

1994

# Procedure for the Protection of Civil Aircraft in Flight

Sompong Sucharitkul

*Golden Gate University School of Law*, [ssucharitkul@ggu.edu](mailto:ssucharitkul@ggu.edu)

Follow this and additional works at: <http://digitalcommons.law.ggu.edu/pubs>

 Part of the [Air and Space Law Commons](#), and the [International Law Commons](#)

---

## Recommended Citation

16 Loyola of Los Angeles Int'l. & Comp. L.J. 513 (1994).

This Article is brought to you for free and open access by the Faculty Scholarship at GGU Law Digital Commons. It has been accepted for inclusion in Publications by an authorized administrator of GGU Law Digital Commons. For more information, please contact [jfischer@ggu.edu](mailto:jfischer@ggu.edu).

# Procedure for the Protection of Civil Aircraft in Flight

SOMPONG SUCHARITKUL\*

## I. INTRODUCTION

International civil aviation faces the challenge of guaranteeing the security of aircraft in flight. Most breaches of security involve terrorist acts perpetrated by hijackers or saboteurs who either physically seize the aircraft in flight and force it to deviate from its scheduled destination,<sup>1</sup> or cause it to disintegrate in mid-air.<sup>2</sup> Past incidents gave rise to international concern, and nations and international organizations have taken concerted actions to protect the safety of air transport.<sup>3</sup> Nations have agreed on rules that regulate the conduct of states in the arrest, extradition, prosecution, trial, and punishment of terrorists involved in the incidents.<sup>4</sup> Tokyo,<sup>5</sup> The Hague,<sup>6</sup> and Montreal<sup>7</sup> have hosted diplomatic conferences to

---

\* B.A. Hons., B.C.L., M.A., D.Phil., D.C.L. (Oxford); Docteur en Droit (Paris); LL.M. (Harvard); of the Middle Temple, Barrister-at-law; Member of the Panels of Conciliators and of Arbitrators of the International Centre for Settlement of Investment Disputes, World Bank; Former Member and Special Rapporteur of the International Law Commission; Distinguished Professor of International and Comparative Law, Golden Gate University School of Law.

1. This type of offence against an aircraft in flight has been labeled "hijacking." Several incidents of aircraft seizure have taken place, involving such airlines as TWA, Air France, KLM, Japan Airline, and Garuda. See Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 10 I.L.M. 133 [hereinafter The Hague Convention].

2. For a treatment of these types of incidents, including the explosion of Air India over the Atlantic Ocean and Pan American over Lockerbie, Scotland, see generally Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 564, 10 I.L.M. 1151 [hereinafter Montreal Convention].

3. See Convention on Offences and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219 [hereinafter Tokyo Convention].

4. See generally *Convention for the Prevention and Punishment of Terrorism*, League of Nations Doc. C.546(I) M.383(I) (1937); Compendium of Relevant International Instruments, U.N. Doc. A/CN.4/368, at 18-22 (1983), reprinted in RICHARD B. LILICH, *TRANSNATIONAL TERRORISM: CONVENTIONS AND COMMENTARY* 175-99 (1982). See also Sompong Sucharitkul, *International Terrorism and the Problem of Jurisdiction*, 14 SYRACUSE J. INT'L L. & COM. 141 (1987).

5. See generally Tokyo Convention, *supra* note 3.

6. See generally The Hague Convention, *supra* note 1.

7. See generally Montreal Convention, *supra* note 2.

adopt conventions designed to provide measures to preempt and frustrate any illegal seizure and sabotage of commercial aircraft, especially those in flight carrying civilian passengers. Most nations that operate national flag carriers have become parties to each of these conventions. Signatory nations include, but are not limited to: France (Air France), India (Air India), Japan (Japan Airlines and ANA), Korea (Korean Air), Kuwait (Kuwait Airlines), the Netherlands (KLM Royal Dutch Airlines), Russian Federation (Aeroflot), Singapore (Singapore Airlines), Thailand (Thai Airways International), United Kingdom (British Airways), and the United States (Pan American Airways, TWA, etc.).

Legal writers and nations unanimously agree on the need to suppress and prevent the occurrence of such wanton destruction of aircraft.<sup>8</sup> There is strong public support for stopping such incidents because they so often result in unnecessary loss of life and property. In spite of concerted international actions, incidents of hijacking and sabotage have not subsided; thus, efforts to stop these occurrences continue. Therefore, we must focus our attention on preventing aerial incidents that are deliberately directed against innocent civilian passenger airlines.

This Article will propose rules, principles, and guidelines for nations to follow in order to protect civilian aircraft. Nations that destroy civilian aircraft must be held responsible for their actions regardless of whether the destruction was intentional. Two recent, notorious incidents stand out that require public attention and further in-depth investigation. This Article is intended to explore effective ways to prevent repetition of such incidents in the future and the litigation that frequently ensues.<sup>9</sup> Accordingly, this Article will discuss two competing principles of international law: (1) possible intrusion of national territorial airspace; and (2) possible misreading of the path of an aircraft in flight.

---

8. See generally Sucharitkul, *supra* note 4; Sompong Sucharitkul, *Terrorism as an International Crime: Questions of Responsibility and Complicity*, 19 ISR. Y.B. HUM. RTS. 247 (1989); Yoram Dinstein, *Terrorism as an International Crime*, 19 ISR. Y.B. HUM. RTS. 55 (1989).

9. The author would like to emphasize that this Article is not intended to place any blame on any entity or person nor to provide *ex post facto* remedies to compensate for losses already suffered.

## II. PROCEDURES FOR THE TREATMENT OF AN UNIDENTIFIED AIRCRAFT FOUND WITHIN NATIONAL AIRSPACE

Several commercial airlines have either been shot down in mid-air<sup>10</sup> or forced to land in an unfriendly territory. Upon landing, the captain and crew were subjected to prosecution and trial, which invariably resulted in undeserving prison terms.<sup>11</sup>

In most cases, the ill-fated airlines happened to carry an Asian flag. It does not appear that either the registration or destination, or the position of the aircraft in terms of geographical coordinates, was a relevant factor for the occurrence of the incidents. Sadly, it would seem that "might" continues to be "justice," as the application of international air law remains haphazard, allowing for arbitrary and primitive acts of destruction to continue with impunity. Moreover, the laws in the making are also not entirely free from prejudices. A "hit and run" is a heinous crime in any national legal system. To destroy a harmless civilian object and murder innocent civilians, and then to attempt to justify such a cowardly act on the ground of self-defence, self-protection, or national security, is to add insult to injustice, not to mention the agony and sufferings of the injured victims and their bereaved families.

### A. *The Incident of September 1, 1983, and Its Consequences*

On September 1, 1983, two Soviet missiles shot down Korean Airlines Flight 007 over the Sea of Japan, killing all passengers and crew. This incident was the most tragic aerial incident in the history of international civil aviation.<sup>12</sup>

---

10. See INTERNATIONAL COURT OF JUSTICE, THE HAGUE 91 (3d ed. 1986). Instances of earlier incidents include the shooting of El Al Airlines by Socialist countries, as in the Aerial Incident of 27 July 1955 (Isr. v. Bulg.), 1959 I.C.J. 127 (May 26) (judgment on the preliminary objections). For a discussion of the same incident, see also (U.S. v. Bulg.), 1960 I.C.J. 146 (May 30); (U.K. v. Bulg.), 1959 I.C.J. 264 (Aug. 3). For other aerial incidents, see 10 Mar. 1953 (U.S. v. Czech.); 7 Oct. 1952 (U.S. v. U.S.S.R.); 4 Sept. 1954 (U.S. v. U.S.S.R.); 7 Nov. 1954 (U.S. v. U.S.S.R.).

11. This occurred in 1978 when the Soviets fired upon and forced the crash landing of a 707 airplane, killing no passengers. Marian Nash Leich et al., *Agora, The Downing of Iran Air 655*, 83 A.J.I.L. 318, 323 (1989). Compare Treatment in Hungary of Aircraft and Crew of the United States of America (U.S. v. Hung.; U.S. v. U.S.S.R.), in INTERNATIONAL COURT OF JUSTICE, *supra* note 10, at 91.

12. Passengers included Americans, Australians, British, Canadians, Japanese, Thais, and South Koreans. See U.N. SCOR, 37th Sess., 2470th mtg. at 47, U.N. Doc. S/PV.2470 (1983). For further details of the debates in the Security Council, see U.N. SCOR, 37th Sess., 2471st mtg. at 1-12, U.N. Doc. S/PV.2471 (1983); U.N. SCOR, 37th Sess., U.N. Docs. S/15947 (letter from the U.S. Permanent Representatives to the U.N. of Sept. 1, 1983), S/

While many have hypothesized possible scenarios, authorities have established certain facts regarding this incident. The point of departure of Flight 007 on this ill-fated voyage was New York, and Seoul was its scheduled destination. When shot down, the plane was apparently off-course.<sup>13</sup> Official investigations on the incident have produced only contradictory and inconclusive findings.

One theory alleges that Flight 007 penetrated the Soviet territorial airspace while it was off-course.<sup>14</sup> What is confusing is the Soviet response to the intrusion. For reasons not known, Soviet ground command ordered the downing of Flight 007, without first signaling a shot to alert the aircraft that it was off-course.<sup>15</sup>

One question of primary importance is the legitimacy of the action taken by the territorial state allegedly in self-defence. Self-defence is justified only if it is absolutely necessary and if there are no immediately avoidable alternatives. The ground command had other alternatives from which to choose. It could have warned the approaching Korean aircraft or, at a minimum, escorted it out of Russian territorial airspace if, indeed, the aircraft was at that moment within its territorial airspace. Instead, the ground command ordered the attack on the Korean aircraft without due warning and without any showing of mercy or regret.

Because the Soviet action was not necessary for self-defence, it violated principles of international law. Furthermore, the response of the Soviets violated the principle of proportionality and exceeded their stated objective of simply removing the intruding aircraft.<sup>16</sup> The incident had several interesting consequences.

---

15948 (note by the President of the Security Council), S/15949 (note by the President of the Security Council answering the letter of the Permanent Observer of the Republic of Korea to the U.N.), S/15950 (letter from Japan), S/15951 (letter from Australia) (1983), *reprinted in* 22 I.L.M. 1111-13.

13. See International Civil Aviation Organization: Action with Regard to the Down-  
ing of the Korean Air Lines Aircraft, 22 I.L.M. 864 (1983).

14. See Soogeun Oh, Liability for International Aviation: Aerial Incidents and War-  
saw Convention of 1929, Presented to the Regional Meeting of American Society of Inter-  
national Law at Golden Gate University School of Law, San Francisco, California (Mar.  
19-20, 1992).

15. See Interception of Civil Aircraft, 22 I.L.M. 1185-87 (1981) (attachment A). *But*  
*see* Stuart M. Speiser, *Update: Korean Air Lines Flight 007 Litigation*, 2 INT'L L. BULL., Fall  
1984, at 45. The chart utilized by the U.S. Department of Defense for military aircraft had  
a more stringent precautionary statement: "Aircraft may be shot down without warning."

16. See *e.g.*, LEAGUE OF NATIONS COVENANT art. 14. It states: "Legitimate defense  
implies the adoption of measures proportionate to the seriousness of the danger." See also  
Naulilaa Case, 2 Trib Arb. Mixtes 1012 (Port.-Ger. 1928).

### *B. The International Community's Reaction*

The former Union of Soviet Socialist Republics ("U.S.S.R.") refused to participate in a proceeding before an international court. The Soviet authority kept its own record and submitted its findings to the Council of the International Civil Aviation Organization ("ICAO").<sup>17</sup> Based upon these findings, the ICAO conducted an independent investigation with the cooperation of affected member countries. A number of international organizations have protested against the U.S.S.R. and the ICAO.

#### 1. The Security Council

Immediately following the incident on September 1, 1983, the United States, the Republic of Korea, Canada, Japan, and Australia petitioned the meeting of the Security Council to discuss the Soviet use of weapons against an unarmed Korean commercial aircraft in flight. On September 12, 1983, the U.S.S.R. vetoed a draft resolution which deeply deplored the destruction of the Boeing 747. The resolution had called for an investigation by the Secretary-General and urged the cooperation of all states with the appropriate specialized agencies to strengthen the security and safety of international civil aviation.<sup>18</sup>

#### 2. Unilateral Counter-Measures

In response to the destruction of the Korean aircraft by Soviet missiles, the United States, on September 16, 1983, prevented Soviet Aeroflot flights from landing in New York and New Jersey.<sup>19</sup> The aircraft was carrying a Soviet Foreign Minister and other members of the Delegation to the General Assembly. The U.S. delega-

---

17. See Report of I.C.A.O. Fact-Finding Investigation, 23 I.L.M. 865 (1983) (report by A.I. Oknowsky, the Chairman of the Accident Investigation). The Report concludes that the South Korean airplane was engaged in a preplanned intelligence-gathering and provocative mission. *Id.*

18. For the text of the Security Council debate, see 22 I.L.M. 1114-47 (1983). The Draft Resolution received nine votes in favor (France, Jordan, Malta, Netherlands, Pakistan, Togo, the United Kingdom, the United States, and Zaire), two votes against (Poland and U.S.S.R. (veto)) and four abstentions (China, Guyana, Nicaragua, and Zimbabwe). *Id.* at 1148.

19. See Joint Statement by the Governors of the States of New Jersey and New York, 22 I.L.M. 1215 (1983) (instructing the Port Authority of New York and New Jersey to deny a request by the U.S. State Department to permit two airplanes carrying Soviet diplomats to land in Newark or Kennedy Airports).

tion explained that this landing was diverted in order to ensure the safety and security of the incoming Soviet delegates.

Then-President Ronald Reagan further expressed the U.S. Government's displeasure when he suspended negotiations of a consular convention with the U.S.S.R. and failed to renew bilateral agreements on cultural, scientific, and transport exchanges.<sup>20</sup> In addition, the United States took measures to close the Aeroflot offices in Washington, D.C. and New York, thereby suspending all commercial operations of Aeroflot in the United States.<sup>21</sup>

### 3. Regional Inter-Governmental Sanctions

The proposal of economic sanctions against the U.S.S.R. did not command the necessary unanimity within the NATO Council because France, Greece, Spain, and Turkey did not concur in the sanctions.<sup>22</sup>

### 4. Sanctions by NGOs

The International Federation of Airline Pilots Association ("IFAPA") adopted a recommendation on September 6, 1983, inviting members and national associations to suspend all flights to the U.S.S.R. for sixty days.<sup>23</sup>

### 5. Amendment to the Convention on International Civil Aviation

The ICAO Assembly unanimously adopted the Amendment to the Convention on International Civil Aviation with Regard to Interception of Civil Aircraft ("Civil Aviation Amendment") at an

---

20. See United States Statements and Orders Concerning Soviet Aircraft and Congressional Joint Resolution, 22 I.L.M. 1205-14 (1983).

21. See Order 83-9-43, adopted by the Civil Aeronautics Board on September 8, 1983, reprinted in CIVIL AERONAUTICS BOARD REP. 1208-12 (1983) (appending then-President Reagan's letter of September 8, 1983, reaffirming the suspension of Aeroflot flights to and from the United States, in effect since January 5, 1982); Order 83-9-88, adopted by the Civil Aeronautics Board on September 20, 1983, reprinted in CIVIL AERONAUTICS BOARD REP., *supra*, at 1208-12.

22. See Djamel-Eddime Lakehel, *Les sanction á la destruction du Boeing Sud-Coréen*, LE SOIR, Sept. 11, 1983, at 3 (stating the United Kingdom's proposal regarding sanctions against all flights to and from Moscow). Ultimately, Spain, which had opposed the boycott, actually suspended all air traffic with the U.S.S.R.

23. The IFAPA represented 57,000 pilots of airlines from 67 countries. See Action Taken by the International Federation of Airline Pilots, 22 I.L.M. 1218-20 (1983) (released Sept. 9, 1983).

Extraordinary Session of May 10, 1984.<sup>24</sup> This Amendment is cited as Article 3 *bis* and referred to as the Montreal Protocol of May 10, 1984.<sup>25</sup> The Amendment was to prevent the violation of other states' airspace and the use of civil aviation for purposes inconsistent with the aims of the Convention, and to enhance the safety of international civil aviation. The Amendment reaffirms the principle of forbidding the use of weapons against civil aircraft in flight. Paragraph (a) of Article 3 *bis* of the Protocol provides:

(a) The contracting States recognize that every State must refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of aircraft must not be endangered. This provision shall not be interpreted as modifying in any way the rights and obligations of States set forth in the Charter of the United Nations ("U.N.").<sup>26</sup>

It should be noted that, although this Amendment was unanimously adopted, it will not enter into force until it is ratified by 102 contracting states.<sup>27</sup> To the extent that the Amendment discourages the use of force in accordance with the principle set forth in Article 2(4) of the U.N. Charter,<sup>28</sup> it can be argued that paragraph

---

24. International Civil Aviation Organization, Amendment of Convention on International Civil Aviation with Regard to Interception of Civil Aircraft, 23 I.L.M. 705, 864-936 (1984) [hereinafter Civil Aviation Amendment]. A description of the destruction of the Korean Air on September 1, 1983, is contained in the Amendment. See also The United Nations Security Council Consideration, 22 I.L.M. 1109, 1109-1220 (1983).

25. The Assembly of the ICAO, at its 25th session (extraordinary) at Montreal on May 10, 1984, adopted the proposed amendment in operative paragraph 2 to add a new Article 3 *bis*. For the text of Article 3 *bis*, see 15 U.N.T.S. 295, 23 I.L.M. 705 (1984). See also International Civil Aviation Organization: Resolution and Report Concerning the Destruction of Iran Air Airbus on July 3, 1988, 28 I.L.M. 896 (1989) [hereinafter Report on Iran Air].

26. Civil Aviation Amendment, *supra* note 24, at 706.

27. As of July 1989, 52 nations have ratified the Montreal Protocol. Fifty more ratifications are needed to bring into force the Amendment to the Chicago Convention on International Civil Aviation, Dec. 7, 1944, T.I.A.S. No. 1591, 15 U.N.T.S. 295. See Report on Iran Air, *supra* note 25, at 1060.

28. U.N. CHARTER art. 2, para. 4. Article 2 states:

The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following principles: . . .

4. 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.

*Id.*



(a) of Article 3 *bis* represents the existing rule of customary international law.

*C. Trilateral Memorandum of Understanding Concerning Air Traffic Control*

As part of their endeavors to avoid future repetitions of the tragic incident of September 1, 1983, nations in the region convened to discuss adoption of precautionary measures. In 1985, delegations from the United States, Japan, and the U.S.S.R. met in Washington, D.C., Moscow, and Tokyo to discuss practical steps to be taken to enhance the safety of flights in the northern part of the Pacific Ocean, or the Northern Pacific ("NOPAC") routes.<sup>29</sup>

The three delegations agreed to designate Anchorage, Alaska (U.S.), Tokyo (Japan), and Khabarovsk (U.S.S.R.) as Area Control Centers ("ACCs"), which operate as points of contact among the air traffic control services of the United States, Japan, and the U.S.S.R., respectively. The Tokyo ACC will serve as the principal point of contact. To coordinate actions to assist a civil aircraft in an emergency situation, the Anchorage and Tokyo ACCs will initiate communications with the Khabarovsk ACC to provide all available information regarding an aircraft assigned to a NOPAC route. This will occur when they become aware of an aircraft's possible entry into a U.S.S.R. flight information region ("FIR"). The ACC communication facilities between Anchorage, Tokyo, and Khabarovsk are now available on an around-the-clock basis.<sup>30</sup>

On November 19, 1985, in Washington, D.C., the ACCs concluded an agreement that specifies steps and procedures to implement the terms of the Trilateral Memorandum of Understanding of July 29, 1985.<sup>31</sup> The agreement also prescribes, as a matter of priority, the procedures to coordinate actions among the air traffic control services of the three countries. These procedures are crucial to verifying unidentified aircraft, exchanging information regarding types of aircraft, establishing the plane's location (latitude/

---

29. These meetings were held in 1985 from February 26-March 3 (Washington, D.C.), May 20-25 (Moscow), and July 17-29 (Tokyo). The Memorandum of Understanding was entered into force on October 8, 1985. See Memorandum of Understanding, July 29, 1985, 25 I.L.M. 74-77 (1986).

30. *Id.*

31. *Id.* at 77-84.

longitude), determining the pilot's intention, deciding what action to take, and assisting identified aircraft.<sup>32</sup>

Pending the entry into force of the unanimously adopted Civil Aviation Amendment,<sup>33</sup> the agreement among the three Air Control Services has, thus far, succeeded in preventing the recurrence of an aerial incident involving the destruction of a civil aircraft in flight in the Northern Pacific routes. The agreement may even serve as a model for other regions of the world. It has proved effective in dispelling suspicion that arises when an unidentified aircraft appears in foreign territory without prior authorization. This measure eliminates any need for the use of weapons or any forcible measures that are harmful to human lives.

As suggested earlier, such a practical precautionary step constitutes an effective countermeasure *ex ante* to ensure non-repetition of incidents that endanger the safety of international civil aviation and add a new dimension to the "terror in the sky."

### III. PROCEDURES FOR THE TREATMENT OF UNIDENTIFIED AIRCRAFT IN INTERNATIONAL AIRSPACE

The "terror in the sky" encountered by the Korean Air Flight 007 on September 1, 1983, was revisited almost five years later, on July 3, 1988, by Iran Air Flight 655 in the Gulf of Persia. The U.S.S. Vincennes, an American warship, caused this incident by its deliberate actions.<sup>34</sup> Like the Korean aircraft, the ill-fated Iranian aircraft belonged to an Asian nation. Like the 269 passengers and members of the crew of Korean Air Flight 007 who perished in the Sea of Japan, Iran Air IR 655's 290 passengers and crew were all killed.<sup>35</sup> Once again, the plane was shot down without a warning. The victims in the Korean Air incident were of Australian, Canadian, Japanese, Korean, Thai, and American national origin.<sup>36</sup> The Iran Air incident included victims of Indian, Italian, Pakistani, Yugoslav, and United Arab Emirates origin. A particularly tragic fact about this incident was the religious character of the voyage. Most passengers were of Islamic faith, travelling that day to make a pilgrimage to Mekka. Ironically, their interrupted journey deprived

---

32. *Id.*

33. See discussion *supra* part II.B.5.

34. For an account of the aerial incident of July 3, 1988, see Report on Iran Air, *supra* note 25, at 896-943.

35. *Id.*

36. See discussion *supra* note 12.

them and their bereaved families of the joy of attending religious ceremonies at the shrines in Mekka and fulfilling the duties imposed by the Muslim faith. While several basic facts of the two incidents are comparable, it is important also to examine the differences between the surrounding circumstances of the two aerial incidents, including the subsequent reactions and measures undertaken by nations.

A. *Circumstances Surrounding the Incident of July 3, 1988*

1. *Circumstances Leading to the Incident*

It is difficult to describe the state of affairs in the Gulf of Persia preceding the incident of July 3, 1988. Nevertheless, it is even more difficult to disregard certain unusual happenings in that precariously sensitive region following the outbreak of hostilities between Iraq and Iran at the dawn of that decade. It is not surprising that, like in Kampuchea where several communist factions vied for the exclusive control of the Buddhist land, in the Persian Gulf, two predominantly Islamic states were violently opposed to each other, basically on religious grounds. In both cases, the Western colonial powers were responsible for the legacies of divisiveness left from bygone days of occidental colonial empires. The use of force remained the only means to settle regional and local differences at the disposal of the warring authorities in the Persian Gulf.<sup>37</sup>

Accordingly, fierce fighting erupted between Iraqi and Iranian forces, resulting in the loss of millions of lives on both sides. This fighting culminated in the interdiction of maritime transport of crude oil from the Persian Gulf, especially from Iraq, through Kuwait.<sup>38</sup> The strategic geographical position of Iran permitted the

---

37. See Letter Dated 11 August 1987 from the Permanent Representative of the Islamic Republic of Iran to the United Nations Addressed to the Secretary-General, Aug. 11, 1987, U.N. SCOR, 42d Sess., Annex 1, at 5, U.N. Doc. S/19031 (1988). Paragraph 4 of the Annex states: "Ironically enough, the initiation of the war by Iraq on 22 September 1980 and occupation of a vast part of the territory of the Islamic Republic of Iran was a breach of world peace. The Security Council, however, chose to remain silent then." *Id.* para. 4. This document explains in detail the position of Iran on Security Council Resolution 598, S.C. Res. 598, U.N. Doc. S/RES/598 (1987), reprinted in 26 I.L.M. 1479 (calling for an immediate cease-fire and an ultimate negotiated settlement). See 26 I.L.M. 1481-84 (1987). For the position of Iraq on Resolution 598, see Letter Dated 14 August 1987 from the Charge D'Affaires A.I. of the Permanent Mission of Iraq to the United Nations Addressed to the Secretary-General, 26 I.L.M. 1485-87 (1987).

38. See S.C. Res. 598, *supra* note 37. The Resolution was unanimously adopted on July 20, 1987, and the parties accepted the U.N. Secretary-General's visit to Iran and Iraq on a peace mission. See *id.* For the factual situation, see U.S. Plan To Reflag Kuwaiti

nation to exercise control over the Straits of Hormuz. Japan, a distant third country, suffered the most, as net importer of crude oil from the Persian Gulf, while the United States also suffered from the marginal increase in the price of oil at the tail-end of private consumption.<sup>39</sup> Whatever the motivation, Western powers, led by the United States, attempted to provide safe passage for the transport of crude oil from Iraq by means of a strong naval presence in the Persian Gulf. This presence was reinforced by the "reflagging" of Kuwaiti tankers. These Kuwaiti tankers, carrying Iraqi crude, sailed with American flags and registration. These measures, however, did not alleviate the gravity of the situation, which appeared to have deteriorated further.<sup>40</sup>

The presence of foreign flags in the Persian Gulf during the 1980s caused confusion from a bird's eye view. For instance, the U.S.S. Stark was mistaken for an Iranian frigate by an Iraqi interceptor pilot who, on May 17, 1987, fired two air-launch Exocet missiles from an Iraqi Air Force F-1 Mirage, which struck the U.S.S. Stark and caused considerable damage to the American ship.<sup>41</sup> This was an incident of friendly fire, as the U.S.S. Stark was there to provide protection for the safe passage of Iraqi crude. The Iraqi Air Force admitted the mistake, and both sides agreed to a sum of money as compensation for the crew-members of the U.S.S. Stark who were killed or injured. For the forty or so casualties, the Iraqi Government paid thirty-five million U.S. dollars as compensation for the damage inflicted.<sup>42</sup>

Like the incident prior, there was neither warning from the air nor from the sea. The losses were extensive; the U.S.S. Stark suf-

---

Ships, 26 I.L.M. 1429 (1987); Senator Nunn's Response to the Weinberger Report, 26 I.L.M. 1464-87 (1987).

39. See The Weinberger Report to U.S. Congress on Security Arrangements in the Persian Gulf, 26 I.L.M. 1433, 1461-63 (1987).

40. For the question of the legitimacy of "reflagging" and "flag of convenience," see FINAL ACT OF THIRD U.N. CONFERENCE ON L. OF SEA, U.N. CONVENTION ON L. OF SEA art. 92, at 31, U.N. Sales No. E.83.V.5 (1982).

41. See U.S.S. Stark Hit by Iraqi Missiles, 87(2124), DEP'T ST. BULL., July 1987, at 58-63, *reprinted in* Iran-Iraq War and Navigation in the Gulf, May 17-Aug. 11, 1987, 26 I.L.M. 1423 (1987). The Secretary of State's letter to Congress on May 20, 1987 states that a total of 37 members of the crew on the U.S.S. Stark were reported dead or missing, and two more were seriously injured. 26 I.L.M. 1425-26 (1987). Then-President Reagan also sought compensation for the ship. See White House Statement, May 18, 1987, 26 I.L.M. 1423 (1987).

42. For a discussion of the Gulf situation, see Report on Iran Air, *supra* note 25, at 909-10.

ferred considerable casualties, as well as physical damage, which required it to return to base for major repairs. The possibility of mistaking the identity of a ship or an aircraft was so great, especially in time of emergency and panic, that injurious consequences easily ensued from the hasty, but deliberate, use of lethal weapons. The U.S.S. Stark was not prepared for such an unannounced attack, and this incident led to the position that U.S. forces should be combat-ready in like circumstances, whatever the legal consequences and complications. A preemptive strike, or a "shoot first and verify the kill later" approach, appears to have become the "rule of engagement," or the standing order of procedure.<sup>43</sup>

Not unlike how the Korean Air plane tried to avoid being escorted down to a Soviet airport in 1983, the U.S.S. Vincennes was not going to tolerate the complacency for which its captain could be reprimanded. The Iraqi fighter was not identified, and it escaped without retaliation from the U.S.S. Stark. Such an insidious and one-sided attack was not to be repeated against a U.S. man-of-war, and all ships would be prepared for battle in such emergency. Thus, the U.S.S. Vincennes was on alert, ready to meet any challenge. The captain of the U.S. warship was never again to be reproached for inertia or neglect of duties.

It was unfortunate that Iran Air Flight 655 happened to cross the deadly overflight path in international airspace; indeed, it was ironic that the destruction was committed by a combat-ready man-of-war patrolling the Persian Gulf to enforce safe passage of maritime transport.

Flight IR 655 left Bandar Abbas for Dubai more or less on schedule.<sup>44</sup> The departure was delayed twenty minutes due to an immigration problem involving a passenger.<sup>45</sup> The flight took off at 06.47 hours and climbed straight ahead (A59 magnetic track 203 degrees).<sup>46</sup> Shortly after take-off, IR 655 contacted the Iran Air office at Bandar Abbas and passed a departure message with an estimate for Dubai.<sup>47</sup> The flight also contacted Bandar Abbas con-

---

43. For a detailed discussion of this approach, see THE UNITED STATES NAVAL WAR COLLEGE OPERATIONS DEPARTMENT, EXTRACTS FROM THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS NWP 9, NWC 4206, § 4.3.2.1 (1987).

44. See Report on Iran Air, *supra* note 25, at 902.

45. *Id.*

46. *Id.*

47. *Id.*

trol at 06.49:18 and reported climbing past 3,500 feet.<sup>48</sup> At 06.54:11, IR 655 reported to Bandar Abbas approach control.<sup>49</sup> No further communication was received from IR 655 by Bandar Abbas approach control, Tehran ACC, Emirates ACC, or Dubai approach control.<sup>50</sup>

At 06.54:43, the Iranian aircraft was destroyed by two surface-to-air missiles<sup>51</sup> whilst climbing from FL 120 to FL 140 well within airway A59, south of MOBET in the vicinity of Qeshum Island.<sup>52</sup>

Of the 274 passengers, 238 were Iranian, 10 Indian, 1 Italian, 6 Pakistani, 13 United Arab Emirates, and 6 Yugoslav. The 274 passengers were comprised of 209 adults, 57 children, and 8 infants. All 16 crew-members were Iranian.<sup>53</sup>

No "red alert" status was in effect on July 3, 1988.<sup>54</sup> Through "red alert" procedure, ATS units are notified of military activities that pose a risk to the safety of civil aircraft.<sup>55</sup> When a "red alert" is in effect, no ATC clearances are given to civil aircraft intending to operate through the affected airspace.<sup>56</sup> In some instances, Iranian aircraft already en route have been recalled through "red alert" procedure.<sup>57</sup> On that tragic day, however, U.S. naval forces did not notify the ATC units in Tehran and Bandar Abbas of any activities at sea that could pose a risk to the safety of IR 655.<sup>58</sup>

## 2. Additional Complications

The decision-making process of the U.S.S. Vincennes' captain was confused by further complications. Apparently, at the same time that the IR 655 was in flight, Iranian boats belonging to the Islamic Revolutionary Guard were involved in surface action with three U.S. warships: the U.S.S. Vincennes (Guided Missile Cruiser—AEGIS); the U.S.S. Elmer Montgomery (Knox class

---

48. *Id.* at 929 (estimating MOBET at 06.52, the FIR boundary (Darax) at 06.58, and Dubai at 07.15).

49. *Id.* at 935 (passing MOBET out of FL 120).

50. *Id.* at 935-37.

51. *Id.* at 936.

52. *Id.* at 902, 924.

53. *Id.* at 903.

54. *Id.* at 912. On July 3, 1988, no "red alert" status was in effect, and the A.T.C. units at Teheran and Bandar Abbas were unaware of any activities at sea.

55. *Id.* at 911-12.

56. *Id.* at 912.

57. *Id.*

58. *Id.*

anti-submarine frigate); and the U.S.S. John H. Sides (Oliver Hazard Perry class-guided missile frigate).<sup>59</sup> According to the ICAO report, the Iranian units had employed small boats of the Boghammar and Boston Whaler types, each armed with one 12.7 mm. machine gun, one RPG-7 rocket launcher, and one 106 mm. recoilless rifle.<sup>60</sup> This additional information may have misled the U.S.S. Vincennes to believe that the radar contact (IR 655) might be hostile, in light of the possible Iranian use of air support in the surface engagements with U.S. warships.<sup>61</sup>

### 3. The Sequence of the Incident

IR 655 disintegrated in mid-air when two missiles exploded, causing "[t]he tail and one wing [to break] off in the air."<sup>62</sup> What was left of the aircraft landed in the sea, and the wreckage sank. No survivor nor other damage was reported.<sup>63</sup>

The search and rescue did not begin until 07.18 hours, when United Arab Emirates ACC contacted Tehran ACC and requested the position of IR 655.<sup>64</sup> "Recognizing that the flight had not arrived at its destination, the controller at Tehran ACC contacted the adjacent ATS units for information on the flight."<sup>65</sup> Search and rescue action followed when Tehran could not obtain information on the plane; the assistance of the United Arab Emirates was requested.<sup>66</sup> Four aircraft from the United Arab Emirates participated in the search around Darax. Similar search and rescue efforts were undertaken by the Islamic Republic of Iran Navy ("IRIN"), the Islamic Revolutionary Guard, the National Iranian Oil Company ("NIOL"), and the authorities at Bandar Abbas.<sup>67</sup> The searchers located bodies and floating parts of the wreckage more than 30 NM north of Darax, and AFTN informed the Emirates ACC at 09.25 hours. At 10.30 hours, Bandar Abbas authori-

---

59. *Id.* at 923.

60. *Id.* at 908-09. *See also id.* at 901 (the U.S. report on the investigation into the circumstances surrounding the downing of IR 655 on July 3, 1988).

61. *Id.* at 923-24.

62. *Id.* at 903.

63. *Id.*

64. *Id.* at 908.

65. *Id.*

66. *Id.*

67. *Id.*

ties took over and advised the United Arab Emirates that its assistance in the search and rescue was no longer needed.<sup>68</sup>

### *B. Reactions by the Parties and the International Community*

In a study of state responsibility for the aerial incident of July 3, 1988, the analysis regarding rights and duties should cover all three parameters: (1) the state committing the internationally wrongful act; (2) the injured state or states; and (3) third states or the international community.<sup>69</sup>

#### 1. Actions Taken by the State Committing an Internationally Wrongful Act

At first glance, the conclusion that the United States was responsible for the aerial incident of July 3, 1988, seems irresistible, even though few of the basic facts are known.

Regardless of fault or intention, international liability attaches to the U.S. Government, as the injurious consequences arose out of acts under the control and within the jurisdiction of the U.S.S. Vincennes. This vessel was subject to U.S. law and jurisdiction. Thus, there is international liability for the injurious consequences arising out of the vessel's actions that destroyed IR 655 in international airspace. Compensation for the physical and moral damages must be paid to the Iranian Airlines and the families of the deceased. Every state must pay for its own mistakes, misadventures, or accidents it causes. Full compensation is due under any theory of damages, including *damnum emergens* and *lucrum cessans*.<sup>70</sup>

Under the law of international liability, the U.S. Government is liable for the physical damage, destruction, and loss of life caused by its action, regardless of fault or state responsibility.<sup>71</sup>

---

68. *Id.*

69. See Willem Riphagen, *Sixth Report on State Responsibility*, [1985] 2 Y.B. INT'L L. COMM'N pt. 1, U.N. Doc. A/CN.4/389. See also Sucharitkul, *supra* note 8, at 247-58.

70. International liability is not based on the wrongfulness of the international act that is attributable to the state, but rather on the injurious consequences arising out of the acts. Thus, liability exists even if there are circumstances precluding wrongfulness. See *generally Report of the International Law Commission on the Work of Its Thirty-Seventh Session*, [1985] 2 Y.B. INT'L L. COMM'N 24, U.N. Doc. A/CN.4/389.

71. See Article 35 (reservation as to compensation for damage of the draft articles on state responsibility adopted at first reading by the International Law Commission), reprinted in *State Responsibility: Draft Articles Proposed by the Drafting Committee*, [1980] 1 Y.B. INT'L L. COMM'N 270, 272, U.N. Doc. A/CN.4/318 [hereinafter *State Responsibility*].



On the question of state responsibility, the act of firing missiles at a regularly-scheduled commercial aircraft in flight in international airspace was clearly attributable to the U.S. Government. Because the U.S.S. Vincennes fired missiles while in the service of the United States, the chain of causation was uninterrupted.

The only plausible justification to excuse the United States of liability would be "self-defence." Although this defence is inherent under Article 51 of the U.N. Charter, the Article limits the occasion for invoking the defence to when "an armed attack occurred."<sup>72</sup> In this incident, there was no possibility of an armed attack against a missile-launching cruiser of a superpower nation. Thus, the United States' reliance on a claim of self-defence appears far-fetched.

Yet, international law has its own yardstick for self-defence, including time and scope limitations and the principle of proportionality. Every state is entitled to its own understanding of what constitutes self-defence. Thus, the United States' understanding of self-defence may diverge significantly from the standard rule of international law.<sup>73</sup> Whatever definition or notion of self-defence a state has adopted, however, it must bear the risk of its own misconception under international law.<sup>74</sup>

The United States' first error was in the identification on the radar screen of Airbus 300 as an F-14, a fighter aircraft.<sup>75</sup> This misreading led to grave consequences in the international arena. Because of this erroneous reading, the United States' reaction mistakenly anticipated an impending armed attack that was, in reality, impossible.

---

72. U.N. CHARTER art. 51.

73. The United States' understanding of collective self-defence was rejected by the International Court of Justice in *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 4 (June 27). For a discussion of the invasion of Iran by U.S. military units on April 24 and 25, 1980, see *U.S. Diplomatic and Consular Staff in Teheran (U.S. v. Iran)*, 1980 I.C.J. 43 (May 24). The Court stated: "The Court therefore feels bound to observe that an operation undertaken in those circumstances, from whatever motive, is of a kind calculated to undermine respect for the judicial process in international relations."

74. See U.N. CHARTER art. 51. For an example of different tests of self-defence, see the *Caroline Case*, 29 BRIT. & FOR. ST. PAPERS 1130-37; Robert Jennings, *The Caroline and McLeod cases*, 32 A.J.I.L. 82 (1938). Compare the test of self-defence as proposed by the United States, which was subsequently accepted, albeit reluctantly, by the United Kingdom.

75. See Report on Iran Air, *supra* note 25, at 923. For causes of the misinterpretation of the aircraft, see *id.* at 923-24.

Apology by the United States was belatedly tendered, and the offer of *ex gratia* compensation was frequently misunderstood.<sup>76</sup> As early as July 11, 1988, then-President Reagan offered *ex gratia* compensation to the families of the victims who died in the Iranian Airlines incident.<sup>77</sup> Specific payments were proposed to compensate the Governments of India, Italy, Pakistan, Yugoslavia, and the United Arab Emirates. The United States offered to pay 250,000 U.S. dollars for a full-time, wage-earning victim and 100,000 U.S. dollars for each of the other victims.<sup>78</sup> The U.S. Government was only willing to pay less than one-third of the amount that the Iraqi Government had paid to the American victims on board the U.S.S. Stark.<sup>79</sup> Accordingly, it seems that Americans who perished in the line of duty on board the U.S. man-of-war were considered more valuable than Iranians and other victims. This discrepancy is not easy to understand.

The United States' offer to pay *ex gratia* compensation is not entirely unprecedented.<sup>80</sup> Its implications, however, may vary from case to case. *Ex gratia* literally means "out of grace" or "as a

---

76. See D.J. HARRIS, *CASES AND MATERIALS ON INTERNATIONAL LAW* 322 (3d ed. 1983). Compensation for personal injuries and economic losses resulting from contamination of Japanese fishing catches was expressly stated to be *ex gratia*. *Id.* See also Myres S. McDougal & Norbert A. Schlei, *The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security*, 64 *YALE L.J.* 648 (1955); Emanuel Margolis, *The Hydrogen Bomb Experiments and International Law*, 64 *YALE L.J.* 629 (1955); *The Nuclear Test Cases* (Austl. v. Fr.; N.Z. v. Fr.), 1974 *I.C.J.* 283, 459 (Dec. 20).

77. Compensation was discussed at length in the hearings held before the Defense Policy Panel of the U.S. House of Representatives Committee on Armed Services. See RICHARD S. WILLIAMSON, *IRAN AIR 655: STEPS TO AVERT FUTURE TRAGEDIES*, H.R. Doc. No. 119, 100th Cong., 2d Sess., at 52-77 (1988).

78. See Report on Iran Air, *supra* note 25, at 897, citing HOUSE ARMED SERVICES COMM'N, *IRAN AIR FLIGHT 655 COMPENSATION*, H.R. Doc. No. 100, 100th Cong., 2d Sess., at 1-77 (1988). For different ratings, see Doo Hwan Kim, *Liability of Governmental Bodies in International Civil Aviation*, in *THE HIGHWAYS OF AIR AND OUTER-SPACE IN ASIA* 177, 189 (1992).

79. See The Iraqi Note to the United States on Compensation, May 20-21, 1987, 26 *I.L.M.* 1422, 1428 (1987).

80. For instance, in the nuclear test incident in the Pacific of 1954, the U.S. Government offered compensation *ex gratia* to Japanese fishermen. See, e.g., HARRIS, *supra* note 76, at 322. Similarly, Chile also offered compensation *ex gratia* to the victims' family in the Letelier's Case, without prejudice to the question of sovereign immunity in non-commercial tort cases. See Chile-U.S. Commission Convened Under the 1914 Treaty for the Settlement of Disputes: Decision with Regard to the Dispute Concerning Responsibility for the Deaths of Letelier and Moffitt, done at Washington D.C., Jan. 11, 1992, 31 *I.L.M.* 1, 19-20 (1992). See also Leich et al., *supra* note 11, at 319. On July 14, 1988, then-President Bush defended the U.S. position before the Security Council, claiming that the action of the U.S.S. Vincennes was justifiable under the international law of self-defence. *Id.*

matter of grace," implying that it is offered without admitting any liability. It can also be offered gratuitously, notwithstanding the question of state responsibility. This second implication does not preclude wrongfulness, but is indicative of the state's readiness to pay compensation without further proof and without establishing wrongfulness. Whatever the intended implications, in the case of IR 655, no clearly defined meaning of *ex gratia* compensation was offered. At best, it cannot cover or preclude the United States' responsibility, as every state is susceptible to state responsibility and this responsibility exists outside and beyond any offer of compensation *ex gratia*, with or without admitting commission of an internationally wrongful act. There may be other attenuating circumstances that alleviate the punishment imposed upon individuals responsible for downing a commercial airline.

All the facts discovered through international investigation concur on one point—No criminal intent is attributable to the U.S. Government. Mistaken identity, if not negligent or reckless, could preclude the *mens rea* also essential to creating an *actus reus*. In other words, the wrongful act attributable to the U.S. Government could only be regarded as an international crime under two circumstances: (1) if deliberate intent to destroy a civil aircraft in ordinary commercial flight is proven; or (2) if the firing authority negligently or recklessly failed to distinguish between an unarmed civil aircraft Airbus 300 and a fighter F-14 on an attacking run.<sup>81</sup> The party basing its action on false assumption must bear the risk of its own failure to draw that basic distinction.<sup>82</sup>

## 2. Actions Taken by the Injured States

The principal injured party is clearly Iran. The aircraft was Iranian, bore Iranian registration, and carried an Iranian flag. There are also many co-injured states whose nationals fell victim to this deliberate act of destruction.

---

81. See Report on Iran Air, *supra* note 25, at 909-18.

82. See *State Responsibility*, *supra* note 71, at 241. Every state is responsible for its internationally wrongful act. Self-defence is only permissible in response to an armed attack. *Id.*

The rights of the injured states correspond to the duties of the responsible state.<sup>83</sup> These duties normally consist of three-dimensional measures:

1. *Ex nunc*: immediate cessation of such harmful activities
2. *Ex tunc: restitutio in integrum*, reparations
3. *Ex ante*: apologies, satisfaction, assurance, or pledge and correction of measures to prevent recurrence of such internationally wrongful acts.<sup>84</sup>

Because Iran failed to receive satisfaction from the U.S. Government, as an injured state it could exercise several options. Other injured states include India, Italy, Pakistan, Yugoslavia, and the United Arab Emirates; they are also entitled to make international claims for the loss of lives.<sup>85</sup> These may conveniently be treated in the context of the international community's response.

### 3. Responses from the International Community

#### a. *The Security Council of the United Nations*

First, Iran notified the Secretary-General of the United Nations and requested an urgent meeting of the Security Council.<sup>86</sup> The Security Council met on July 14, 15, 18, and 20, 1988 to consider the question. On July 20, 1988, the Council unanimously adopted Resolution 616, which contained the following five operative paragraphs:

- (1) Expresses its deep distress at the downing of an Iranian aircraft by a missile fired from a United States warship *and profound regret* over the tragic loss of innocent lives;
- (2) Expresses its sincere condolences to the families of the victims of the tragic incident and to the peoples and Governments of their countries of origin;
- (3) Welcomes the decision of the International Civil Aviation Organization . . . to institute an immediate fact-finding of . . . the chain of events relating to the flight and destruction of the aircraft. . . .;
- (4) Urges all parties to the Chicago Convention of 1944 on International Civil Aviation [15 U.N.T.S. 295] to observe to

---

83. See, e.g., *Comments of Government on Part 1 of the Draft Articles on State Responsibility for International Wrongful Acts*, [1981] 2 Y.B. INT'L L. COMM'N. 71, U.N. Docs. A/CN.4/342, A.1-4.

84. See Riphagen, *supra* note 69.

85. See Report on Iran Air, *supra* note 25, at 897.

86. *Id.* at 896.

the fullest extent, in all circumstances, the international rules and practices concerning the safety of civil aviation, in particular, those of the annexes to that Convention, in order to prevent the recurrence of incidents of the same nature;

- (5) Stresses the need for a full and rapid implementation of its resolution 598 (1987). . . .<sup>87</sup>

It is significant that the support for the Resolution was unanimous. It is also important that both the United States and Iran announced that they would cooperate with the ICAO's fact-finding investigation.<sup>88</sup>

*b. The Actions Taken by the ICAO*

On March 17, 1989, at the 20th meeting of its 126th session, the Council of ICAO adopted a resolution *inter alia*.<sup>89</sup> This Resolution urged all states to take necessary action for civil aircraft navigation safety, particularly by assuring effective coordination of civil and military activities.<sup>90</sup> In the Resolution, the Council reaffirmed the fundamental principle of general international law requiring states to refrain from resorting to the use of weapons against civil aircrafts. The Council also appealed to all states to ratify the Protocol introducing Article 3 *bis* into the Convention on Civil Aviation.<sup>91</sup> The Resolution instructed the Air Navigation Commission to study the safety recommendations contained in the report of the fact-finding investigation of November 1988<sup>92</sup> and to report to the 126th session of the Council on any measures it considers necessary.

The Fact-Finding Investigation of the ICAO made the following recommendations concerning measures that could be considered *ex ante*:

---

87. S.C. Res. 616, U.N. Doc. S/RES/616, reprinted in 28 I.L.M. 896 (1989). Resolution 616 was unanimously adopted by the U.N. Security Council on July 20, 1988. See Report on Iran Air, *supra* note 25, at 896.

88. See S.C. Res. 616, *supra* note 87, para. 3.

89. See Report on Iran Air, *supra* note 25, at 898.

90. See *id.* at 924-25.

91. See I.C.A.O. Res., 126th Sess., 20th mtg., 28 I.L.M. 898 (1989); Decision of I.C.A.O. Council, 125th Sess., 14th mtg., 28 I.L.M. 898-99 (1989) (appealing urgently to "all states which have not yet done so to ratify, as soon as possible, the Protocol introducing Article 3 *bis* and the Convention on Civil Aviation").

92. 28 I.L.M. 900-25 (1989).

- 4.1 In areas where military activities potentially hazardous to civil flight operations aircraft take place, optimum functioning of civil/military coordination should be pursued. When such military activities involve States not responsible for the provision of air traffic services in the area concerned, civil/military coordination will need to include such States. To this end: (*inter alia*)
- (a) Military forces should, initially through their appropriate State authorities, liaise with States and ATS units in the area concerned . . . .
  - (e) Military units should be equipped to monitor appropriate ATC frequencies to enable them to identify radar contacts without communication . . . .
  - (f) If challenges by military units on the emergency frequency 121.5 MHz become inevitable, these should follow an agreed message with content operationally meaningful to civil pilots . . . .<sup>93</sup>

*c. Institution of a Proceeding Before the International Court of Justice*

Iran filed an application on May 17, 1989, referring to the Chicago Convention on International Civil Aviation,<sup>94</sup> as amended, and the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation,<sup>95</sup> as well as the decision of the ICAO Council on March 17, 1989.<sup>96</sup> Iran requested that the Court adjudge and declare:

- (a) that the ICAO Council decision is erroneous in that the Government of the United States has violated the Chicago Convention . . . as well as Recommendation 2.6/1 of the Third Middle East Regional Air Navigation of ICAO;
- (b) that the Government of the United States has violated Articles 1, 3 and 10(1) of the Montreal Convention; and
- (c) that the Government of the United States is responsible to pay compensation to the Islamic Republic, in the amount to be determined by the Court, as measured by the injuries suffered by the Islamic Republic and the bereaved families as a

---

93. *Id.* at 924-25.

94. See Report on Iran Air, *supra* note 25, at 896; Aerial Incident of July 3, 1988 (Iran v. U.S.), 1989 I.C.J. 132 (Dec. 13).

95. See Tokyo Convention, *supra* note 3; The Hague Convention, *supra* note 1; Montreal Convention, *supra* note 2.

96. See Decision of I.C.A.O. Council, *supra* note 91.

result of these violations, including additional financial losses which Iran Air and the bereaved families have suffered for the disruption of their activities.<sup>97</sup>

As the matter is *sub judice* in the International Court of Justice, the discussion of the dispute should be postponed, pending judicial pronouncement on the case's merits.

#### IV. CONCLUSION

An examination of the procedures recommended by the Specialized Agency of the United Nations for handling civil aircrafts that enter a national airspace or fly over a warship reveals essential similarities. The bottom line is the same in both cases: they reflect the necessity to accord top priority to safety. Regardless of the circumstances, no weapon may be used against a civil aircraft in flight. This prohibition is absolute.

In the incident of September 1, 1983, the alleged grounds for firing the missiles against Korean Air Flight 007 were the protection of national security and the defence of territorial sovereignty. The absurdity of these justifications are so self-evident that even the commanding officer who had ordered the downing of the Korean aircraft, decided to leave his post. The irony of that incident was that the Republic of Korea obtained no satisfaction from any quarters, except for the reactions from the international community and the unanimous adoption of Article 3 *bis* of the Chicago Convention of 1944. The Trilateral Agreement among the ACCs on the Pacific Route was a positive step in the right direction. Nevertheless, Korean Air had to pay compensation for the loss of its own passengers' lives in certain cases, even beyond the Warsaw system's limits. It is all the more ludicrous that the former U.S.S.R. paid nothing, and then, subsequently, received three billion U.S. dollars in assistance from the Republic of Korea; only slightly more than half that amount pledged by the Group of Seven.

The second incident on July 3, 1988 was radically different. There was no possible excuse of a national airspace violation. The United States also cannot claim that a warship is a floating territory and is, therefore, a security zone akin to territorial airspace. Fur-

---

97. See *Iran Brings a Case Against the United States*, Communiqué from the International Court of Justice No. 89/6 (May 17, 1989) (unofficial press release, copy on file with *Loyola of Los Angeles International and Comparative Law Journal*); Aerial Incident of 3 July 1988 (Iran v. U.S.), 1989 I.C.J. 132 (Dec. 13).

thermore, the argument of self-defence is untenable. This argument is based on a self-induced error of an impossible scenario—that defensive measures could in any way have been legitimately taken to destroy an unarmed civil aircraft in routine commercial flight. Whatever the missing link in the chain of communication causing the mistaken identity of the Airbus, the government responsible for the damage must bear the consequences of its mistake.

Reactions from third parties have been uniform. The international community not only expressed regret, but also deplored the wanton destruction of the civil aircraft and the loss of human lives. Furthermore, such acts of terror intensified and augmented public fear for international civil aviation. State terrorism and its tactics of deliberately shooting civil aircraft in flight should not be tolerated. There is no excuse for such terrorism. The status of a state as a “superpower” does not exempt that state from responsibility. The days of “gun-boat diplomacy” are long gone. The existence of a “superpower,” once an inevitable necessity to preserve the delicate balance of power, has now become obsolete.

To respect and protect human rights, the right to life of innocent civil passengers on aircraft must be preserved. If a sacrifice has to be made, national pride for the territorial integrity against intrusion of airspace should be the first to go. Furthermore, the need for any challenges against civil aircraft in routine flight must be eliminated. Such challenges violate the fundamental human rights of hundreds of passengers to have and enjoy their lives free from acts of terrorism and arbitrary executions without due process of law.

The safety measures this Article recommends are, in fact, legally enforceable. Such enforcement remains to be strengthened further by all peace-loving nations in the interest of safe international civil air-transport. It is the author’s submission that, for the peace and security of mankind, no military necessity is ever admissible that impairs the integrity and dignity of men or that interrupts the free and innocent passage of civil aircraft in flight through national and international airspace.