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**The Principle of Sovereignty in the Air**  
**To what extent can it be upheld against aerial intruders?**

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# Summary

The issue of possession of the air has been debated over literally thousands of years. The Romans debated the ownership of the air above their cornfields. When man finally could construct aircraft, in this case a balloon, heavier-than-air in the 1780's it did not take long before the first regulation came into force. The issue of state sovereignty had been discussed since the national states started to materialize during the late Middle Ages. It became even more important as the number of states grew in the 18<sup>th</sup> and 19<sup>th</sup> Centuries. The beginning of the 20<sup>th</sup> Century saw a rapid development of engine-powered aircraft. Several pilots lost their way over the borders of Europe and the first cases of aerial intruders were a fact. Scholars debated over the issue of total freedom and total sovereignty in the air. The winning side was for total sovereignty and since then that idea has prevailed. Between the two World Wars the development of aircraft escalated and the first airlines were formed. After the Second World War it was possible to fly across oceans on a regular basis. The need for a universal convention on civil aviation was great. The result, the Chicago Convention on Civil Aviation, is still governing the skies of the world.

With an increasing number of aircraft in the air, the number of mistakes also increases. Over the last fifty years, a large number of aircraft have wandered off from their authorized routes into foreign and forbidden air territories. The sovereignty of the air space gives each state exclusive right to its own air territory and aircraft within that territory without permission are seen and treated as intruders. Several serious incidents have occurred, many with the loss of lives and aircraft as a result. There is a disagreement on what means can be used against aerial intruders and either customary law or a somewhat recent written provision have changed this. The difference between civil aircraft and state aircraft is also debated. There seems to be a difference in the treatment of these groups of aircraft. State aircraft and military aircraft in particular often become targets for the weapons on the intercepting aircraft. Unfortunately, this is the case with many civil aircraft as well.

The general rule is that no violence is to be used, either on civil or state aircraft. The rule is unconditional regarding civil aircraft since they have no chance to defend or forestall the interceptors. The rule is conditional for state aircraft, i.e. military aircraft, if they are armed and if there is an uncertainty about the classification of the aircraft it is presumed to be civilian in order to save lives and equipment.

# Preface

Ever since I read my first book on Biggles and his friends in the late 1970's, I have been very interested and fascinated in aviation and its historical aspects in particular. I have spent many long hours burning the midnight oil with books and journals on aircraft and their cousins, the spacecraft. Last year I had the opportunity to combine this interest with my studies at the Law Faculty when taking a course in Air Law for Professor Malmberg. The course also helped me decide the subject for this thesis.

I would like to thank Professor Lars-Göran Malmberg for his patience and help. It has been a pleasure to make his acquaintance during my last year of study. I would also like to thank my parents for their non-demanding support over the years and for carrying me financially when my government loans came to an end. Furthermore, a note of thanks to Anny Channual, whose kindness and thoughtfulness has carried me over many obstacles these last few years and finally, my gratitude to Magnus Hermansson who put a room and a computer at my disposal so that I could finish what I started almost five years ago.

Alexander Engvers 2001-04-10

# Abbreviations

ADIZ	Air Defence and Identification Zone
ANC	Air Navigation Commission
CADIZ	Canadian Air Defence and Identification Zone
ECAC	European Civil Aviation Conference
ECOSOC	Economic and Social Council (within the UN)
EEZ	Exclusive Economic Zone
ICAN	International Commission for Air Navigation
ICAO	International Civil Aviation Organization
ICJ	International Court of Justice
INS	Inertial Guidance System
KAL	Korean Air Lines
NATO	North Atlantic Treaty Organization
PADIZ	Philippine Air Defence and Identification Zone
SARPS	Standards and Recommended Practices
UN	United Nations
VCLT	The Vienna Convention on the Law of Treaties

# 1 Introduction

According to public law regulations in force today, the part of the air space found above a particular state's land and sea territory is to be seen as that state's air space. The air space, as a physical element, can be described as the whole atmosphere surrounding the planet reaching from the ground up to the vacuum of space.<sup>1</sup> Within its own air space the state has a power monopoly, i.e. it exercises an unlimited right to decide over the air space. This right is based on the rules within public law that prohibits other states to exercise power within other states' territories.<sup>2</sup> In air law, there is nothing equal to the right of innocent passage, found within maritime law, but a limited right of passage is found in the Chicago Convention of 1944 on International Civil Aviation. The air above the open sea is free air space and the principles ruling aviation are quite similar to those ruling at the sea level. The right or freedom to fly over the high seas is firmly established in the sea conventions. The upper limit of the air space over the open sea must be considered of little interest since that air space is free and the outer space is not part of any state's sovereignty. As is the case with maritime law and the waters, a number of conventions within air law have tried to regulate the use of the air space. Both the Chicago Convention as well as the International Civil Aviation Organization, established through the named convention, carry a large portion of the responsibility for the efficient use of the air space. One measure to do so is that states recognize each other's right to fly through national air territory and to use certain areas of national land territories and territorial waters such as landing grounds and harbours.<sup>3</sup> The air space, as a whole, must be regarded as belonging to humanity without exceptions and as such, it is natural to submit it to international legislation.<sup>4</sup>

Ever so often, aerial intrusions take place in the sovereign air space. They occur for a variety of reasons and in a variety of circumstances. Most of the time it is about aircraft in distress or violations caused by mistakes. Other reasons to these violations may be that they are deliberate and even hostile or criminal such as attack, reconnaissance flights, smuggling, shady activities or simply a calculated defiance of the sovereign air space. The territory intruded upon could be neutral or part of an alliance. The intrusions could be made by state or civil aircraft in time of peace or war and the state

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<sup>1</sup> International Air Transportation, p 11.

<sup>2</sup> Folkrätten, 4<sup>th</sup> Ed., 1987, p 402.

<sup>3</sup> Folkrätten, 4<sup>th</sup> Ed., 1987, p 456-7.

<sup>4</sup> International Air Transportation, p 23.

aircraft may be of combat or non-combat types, i.e. armed or unarmed.<sup>5</sup>

## **1.1 Purpose**

The purpose of this thesis is to examine the principle of sovereignty in the air space and to what extent that sovereignty can be upheld against external intrusion from other state's aircraft. The aim is to present a de lege ferenda perspective on the regulations that should rule every nation's actions against aerial intruders.

## **1.2 Issues**

When the territorial air space is violated, what action or actions are permitted by the offended state? Is there a difference between state and civil aircraft when it comes to permissible actions? What will be the future solution to this problem?

## **1.3 Demarcations**

The theory of sovereignty is of course applicable on other areas than the air space but for the sake of this thesis I will limit the contents to the area of air space alone. In addition to intruding aircraft a state also have the right to prevent radio waves to penetrate the national air space. This will not be discussed in this thesis. The matter of air pollution from one state's air space to another will not be discussed either. Rights and regulations over the high seas will be touched upon but not dealt with. The thesis will focus on intrusions in peacetime since it is during that time that the sovereignty is governing the skies. Terra nullius will be mentioned but not treated. There will be no discussion regarding outer space since this thesis will limit itself to the atmospheric space. The Cold War will be considered as a time of peace.

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<sup>5</sup> The American Journal of International Law, Volume 47, 1953, p 559-60.

## **1.4 Any Methods or Explanatory Models**

I will describe the coming into being of the principle of sovereignty through history and then define what the principle consists of today and for what areas and spaces it is valuable. In the greater part of the thesis I will discuss the problems surrounding the issue of what constitutes a breach of sovereignty through legal theory and explanatory cases. The focus will be on the treatment of aerial intruders both during the event as well as after.

## **1.5 Material**

Most books on international law gives a general introduction to air law and its essential rules and regulations but presents no depth into the matter. On the whole, air law does not take up much space in international law journals and magazines, unless those exclusively devoted to the subject. Naturally, very little was written before the 1950's, since it was after World War II that international transport took off and States also developed different means to supervise their sovereign air space. Much of the material is written in the aftermath of a major incident causing great damages of lives and machines. As is the case within maritime law and perhaps any area of transport regulation systems, air law has 'blood priority'. That means that it takes human lives for the international community to react and act. With a great number of serious incidents during the 1950's and early 1960's, more publications materialized within that period of time. The next time new material was piling up was in the early 1980's when the Korean Airlines 747 was shot down with the loss of more than 250 lives. Every now and then articles are written to clarify current issues but no recent major changes of the international regulations with practical importance have prompted the legal writers to resurface.

## **1.6 Research situation**

The issue of sovereignty of states has been widely debated among states and individuals during a very long time. The issue of sovereignty in the air space has, for obvious reasons, been discussed during a much shorter time. Governing the civil aviation on the international level is the 1944 Chicago Convention on the Rules of the Air. It has now been in force for more than 50 years and it has been the subject of criticism since the standards and regulations are

not observed and followed appropriately by the Member States. There have been discussions about the future of the Convention and they involve such dramatic ideas of a completely new convention.

## **1.7 Disposition of the Thesis**

To begin with I will try to give a historical view on the development of the sovereignty of the air. The background will take us from the time of the Romans to the Second World War and the Chicago Convention on Civil Aviation. After that I will try to explain the principle of sovereignty in the air space with definitions of air territory and the frame of boundaries surrounding the sovereign territory. The main part of the thesis is about to what extent the sovereignty in the air can be upheld. There will be a differentiation between civil and state aircraft. After that follows a short discussion around the exclusive sovereignty and the European Union. Finally, there will be a summarizing analysis where I will try to bring it all together.

## 2 Background

Humans have for a long time been fascinated in free movement in the air. We can only speculate what the early people of the Earth thought when observing the birds flying around above them. Having a moment from the daily chores they possibly dreamt of swaying up above all problems. They were probably not very different from us in that sense. We recall the tale of Icarus in the Greek mythology, who crashed into the Aegean Sea when escaping from Knossos on the island of Crete as he flew too high and the sun melted the wax that attached the wings to his body. We are also familiar with the drawings of Leonardo da Vinci in which he laborated with the idea of wings attached to the body and also with something close to the construction of a helicopter. Both ideas depended on man-made power and was not accomplishable. Still, there were dreamers.

Within the Roman law, there was a difference between the notion of air and the notion of air space. Air and water, as physical elements, were treated as 'communia omnium', i.e. common to mankind and could not be taken into possession. There seems to have been no private or social control function at the time. In opposite, the air space did not have the same legal status as the physical element of air. Roman law regulated first and foremost the matters in the air space above public land, *populi Romani publicum*, but also non-commercial land, i.e. religious property, grave sites, etc. Furthermore, Roman law also regulated private property. The Roman state possessed all necessary powers to control and regulate the use of the air space above public land. As far back as 450 BC, the praetor of the Roman state could enact injunctions against the right to let branches from a tree grow over a neighbours cultivation plot. It is very obvious that the state regulates the rights of the air space between different landowners. There was a legal system that throughout was used to give the Roman state the control of a three dimensional area. Even if the land was privately owned, the Roman state had the last say on the issue of land and air.<sup>6</sup>

During the 12th and 13th centuries, the Glossographers in Bologna compiled, systemized and interpreted the old Roman law. In a passage regarding the air space above public land, it is said that the owner of the land should own it all the way up to space.<sup>7</sup>All in all,

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<sup>6</sup> Suveränitet i havet och luftrummet, p 207-10.

<sup>7</sup> Accursius, a note to Digesterna VIII.II.1. Suveränitet i havet och luftrummet, p 210.

the Roman legal system seems to have treated the use of the air space as a right of utility, subject to the sovereignty of the state. This was an undeveloped form of the principle of sovereignty.<sup>8</sup>

The 16th century saw the development towards the situation where the legal rights of private ownership were stated before the national supremacy. Iacobus Cuiacius (1522-90) was of the opinion that the legal status should be the same for land and air. Should the status change for either one of them, the status should change for the other as well. Hugo Grotius (1583-1645) points out, on the issue of rights in the air space, that the land area and the air space above it constitutes an unbreakable unit. The air space is of such magnitude that it is enough for every person's needs but also that those needs may be regulated by the state.<sup>9</sup> For a long time, the air space came to be seen as the unbreakable unit described by Grotius. There were exceptions regarding the right of taxation and even monopoly stemming from the sources of income found in the air space, such as bird catches.<sup>10</sup>

The first aircraft to leave the ground was a hot-air balloon constructed by the French Montgolfier brothers in 1783. The first known aeronautical regulation dates back to April 1784. It regards a prohibition for balloons to fly over Paris without prior authorisation. It was a police directive aimed at protecting the population of the French capital. The balloons became the earliest form of aerial transport.<sup>11</sup> Balloons were the very first aircraft used for aerial transport and for military purposes, such as reconnaissance and bombings.<sup>12</sup>

The issue of flying machines soon came to occupy the interest of lawyers. In 1900 the French jurist and writer Fauchille proposed the idea of a code of international air navigation to be drawn up by the 'Institut de Droit International'.<sup>13</sup> This was even before the first controlled flight with a power-driven heavier-than-air machine performed by the two brothers Orville and Wilbur Wright on the beach in Kitty Hawk, North Carolina, USA, in 1903. Three years later, in 1906, aircraft were flying in Europe for the first time. Together with other writers such as Lyckama á Nijeholt and Nys, Fauchille also suggested a 'freedom of the air' equivalent to Hugo

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<sup>8</sup> Suveränitet i havet och luftrummet, p 210-11.

<sup>9</sup> Suveränitet i havet och luftrummet, p 213, note 407.

<sup>10</sup> Suveränitet i havet och luftrummet, p 212-3.

<sup>11</sup> Air and Space Law, Vol XX, Number 6, 1995, p 311.

<sup>12</sup> Shawcross and Beaumont, 4<sup>th</sup> ed., Issue 70, note 1, p 1.

<sup>13</sup> An Introduction to Air Law, p 2.

Grotius' 'freedom of the high seas'. Like ships sailing on the high seas, aircraft should be able to fly between states freely. What they didn't think about was that while ships are restricted to the high seas and territorial waters, an aircraft could easily enter and penetrate deeply into the sovereign territories of states. A fact that was proven in July 1909, when Blériot crossed the English Channel from a place near Calais in France to land near Dover in England.<sup>14</sup> Naturally there were opponents to this idea who argued that each sovereign nation should have the right to control flight by domestic but most importantly foreign aircraft over its own territory, i.e. national sovereignty of the airspace.<sup>15</sup> Both ideas were discussed during the first international codification attempt on the issue in Paris 1910. German balloons frequently passed over French territory and there had already been a conference in the Hague in 1899 concerning aerial warfare involving balloons.<sup>16</sup> With the French-German war fresh in mind and the flourishing nationalism spreading through Europe at the time the French reaction was hardly surprising.<sup>17</sup> The Paris Conference followed the mood of the time and decided on the national sovereignty of the airspace.<sup>18</sup>

## 2.1 The First World War

During World War One few civil aircraft flew while all kinds of military aircraft were developed by the belligerent parties. Aircraft were used in massive numbers and in all sorts of roles, such as aerial combat, reconnaissance, bombing, ground attacks and naval warfare.<sup>19</sup>

After the First World War 1914-18 the aerial technology development had undergone major changes and improvements. The thinking had also developed during this time and there was an awareness about the connection between national security and national sovereignty of the airspace. Scheduled air services began slowly to emerge from the ashes in Europe. The first service was established between Paris and London in February of 1919 and between Paris and Brussels in March the same year. This need for

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<sup>14</sup> Shawcross and Beaumont, 4<sup>th</sup> ed., Issue 70, p 2.

<sup>15</sup> Air and Space Law, Vol XX, Number 6, 1995, p 311.

<sup>16</sup> International Declaration Prohibiting the Discharge of Projectiles and Explosives from Ballons (The Hague, July 29, 1899).

<sup>17</sup> The war was fought 1870-71. Prussia, under the supreme command of von Bismarck, was the victorious party.

<sup>18</sup> An Introduction to Air Law, p 2.

<sup>19</sup> Shawcross and Beaumont, 4<sup>th</sup> ed., Issue 70, p1.

the already existing agreements to be gathered into a convention led to a second Paris Convention in 1919.<sup>20</sup>

## 2.2 The Paris Convention of 1919

Meeting in Paris was natural since the World War I post war peace conference was held there with all major parties of the world community assembled. The Convention became the first legal instrument to enter into force in the field of air law, although it took years to implement it in an efficient manner. Ratified by 32 states, the outcome of the Convention showed an even stronger support for complete and exclusive sovereignty of the air space. Though successful in this way, it was never adopted by the United States and most of the South American republics. They were to adopt their own convention nine years later, in Havana. The Convention's first article recognized the complete and absolute sovereignty over the air space of the underlying state. This article confirmed what had become customary law and thereby was also applicable to states not parties of the 1919 Convention. The Convention discussed the issue of freedom of innocent passage but there is nothing about the freedom of civil aviation, i.e. it does not include the right to land in a foreign country.<sup>21</sup> In all, the Convention contained and established a system with rules overseeing the use and flight of aircraft over the territories of and between the Member States. There was also a permanent committee established to administer the Convention. Annexes were added regarding, among other things, standards of airworthiness and certificates of competency for crewmembers. Furthermore, the Convention also established the International Commission of Air Navigation (ICAN).<sup>22</sup> ICAN was given a wide range of supervisory powers in the technological area. The Convention also included the very first generally accepted definition of the term 'aircraft'. The definition was overtaken by the 1944 Chicago Convention and did not change until 1967 when the ICAO produced a new definition.<sup>23</sup> Civil aviation was practically non-

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<sup>20</sup> An Introduction to Air Law, p 2. See also Shawcross and Beaumont, 4<sup>th</sup> ed., Issue 70, note1, p 3.

<sup>21</sup> Air and Space Law, Volume XXIV, Number 2, 1999, p 71. An Introduction to Air Law, p 4.

<sup>22</sup> ICAN set up standards on technical matters and furnished the Member States with the collection and exchange of information on international civil aviation. See note 5, Air & Space Law, Volume XIX, Number 3, 1994.

<sup>23</sup> The first definition reads: '*Aircraft is any machine that can derive support in the atmosphere from the reactions of air*'. The second one, now in force, reads: '*Aircraft is any machine that can derive support in the atmosphere from the reactions of the air other than the reactions of the air against the earth's surface*'. The latter definition excludes hovercraft from the definition of 'aircraft. One should also bear in mind that the term

existent at the time of the Paris Convention and the only major branches of flying were either military or postal.

## 2.3 In Between Wars

In the following years a few more conferences were held regarding the development of civil aviation. The stipulations resulting from the 1926 Madrid Conference bore close resemblance to those of the Paris Convention. Of importance, though, was that these stipulations were recognized by several Latin-American states. The result came to be the Ibero-American Convention. Following this, the 1928 Havana Conference composed a small step forward. In comparison with the 1919 Paris Convention the former did not contain any technical annexes. Neither did it produce a measure of uniformity in air traffic regulations or arrange for something equal to the ICAN. Replacing the 1926 Convention with the Havana Pan-American Convention on Civil Aviation, the latter's article 4 spoke of the freedom of innocent overflight but did not contain any regulation restricting the freedom of regular airlines.<sup>24</sup> It was the equivalence of the Paris Convention for the United States and a number of South American states, though.

While the political situation stabilized in Europe the potential of aviation was obvious to many governments. A new epoch of productivity in the development of aircraft was entered upon. The flying machines became bigger and faster and grew largely in number. For example, the annual international competition between countries for the Schneider Trophy had since 1913 occupied the minds of many of the European and American aircraft constructors. It continued after World War One and the British winner of the competition in 1931, which brought the trophy permanently to Great Britain, after winning three consecutive races, was built by Supermarine and was the forerunner of the famous Spitfire fighter of World War Two. The first functional jet engine was developed in 1933<sup>25</sup> but was not yet ready to supersede the propeller engine.

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'aircraft' is perceived in various ways in different air law conventions. Rockets or missiles do probably not fit into the definitions above since they do not derive support in the atmosphere from the reactions of the air. A possible exception could be the World War II German V-1 rocket. An Introduction to Air Law, p 4-6.

<sup>24</sup> Air and Space Law, Volume XXIV, Number 2, 1999, p 71. An Introduction to Air Law, p 6.

<sup>25</sup> It was constructed by H. von Ohain of Germany and the first test flight in a suitable aircraft body, the Heinkel 178, took place in August, 1939.

There were only a few passenger planes developed during this period of peace but as the new conflict broke out in Europe and Asia, the need for bigger strategic bombers and transporters became necessary for the allied powers and their counterparts. These were later to stand model for pure passenger aircraft or were simply rebuilt after the war to serve as such. After 1939, it became possible to cross the oceans for the first time. Because of the Second World War, all efforts to find a common legal basis for international civil aviation were put forward indefinitely. Only when victory for the allied powers seemed secure, the future was worthwhile planning for. The world stage was set for a new convention that would replace all the parallel conventions above.

## **2.4 The Chicago Convention on International Civil Aviation**

On November 1 in 1944, with the allied powers slowly moving closer to victory both in Europe and in Asia, the American president Franklin D. Roosevelt invited all the allied powers together with some neutral governments to a conference in Chicago regarding civil aviation. The purpose of the conference was to come together for the future and make the use of the air space as efficient as possible. In his message to the Conference, Roosevelt described the need for a global air communication net as immediately necessary and announced that a large number of transport planes would be made available as soon as the enemy in Europe and Japan had been defeated. Because of the global extent of the conflict, trained pilots and airports were already in existence by the numbers. He further urged the participating States to create mutual trust between themselves and avoid dominance over each other. This was, according to Roosevelt, the key issue for the creation of a new convention.<sup>26</sup> A little more than a month later, on December 7, 52 states signed the Convention, along with two other agreements supplementing it.<sup>27</sup> The Convention needed 26 ratifications to enter into force and on the 4<sup>th</sup> of April 1947 it became functional. The Convention and its two annexing agreements meant that the contracting states recognized each other's right to fly through national air space and to use certain areas of their sovereign territories as landing sites.<sup>28</sup>

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<sup>26</sup> Air and Space Law, Volume XIX, Number 3, 1994, p 114.

<sup>27</sup> The annexing agreements are the "Two Freedoms" Agreement (International Air Services Transit Agreement) and the "Five Freedoms" Agreement (International Air Transport Agreement). These are explained later on in the thesis. An Introduction to Air Law, p 9-10.

<sup>28</sup> Folkrätten, 4<sup>th</sup> Ed., 1987, p 457.

Forecasting transatlantic commercial air traffic the United States and Great Britain made an agreement in 1935 on aerial navigation on international flights everywhere in the British Empire, except Commonwealth territories, and the American territory. Similar agreements were subsequently made between the United States and Eire, South Africa and Canada.

On the same day the Convention became functional, its administrative organization also came into being.

## 2.5 ICAO

The Chicago Convention also established the International Civil Aviation Organisation (ICAO) for the purposes enumerated in article 44 of the Convention:

The aims and objectives of the Organisation are to develop the principles and techniques of international air navigation and to foster the planning and development of international air transport so as to:

- (a) Insure the safe and orderly growth of international civil aviation throughout the world;
- (b) Encourage the arts of aircraft design and operation for peaceful purposes;
- (c) Encourage the development of airways, airports, and air navigation facilities for international civil aviation;
- (d) Meet the needs of the peoples of the world for safe, regular, efficient and economical air transport;
- (e) Prevent economic waste caused by unreasonable competition;
- (f) Insure that the rights of contracting States are fully respected and that every contracting State has a fair opportunity to operate international airlines;
- (g) Avoid discrimination between contracting States;
- (h) Promote safety of flight in international air navigation;
- (i) Promote generally the development of all aspects of international civil aeronautics.<sup>29</sup>

Today, more than 185 states have become members of the ICAO and thereby also acceded to the Convention. That means that the organization now has, in practice, universal membership. A large number of states have also signed or ratified the Transit Agreement in contrast to the Transport Agreement. The case seems to be that as soon as a new state becomes member of the United Nations (UN), it also becomes a member of the ICAO.<sup>30</sup> It is hardly surprising since the ICAO is a specialized agency within the UN placed under the Economic and Social Council (ECOSOC). The

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<sup>29</sup> See Article 44 of the 1944 Chicago Convention.

<sup>30</sup> Haveriutredningar, note 8, p 74.

structure of the ICAO bears strong resemblance to the structure of the UN, with an Assembly and a permanent body, the Council. Subordinate to the Council are several committees.<sup>31</sup> ICAO also has a Secretariat, headed by a Secretary General.<sup>32</sup>

Since its establishment the ICAO has become the main forum for the development of both international and consequently domestic air law. Its powers can in principal be described as quasi-legislative as it lays down not rules, per se, but international standards, especially when it comes to air navigation. Since 1944 several attempts have been made to set up rights of aircraft of contracting states to be able to fly into each other's territories on a multilateral basis, whether the aircraft are engaged in scheduled air services or in non-scheduled flights. These attempts have failed. Instead, the current system of traffic rights is basically relying on a large number of bilateral treaties. These treaties allows one state to fly its aircraft through another state's air space, usually in return for a similar concession from the first state. These bilateral treaties aim at creating a trade of rights that has equivalent commercial value.<sup>33</sup> The strength of the organisation is situated on the technical regulation and accordingly on safety. The Convention has had several technical annexes, and through them it has become a major force in the international arena.<sup>34</sup> There are 18 Annexes to the Convention and for this thesis Annex Number 2 on Rules of the Air is the most useful. Its relevant contents will be outlined later in the thesis under the appropriate sections.

ICAO works closely to other members of the UN organization whose areas of responsibility are kindred to that of the ICAO, such as the International Maritime Organization, the World Meteorological Organization and the World Health Organization. ICAO also works together with a number of non-governmental organizations, such as the International Air Transport Organization and the Airports Council International.<sup>35</sup>

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<sup>31</sup> An Introduction to Air Law, p 7-8. Haveritredningar, p 76-7. International Organizations, p 58.

<sup>32</sup> The *Assembly* is composed of representatives from all Contracting States. It is the sovereign body of the ICAO and meets every three years. The *Council* is the governing body, composed of 33 states for three year terms. It directs the work of the ICAO. The Council adopts Standards and Recommended Practices (SARPS) and these are incorporated to the Chicago Convention as Annexes. The *Secretariat* is divided into five main divisions, called Bureaus. They deal with navigation, transport, technical, legal and administrative matters. See How ICAO Works, [www.icao.int/icao/en/howworks.htm](http://www.icao.int/icao/en/howworks.htm), 2000-11-04.

<sup>33</sup> Akehurst's Modern Introduction to International Law, p 200-1.

<sup>34</sup> Haveritredningar, p 76.

<sup>35</sup> [www.icao.int/icao/en/howworks.htm](http://www.icao.int/icao/en/howworks.htm), 2000-11-04.

# 3 The Principle of Sovereignty

In superseding both the 1928 Havana Convention and the Paris Convention of 1919, the Chicago Convention overtook the first article on sovereignty from the Paris Convention almost as it was:

The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory.

This principle was, as seen before, accepted both in public national law and in international treaties and it was recognised by states to be part of international customary law. Article 1 is in this manner purely declaratory in its nature. As appears in the article, the principle of sovereignty also extends to non-parties of the Convention since it concludes that *every* state has complete sovereignty over its territory.<sup>36</sup>

The concept of territory is specified in article 2:

For the purposes of this Convention the territory of a State shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State.

This definition also applies to non-parties to the Convention. It appears that the Contracting States have accepted the principle that there is no sovereignty over the air space over the High Seas and over terra nullius, i.e. no man's land.<sup>37</sup>

## 3.1 Air Space

### 3.1.1 Vertical Boundaries

While the air space normally is perceived as the three dimensional space above the state's territory and thereby also within the jurisdiction of the state itself, this was not the reason to why Hans Kelsen considered the sovereign state to have jurisdiction of the space. He thought not primarily of the physical connections but on the fact that the state has jurisdiction within something he called a "Geltungsraum", i.e a space of validity. Kelsen describes this space

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<sup>36</sup> The Law of International Air Transport, p 120.

<sup>37</sup> The Law of International Air Transport, p 121.

as a room where not only the legal application of the territorial states but also the legal effect from a judicial act of that state, is three-dimensional. Not only in the width and length but also in the height and deep is the legal order applicable. Maybe the physical connections are not primarily considered for Kelsen's reasoning but it seems definitely to be part of it.<sup>38</sup>

The term "air space" denotes space where air can be found. Furthermore, it is the space within the atmosphere, all in harmony with the intention of those who drafted the 1919 Paris Convention. The English text used the word "airspace" whereas the French and Italian texts used the equivalence of the notion "atmospheric space". The territorial scope of the exclusive sovereignty therefore extends upwards into space and downward to the centre of the earth.<sup>39</sup> Within this territory the state exercises an unlimited power of monopoly.<sup>40</sup> This assumption has come into being during the development of the rules that prohibits the states to exercise any power within other states' territories.<sup>41</sup> J.C. Cooper has described it as follows:

"If any area on the surface of the earth, whether land or water, is recognized as part of the territory of a State, then the airspace over such area is also part of the territory of the same State. Conversely, if an area on the earth's surface is not part of the territory of any State, such as the water areas included in the high seas, then the airspace over such surface areas is not subject to the sovereign control of any State, and is free for the use of all states."<sup>42</sup>

The vertical delimitation of the air space has not yet been settled. No treaty regarding outer space defines it. What is clear is that no state has any claim to outer space. Different proposals have been made, such as the upper limit of the atmosphere, the limit of the earth's gravitational effects, the demarcation line between aeronautics and astronautics, the area which a state could effectively control, a clearly defined limit fixed by distance or finally, a more functional approach. None of these proposals have come to form a platform for deciding the vertical limit. For now, it is safe to say that the upper limit of a state's rights in the air space is above the height at which an aircraft can fly.<sup>43</sup>

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<sup>38</sup> Suveränitet i havet och luftrummet, p 200-1.

<sup>39</sup> The Law of International Air Transport, p 121. Also, see note 53 on p 121.

<sup>40</sup> Folkrätten, 4<sup>th</sup> Ed., 1987, p 456.

<sup>41</sup> Folkrätten, 4<sup>th</sup> Ed., 1987, p 402.

<sup>42</sup> The Journal of Air Law and Commerce, Volume 19, 1952, p 145. See also J.C. Cooper, "Airspace Rights over the Arctic," Air Affairs, Vol. III, 1950, p 517.

<sup>43</sup> Shawcross & Beaumont, Issue 50, IV, p 1.

### 3.1.2 Horizontal Boundaries

As seen during the development of air regulations, air law has a strong relationship to maritime law. The boundaries of the sovereignty in the air, coincides with the boundaries of the sovereignty of the sea. As seen in Cooper's definition above, the airspace over an area recognized as part of a State's territory gives that State the legal right to sovereignty. It is obvious that the land area belongs to the State sovereignty but what is the situation with the surrounding waters, if any? The Convention on the Law of the Sea states:

1. The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.
2. This sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil.
3. The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law.<sup>44</sup>

In article 3 of the Convention on the Law of the Sea, the width of the territorial sea is established to be no more than 12 nautical miles (one nautical mile is 1852 metres). Within this distance the coastal state has exclusive and total sovereignty. Generally, the baselines that decide the width of the territorial sea are determined by the low-tide water line along the coastal state. Some states have islands, bays and reefs to consider. The baselines are therefore seldom straight and in reality the breadth of the territorial sea is often more than the allowed breadth measured from the mainland.<sup>45</sup> Furthermore, the coastal state has the right of a contiguous zone of a maximum width of 24 nautical miles including the territorial waters. In this contiguous zone, the powers are restricted to special matters. Finally, the coastal state can establish an exclusive economic zone (EEZ) of 200 nautical miles. The exclusive sovereignty is for the territorial waters only. The freedom to fly over the contiguous zone and the EEZ cannot be debilitated even though the coastal state has the right to impose some restrictions. Further out, over the high seas, the right to fly is open to all. That right can only be limited by non-peaceful activities, since the high seas are reserved for peaceful purposes.<sup>46</sup>

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<sup>44</sup> Article 2 of the United Nations Convention on the Law of the Sea (1982), UN Doc A/Conf. 62/122 of October 7, 1982.

<sup>45</sup> International Law, p 138. See also Articles 3-10 in the United Nations Convention on the Law of the Sea (1982), UN Doc A/Conf. 62/122 of October 7, 1982.

<sup>46</sup> Shawcross & Beaumont, Issue 79, IV, p 2. Regarding the peaceful purposes of the High Seas, see Convention on the Law of the Sea, articles 86-88 in particular and also 78 and 135.

### 3.1.3 Additional Zones

In addition to the zones discussed above comes the air defence and identification zones (ADIZ and CADIZ) established by the United States and Canada in 1950 because of the war in Korea. These zones extend several hundred miles into the Atlantic and Pacific Oceans along the American and Canadian coastlines. The purpose is to be able to identify aircraft approaching the United States and Canada as early as possible. Besides the American and Canadian coast lines, equivalent zones were established around Guam, Hawaii, Puerto Rico and for Canada above its arctic areas. Also the Philippines have taken up this system, called the PADIZ. In any case, this unilateral action has been argued to be a breach of international law as an unwarranted extension of territorial sovereignty. The only defence for the action could be found under the principles of the right of self-defence and self-protection, established in article 51 of the United Nations Charter. Earlier identification has become more and more important as the time factor is crucial for deciding if any action need to be taken against an unidentified object and the right to identify seems to be compatible with human rights. It has been argued that the concept of identification zones is part of the general corpus of international law through tacit acquiescence of states. There were never really any protests and aircraft are as free to fly through the identification zones as through the air space above the high seas.<sup>47</sup> The Soviet Union seems to have never publicly upheld any ADIZ's.<sup>48</sup>

Anything equivalent to the rule of innocent passage, which we find within the maritime law system,<sup>49</sup> does not exist within the area of air law. There is however, a certain right of passage in the 1944 Chicago Convention. The air above the High Seas constitutes free air space and the principles valid for its use are basically the same as for the High Seas, however with due changes. The right to fly over the High Seas is expressed in the maritime conventions.<sup>50</sup>

## 3.2 Renunciation of sovereignty

In certain cases, the complete and exclusive sovereignty must be abandoned, either through voluntariness or duress. Two examples

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<sup>47</sup> Suveränitet i havet och lufrummet, p 272-6. See also Shawcross & Beaumont, Issue 79, IV, p 2.

<sup>48</sup> The American Journal of International Law, Volume 56, 1962, p 141.

<sup>49</sup> United Nations Convention on the Law of the Sea (1982), article 17-26.

<sup>50</sup> Folkrätten, 4<sup>th</sup> Ed., 1987, p 456-7.

are entering into agreements and a quite recent invention, the no-fly orders.

### 3.2.1 Agreements

The formal eminence of the principle of sovereignty prohibits other states to have any rights in other air spaces than their own. In practice, the situation for the civil aviation is different. The more functional principle of sovereignty neutralizes the formal one. Without a system for cooperation between the states, international traffic would not be possible. In the area of air traffic there is an extensive net of agreements of a universal character. All traffic must take place within the framework of this net of agreements. If not, since there is nothing completely equal to the 'innocent passage' found within maritime law, any moves will be unlawful seen through international public law regulations and it will also constitute a territorial violation of the underlying state.<sup>51</sup> The 1919 Paris Convention adopted the right of innocent passage, which clearly limited the force of the absolute principle of sovereignty. This right of innocent passage was restricted above prohibited areas, to state aircraft and scheduled air services. These services were instead referred to bilateral agreements. The Chicago Convention recognizes the right of innocent passage. It is the universally accepted principle of freedom of air traffic and not subject to the control of the territorial state beneath. The Transit Agreement, with the first two freedoms of overflight and stops for non-traffic purposes gives the right of innocent passage its legal platform in written law. The conclusion is that each state has exclusive sovereignty over its air space limited only by the right of innocent passage.<sup>52</sup>

The elements of the universal net of agreements consist of the freedoms of the air. These existed even before the 1944 Chicago Convention but came into extensive use in connection with the said Convention and the Agreements accepted in 1944. These freedoms must not be confused as being rights based on public law principles. The term 'freedom' refers to having the benefit of cooperation with other states that are members of the documents of the Chicago Convention or other bilateral agreements in its spirit.<sup>53</sup>

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<sup>51</sup> Suveränitet i havet och luftrummet, p 250-2.

<sup>52</sup> Aeronautical Law, p 61-2.

<sup>53</sup> Suveränitet i havet och luftrummet, p 252-3.

From a public law standpoint, the transit privileges are the most interesting. These permit the aircraft to legally penetrate the alien air space. Two Agreements have been attached to the 1944 Chicago Convention, i.e. the International Services Transit Agreement and the International Transport Agreement. The first two freedoms are found in the Transit Agreement, and subsequently in the Transport Agreement. They regard the privilege to fly across another state's territory without landing and the privilege to land for non-traffic purposes, also called a technical landing. These can involve such activities as refuelling and maintenance. In the Transport Agreement three more freedoms are found. The third concerns the ability to transport passengers, mail and cargo from one state to another. The fourth freedom regards the privilege to transport passengers, mail and cargo in the opposite direction, i.e. back to the home state. Finally, the fifth agreement contains the privilege to carry passengers, mail and cargo between two foreign states. This last freedom has caused the difficulties in practice and has made many states disinclined to join the Transport Agreement and therefore it has not amounted to much.<sup>54</sup>

### 3.2.2 No-fly orders

When necessary, the UN Security Council can issue a no-fly order. This means that states may be prohibited to make use of either parts of or the whole air space above their territory. These orders are issued for areas of armed conflict for reasons of humanitarian intervention. The purpose is to prevent or diminish aggression from the air against groups of the population in those areas. The UN Security Council can also decide that UN military aircraft may be allowed to enforce the no-fly orders. The legal basis for no-fly orders cannot be found in the 1944 Chicago Convention but in the UN Charter.<sup>55</sup>

Since the development of no-fly orders is of recent origin, the most well known example is that of the no-fly zones of Iraq. No Iraqi aircraft, military or civilian, are allowed to fly south of the 33rd degree of longitude and no farther north than the 36th degree of longitude. This is the result of aerial aggressions against minorities in

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<sup>54</sup> International Air Services Transit Agreement and International Air Transport Agreement, articles 1. See also An Introduction to Air Law, p 12-13. Apart from the freedoms above, there is an occurrence of three more freedoms, numbers 6, 7 and 8. These plays no major role and is said to express no more than minor variations of the first five freedoms. See An Introduction to Air Law, p 13, note 10, for definitions.

<sup>55</sup> An Introduction to Air Law, p 14.

Iraq. The bombing with chemicals of the Kurdish town of Halabja in the northern part of Iraq, with more than 5000 casualties, was a major incentive for the decision by the UN Security Council.

### 3.3 The legal status of a treaty

The Chicago Convention and its Annexes constitutes an international transaction of a legal character in written form and governed by international law.<sup>56</sup> Each treaty has four elements to fulfil in order to fully function. First, the parties to the convention must have capacity to conclude agreement of the provisions of the treaty under international law. Secondly, the parties should intend to apply principles of international law when concluding agreement under a treaty. Thirdly, there must be a meeting of the minds among the parties and finally, the parties must have the intention to create legal obligations among themselves. Furthermore, a treaty is based on three fundamental principles of international law, i.e. good faith, consent and international responsibility. Treaties are entered into because the states wish to create them. The voluntariness constitutes fertile soil for international cooperation.<sup>57</sup>

Article 27 of the Vienna Convention on the Law of Treaties (VCLT)<sup>58</sup> requires states not to use the national laws as an excuse for failure to comply with the provisions of a treaty because the overriding rule is that treaties are superior to national laws and have to be implemented.<sup>59</sup> Some rules have a stronger position than others. They are *jus cogens*, i.e. peremptory norms, which means that they are mandatory. Treaties or rules that are in conflict with these norms are automatically void. A peremptory norm of general international law allows no derogation from it. Article 53 of the VCLT states:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

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<sup>56</sup> The Vienna Convention on the Law of Treaties, article 2(a).

<sup>57</sup> Air & Space Law, Volume XIX, Number 3, 1994, p 118-19.

<sup>58</sup> Signed in Vienna on May 23<sup>rd</sup>, 1969, 1155 UNTS 331. Came into force on January 27, 1980.

<sup>59</sup> Air & Space Law, Volume XIX, Number 3, 1994, p 120.

The VCLT has implicitly established the principle that treaties are in fact *jus cogens* and the compliance with the provisions therein, is mandatory. The Chicago Convention was in accordance with the principles of accepted international legal norms when it was being concluded.<sup>60</sup>

Based on this it is understandable why article 3bis is not yet in force. If the character of 3bis is purely declaratory, the provision behind it is already in force. With all the problems regarding its interpretation it is probably more comfortable for the member states to leave it be for the moment. There should be a meeting of the minds in creating a new rule and there are differences among the member states as to what is legal when intercepting a civilian aircraft. Most nations follow the recommendation given by the ICAO in 1981 and considering the consequences of a downing, it is probably more convenient in the long run to do so. There is, however, a need for elbowroom in case of emergency, i.e. when the intruder penetrates security zones.

The legal status of the Chicago Convention has been much debated over the years since it came into being. Does the Convention contain provisions that admit legislative, i.e. law making, powers of ICAO? If so, to what extent can such law be enacted under the Convention? Legislative power has been described as ‘power to prescribe rules of civil conduct’, and law is to be seen as ‘rule of civil conduct’.<sup>61</sup>

### **3.3.1 The Legal Status of the Chicago Convention**

Articles 37 and 38 obligate all contracting states to have uniform standards, regulations, procedures and organization in order to improve air navigation. The contracting states are obliged to inform ICAO immediately if they cannot comply with these provisions or if they have different practices than that of the ICAO. If a state does not implement amendments within a certain time frame they must inform the ICAO. Article 54 imposes the adoption of international Standards and Recommended Practices (SARPS), later to become Annexes to the Convention. SARPS have two forms, one negative and one positive. The negative means that states shall not impose more than a certain maximum requirements. The positive form imposes that states must take certain steps as ordered by the ICAO Annexes. The Standards are mandatory and the Recommended

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<sup>60</sup> Air & Space Law, Volume XIX, Number 3, 1994, p 120.

<sup>61</sup> Schaake v. Dolly 85 Kan. 590., 118 Pac. 80. Air and Space Law, Volume XIX, Number 3, 1994, p 120.

Practices have a more loose form. The states should strive to fulfil them. The Assembly have even made efforts to facilitate the implementation of SARPS. These follow customary law and that gives them the effect of legal principles.<sup>62</sup>

Also, disputing states can turn to the ICAO Council to seek remedy in case of violation and possible damages. The Council is not the highest level of appeal. The disputing parties can appeal to an ad hoc arbitral tribunal which means that the Council continues to exercise some of its functions or if the disputing parties have accepted the jurisdiction of the International Court of Justice (ICJ), an appeal from a decision of the Council must be brought before the ICJ in accordance with Chapter XVIII of the Convention.<sup>63</sup>

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<sup>62</sup> Air & Space Law, Volume XIX, Number 3, 1994, p 121-2.

<sup>63</sup> The Law of International Air Transport, p 104.

# 4 To what extent can the sovereignty be upheld?

Since the Chicago Convention is only directed towards civil aviation and civil aircraft, a distinction is made between civil and state aircraft in article 3 of the Convention:

- (a) This Convention shall be applicable only to civil aircraft, and shall not be applicable to State aircraft.
- (b) Aircraft used in military, customs and police services shall be deemed to be State aircraft.
- (c) No State aircraft of a contracting State shall fly over the territory of another State or land thereon without authorisation by special agreement or otherwise, and in accordance with the terms thereof.
- (d) The contracting States undertake, when issuing regulations for their State aircraft, that they will have due regard for the safety of navigation of civil aircraft.

The first part of this chapter will deal with intruding civilian aircraft historically and the outcome of the incidents. The second part of the chapter will deal with state aircraft in a similar way.

## 4.1 Civilian Aircraft

### 4.1.1 Air France – April 1952

An Air France airliner on a scheduled flight from Frankfurt to Berlin was attacked by Soviet fighter aircraft in April 1952. The airliner was exposed to three or four isolated attacks with cannons and machine gun fire. Six of the passengers and crew, including the co-pilot, were injured by either bullets or metal splinters. Even though the airliner had taken serious hits in both starboard (right) engines and fuel tanks, it managed to land in Berlin. The Soviet Union claimed that the airliner had intruded Soviet air space without authorization and thereby violated Soviet air regulations. The French disagreed that an intrusion had occurred. Only a few minutes before the attack, the pilot of the airliner had received a position report stating that the aircraft was well within the flight corridor leading to Berlin.<sup>64</sup> The Allied High Commissioners in Germany not only

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<sup>64</sup> The flight corridor was 20 miles wide, i.e. 32 kilometres wide.

protested against the Soviet claim that the airliner intruded Soviet air space but also made a statement against firing on an unarmed aircraft.

Quite apart from these questions of facts, to fire in any circumstances, even by way of warning, on an unarmed aircraft in time of peace, wherever the aircraft may be, is entirely inadmissible and contrary to all standards of civilized behaviour.<sup>65</sup>

Together with the American, French and British Commandants in Berlin, the Allied High Commissioners demanded an immediate investigation of the incident in order to punish those responsible and also to pay for the damages to the aircraft and for the pain and suffering of the injured. The Soviet Union held on to its position that the airliner had intruded Soviet air space and had refused to pay heed to orders given by the fighters to land and delivered a strong protest against the airliner's actions. The Soviets also held that the shots fired on the airliner were not meant to harm but only as a warning.<sup>66</sup>

#### **4.1.2 Cathay Pacific – July 1954**

Two years later, in July 1954, an airliner of the Cathay Pacific carrier on a scheduled flight from Bangkok to Hong Kong was shot down by interceptors from the People's Republic of China outside the international air corridor of Hainan Island in the South Chinese Sea. Two passengers were killed by the gunfire and several others drowned after the pilots managed to ditch the plane into heavy seas. The aircraft commander, who survived the incident, claimed that the airliner had received no warning before the fuel tanks were scattered by gunfire and the western nations were not late in condemning the use of force. Great Britain and the United States required that China make reparations for property and personal losses. This prompted the Chinese, who immediately after the incident had made no admission of responsibility for the incident, to finally take full responsibility for the downing of the airliner and also to compensate the damage of property and the loss of life. Even this, they stood by their explanation that they thought the airliner to be a hostile Koumintang aircraft from the island of Taiwan.<sup>67</sup>

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<sup>65</sup> The American Journal of International Law, Volume 47, 1953, p 574. Journal of Air Law and Commerce, Volume 45 (1980), p 601. See London Times, April 30th 1952, at 6.

<sup>66</sup> Journal of Air Law and Commerce, Volume 45 (1980), p 600-601.

<sup>67</sup> Journal of Air Law and Commerce, Volume 45 (1980), p 601-602.

### 4.1.3 EIAI – July, 1955<sup>68</sup>

Perhaps the most severe incident during the 1950's is the downing of an EIAI airliner by Bulgarian interceptors in July 1955 over the Greek-Bulgarian border. The airliner was on its way from London to Israel with stops in Paris, Vienna and Istanbul on the way. The Bulgarian government claimed that the airliner had entered Bulgarian air space without any warning or proper authorization. At first, they maintained that the airliner was shot down by anti-aircraft defences, which were not able to identify the aircraft, since they were positioned on the ground. This was not the truth but the reason to why the Bulgarian government had misled the involved parties soon enough became obvious. The airliner had been shot down by fighters who could easily have identified the aircraft. All 58 on board, including seven crewmembers, were killed. The day after the downing Bulgaria received two sharp protests from Israel. The protests branded the attack as "shocking recklessness" and also as "a wanton disregard for human life and for elementary obligations of humanity." Israel called for punishments for those responsible as well as compensation for the aircraft and for the families of the deceased. Israel also protested against the Bulgarian initial decision not to let Israeli investigators examine the wreckage of the aircraft. After a while, Israeli civil aviation experts finally got their chance to examine the downed airliner, although reluctantly. These experts could confirm that the aircraft had been shot down by fighters and not from the ground. They even found out that the wreckage had been tampered with, in order to remove evidence. Since the passenger list consisted of many nationalities, the Bulgarian government received several sharp protests from different parts of the world.<sup>69</sup> The contents of the protests ranged from considering the attack a severe break of principles of international law to an act of war, as the French government described it. Each protest contained a demand for punishment of the responsible and for compensation to the families of the people killed. The Bulgarian government soon took responsibility for the incident and promised that the culprits would be punished and that the relatives of those killed would be compensated. The government also admitted that they had not done all they could do to make the airliner change direction and promised that a similar incident would not occur again.

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<sup>68</sup> Journal of Air Law and Commerce, Volume 45 (1980), p 602-611.

<sup>69</sup> The passengers came from Great Britain, Canada, South Africa, USA, France, Sweden and Israel.

The governments of Great Britain, United States and Israel went to the International Court of Justice (ICJ) for proceedings against the Bulgarian government. The applications held that the Bulgarian action was illegal under international law. They rested on the *Corfu Channel* case<sup>70</sup> where the ICJ put forward principles stating that in time of peace all unnecessary or reckless actions taken by states that run the risk of hurting or killing nationals of other states or cause destruction of their property is condemned by international law. The British and American applications also referred to the *Garcia v. United States* case<sup>71</sup> in order to strengthen and clarify that regard for humanity had a legal support. An American officer had opened fire on a raft returning back to the Mexican side of the Rio Grande River. He claimed he had fired without aiming at anybody in order to frighten the people on the raft but the outcome was that a small child was killed. The action was deemed illegal and disproportionate to the crime committed and shooting at people should not even be considered if there are other possible ways to prevent a criminal action. Furthermore, the British government argued that the downing of the ElAl airliner was inconsistent with the non-violence principle in the United Nations Charter and article 2 therein.<sup>72</sup> They continued their argumentation saying that using armed force against aircraft is not legitimate according to international law or article 51 in the United Nations Charter, if it is not in self-defence. The use of force against an airliner as in this case is not justifiable. Nothing in the Paris Convention or the Chicago Convention permits use of force. What they do permit is that each state has the right to establish areas, which for military or for public safety are prohibited to enter. Article 9 of the Chicago Convention states that each contracting state may order any aircraft flying over a prohibited area to land at a suitable airfield within its territory. Great Britain argued that since there was no support for the use of arms against civil aircraft in scheduled flights flying over restricted areas in any conventions on aerial navigation, the support for the use of force when unrestricted areas are overflown is even smaller.

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<sup>70</sup> *Corfu Channel Case, (1949) ICJ 4*. The ICJ held Albania responsible for not warning ships passing through its territorial waters about a mine field. The hold was based on a general principle, well known and even more important to follow in time of peace than in war. It rests upon every state not to let its territory be used for actions opposed to other states' rights.

<sup>71</sup> *Garcia Case (Mexico v. United States), 4 R. Int'l Arb. Awards 199 (1928)*. The case was decided by the Mexico-United States General Claims Commission.

<sup>72</sup> In section 4 of the article it is said that all members (of the United Nations) shall refrain in their international relations from the threat or use of force against the territorial integrity of political independence if any state, or in any other manner inconsistent with the Purposes of the United Nations.

All three memorials put on the table the principle of international law, giving ships the right of entry into the territory of a foreign state in cases of overriding necessity or distress. The memorials maintained that there is a right of entry for an aircraft in distress into the air space of a foreign state, analogue to the right of entry for ships in distress. At the time, article 22 of the Paris Convention allowed the same measures of assistance for landing, particularly in case of distress for foreign aircraft as for national aircraft. Article 25 of the Chicago Convention also imposes assistance to aircraft in distress.

Each contracting State undertakes to provide such measures of assistance to aircraft in distress in its territory as it may find practicable, and to permit, subject to control by its own authorities, the owners of the aircraft or authorities of the State in which the aircraft is registered to provide such measures of assistance as may be necessitated by the circumstances. [...]

The British memorial unconditionally rejected the use of force and considered the only proper remedy of the offended state was through diplomatic channels, after attempting to obtain satisfaction from the owner of the aircraft. The United States opinion was that armed force is excusable when the national security is threatened and all other possible means have been exhausted. Israel thought the use of force to be a normal reaction of the offended state, but stated that in time of peace, only two remedies are allowed. First, the offended state should require the intruder either to return to its authorized position or to submit the aircraft to a landing at an appropriate airfield followed by an examination of the aircraft. Secondly, the offended state should afterwards deal with the intrusion through its diplomatic channels.

These arguments by Great Britain, the United States and Israel were never reviewed by the ICJ since the Bulgarian government never had accepted the jurisdiction of the ICJ and therefore the Court did not have jurisdiction over Bulgaria.<sup>73</sup> Because of this, Great Britain withdrew its application to the ICJ against Bulgaria in 1959 and finally the United States decided to discontinue the proceedings and asked for the removal of the case from the Court's list in 1960.<sup>74</sup>

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<sup>73</sup> Bulgaria had in 1921 accepted the optional clause of the Permanent Court of International Justice but this acceptance was no longer valid in the new court, i.e. the ICJ.

<sup>74</sup> The American Journal of International Law, Volume 56, 1962, p 357-8.

#### **4.1.4 Libyan Airlines – February 1973**

In February of 1973 a Libyan Airlines Boeing 727 was downed by Israeli interceptors over the Sinai peninsula which at the time was occupied by Israel. The airliner was on route from Tripoli to Cairo and after it had overflown Cairo it entered Israeli-occupied territory by twelve miles and was shot at by Israeli fighters which caused the airliner to crash-land resulting in destruction of the aircraft and the loss of 108 lives. The response from the Egyptian government stated that the action was a violation of international law. It was also alleged that the Israeli fighters fired without warning and that the pilot of the airliner was aware of the fact that he was outside the lawful air space and had contacted Egyptian air controllers just before the plane was hit by the shots. Israel defended the action, saying that the airliner violated the air space over occupied territory and thereby a sensitive area and that the action was in accordance with international law and that the measure was taken only after serious consideration. Israel held that the pilot of the airliner did not regard any of the warnings given prior to the downing. Finally the fighter pilots claimed that the purpose was only to damage the airliner to make it land and the intention was not to shoot it down. The following reaction from the ICAO was swift, zealous and of major importance. Five experts from the ICAO secretariat formed an investigation team to probe the downing. Following the report from the group the ICAO adopted a resolution<sup>75</sup> that strongly condemned the Israeli action and implored Israel to observe the aims and objectives of the Chicago Convention.<sup>76</sup>

#### **4.1.5 Korean Air Lines – April 1978**

In April 1978 a Korean Air Lines (KAL) Boeing 707 flying from Paris to Seoul, was forced down by Soviet interceptors after entering Soviet air space. One of the interceptors fired at the airliner, killing two and wounding eleven of the passengers. The airliner had entered a Soviet high security zone in the White Sea area and was forced to land on a frozen lake some 370 kilometres south of Murmansk. The passengers and crewmembers were soon shipped out of the Soviet Union. This time the reaction from the affected state, i.e. South Korea, was different from the previous incidents. The South Korean president thanked the Soviet Union for returning the passengers and crew so quickly and very soon another

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<sup>75</sup> ICAO Council Resolution of June 4, 1973, ICAO Bulletin 13 (July, 1973).

<sup>76</sup> Journal of Air Law and Commerce, Volume 45 (1980), p 611-612.

expression of gratitude was given by the South Korean Foreign Minister for the release of the airliner's aircraft commander and navigator. According to the information released from the Soviet authorities, the KAL airliner entered prohibited air space heading south and did not obey the orders given by the Soviet interceptors. The flight continued for two hours before the airliner was fired at. According to the authorities the aircraft commander and navigator admitted to breaking the international rules of flight and also that they had not obeyed the pre shooting warnings. The same authorities also stated that the airliner once it was intercepted, had attempted to change its course in a westward direction towards Finland. These events were not challenged by South Korea who did not reprimand the Soviet Union. Normally an incident of this kind, as we have seen, brings about reactions from other states but in this case that did not happen. The reason for that is probably that South Korea itself did not protest against the incident.<sup>77</sup>

#### **4.1.5.1 Customary Law until 1984**

In no case above can there be found any claim of an unqualified right to use force against the intruding aircraft by any of the offended territorial states. Some of the states defended their action with reference to its own rights and obligations under international law. But most importantly, they alleged aggravating circumstances to explain their action. The most essential among these circumstances was the failure or refusal of the intruding aircraft to comply with the warnings and instructions of the intercepting fighters.<sup>78</sup> This was held by the Soviet Union in both cases they were involved in, i.e. in 1952 and 1978. The Bulgarian government claimed the EIAI airliner did not follow the instructions given by the interceptors in the 1955 case. Also Israel maintained that in the incident of 1973, the Libyan airliner refused to regard the repeated warnings. In the case of the downing of the Cathay Pacific airliner in 1954 the Chinese only claimed that the aircraft was mistaken for a hostile Koumintang aircraft. They did not deny that no warning was given.<sup>79</sup>

It does not matter if these claims are true or not. What they do reveal is that all the offended states felt obliged to defend their action since there is not much support for states to have an unqualified, absolute right to use force against intruding civil airliners. There is a

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<sup>77</sup> Journal of Air Law and Commerce, Volume 45 (1980), p 613-614.

<sup>78</sup> Air Law, Volume IX, number 3, 1984, p 138.

<sup>79</sup> Air Law, Volume IX, number 3, 1984, p 139.

difference of opinion between states whether there should ever be lawful to use force against civil aircraft in peacetime or not. It seems like this issue has led to a customary international law or at least a general consensus among states, that there is no unqualified right to use force against intruding civil aircraft. There are certain standards to be followed according to customary international law and article 9 of the Chicago Convention 1944. Both reject the use of force against intruders as a primary remedy for the offended state. Instead, there seems to be other ways of dealing with intruding civil aircraft.

Certainly, all states have the right to react and act on violations of their air space. International law contains certain standards to be followed in case of intrusions. If a state chose not to use the means permitted it does not automatically imply that the state considers these means as unlawful. Holding back could instead imply that there is a lack of those means or simply mean that there are other considerations of practicality or humanity. Perhaps there is no rule of customary international law.<sup>80</sup> The view of the Permanent Court of International Justice in the *Lotus Case* was that all states that bind themselves to the rules of law do this by their own free will. Therefore, restrictions cannot be laid on independent states. The court continues by saying that "every State remains free to adopt the principles which it regards as best and most suitable."<sup>81</sup> Following this, it is probably more accurate to talk about a legal right or privilege for each state to react and act. Even if there is no universally accepted rule of what these actions may be, there are, as said above, certain standards of behaviour to follow.

First, the state intruded upon must give the intruding aircraft an indication that it is performing an unauthorised act. This must be done without risking the aircraft or its passengers and crew. While this is conducted, the offended state may either make the intruder leave and return to its authorised position or land on an airfield suitable for the aircraft followed by an examination of the aircraft. Secondly, the offended state may only use diplomatic channels to put forward suitable demands or protests against the violation of their sovereignty.<sup>82</sup>

If armed force is used it is only lawful if it is necessary to force or effect a landing for the security of the offended state. Also, firing on

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<sup>80</sup> The American Journal of International Law, Volume 47, 1953, p 585.

<sup>81</sup> The Lotus Case, 1927, P.C.I.J., Section A, 4 Annual Digest of Public International Law Cases (1927-28).

<sup>82</sup> Air Law, Volume IX, number 3, 1984, p 139. See also Annals of Air and Space Law, Volume IX, 1984, p 155. Journal of Air Law and Commerce, Volume 45 (1980), p 619-20.

the intruding aircraft in order to discontinue the flight must be in reasonable proportion to the danger of the offended state emanating from the intrusion. In addition to this, all other possible ways of discontinuing the flight must have been exhausted, i.e. that the aircraft has refused to follow instructions to return to authorised air space or to land at an airfield designated by the interceptors. All these three criteria must be satisfied for the state intruded upon to lawfully shoot down the intruder. If this is not the case, any use of armed force against a civilian aircraft will be unlawful. The state will have to turn to the Chicago Convention and international customary law for corrective procedure.<sup>83</sup>

#### **4.1.6 KE007 and its consequences**

While the incidents in the past were bad enough and surely grounds for questioning the actions by the offended states, the worst was yet to come. In 1981 ICAO recommended its member states that 'intercepting aircraft should refrain from the use of weapons in all cases of interception of civil aircraft'.<sup>84</sup> Two years later, these words echoed empty in the sky over the Sea of Japan.

#### **KE007 – September 1983**

Only five years after the first Korean Air Lines incident, a second and much more grave action took place over the Sea of Japan. On the last of August 1983 flight KE007, a Boeing 747 with 269 people on board, including flight and cabin crew, on route from Anchorage in Alaska to Seoul in South Korea, was shot down by Soviet interceptors near Sakhalin Island. The airliner had violated restricted air space over Soviet territory and all people on board were killed in the downing. This incident alone caused more people to die than all the others mentioned above combined. The plane took off from Anchorage destined to land a little less than eight hours later in Seoul. Not long after the departure, KE007 started to deviate to the north from its planned course.<sup>85</sup> The drift was consistent for almost five and a half hours which led to a progressively greater deviation from the planned course. This made the airliner to penetrate Soviet Union restricted air space and according to the Soviet authorities

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<sup>83</sup> Air Law, Volume IX, number 3, 1984, p 140. See also Annals of Air and Space Law, Volume IX, 1984, p 155-6.

<sup>84</sup> Akehurst's Modern Introduction to International Law, p 199. Quote originally taken from ILM 22 (1983), 1185, 1187.

<sup>85</sup> Air Worthy, p 49.

there were two interception attempts, finally resulting in the downing of the airliner. The probable cause of the deviation from the assigned course was that, according to the ICAO report,<sup>86</sup> the flight crew had set the INS system incorrectly.<sup>87</sup> According to the analysis and conclusions submitted by the Russian Federation the INS was in good working order and had the flight crew used the terrain mapping mode they would soon have discovered that they were flying above actual terrain, the Kamchatka Peninsula, and not above water as they were supposed to do according to their planned airway.<sup>88</sup> The ICAO investigation confirms that the flight crew did not implement the proper navigation procedures for the aircraft to remain on its assigned airway. KE007 was mistaken for a United States intelligence aircraft in the area and the Soviet air defence presumed the airliner was a military aircraft. The investigation concludes that all-inclusive efforts to identify the airliner were not made even though the Soviet air defence were not sure of its identity. Most importantly, the Soviet interceptors did not act in compliance with the ICAO standards and recommended practices before attacking KE007.<sup>89</sup> At the time of the downing the airliner was about 300 nautical miles off course and well over the sovereign territory of the Soviet Union. According to the ICAO report, the flight crew seems to have been totally unaware of the deviation which points to the fact that the intrusion was non-deliberate. Neither the flight data or voice recorders were recovered from the airliner at that time.<sup>90</sup> It was not until 1992 that Russian leaders admitted that the black box tape recorder, together with the wreckage, had been localized and after listening to the tape, they found no evidence the flight crew was aware of their mistake.<sup>91</sup> Nevertheless, the Soviet Union placed all responsibility for the incident on the United States. It never deviated from its position that the interceptors had acted to defend the Soviet air space from a United States intelligence aircraft involved in

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<sup>86</sup> ICAO Document. Ref. LE 4/19.4 – 93/98.

<sup>87</sup> Inertial Navigation System. An electronic system capable of navigating an aircraft in a precise and reliable manner without any position information from outside the aircraft. The flight crew puts in initial departure point position information, such as the latitude and longitude of the departing point, and based on that, the INS is continuously updating the flight crew of present position, ground speed, attitude and direction. It can also provide steering information for the autopilot and the flight instruments. One big advantage it provides is that since the system is self-supporting, it is not sensitive to outside interference, such as jamming. Normally all three in the cockpit crew, i.e. pilot, co-pilot and flight engineer, take part in supplying the system with the relevant information. See Air Law, Volume IX, number 3, 1984, p 143-4 for a more exhaustive explanation.

<sup>88</sup> ICAO Document. Ref. LE 4/19.4 – 93/98, Attachment D, p 7.

<sup>89</sup> ICAO Document. Ref. LE 4/19.4 – 93/98, Attachment B, p 59-61.

<sup>90</sup> Air Law, Volume IX, number3, 1984, p 141.

<sup>91</sup> National Geographic, Volume 185, No.4, April 1994, p 56.

espionage activities. The Soviet Union even vetoed a resolution by the UN Security Council expressing regrets regarding the downing.<sup>92</sup>

#### **4.1.7 The Amendment 3bis**

The downing of KE007 brought about an Extraordinary Session of the ICAO Council in Montreal on September 15-16, 1983. The Session was requested by Canada and South Korea in order to consider the incident. Two resolutions were adopted. First, the Secretary General of the ICAO were to initiate an investigation of the incident in order to determine the facts and technical aspects and also for the Air Navigation Commission to review the Chicago Convention and other related documents and to examine possible amendments in order to avoid a repetition of the tragedy. The other resolution ordered the ANC to deal with special tasks and thereafter report to the ICAO Council. These resolutions were endorsed by the 24th Session of the ICAO Assembly in September-October the same year. Proposals for the amendment of the Chicago Convention were made and statements concerning these were considered. Later the same year, the Council was handed the Air Navigation Commission's Report and the Secretary General's Final Report ordered by the ICAO Council. The latter found that the violation of the Soviet air space was due to human error rather than to deliberate intentions for the sake of espionage or fuel saving. The blame for the deviation was laid on the lack of alertness by the flight crew.

The following year, April 24-May 10 of 1984, the ICAO Assembly convened for an extraordinary session in order to amend the Chicago Convention with a specific rule prohibiting the use of arms against civil aviation. With this rule, the Assembly sought to find a balance between the safety of civil aviation and the sovereignty of states. It was unanimously adopted and the purpose was not to create a new rule but to consecrate an already existing principle. The general desire was to reaffirm the principle of non-use of weapons against civil aircraft in flight. The new article was named 3bis. In order to enter into force, the article must be ratified by two-thirds of the ICAO member States.<sup>93</sup>

(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 must not be interpreted as modifying in

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<sup>92</sup> Annals of Air and Space Law, Volume IX, 1984, p 150-1.

<sup>93</sup> Annals of Air and Space Law, Volume IX, 1984, p 151-3.

any way the rights and obligations of States set forth in the Charter of the United Nations.

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

Dr. Assad Kotaite, the ICAO Council President described the situation as although already an existing principle and by many considered to be a firm part of general international law without any need for codification, the purpose of the adoption of article 3bis must be seen as an enshrinement of the principles of humanity, safety and protection of human life. In time of peace and of war, international law aims to protect civilians exposed to danger. The difference between written law and customary law is that the latter fills the gaps that exist in written law and also gives precision to unsettled abstract general principles. Dr. Kotaite refers to the words of the Secretary-General of the UN<sup>94</sup> who in 1982 said of written law that "a written rule of law is far superior to general principles recognized as customary law because frequently the very existence of a customary law or its exact scope and content may remain subject to challenge..."<sup>95</sup>

Innocent lives are often lost in times of conflict and it is very difficult to offer full protection in belligerent areas but in time of peace no

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<sup>94</sup> Mr. Javier Perez de Cuéllar. He served as Secretary-General between 1982 and 1992.

<sup>95</sup> Annals of Air and Space Law, Volume IX, 1984, p 154-5. See also ICAO A25 - Min. (1984) p 1.

weapons should be used against civilian vehicles and this increases the demand for protection of civilians in time of peace.

The main objective of the amendment was to remedy this deficiency as soon as possible. There was a clear need for a provision in international law which conclusively rejected the use of weapons against civil aircraft. Many of the delegates to the Assembly considered the amendment to be of declaratory character. If this is the case, what are the legal implications coming out of it?

First, there may be the view that article 3bis is already valid in international law, even though it has not yet come into force. This comes from the opinion that customary law had always been as was stated in the new article, even for non-members of the ICAO. Secondly, at the time of the vote, the ICAO members had, together and on their own, come to the conclusion that the rules incorporated in article 3bis was part of existing general international law, even though this view was not shared by ICAO non-members. In fact, as a result of the adoption of the amendment, the article would be operative among themselves even before it entered into force. Finally, there is the possibility that the ICAO members have decided to await the coming into force of the article to treat it as written international law.<sup>96</sup>

The ICAO members would still be bound by its declaratory character and by the recommendation of the ICAO not to use weapons against civil aircraft. This seems to be the prevailing point of view. The Contracting states seems to be satisfied with the customary law instead of binding themselves to a written law that can be used against them, since a written law is considered to be more powerful than a non-written law.

#### **4.1.7.1 Support in the Annexes**

In Annex 2<sup>97</sup> to the Chicago Convention, there is support for article 3bis. In Annex 2 it is stated that ‘intercepting aircraft should refrain from the use of weapons in all cases of interception of civil aircraft.’ It is noticeable that the Annex says that intercepting aircraft “should” refrain from the use of weapons while article 3bis uses the word “must”. The Annex expresses what customary law says about the use of weapons against civil aircraft. Customary law sternly restricts

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<sup>96</sup> Air Worthy, p 59-61.

<sup>97</sup> ICAO Document Ref. LE 4/19.4 – 93/98, Attachment A, paragraph 7.

the right for intercepting aircraft to fire at intruders but do not deny it dictatorially.<sup>98</sup>

Both article 3bis and Annex 2 says ‘to refrain’ from the use of weapons. The expression merely means a voluntary non-performance of an action. Well, if this wording seems vague, the end of the same sentence speaks more clearly. It says ‘the lives of persons on board and the safety of aircraft must not be endangered.’ In conclusion, the somewhat vague expression ends up with a more firm view on the use of weapons against civil aircraft. It could mean that, while the safety of the aircraft must not be endangered, the use of weapons as a warning should be avoided if possible. One should, at this time, keep in mind the inward sense of article 3bis. It was accepted by the ICAO Assembly in order to prevent any further incidents equal to the KE007 downing. Even if the chosen language was somewhat vague, the spirit of the rule clearly prohibits the use of weapons.<sup>99</sup> Perhaps the vague wording helped the article to be accepted unanimously by the Assembly.

#### **4.1.7.2 Other means than weapons**

Article 3bis prohibits the use of weapons but does not mention ‘force’. The delegates to the ICAO Assembly simply agreed to, that any force used should be proportionate and adequate the specific situation. The violated state must have some kind of means to make an intruder leave. These means, though, must not endanger the lives of the passengers on board.<sup>100</sup>

#### **4.1.7.3 In flight**

Article 3bis is only applicable to civil aircraft ‘in flight’. The term could also be expressed as ‘flight time’ and there are two popular definitions of the term ‘flight time’. Both are found in the 1963 Tokyo Convention on Offences and Certain Other Acts Committed On Board Aircraft. Generally the term ‘flight time’ is defined to be the time from ‘the moment when power is applied for the purpose of take-off until the moment when the landing run ends’.<sup>101</sup> Another

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<sup>98</sup> Annals of Air and Space Law, Volume IX, 1984, p 154 and 156.  
also Air Worthy, p 61.

<sup>99</sup> Air Worthy, p 61-2.

<sup>100</sup> Air Worthy, p 62-3.

<sup>101</sup> The Tokyo Convention, article 1, paragraph 3. Definition taken from the 1952 Rome Convention relating to damage to third parties on the surface.

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definition, usually linked to the authority of the aircraft commander, saying that an aircraft is in flight 'at any time from the moment when all its external doors are closed following embarkation until the moment when any such door is opened for disembarkation'.<sup>102</sup> After the aircraft has closed its doors, it is cut off from the external world and the powers of the aircraft commander come into force and these powers should enable the commander to take internationally recognised measures to protect the aircraft together with the people and goods on board. Both definitions are there to guarantee that the aircraft does not operate outside the scope of the Chicago Convention.<sup>103</sup>

Another result of the wording 'in flight' is that it has become applicable not only to foreign registered aircraft but also to aircraft of a state's own registration. This is very unusual in international agreements and even though the very explicit wording in the article, it has been suggested that the unusualness would disqualify the application of such an interpretation.<sup>104</sup>

No attempts have been made in article 3bis to define the term 'in flight'. For the time being the definitions in the Tokyo Convention will have to suffice. In both definitions an aircraft is in flight while still on the ground but the circumstances that has brought forward the amendment are based on intrusions in the air and not on the ground. The inward sense of the term 'in flight' in the article is most likely in regard of airborne aircraft.

#### **4.1.7.4 Problems with 3bis in practice**

Seventeen years after its unanimous acceptance, article 3bis has not yet entered into force. Why is that? The problems with the article go beyond the wording. First, the article does not give an answer to all practical situations it is supposed to be applicable to. For the purpose of this thesis, the most important problem arise when, for instance, a civil aircraft is used for purposes making it a non-civil aircraft, such as gathering military intelligence and doing so with or without the knowledge of the crew or the operator and the state intruded upon is aware of it. Then article 3bis is not applicable in accordance with article 3 of the same convention.<sup>105</sup> Has the aircraft become a state aircraft?

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<sup>102</sup> The Tokyo Convention, article 5, paragraph 2.

<sup>103</sup> An Introduction to Air Law, p 206-7.

<sup>104</sup> Air Worthy, p 62-3.

<sup>105</sup> Air Worthy, p 65.

The prohibited use of civil aviation by states, may not compromise the civil nature of the aircraft. Any use of military aircraft is not within the scope of article 3bis. Should there be a doubt whether an aircraft is used for civil or military purpose, the Chicago Convention seems to presume in favour of the civil character of the aircraft. This means that the state whose territory was being violated would be without means to legally defend its air space and national interests. The means actually permitted are expressed in article 3bis and they are subject to the prohibition of the use of weapons.<sup>106</sup>

#### **4.1.7.4.1 Safety most important**

An amount of attention should be directed towards the second half of the first sentence and the second sentence of article 3bis. The obligation in the second half of the first sentence in paragraph (a) is much more rigid than that in the first half of the article. When taking a closer look on paragraph (a) it seems like it is the safety of the aircraft and the lives of those on board that matters and perhaps not so much what is used against civil aircraft. The importance of paragraph (a) is then emphasized in the following paragraphs (b) and (c).<sup>107</sup>

#### **4.1.7.5 Grounds for interception**

Article 3bis seems to recognise two major grounds for a state to require a civil aircraft flying over its territory to make a landing at an appropriate airfield. Paragraph (b) states that the requirement is allowed when such an aircraft is flying above its territory without authority and when there are reasonable grounds to conclude that it is being used for any purpose inconsistent with the aims of the Chicago Convention. The same state may, if it so chooses, give any other instructions to put an end to the violation. In accordance with article 4 of the Chicago Convention all member states have taken upon themselves 'not to use civil aviation for any purposes inconsistent with the aims of this Convention'.<sup>108</sup>

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<sup>106</sup> Annals of Air and Space Law, Volume IX, 1984, p 156.

<sup>107</sup> Air Worthy, p 67.

<sup>108</sup> Air Worthy, p 68. See article 4 of the Chicago Convention.

#### 4.1.7.6 Remedies

The offended state can require the intruder to land either from the ground or through interceptors. If the intruder refuses to comply with the order, the only action permitted by the Chicago Convention is to end the violation through diplomatic channels. Any penalties against intruding aircraft not complying with orders to land are left to the state of registry or of principal place of business or residence of the operator. If a state itself is guilty of misuse of civil aircraft for its own purposes or for the advantage of a third party, any real sanctions are not to be expected. The only way left for the offended state to seek remedy would be to pursue a settlement of the dispute with the ICAO Council. That is, if the offended state is a Contracting State and thereby has recognized the compulsory jurisdiction of the Council. If all the required conditions for the jurisdiction of the Council are fulfilled, then the Council can adjudicate the disagreement.<sup>109</sup> Over the years, this solution has been used only a few times.<sup>110</sup>

The absence of specific penalties for breaching the ban on the use of weapons and thereby leaving this to the state of registry or principal place of residence or business of the operator is most likely a major reason to why the amendment was unanimously accepted by the Assembly. This, together with the need to give expression to the sense of shock and horror left by the fatal downing of KE007.<sup>111</sup>

Richard concludes by saying that even if Article 3bis is not yet in force, it has succeeded in confirming and reinforcing the principle of non-use of weapons against civil aircraft in flight. It has also given the Member States a provision, not in force though but unanimously accepted, to point to when so needed. At least, Article 3bis has helped to enhance the safety of civil aviation extensively, all in accordance with the aims and objectives of the Chicago Convention. National security has been strengthened by the immunity brought on by the amendment, which has increased the incentives for

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<sup>109</sup> The required conditions are (1) there must be a dispute between the parties and (2) the dispute must relate to the interpretation or application of the Convention or its Annexes and (3) it is only a Contracting State which is part in the dispute that can refer the case to the Council for settlement and (4) it must have been settled that the dispute cannot be decided by negotiation before it appears before the Council. All four conditions must be fulfilled at the same time. If not, the Council will have to abstain from assuming jurisdiction.

<sup>110</sup> *Annals of Air and Space Law*, Volume IX, 1984, p 157. Between 1952 and 1971 there were three disputes for the ICAO Council to decide upon. India and Pakistan has had disagreements twice (1952 and 1971) and the third dispute was between Great Britain and Spain (1967).

<sup>111</sup> *Annals of Air and Space Law*, Volume IX, 1984, p 159.

discouraging misuse of civil aviation. As economic sanctions no longer pose a threat in an increasingly interdependent world, the most effective safeguard against the misuse of civil aviation remains the self-interest of states in preserving the integrity of a well-functioning Chicago Convention.<sup>112</sup>

Obviously Richard has a point saying that sanctions no longer pose a threat to most countries but it certainly has not played out its role completely. If the intruding aircraft is registered in a powerful country, such as the United States, and the action taken against the aircraft is devastating in terms of material losses or losses of lives, then certainly economic sanctions could play a major role. The influence from an important state would definitely keep others from interacting with the transgressor.

#### **4.1.8 Brothers to the Rescue – February 1996**

The incident that is closest in time is the downing of two civilian aircraft (from Brothers to the Rescue) registered in the United States by Cuban military aircraft. Four lives were lost. The president of the UN Security Council<sup>113</sup> issued a statement, which condemned the act with reference to article 3bis of the 1944 Chicago Convention. The president also called for an investigation of the incident by the ICAO. Little more than two weeks later, the United States President Clinton, approved sanctions against Cuba under the Cuban Liberty and Democratic Solidarity Act of 1996.<sup>114</sup>

This hardly worsened the socio economic situation in Cuba since the United States has had sanctions against the country for decades. Sanctions probably did not have any affect other than the statement made by the United States.

#### **4.2 How far can the offended state go?**

Not far at all, in fact. None of the incidents presented above admits the use of weapons on civil aircraft. On the contrary, both human aspects together with established international customary law prohibits the use of arms on a civil aircraft. After the incident with the Air France aircraft in 1952, the Allied High Commissioners in Berlin

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<sup>112</sup> Annals of Air and Space Law, Volume IX, 1984, p 159-60.

<sup>113</sup> The United States UN Ambassador Madeleine Albright was president at the time.

<sup>114</sup> Akehurst's Modern Introduction to International Law, p 200.

thought the action to use weapons on unarmed aircraft in peacetime to be intolerable and against civilized behaviour. I must agree with them. Whenever a civil aircraft is shot down or damaged after the use of force, there seems to be an infected political situation behind the action.

Customary law says that using weapons on a civil aircraft is not legal. Even if article 3bis is the first provision to make clear what actions may be taken in case of an intrusion, it only declares what has been known and accepted for a longer time. Also, 3bis expresses common sense in dealing with intruders. The risk of the loss of lives is so great if the provisions in the article are not followed that it should deter the offended state from using armed force against the aircraft.

As also said below about state aircraft, the defence weapons on military aircraft are today very sophisticated and effective. The risk of running into a military aircraft instead of a civil one when intercepting, as in the case of KE007 according to the Soviets, may be ground for shooting first and ask questions later. The rockets fired at the KE007 were launched from several thousand meters. One would wonder if the interceptors really identified the aircraft thoroughly. They acted in accordance with their national legislation but against customary law. The result was devastating. The action taken against the intruder must be proportionate.

## **4.3 State Aircraft**

The number of intrusions involving state aircraft has undoubtedly outnumbered those involving civilian aircraft. We know for a fact that almost all countries around the world at least keep an eye on their neighbours and some do more than that. Both super powers during the Cold War, the United States and the Soviet Union, repeatedly ended up in situations of intrusion followed by either belligerent action or subsequent diplomatic protests. The incident above involving flight KE007 is an example where one party claim it fired at a state aircraft.

### **4.3.1 Definition of a State Aircraft**

The main criterion for a state aircraft to be a state aircraft would be that it is intended for use in the public service. As a rule, an aircraft is

identified as a state aircraft if it is under control of the state and used exclusively by the state for state-intended purposes. Except for military, customs and police aircraft also mail-carrying aircraft, aircraft carrying Heads of State, aircraft carrying high government officials and aircraft on special missions are distinguished as State aircraft.<sup>115</sup> Almost exclusively the aircraft that are involved in intrusions of other states are military aircraft and unless so specified, a state aircraft is a military aircraft in the text below.

Operating military aircraft above a foreign state's territory is closely surrounded by regulations and is only allowed when special permission is given, obtained through diplomatic channels. States that are part of military alliances, such as NATO, have particular rules to follow within their organization and they often are of a less strict nature. The Chicago Convention brings up the issue of state aircraft in its article 3(b).<sup>116</sup> Such aircraft may not fly over another state's territory without special agreement with that state.<sup>117</sup>

### 4.3.2 “Innocent Passage”

The right of innocent passage found within civil aviation is very rare when it comes to state aircraft. While military sea vessels are guaranteed a safe passage through the territorial waters of another state, this is not a characteristic for state aircraft. There are, however, certain areas where innocent passage is allowed in peacetime. For example, over the narrow passage between Sweden and Denmark, the Öresund Strait, permission of overflight over Swedish territorial sea is not necessary as long as the aircraft stays within a given route. Even if the state aircraft passing through belongs to a war faring state, to which Sweden remains neutral, the condition of innocent passage prevails. If the neutrality towards the state in question is revoked, the right of innocent passage is also revoked. For any other part of the air space, permission is required. Also Denmark has renounced its complete sovereignty over their outer territorial waters in Öresund and over Stora Bält (The Great Belt). In this case, the aircraft approaching the area must immediately before entering Danish air space, contact the Air Traffic Controllers who will direct the flight. The vast majority of states demand that all state aircraft applies for permission for the overflight well in advance. How much in advance varies from state to state. The vast majority of

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<sup>115</sup> An Introduction to Air Law, p 34.

<sup>116</sup> Article 3 (b) reads: Aircraft used in military, customs and police services shall be deemed to be State aircraft.

<sup>117</sup> Suveränitet i havet och luftrummet, p 261-2.

states also allow rescue and ambulance aircraft to fly through their air space when participating in trans border emergency operations.<sup>118</sup>

### **4.3.3 The Red Cross - civil or military?**

Red Cross aircraft presents a problem since they are used for both military and civil humanitarian purposes. The most preferable definition of a military aircraft would be that it is registered in a military aviation register and designated to be a part of the armed forces. According to this definition Red Cross aircraft should be regarded as military aircraft when they belong to the armed forces and when participating in appurtenant activities, such as transporting medicine and equipment and also assisting the casualties in armed conflicts.<sup>119</sup> The status of these military Red Cross aircraft is regulated in two of the four Geneva Conventions from 1949.<sup>120</sup>

#### **4.3.3.1 American Hospital Aircraft – October 1952**

In October 1952, an American hospital aircraft was exposed to machine gun fire from Soviet fighters in an attempt to force it to land. The Soviet authorities claimed that the hospital plane had trespassed on East German air space. The reply from the American Commander in Berlin was that the trespassing was a possibility but that the Soviet actions not only constituted a gross violation of the agreed rules and procedures governing air traffic to and from Berlin, but also that the Soviet authorities ‘must be prepared to accept the possibly disastrous outcome of such reckless use of weapons.’<sup>121</sup>

#### **4.3.3.2 The Geneva Conventions**

The first Geneva Convention of 1949 states in article 36 that medical aircraft shall not be attacked while flying on routes specifically agreed upon between the belligerents concerned and later on, that

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<sup>118</sup> Suveränitet i havet och lufrummet, p 262-3.

<sup>119</sup> An Introduction to Air Law, p 35.

<sup>120</sup> The Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces, articles 36 and 37, and also in The Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, articles 39 and 40.

<sup>121</sup> The American Journal of International Law, Volume 47, 1953, p 577.

flights over enemy or enemy-occupied territory are prohibited. According to these provisions a strict interpretation would support the Soviet action if the aircraft had deviated from its allowed course. Using machine guns on a hospital plane seems overly zealous, though. Apparently, the American Commander disagreed with his Soviet counterparts on what had been agreed upon between the parties.

#### **4.3.3.3 Is the Chicago Convention applicable?**

Regarding the civil Red Cross aircraft, the Chicago Convention is fully applicable. International organisations, such as the United Nations and the Red Cross, enter their Red Cross aircraft on some country's national register and follow the rules and regulations of that country. This procedure is mandatory and in compliance with article 17 of the Chicago Convention.<sup>122</sup> References to state aircraft and legal provisions are also found in an additional number of international agreements.<sup>123</sup>

#### **4.3.4 Acts of aggression?**

Most states have very extensive regulations regarding interception when upholding the sovereignty and integrity of the state. Confrontations between conflicting parties are common above disputed territorial waters. There is a distinction between civilian and military aircraft when it comes to the level of force allowed. What countermeasures can be taken against the violation? What is the legal basis for the offended state to respond to an intrusion? Should in fact the intrusion be seen as an act of aggression, as the United States was accused of after the U-2 incident in 1960 (see below)?

Several attempts have been made to define what constitutes an act of aggression. The first effort was made in 1927 and after that came many more which none of them have lasted within international law.

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<sup>122</sup> An Introduction to Air Law, p 35-6.

<sup>123</sup> The Warsaw Convention (1929), article 2, The Hague Protocol (1955), article 26, The Guadalajara Convention (1961), article XXIII, The Convention for the Unification of Certain Rules Relating to the Precautionary Attachment of Aircraft (1933), article 3, The Convention for the Unification of Certain Rules Relating to Assistance and Salvage of Aircraft or by Aircraft at Sea (1938), article 13, The Convention on the International Recognition of Rights in Aircraft (1948), article XIII, and The Convention on Damage Caused to Third Parties in the Surface (1933), article 21.

There are differences between common law countries that wish that the creation of law comes through practice, i.e. judge-made law, and civil law countries who wants to create law through codification.<sup>124</sup>

In 1974, a UN Committee approved a definition of the term "acts of aggression".

Aggression is the use of armed forces by a State against the sovereignty, territorial integrity or political independence of another State or in any other manner inconsistent with the Charter of the United Nations, as set out in this definition.

The UN Charter prohibits in its article 2(4) the use of violence between states:

All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.

Even if there is a prohibition of violence, there is always the case of self-defence. Article 51 of the United Nations Charter states:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations...

At a first look, article 51 excuses the use of weapons against acts of aggression and possibly against aerial intruders but the prevailing opinion seems to be that the right to use violence in self-defence sets in only after an armed attack actually have started. This means that there should be more than a threat for an armed attack or a risk for it to happen. Anticipatory self-defence is not allowed. If allowed, there would be an unlimited right to use force based on fortuitous and one-sided estimations.<sup>125</sup> But these are acts between States. What countermeasures does a State have against a single state aircraft?

Lissitzyn suggested in 1953 that the territorial sovereign must not expose the aircraft and the people on board to unnecessary or unreasonably great danger. The action taken against the intruder must be proportionate to the expected harmfulness of the violation. This means that a warning to land or change course should be given before the aircraft is attacked and the attack should not be carried out unless there is reason to believe that the intruder make a real threat to the security of the sovereign state. According to

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<sup>124</sup> American Journal of International Law, Volume 62, 1968, p 701-3.

<sup>125</sup> Folkrätten, 3<sup>rd</sup> Ed, 1980, p 299-301.

Malanzcuk, this approach is still accurate in the case of military aircraft but not with civil aircraft.<sup>126</sup>

### 4.3.5 Hot Pursuit

The concept of hot pursuit is well codified within maritime law but not within the law regarding land or air. In maritime law hot pursuit is "the legitimate chase of a foreign vessel on the high seas following a violation of the law of the pursuing State committed by the vessel within the pursuing State's jurisdiction." Hot pursuit is allowed only if the chase begins immediately after the violation is discovered and a signal to stop has been given. Also, the chase must continue without interruption on the high seas. The pursuit must start when the violator is within internal waters, the territorial sea or the contiguous zone. The chase must end as soon as the vessel enters the territorial sea of its own or another state.<sup>127</sup>

No corresponding rule for hot pursuit in the air space has yet surfaced. N.M. Poulantzas has defined aerial hot pursuit as "the right of any sovereign State to continue the pursuit of a foreign aircraft (which started within the airspace above its territory, territorial waters or contiguous zone in reaction to infringement of the laws or regulations of this State) over the high seas, provided, however, that the pursuit started immediately after the violation, and continued uninterrupted beyond the territorial or contiguous airspace of the coastal State." According to Poulantzas, customary law permitting aerial hot pursuit is in the making.<sup>128</sup> This right is probably useable on military but not on civil aircraft and it does not excuse the use of weapons on civil aircraft in accordance with article 3bis of the Chicago Convention.

Preferably, a multilateral treaty would regulate the interception and treatment of aerial intruders but the diversity of national laws and regulations in this area make such a treaty unlikely. Wooldridge agrees with Poulantzas saying that the possibility of a customary right of aerial hot pursuit seems more realistic at present.<sup>129</sup>

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<sup>126</sup> Modern Introduction to International Law, p 199.

<sup>127</sup> Convention on the High Seas, article 23(2) and Law of the Sea Convention, article 111(3).

<sup>128</sup> Encyclopedia of Public International Law, p 145-7.

<sup>129</sup> Encyclopedia of Public International Law, p 148.

### 4.3.6 The Catalina Incident – June 1952

In June 1952, a Swedish military DC-3 aircraft was lost during a flight over the Baltic Sea. Three days after, one of the Swedish search and rescue aircraft, a military Catalina flying boat, was intercepted by Soviet fighters and shot down. The crew managed to land on the water and was subsequently picked up by a passing German vessel. The Soviet government claimed that the flying boat had violated Soviet air space and did not pay heed to the repeated request to follow the fighters for a landing. Instead the Swedish crew had opened fire and the fighters had fired back. The flying boat was supposed to have been as close as four miles off the Soviet coastline. The Swedish government denied that the flying boat was armed and that it had been closer than 15 miles to the Soviet coast.<sup>130</sup> The Soviet Union claimed the width of its territorial waters to be twelve miles. This claim was not accepted by Sweden for the waters off the shore of the Baltic states.<sup>131</sup> Sweden also accused the Soviet Union for the downing of the DC-3 and demanded that those responsible should be punished and the taking of necessary measures to prevent a repetition of the action. Sweden also reserved the right to claim indemnity and put forward that the dispute between the two countries be subject to the jurisdiction of the International Court of Justice or a similar international procedure. Naturally, the Soviet government rejected the Swedish claims and it also denied the correctness of the facts as presented by the Swedish government. The Soviet Union also pointed out the instructions in force in both the Soviet Union and all other states that in case of an intrusion by a foreign aircraft, it is the duty of the airmen of the state concerned to force the intruder to land and if the order is disobeyed, to open fire on it. Sweden denied this to be its policy and stressed that the Swedish Air Force had as orders to turn off foreign aircraft by warning them and not to fire at them if they change direction and fly away. According to the Swedish government the order for the Soviet Air Force seemed to be to try to force the foreign aircraft to land and if it did not land it should be fired upon. The Swedish government maintained that both aircraft were shot down over the High Seas and therefore did not enter into any discussions whether the Soviet actions were lawful or not. In any case, there was no contest of the propriety of the Soviet measures.<sup>132</sup>

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<sup>130</sup> The American Journal of International Law, Volume 47, 1953, p 574-5.

<sup>131</sup> The American Journal of International Law, Volume 47, 1953, p 574, note 69.

<sup>132</sup> The American Journal of International Law, Volume 47, 1953, p 575-6.

### **4.3.7 The U-2 incident – May 1960**

Probably the most heard of incident involving a state aircraft occurred on May 1, 1960. An American U-2 plane, a high altitude reconnaissance aircraft, was shot down over Soviet territory near today's Jekaterinaburg<sup>133</sup> by a surface-to-air missile. The U2 was on route from Pakistan to Norway on a Central Intelligence Agency (CIA) mission. The pilot, Francis Gary Powers, bailed out but was captured after landing with his parachute. Needless to say, this incident stirred up a massive diplomatic activity between the two countries. The aircraft was obviously in Soviet air space carrying advanced photo equipment and the wreckage was salvaged by the Soviets and eventually displayed in Moscow to the public.

The United States did not formally challenge the right to shoot down the aircraft and the American president, Dwight D. Eisenhower, took full responsibility for the unlawful flight. It was admitted that U-2 aircraft had been penetrating Soviet airspace for four years to gather intelligence from the ground below. The United States denied that they had committed any aggressive acts against the Soviet Union and that the flights were to be suspended permanently. The UN Security Council which had convened to discuss the matter, refused to agree with the Soviet Union that the flight constituted an act of aggression. The representatives of China and Italy stated that air space sovereignty had become more or less a myth, after the introduction of observation satellites in outer space. The Council finally agreed on a resolution, which called upon governments to refrain from the use of force or threats of it and to respect the sovereignty, territorial integrity and political independence of every state.<sup>134</sup>

### **4.3.8 The RB-47 incident – July 1960**

Another incident occurred two months after of the U-2 incident. A second reconnaissance aircraft, a United States Air Force patrol aircraft RB-47, was shot down on July 1 by Soviet interceptors after, according to Soviet authorities, penetrating Soviet air space along its northern border over the Barents Sea. Two of the crewmembers survived and was imprisoned and finally released and returned to the United States in the beginning of 1961. The

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<sup>133</sup> Called Sverdlovsk at the time.

<sup>134</sup> The resolution was unanimously approved, only forgone by the Soviet Union and Poland. The American Journal of International Law, Volume 54, 1960, p 839-44.

difference between this case and the one involving the U-2 aircraft is that here the United States protested against the downing. The two countries disagreed regarding the facts surrounding the incident. The United States held that the aircraft did not violate forbidden air space while the Soviet Union contested that opinion and claimed the opposite.<sup>135</sup> If the United States view was accurate it would mean that the RB-47 was shot down over the High Seas and that would probably constitute an act of aggression on behalf of the Soviet Union.

At the time of the downings of the U-2 and RB-47 aircraft, the Soviet Union was not party to the Chicago Convention or any other treaty that recognized the exclusive sovereignty in the air space. Despite this, the Soviet Union claimed the sovereignty in its own air space and that was never challenged by any other state. The United States never protested against the downing of the U-2 aircraft which points to the fact that sovereignty of the air space is part of international customary law. In 1960, the upper limit of the air space had not been established but it appears from the decision of the UN Security Council that the Soviet sovereignty extended at least up to the altitude of the U-2 aircraft. The U-2 incident also led to the view that no warning is needed before weapons are used on an intruding state aircraft, no matter what its purpose with the intrusion is.<sup>136</sup>

#### **4.4 How far can the offended state go?**

According to public international law it is unlawful to intrude upon another state's sovereign air space. International law is built on mutual trust between states. The Security Council called for respect for sovereignty, territorial integrity and political independence of every state. Since all states generally protest against intrusions, one must conclude that the prohibition on intrusion in customary law, which hovers above all written law of the subject. The prohibition against the use of force in the UN Charter (article 2(4)) is a peremptory norm and it cannot be overruled. An intruding aircraft could be considered to be a threat of the use of force by the offended state and it may take forceful action against it. A state aircraft bears markings signifying its affiliation and it may not be obvious that it is unarmed in case it is a reconnaissance aircraft. With the sophisticated defence systems found on military aircraft today, it may

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<sup>135</sup> The American Journal of International Law, Volume 56, 1962, p 139-.

<sup>136</sup> The American Journal of International Law, Volume 56, 1962, p 136-8.

be dangerous to approach such aircraft for a definite identification. Even if the aircraft is unarmed and can do no harm whatsoever, it is still violating the imposition of respect for each other's territory. In order to maintain peace and tranquillity between states a downing of such aircraft should be avoided as long as possible. Unless the intruder is obviously hostile in its conduct, the offended state should follow accepted international law and try to make the intruder leave or land for inspection. In any case, there should be a warning if there is time. Communication tends to solve most problems in our world.

Is an intrusion by a state aircraft an act of aggression? Well, the political situation between the states in question tends to decide that. During the cold war between the United States and the Soviet Union the latter party tended to brand all American or NATO intrusions as acts of aggression. Again, even if the aircraft is unarmed, the intrusion is an act of non-respect for the other party. The definition from 1974 by the UN Committee the first part of it states that there is a need for armed forces for an act of aggression to take place. That may not correspond well with an unarmed aircraft but the second part of the definition brings up manners inconsistent with the UN Charter should constitute an act of aggression. Flying over another state's territory without permission in a military aircraft must be considered inconsistent with the UN Charter, perhaps not an act of aggression but absolutely inappropriate and illegal. Hot pursuit is probably permitted with state aircraft but it does not excuse the use of weapons. It contributes, though, to show the seriousness the offended state feels towards the intrusion.

Finally, the measures an offended state can take after the intrusion, unless the intruder was shot down, is through diplomatic channels. Usually the offended state demands a public apology and reassurances that further intrusions will not take place. The crew of the aircraft, if shot down, could be sent to jail since they stand under the national penal law of the intruded state. The Nuremberg Charter established that individuals are not protected when they are performing acts, sanctioned by their own state, prohibited by international law.<sup>137</sup> The demand for those responsible at home to be punished is not realistic since the act is state sanctioned. Orders of reconnaissance normally come from the Chief of Staff of the infringing state.

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<sup>137</sup> See note 41, p 851, *The American Journal of International Law*, Volume 54, 1960.

## 5 EXCLUSIVE SOVEREIGNTY V. THE EUROPEAN UNION

Through the Treaty of Rome in 1957, the European Community made it their task to establish a common market and bringing the policies of Member States more and more together. Among the activities were the adoption of a common transport policy and also establishing a system for the prevention of non-competitive measures. Because of this, the Union Members must harmonize or at least approximate their national legal systems. As a result of this, some relaxation of the exclusive sovereignty provided for in article 1 of the Chicago Convention is needed. In practice, this would mean a transfer of functional competence between the Member States.<sup>138</sup> So far no legal document from the European Union has emerged containing any major deviation from the exclusive right to the territorial sovereignty of the Member States. On the other hand, the global situation is mirrored within the Union. Sovereignty is still essential but at the same time it is eroded. The development today is towards regionalism where the sovereignty is surrendered bit by bit to a larger entity. At the same time there is a trend moving in the opposite direction towards smaller sovereign entities through the dissolution of once unified states.<sup>139</sup> Conventions are still a powerful tool in international aviation but there are an increasing number of bilateral, regional and multilateral agreements.<sup>140</sup> However, customary law is not abandoned in these agreements. On the contrary, customary law must be a part of them and Contracting States cannot disregard their importance.

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<sup>138</sup> Shawcross and Beaumont, Issue 79, IV, p 6.

<sup>139</sup> Air & Space Law, Volume XX, Number 6, 1995, p 288.

<sup>140</sup> Air & Space Law, Volume XX, Number 6, 1995, p 293.

## 6 Summarizing Analysis

Intruding on another state's air space without permission is clearly unlawful in public international law. Intercepting the aircraft is clearly lawful in public international law. What is allowed after that is the breaking point between many different views and also to what proportion it can be done.

The main rule is what has been described in article 3bis, also for state aircraft. Entering the foreign air space will be refused but the offended state should not endanger the aircraft and the people on board if that refusal is not obeyed. If attacked, self-defence is of course allowed. To enter foreign air space with hostile purposes is an act of aggression but several times it is hard to decide whether the intruder carries weapons. When a state aircraft has been shot down it is very easy to excuse the use of weapons with the argument of self-defence and nobody can say otherwise unless the intruding aircraft obviously was unarmed.

The shooting down of civilian aircraft is often connected to the political situation prevailing in the area and the circumstances surrounding the incident are often confusing. The Korean Airlines flight KE007 was held by the Soviets to be an American military reconnaissance aircraft and that it flew close to prohibited areas. The Soviets referred to what they called 'aggravated circumstances'. Even though there is an intrusion by one of two opposing states there seem to be more necessary for a hostile reaction than just the intrusion itself. The political situation often plays an important role in these incidents.

In order to prevent incidents where civilian aircraft are mistaken for either military aircraft or civilian aircraft with a hostile purpose, where there is a definite risk that man and machine comes to harm, each aircraft could be equipped with a beacon telling interceptors or Air Traffic Controllers on duty about the status of that specific aircraft.

Another solution could be to put a marking on the fuselage that carries protection equivalent to the sign of the International Red Cross and Red Crescent movement. Of course there are already civilian markings on all registered aircraft in the world but using protective markings would involve a commitment from the carrier not to participate in any illegal activity or suffer the consequences. Not obeying this commitment could and should result in severe

penalties for the carrier. With this protection it would be considered a criminal act to fire at such aircraft.

It has been suggested that the aerial intruder should be boxed in by the interceptors, so that it would not be able to escape from its offence. This would require at least three interceptors, one behind and one on each side of the intruding aircraft. The general view on this is that it would be very dangerous for both the intercepting pilots and the intruder, but perhaps the risk is worth taking considering the possible losses of lives and machine if the intruder is downed or damaged. If protective markings of sufficient size are put on the civil aircraft, intercepting aircraft would not have to come too close to the civil aircraft.

What if the intrusion takes place during the night, such as the KE007 flight? The main rule to follow must be not to use weapons on such an aircraft. It is better to let go and seek remedy afterwards through diplomatic channels rather than to regret the loss of lives and material. As said before, the political situation in the offended state will probably decide what action will be taken.

As Lissitzyn pointed out, the use of force must be proportionate to the threat the intruder poses. The offended state may fire at an aircraft in distress and is obliged by the Chicago Convention to aid such aircraft. But, as we have seen, sometimes a state wants to make a statement.

The Chicago Convention remains in force but as long as the SARPS and Annexes are not implemented as they should into the national legislations and these nations fail to notify ICAO of this, it will be somewhat pointless in many situations.

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