeli aggressors, at a time when world public opinion was deeply concerned over the continuing acts of unlawful interference with civil aviation, when ICAO, at many meetings, was trying to find means of preventing crimes against air safety and punishing those responsible, and when States were taking serious measures to ensure the safety of civil air transport and of those making use of it. The Assembly, the highest aviation forum in the world, must strongly condemn this criminal act, in accordance with the principles embodied in the Chicago convention and other international legal instruments.¹⁶

In April 1978, in the most bizarre incident of aerial intrusion, a Korean Airlines flight carrying 103 passengers and crew members from Paris to Seoul via the polar route wandered off course and into Soviet airspace. After lingering for some time, apparently undetected, it was intercepted and fired upon by Soviet fighters. Two people were killed and sixteen injured. The Korean plane also sustained considerable damage, but two hours later made an emergency landing on a frozen lake.¹⁷ Unlike either the Israeli/Libyan or the 1983 Soviet/Korean catastrophe, the 1978 incident provoked little discussion in international law fora. Both Soviets and Koreans appeared

13. *ICAO to Investigate Downing of Libyan Airliner over Sinai*, 68 DEP'T STATE BULL. 369 (1973).

14. *Visit of Prime Minister Golda Meir*, 9 WEEKLY COMP. PRES. DOC. 212 (March 5, 1973).

15. *See, e.g., President Reagan's Address on the Soviet Attack on Korea Civilian Airliner*, 19 WEEKLY COMP. PRES. DOC. 1199 (Sept. 12, 1983).

16. *Res. and Minutes, ICAO Assembly, 19th Sess., Doc. 9061 at 38 (Feb. 28, 1973) (Statement of the Soviet delegation during the debate on ICAO Resolution A19-1).*

17. *South Korean Plane Plunged 30,000 Feet After Being Fired On*, N.Y. Times, April 24, 1978, at A1, col.8 [hereinafter cited as *South Korean Plane*].

very embarrassed, and the Soviets released the passengers and crew with only minor wrangling.¹⁸ Korea did not protest the shooting down of the plane, but instead thanked the Soviets for the release of the passengers and crew.¹⁹ The United States' greatest concern about this incident involved its own security. The early revelation by the Carter Administration of the incident may have disclosed the United States' capacity to monitor Soviet airspace.²⁰ Curiously, an attack which killed or wounded eighteen people and in which only the tremendous effort of the Korean pilot effected a safe landing and saved the others provoked no protest of the Soviet use of force from any corner.²¹ Eyewitness accounts from passengers indicate that the Soviet fighters followed the airliner for about fifteen minutes, then fell back and fired without warning.²² The Soviets wrested a "guilty plea" from the Korean pilot and navigator before releasing them.²³

The Soviet downing of Korean Airlines Flight 007, a Boeing 747 with 269 people aboard, has been the most widely publicized and debated of all cases of aerial intrusion. United States and Japanese intelligence agencies have made a great deal of factual information available.²⁴ The Soviets have made more public statements than on previous occasions.²⁵ Still, the crucial question—why did flight 007 go so far off course—has not been and probably will not be answered. Neither faulty navigation equipment nor a spy mission seems to be a very plausible answer, and neither an admission from the intelligence communities nor recovery of the wreckage is likely.²⁶

Among other factors that would illuminate the incident and help in the development of procedures for avoiding such calamities is the extent to which the Soviet interceptors followed the current procedures recommended in the Chicago Convention.²⁷ The Soviet pilots

18. *Airliner's Survivors Reach Finland, Tell of Soviet Jet Attack*, N.Y. Times, April 23, 1978, at A1, col.4.

19. *Park Thanks Soviets*, N.Y. Times, April 25, 1978, at A10, col.1.

20. *Korean Pilot, Navigator Held by Soviets*, 108 AVIATION WEEK AND SPACE TECH. 34 (May 1, 1978).

21. There is no mention of the incident in the Department of State Bulletin or Weekly Compilation of Presidential Documents nor was a protest lodged at the U.N. Security Council or the ICAO Council.

22. *South Korean Plane*, *supra* note 17.

23. *Soviets Free Last Two in Korean Plane Case*, N.Y. Times, April 30, 1978, at A1, col.5.

24. Robinson, *supra* note 1.

25. *Text of Statement by Soviet Government*, N.Y. Times, September 7, 1983, at A16, col.1; *Soviet Cautions West Its Fighters Will Shoot Again*, 119 AVIATION WEEK SPACE TECH. 22 (Sept. 19, 1983) (Report of Marshall Ogarkov's news conference) [hereinafter cited as *Soviet Cautions West*].

26. *Soviet Action Impedes Search for Korean Plane*, N.Y. Times, October 18, 1983, at A5, col.7. (Since the writing of this article, the ICAO investigation has adopted the view that human error in programming the navigational equipment was the probable cause.)

27. Chicago Convention, *supra* note 3, Annex 2, Attachment A, Interception of Civil Aircraft (adopted April 1, 1981).

claim to have made repeated efforts to contact the stray plane by radio using the standard international emergency frequency²⁸ and by using standard visual signals. The intercepted radio transmissions released by the United States do not substantiate these claims. The United States, however, did retract its earlier allegation that the Soviets did not fire warning shots as claimed.²⁹ Of all the Soviet claims about the incident, one of the least credible is that the interceptor pilots did not recognize Flight 007 as a commercial airliner. If true, this evidences a dangerous and appalling lack of training. A Boeing 747 is big and slow and, with its hump-backed cockpit, has the most distinctive silhouette of any common aircraft.

Whichever version of the facts one believes, clearly shooting down commercial aircraft should be forbidden by international law. Less drastic steps can and should be taken to preserve national security interests. Indeed, in none of the fatal incidents involving civilian airliners has any security necessity been shown. Flight 007, in particular, was destroyed as it was leaving Soviet airspace. It was posing no threat of attack at the time. Any intelligence that could possibly be gathered by one overflight hardly warrants deadly retaliation.³⁰ The excessiveness of the retaliatory measure in light of the threat posed is especially evident when the retaliation is aimed at an aircraft of uncertain identity which may be in distress with malfunctioning radio and navigational equipment.

The preeminent source of international law is custom.³¹ "The use of force against intruding civilian airliners is narrowly limited by customary international law."³² Custom recognizes only a very limited "security necessity" exception. Several nations, including the United States and Israel,³³ sought this exception, but it has not been accepted by a vast majority of the nations of the world either in practice or *opinio juris*.³⁴ Indeed, despite reports of repeated intrusions over sensitive areas by Aeroflot airliners, the United States has never acted upon it³⁵ and appears to have repudiated it.³⁶ Arguably,

28. The United States disputes this claim and argues that Soviet fighters are not equipped with radios capable of using these frequencies. 119 AVIATION WEEK AND SPACE TECH. 26 (Sept. 12, 1983).

29. *U.S. Admits Soviets Fired Cannon Shots*, 119 AVIATION WEEK SPACE TECH. 25 (Sept. 19, 1983).

30. A generally accepted principle of international law is that the use of force should be proportional to the gravity of the threat or offence. *The Naulilaa Incident (Ger. v. Port.)*, 2 R.Int'l. Arb. Awards 1012 (1928).

31. For a more detailed development, see Lissitzyn, *supra* note 5; Hughes, *supra* note 5.

32. Hughes, *supra* note 5 at 620.

33. *Aerial Incident*, *supra* note 9.

34. See Res. and Minutes, ICAO Assembly, 19th Sess., Doc. 9061, at 17-64 (1973).

35. Statement of F.A.A. Administrator J. Lynn Helms before the Extraordinary Session of the Council of the Int'l Civil Aviation Org., Sept. 15, 1983 at 13. The International Court of Justice has required both practice and *opinio juris* to establish a customary rule. *North Sea Continental Shelf Case*, 1969 I.C.J. 3.

the "security necessity rule" therefore is not part of customary international law, and the incidents and claims upon which it is based are all violations of the customary rule that force should never be used against a civilian airliner. The Soviet Union implied such a rule in its protest of the 1961 incident.³⁷ Currently, however, the Soviets claim the right to shoot at anything in their sovereign airspace, a claim that appears to be unique among nations.³⁸

In addition to this rule of customary international law, most nations have ratified the Chicago Convention, agreeing to ". . . certain principles and arrangements in order that civil aviation may develop in a safe and orderly manner" ³⁹ Among these arrangements are provisions for the peaceful settlements of disputes.⁴⁰ Nowhere does the Convention countenance violence against civil aviation, even in the provisions regarding prohibited zones. The proper course of action for the Soviets or for any nation detecting an intruding aircraft is first to take steps to identify it⁴¹ and then to aid it if it appears to be in distress.⁴² If the aircraft is offending the sovereignty of the nation or violating a prohibited zone, the pilot should be warned of any danger and protests should be made through diplomatic channels. The latter of course would include resort to the provisions of the Chicago Convention and the submission of a complaint to the ICAO Council. If the Soviets had pressed their charge of espionage—misuse of civil aviation⁴³—ICAO could, and undoubtedly would, have investigated the incident impartially. Regardless of the outcome of that investigation, the Soviets would have fared much better in world public opinion with little injury to their security by using diplomacy instead of missiles.

Four times since 1955 commercial airliners have been shot down with a total loss of over four hundred lives. In none of these cases could any real threat to security be shown. Each incident precipitated calls for preventive measures, and some have been instituted. Most significantly, ICAO has adopted special recommenda-

36. Mrs. Kirkpatrick, the U.S. Ambassador to the United Nations, asked: Does a nation which is not at war have the right to shoot down planes that enter its airspace without authorization? . . . no. We do not believe that the protection of the sovereignty of any nation gives that nation a right to shoot down any plane in peacetime, flying any place over its territory.
U.N.S.C.O.R. (2476th mtg.) at 67, U.N.Doc. S/PV.2476 (1983).

37. N.Y. Times, *supra* note 12. See also Soviet Statement in the ICAO Assembly Debate, Res. and Minutes, ICAO Assembly, 19th Sess., Doc. 9061 at 38 (1973).

38. See, e.g., *Bulgaria to Pay U.S. for Airlines Deaths*, N.Y. Times, Aug 20, 1955, at 35, col.2 (Bulgaria's retraction of its security claim regarding downing of Israeli airliner).

39. Chicago Convention, *supra* note 4, at 1.

40. *Id.* at Art. 84.

41. *Id.* at Annex 2, Attachment A.2.1 (1981).

42. *Id.* at Art. 25.

43. *Id.* at Art. 4.

tions for the interception of intruding aircraft.⁴⁴ These state that interception should be avoided and undertaken only as a last resort and its purpose should be limited to identification and assistance. Further, "intercepting aircraft should refrain from the use of weapons in all cases of interception of civil aircraft."⁴⁵ Unfortunately these are only recommendations, lacking the force of law. States are only urged to implement them.

France has put forth the most promising current proposal. This proposal, included with highest priority in the ICAO Council's Work Programme, would amend the Chicago Convention to provide that all Contracting States undertake to abstain from the use of force against civil aircraft.⁴⁶ The French also seek to invoke Article 94(b) which would force member nations to accept the amendment or withdraw from ICAO. This is a good starting point.

The nations of the world should join together as they did in the early 1970s to combat terrorist acts against civilian aircraft.⁴⁷ Strict standards for interception of aircraft should be developed and should include mandatory training of interceptor pilots in accepted international practices and aircraft identification.⁴⁸ Such standards of course must recognize the potential security threat posed by intruding aircraft.

An important part of the development of these strict standards is a thorough technical study of the problem. The ICAO Council initiated such a study after the downing of Flight 007,⁴⁹ but the Soviets hampered the search efforts for that plane's wreckage.⁵⁰ Moreover, the Soviets neither cooperated with the ICAO investigation nor allowed Korean, Japanese or United States observers at the Soviet investigation, as is required by Article 26 of the Convention and rec-

44. *Id.* at Annex 2, Attachment A.

45. *Id.*

46. Proposal by France, ICAO Doc. C-WP/7694 (9/14/83) (accepted by consensus except for the U.S.S.R. and Czechoslovakia). The French draft of the amendment would add the following: "All Contracting States undertake to abstain from resorting to the use of force against civil aircraft subject to the provisions of the Charter of the United Nations and, in particular, Article 51 thereof concerning the exercise of the right of individual or collective self-defense." ICAO Assembly, 24th Sess., Information Paper no.1 (related to ICAO Doc. A24-WP/49 P/18 (9/21/83)).

47. *Cf. FitzGerald, Concerted Action Against States Found in Default of Their International Obligations in Respect of Unlawful Interference with International Civil Aviation*, 1972 CAN. Y.B. INT'L L. 261.

48. This poses a problem because Article 3 of the Chicago Convention excludes "state aircraft" from the other provisions of the Convention. Military interceptors clearly are state aircraft. To establish effective standards of practice, the proposed amendment should include language overriding Article 3 in cases of military interception of civilian aircraft.

49. Resolution Adopted by the Council on 16 September 1983, ICAO Doc. A24-WP/49, Appendix (Sept. 20, 1983).

50. Such "interference" arguably is within the letter of the law because the Soviets have the first right to investigate the accident under the Convention.

ommended by Annex 13.⁵¹ It is certainly doubtful that the Soviet investigation will provide a basis for improving air safety.⁵²

Meanwhile, ICAO and the countries along the western Pacific air route have begun to tighten the system of navigational aids and to change route pattern.⁵³ These measures will help to prevent repetition of the Flight 007 tragedy. Commercial airliners, however, inevitably will stray off course on occasion. This is particularly worrisome because the Soviets have vowed to use force again if their sovereignty is violated.⁵⁴

Thus, action must be taken to dissuade nations from using deadly force on commercial airliners that inadvertently violate their airspace. In the first quarter of 1984, the ICAO Assembly will meet in Extraordinary Session to examine and adopt the amendment to the Chicago Convention now being drafted by the Council.⁵⁵ All nations that respect the lives of travelers in international civil aviation should support a strong amendment.

51. *Aviation Officials to Discuss Flight 7 in Soviet*, N.Y. Times, Oct. 23, 1983, sec. A, at 33, col. 1. On March 6, 1984, the ICAO Council condemned the Soviet Union for shooting down the Korean Airliner and deplored the Soviet failure to cooperate with the ICAO investigation. *Aviation Council Faults Soviet*, N.Y. Times, March 7, 1984, sec. A, at 4, col. 3.

52. Any report of such investigation would be almost unique. The only accident investigation report from the U.S.S.R. published by ICAO is *Balkan-Bulgaria Airlines Accident at Moskva, U.S.S.R.*, ICAO Circ. 132-AN/93 at 63. See also *Aeroflot Airliner Reported to Crash in Soviet*, N.Y. Times, Oct. 23, 1983, at A11, col. 1.

53. See *FAA Studies Upgrade Pacific Nav aids*, 119 AVIATION WEEK SPACE TECH. 18 (Sept. 19, 1983); *ICAO Considers Replacing Route System on Pacific*, *id.* at 33.

54. *Soviet Cautions West*, *supra* note 25.

55. See Proposal by France, *supra* note 46.

EPILOGUE

The ICAO Assembly met April 24 through May 11, 1984. During the first days the meeting was deadlocked over procedure for considering the four proposed draft amendments. On these first days delegates were not very hopeful of a positive outcome. By the end of the session, however, the Executive Committee had negotiated a compromise leading to the unanimous adoption by the Assembly of Article 3 bis., which provides as follows:

(a) The contracting States recognize that every State must refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of aircraft must not be endangered. This provision 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 regarding 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 provisions in its national laws or regulations to make such compliance mandatory for any civil aircraft registered in that State or operated by an operator who has his principal place of business or permanent residence in that State. Each contracting State shall make any violation of such applicable laws or regulations punishable by severe penalties and shall submit the case to its competent authorities in accordance with its laws or regulations.

(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.

This amendment will require ratification by 102 contracting states to come into force.⁵⁶

56. Report of the Executive Committee to the Plenary on 10 May 1984, ICAO Doc. A25-WP/20.