THE LEGAL IMPLICATIONS OF THE SOVIET UNION'S ASSERTIONS CONCERNING THE DOWNING OF KAL FLIGHT 007

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On the first day of September 1983, a Soviet SU-15 ("Flagon") fighter shot down a South Korean 747 Jumbo jet on a scheduled international flight from New York via Anchorage, Alaska to Seoul, Korea which had penetrated Soviet airspace above the southern-most tip of Kamchatka Peninsula and Sakhalin Island. The aircraft crashed into the Sea of Japan killing all 269 persons on board.[1] The circumstances surrounding this tragedy were a major turning point in world politics. States around the globe burst into protest[2]

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1. On 2 August 1989 a six-member Federal Court jury in Washington found that Korean Air Lines had acted with wilful misconduct by straying into Soviet airspace. They awarded $50 million in punitive damages to be divided equally among the estates of 137 of the victims. Without the finding of wilful misconduct the families would have been limited to compensation of $75,000 per passenger pursuant to articles 22 and 25 of the Convention for the Unification of Certain Rules Relating to International Carriage by Air signed at Warsaw in 1929 as modified by the Hague Protocol 1955 and the Montreal Agreement 1966. (For a detailed examination of the limitations on the amount of liability and what constitutes wilful misconduct see S Speiser & C Krause *Aviation Tort Law* Vol 1 (Rochester, NY: Lawyers Cooperative Pub Co, 1978) 11:36-11:37.) With the finding the families are free to seek additional individual damages (eg loss of earnings of a parent or spouse) in Federal Courts around the United States. The airline, claiming that the evidence does not justify the verdict, plans to appeal.
2. Among the countries that deplored the USSR's action were the United States, Republic of Korea, Japan, China, Australia, Canada, the United Kingdom, New Zealand, Zaire, Liberia, the Netherlands, France, Sweden, Belgium, Italy, the Federal Republic of Germany, Singapore, Fiji, Colombia, Ecuador and Paraguay. The most notable expression of protest was that in response to a call by the International Federation of Airline Pilot Associations (IFALPA) eleven of the sixteen nations with direct air service to the USSR temporarily terminated flights to Moscow. See "11 Nations Halt Moscow Service to Protest Downing" Aviation Week and Space Technology 19 September 1983, 26.

amidst the American and Soviet exchange of allegations, counter-allegations and self-justifications. However, despite the passage of time and the investigations into the incident many of the basic facts remain in dispute.[3] Inevitably, the controversy has become heavily coloured with the predictable paranoia of the cold-war. Those raising hypotheses damaging to one side have quickly found themselves accused of being the medium of Soviet or CIA disinformation campaigns.[4] It is not intended to enter this futile debate, weighing the evidence and probability of each theory in turn.[5] Rather, this examination will proceed on the basis that the USSR's account of the incident is correct and will focus on the legality or illegality of its destruction of Kal 007 in the light of this assumption.[6]

The USSR alleged (and still maintains today) that the United States intentionally sent flight Kal 007 on a thoroughly pre-planned intelligence gathering mission over areas of strategic importance

3. This is largely due to the fact that the flight recorder, which would have contained valuable information as to the events that occurred, was never found. For an account of the controversy surrounding the salvage missions see J D Laveson "Korean Airline Flight 007. Stalemate in International Aviation Law-A Proposal for Reinforcement" (1985) 22 San D L Rev 859, 866-868.
4. See R W Johnson *Shootdown The Verdict on Kal 007* (London: Chatto & Windus, 1986) 1
5 At the start of the recent Washington trial Judge Aubrey Robinson remarked that "there are people [in the United States and Soviet governments] who know exactly where [KAL 007] was shot down and how it got there". His Honour continued that due to national security concerns "nobody will breathe a word about it". There has been no agreement between the various writers on the facts For an examination of the hypotheses that have been advanced see Johnson supra n 4; W Brown ed *Why was the World Misled? The Facts about Flight 007 — The Soviet View, an Australian View, an American View and the case for Peaceful Coexistence* (Sydney Survey, 1984); R Rohmer *Massacre 007 The Story of the Korean Air Lines Flight 007* (Sevenoaks: Coronet, 1984); J St John *Day of the Cobra The True Story of Kal Flight 007* (Nashville: Thomas Nelson Publishers, 1984); A Dallin *Black Box Kal 007 and the Superpowers* (Berkeley: University of California Press, 1985), O Clubb *Kal Flight 007 The Hidden Story* (Sag Harbour, NY: Permanent Press, 1985); S Hersh *The Target is Destroyed What Really Happened to Flight 007 and What America Knew About It* (New York. Random House, 1986); D Pearson "Kal 007: what the US knew and when we knew it" The Nation 18-25 August 1984, 105; D Pearson *Kal 007 The Cover-Up* (New York: Summit Books, 1987).
6. As this examination is concerned only with the legality of the USSR's action at the time of the incident, the implications of the resolution of the 25th extraordinary session of the International Civil Aviation Organisation (24 April — 10 May 1984) amending art 3 of the Convention on International Civil Aviation signed at Chicago in 1944 (art 3 bis) will not be analysed.

to the USSR.[7] According to the USSR the airliner entered Soviet airspace over the Kamchatka Peninsula at the same time "another spy plane of the United State's Air Force, an RC-135"[8] was in the same area. Soviet interceptors were deployed and, in accordance with the International Civil Aviation Organisation's (ICAO) procedures for the interception of civil aircraft,[9] signalled to the intruder that it was infringing Soviet airspace, but these warnings were ignored. Kal 007 was again intercepted by Soviet fighters as it approached Sakhalin Island and attempts were made to establish contact with it on the international emergency frequency of 121.5 megacycles. When Kal 007 did not respond to these signals warning shots with tracer shells were fired along the route of the aircraft. Since even after this the intruder refused to obey a demand to land in Soviet territory and attempted evasive action, the interceptors were forced to resort to the use of armed force to terminate the flight.[10] The USSR contended that their pilots could not have known that Kal 007 was a civilian aircraft, because they were positioned behind and below the aircraft which was flying without navigational lights, at night, in conditions of poor visibility, and it was not responding to their signals and warnings. Thus, it was alleged that the USSR had defended its sovereign airspace in con-

7. There is no doubt that Kal 007 overflew launching and testing sites for the USSR's ballistic missiles. Indeed there is evidence that strategic missile tests were scheduled to proceed on the day of the intrusion, see Pearson "Kal 007: what the US knew and when we knew it" supra n 5, 114. Kal 007 also overflew the Soviet submarine pens at Petropavlosk, home port for an estimated thirty strategic missile submarines, or about half the sea-based deterrent forces of the USSR. To carry out military operations in time of war, the Soviet Pacific Fleet must pass through the Le Pérouse Strait, a narrow waterway separating Sakhalin Island from Japan. See G M McCarthy "Limitations on the Right to Use Force Against Civil Aerial Intruders: The Destruction of Kal Flight 007 in Community Perspective" (1984) 6 NYL Sch JICL (No 1) 177, 203; Middleton, "Area where Russians Say Plane Intruded is Critical Part of Their Far East Defences" New York Times 2 Sept 1983, A1 col 5 and Schmemann "Soviet is Pressing Case on Kal 007" New York Times 31 Aug 1984, A1 col 1.

8 "Text of Tass statement on Downing of Airliner" New York Times 3 Sept 1983, A4 col 1.

9 These are located in the general text in Annex II of the Convention on International Civil Aviation signed at Chicago in 1944 and are fully documented in Attachment A to the Convention

10 Marshall Nikolai Ogarkov, the Chief of Staff of the Soviet Armed Forces, insisted that "the Soviet side took every responsible step to force the plane to land on one of our Soviet airfields. However, the plane stubbornly ignored all the warnings from the Soviet plane and did not want to answer radio contact" See "Transcripts of Soviet Official's Statement and Excerpts from News Session" New York Times 10 Sept 1983, A4 col 1.

formity with Soviet border law[11] and international law.[12]

The most significant milestone in civil aviation law is undoubtedly the almost universally ratified Convention on International Civil Aviation signed at Chicago in 1944 ("the Chicago Convention").[13] The Chicago Convention explicitly reaffirmed the principle outlined in article 1 of its predecessor, the Paris Convention of 1919; namely, that every state has "complete and exclusive sovereignty over the airspace above its territory".[14] Equally significant is article 6 which prohibits scheduled international aircraft from trespassing into contracting states' airspace except with the "special permission or other authorisation of that state and in accordance with the terms of such permission or authorisation".[15] Furthermore, article 9 recognises a nation's right to restrict the flight of foreign civil aircraft for reasons of military necessity or public safety. Thus, with respect to scheduled and military aircraft the legal control of a subjacent state over its airspace appears, on the face of it, to be virtually absolute.[16] However, some states have asserted that trespassing aircraft are not completely at the mercy of the territorial sovereign and that fetters

11 Article 36 of the State Border Law provides: "The border guard and Anti-Aircraft Defence Forces shall, in effectuating the protection of the USSR state boundary, use weapons and combat equipment in order to repel.. violators of the USSR state boundary...in the air when the cessation of the violation or detention of the offenders cannot be effectuated by other means." (Reprinted at (1983) 22 ILM 1074)

12. On 6 March 1984, the Council of the ICAO voted twenty to two, with nine abstentions, to strongly deplore the destruction of Kal 007. See M N Leich "Destruction of Korean Airliner: Action by International Organisations" (1984) 78 AJIL 244 and G F FitzGerald "The Use of Force Against Civil Aircraft: The Aftermath of the Kal Flight 007 Incident" (1984) Can YBIL 291. In response to the resolution Boris Rygenov, the Soviet delegate, insisted that the USSR's "measures to protect its airspace were in accord with the rules and procedures of international law . . . Every warning and measure was taken to have the violation handled and the airplane landed" New York Times 7 Mar 1984, A12 cols 3-4.

13. Although the USSR was not an original signatory to the Convention, it became a party to it in 1970

14. Art 1. Under art 2 national airspace includes airspace above territorial water. This international principle reflects the general principle of the common law· cujus est solum, ejus est usque ad coelum et ad infernos. (To whomsoever the soil belongs, owns also to the sky and to the depths).

15 "Scheduled" aircraft refers to regularly operating civil passenger airlines. In contrast to art 6, note art 5 which grants fairly extensive rights of traffic to "non-scheduled" civilian aircraft, subject to certain restrictions

16. As R Y Jennings "International Civil Aviation and the Law" (1945) 22 Brit YBIL 191, 199 observes, the only real sanction against the abuse of a sovereign's right would appear to be international public opinion and world conscience sanctions which are, at the best of times, of questionable influence.

on this apparent absolute right do exist and may be found in treaty law.

During submissions to the International Court of Justice concerning the destruction by Bulgaria of an Israeli passenger airliner in 1955, the United Kingdom referred to article 9(c) of the Chicago Convention which provides that each contracting state may require any aircraft trespassing into one of its restricted or prohibited areas to "effect a landing as soon as practicable thereafter at some designated airport within its territory". Notwithstanding that article 9(c) does not specify how this is to be accomplished, it was asserted that it impliedly refused to sanction the use of force against a civil airliner under any circumstances.[17] Reference was also made by the United States to article 25 which states that "each contracting state undertakes to provide such measures of assistance to aircraft in distress in its territory as it may find practicable...".[18] By implication, it was submitted that subjacent states "owe a duty of safety to overflying passengers and crew and a duty not to kill or destroy or to tolerate destruction and pilferage".[19] However, in arriving at their conclusions regarding the international standards applicable to aerial intrusions, the United Kingdom, the United States and Israël acknowledged that there is very little treaty law concerning the use of force against aerial intruders.[20] Consequently these implications, however desirable for the furtherance of international peace and safety, must be viewed in this light.

As existing treaty law does not directly cover the question of when precisely the destruction of intruder aircraft should or may take place, it is necessary to resort to an examination of that part of treaty law which concerns the use of force in general terms. Any analysis

17. 1959 Aerial Incident of 27 July 1955, *Israel v Bulgaria, United States v Bulgaria, United Kingdom v Bulgaria,* ICJ Pleadings, ("1959, ICJ Pleadings") Memorial of the United Kingdom, 364. But see Chauveau, *Droit Aerien,* (1951) where it is suggested at 49 that art 9 implies that an aerial intruder can be shot down in cases of resistance or attempted escape (as cited by O J Lissitzyn "The Treatment of Aerial Incidents in Recent Practice and International Law " (1953) 47 AJIL 559, 568).
18. See also art 22 of the Paris Convention of 1919.
19. 1959 ICJ Pleadings, Memorial of the United States supra n 17, 239.
20. As the United States noted "there is no existing treaty or international code in terms prohibiting a government from ordering the killing of innocent passengers in an innocent civil transport aircraft that has strayed without prior authorization into the territorial airspace of the killing government" ibid, 212.

of the legality of the use of force by the USSR against Kal 007 is inextricably intertwined with the right of self-defence which is reserved in article 51 of the Charter of the United Nations. Although the availability of such a defence necessarily calls for an examination of the particular facts of the incident in question, the permissible scope of this provision has been the subject of much debate among legal commentators. One view holds that an armed attack is a condition precedent to the lawful use of force in self-defence. Proponents of this strict interpretation of self-defence read article 51 in connection with article 2(3) which instructs members to settle their disputes by peaceful means without endangering international peace, and article 2(4) which outlaws the threat or use of force against the territorial integrity or political independence of any state, in order to assert that the use of force in self-defence is lawful if, *but only if*, "an armed attack occurs".[21] This view narrows the traditional conception of self-defence which permits defensive action even before an armed attack occurs if there is an instant and overwhelming necessity.[22] It necessarily follows from an application of the restrictive interpretation of article 51 that the destruction of Kal 007 was an unlawful use of force by the USSR and therefore contrary to international law as the requirement of an armed attack was not met. Indeed, on the strict view, the use of force will almost never be justified against civil intruders as an armed attack is highly unlikely to have occurred.[23]

It has been submitted, however, that such a restrictive interpretation of article 51 is unrealistic and must be rejected for three

21. See I Brownlie "The use of Force in Self-Defence" (1961) 37 Brit YBIL 183; J L Kunz "Individual and Collective Self Defence in Article 51 of the Charter of the United Nations" (1947) 41 AJIL 872; L Henkin *How Nations Behave Law and Foreign Policy* (New York: Praeger, for the Council on Foreign Relations, 1968), P C Jessup *A Modern Law of Nations* (New York: MacMillan, 1948); Q Wright "The Cuban Quarantine" (1963) 57 AJIL 546; Badr "The Exculpatory Effect of Self-Defence in State Responsibility" (1980) 10 Ga JICL 1 and H Kelsen *The Law of the United Nations* (London Stevens, 1950).
22. See R Y Jennings "The Caroline and McLeod Cases" (1938) 32 AJIL 82, 89
23. It is beyond the scope of this examination to embark upon an extensive analysis to determine at what stage exactly an armed attack can be said to have first occurred. However, it should be noted that the wider the meaning afforded to the words the less the divergence between a strict and wider interpretation of art 51. See N Feinberg "The Question of Defining Armed Attack" in *Mélanges en L'honneur de Gilbert Gidel* (Paris: Librairie Sirey, 1961) (as cited by B Feinstein "Self-Defence and Israel in International Law: A Reappraisal" (1976) 11 Is L Rev 516, 532).

reasons.[24] Firstly, the fundamental predicate for the restrictive right of self-defence — a reasonably operational Security Council — has never come to pass.[25] Article 51 envisions a Security Council with the effective authority to resolve international disputes peacefully thereby precluding resort to force.[26] However, the Security Council has proven itself ineffective due to the political biases of its members.[27] There is a strong tendency for members to place emphasis upon group loyalties, their general international policies and their own special interests rather than the merits of the case and thus to subordinate the interests of justice and international law to those factors.[28] As two commentators have argued, "to wait for organs of the world community to determine the necessity of acting [in self-defence] is a utopian concept".[29] Secondly,

24. See McCarthy supra n 7, 187-189 For other proponents of a wider view of art 51 see Feinstein supra n 23; M McDougal and F Feliciano "Legal Regulation of Resort to International Coercion Aggression and Self-Defence in Policy Perspective" (1959) 68 Yale LJ 1057, M McDougal "The Soviet — Cuban Quarantine and Self-Defence" (1963) 57 AJIL 597, B MacChesny "Some Comments on the 'Quarantine' of Cuba" (1963) 57 AJIL 592, D W Bowett *Self Defence in International Law* (Manchester: Manchester University Press, 1958) and "Reprisals Involving Recourse to Armed Force" (1972) 66 AJIL 1; J Stone *Aggression and World Order* (Sydney: Maitland Publishers, 1958), J L Brierly *The Law of Nations An Introduction to the International Law of Peace* (Oxford OUP, 1963) and Rostow "Law is Not a Suicide Pact" New York Times 28 Nov 1983, A24 col 1.
25. G Schwarzenberger "The Fundamental Principles of International Law" (1955) 87 Recueil des Cours 195, 338 states that "The reduction of self-defence to an interim right was made on the assumption that the international quasi-order, which was to be established by the United Nations, would normally work. The Security Council was to exercise the utmost freedom in determining what amounted to a threat to peace, breach of peace or act of aggression, including armed attack If, therefore, the Security Council fails to fulfill its appointed function, this task falls back on the individual members of the United Nations"
26. Art 33, para 1 provides: "The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall . seek a solution by negotiation, inquiry, mediation.. or other peaceful means of their own choice." Art 37 provides "1. Should the parties to a dispute...fail to settle it by the means indicated [in article 33] they shall refer it to the Security Council. 2. If the Security Council deems that the continuance of the dispute is in fact likely to endanger the maintenance of international peace and security, it shall decide whether to take action under Article 36 or to recommend such terms of settlement as it may consider appropriate."
27. See McCarthy supra n 7, 187; J Spanier *Games Nations Play* 5th edn (London. Nelson, 1984) 459 argues that the United Nations "only registers the power politics of the state system" and that its decisions "are not made according to some impartial, non political and therefore purportedly superior standard of justice"
28. See F Vallat "The Peaceful Settlement of Disputes" in *Cambridge Essays in International Law* (London: Stevens, 1965) 155, 159-160
29. M McDougal and F Feliciano *Law and Minimum World Public Order The Legal Regulation of International Coercion* (New Haven: Yale University Press, 1963) 219. See also Brierly supra n 24, 418-420

there is no indication that the drafters of the Charter, by inserting a provision which expressly reserves a right of self-defence, had the intent of imposing, by this provision, new limitations upon the traditional rights of states.[30] In fact, the preparatory work suggests only that the article should safeguard the right of self-defence, not restrict it.[31] Thirdly, and, in the writer's view, most importantly, it is totally unrealistic in the modern world of military technology to require a state to submit to an armed attack before that state may lawfully take defensive measures to protect itself. To confine the ambit of article 51 in this way could quite possibly result in restricting the lawful right of a state to secure itself against extermination.[32] When coercion against a state consists of military measures short of an armed attack — such as espionage — realism, common sense, and the destructive nature of modern weapons demand that the coerced state should and must be entitled to protect itself. It is submitted therefore, that article 51 is only a declaratory article intended to preserve the customary right of self-defence and was not intended to render that right effectively null and void.[33] Since the USSR has repeatedly insisted that the destruction of Kal 007 was a lawful response to the aerial trespass, its justification must be premised on the customary international law doctrine regarding the use of force in self-defence.

The classic formulation of the right to use force in self-defence under customary international law was offered by the United States Secretary of State David Webster during the *Caroline* dispute.[34] He

30 See McDougal supra n 24, 599; Bowett supra n 24, 188, Feinstein supra n 23, 529; Brierly supra n 24, 417. For a contrary view see Henkin supra n 21, 232-233.

31 Committee 1/I stressed in its report, approved by both Commission I and the Plenary Conference that "The use of arms in legitimate self-defence remains admitted and unimpaired". See Bowett supra n 24, 185, Feinstein supra n 23, 529; Brierly supra n 24, 417

32 See Feinstein supra n 23, 530. As Rostow supra n 24 has stated, "international law, after all, is not a suicide pact" McDougal and Feliciano supra n 24, 1120-1121 assert that a denial of "a right of self-defence in any and all contexts not exhibiting overt violence and even against the most intense uses of non-military instruments — may, under the same conditions of the present world, amount to requiring a target state to be the sedentary fowl in an international turkey-shoot" Henkin supra n 21, 232-233 appeared to play down the practical realities of the nuclear age when he argued that the development of "terrible weapons" should have no bearing upon the "fair" reading of art 51 (ie upon the strict interpretation).

33 See McCarthy supra n 7, 189, MacChesny supra n 24, 595; Feinstein supra n 23, 531; Brierly supra n 24, 418.

34. See Jennings supra n 22

stated that the applicable legal principle was that the right of self-defence permits the anticipatory use of force if there is an instant and overwhelming necessity provided that the measures used are not unreasonable or excessive.[35] The recognition and acceptance of Webster's formulation by both the United States and British governments makes it all the more valuable as a precedent.[36] The principal requirements which customary international law makes prerequisites to the lawful assertion of self-defence are commonly summarised in terms of necessity and proportionality.[37] There must exist an actual or threatened infringement of the rights of the subjacent state and a failure on the part of the infringing state to stop or prevent the infringement.[38] Under these conditions a state may lawfully resort to acts of self-defence which are strictly confined to the object of stopping or preventing the infringement and reasonably proportionate to what is required for achieving this result.[39] This general formulation governs community expectations concerning self-defence and, as such, raises questions as to its applicability in any particular situation. An examination of the most important prior incidents involving the use of force against civil aerial intruders is necessary in order to determine community expectations concerning self-defence and the treatment of intruding civil aircraft as evidenced by states practice and opinion.[40]

In their memorials submitted to the International Court of Justice following Bulgaria's attack on an Israeli airliner in 1955, the United States, the United Kingdom and Israel all cited with approval the

35 Ibid, 89.

36. Ibid, 92.

37 As McDougal supra n 24, 597-598 has put it, "in broadest formulation, this right of self-defence, as established by traditional practice, authorizes a state which, being a target of activities by another state, reasonably decides.. that such activities imminently require it to employ the military instrument to protect its territorial integrity and political independence, to use such force as may be necessary and proportionate for securing its defence"

38 See H Waldock "The Regulation of the Use of Force by Individual States in International Law" (1952) 81 Recueil des Cours 455, 463-464.

39. See McCarthy supra n 7, 191. Bowett supra n 24, 269 offers a similar characterisation of the right of self defence

40. Incidents of this nature have occurred on average once a year during the last twenty years and at least thirty-three times since 1947, see "Korean 747 is not the only one" Flight International Sept 1983, 732 and G Richard "Kal 007: The Legal Fallout" (1984) 9 Annals of Air and Space L 147, 148 It is possible to discuss only a limited number of the more well known incidents in this paper

decision in *United Kingdom v Albania* ("the *Corfu Channel* case").[41] The judgment was advanced as evidence that international law considers actions by states that unnecessarily or recklessly risk the lives or property of nationals of other states to be violative of "elementary considerations of humanity even more exacting in peace than war".[42] The British and American memorials also cited *Garcia v United States*[43] for the proposition that such considerations of humanity necessarily involve the balancing of competing interests of sovereign states and the application of a standard of reasonableness. In that case the United States — Mexican General Claims Commission held that the act of firing upon unarmed civilians is contrary to international law "unless the importance of preventing or repressing the delinquency by firing is in reasonable proportion to the danger arising from it"; nor should it be used "when other practicable ways of preventing or repressing the delinquency might be available".[44]

Although the United States and Israeli governments viewed the Bulgarian incident as a violation of international law, they did not adopt the United Kingdom's categorical rejection of the use of force against civil intruders.[45] The United States maintained that regardless of the explanation for a civilian aircraft entering foreign airspace it cannot be shot down without first being offered a safe alternative such as the opportunity to be led out of the territorial airspace or to land at a designated airfield.[46] However, it argued that the issue of the legality of the use of force in this situation could not even arise unless the offended state raised an articulable security necessity, which Bulgaria did not claim.[47] Similarly Israel maintained that "in normal times there can be no legal justification for haste and inadequate measures *after* interception of, and for the opening of fire on, a foreign civil aircraft clearly marked as

41. 1949 ICJ 4.
42. Ibid, 22.
43 *Garcia Case* (Mex v US) 4 R Int'l Arb Awards 119 (1928).
44. Ibid, 123.
45. 1959 ICJ Pleadings Memorial of the United Kingdom supra n 17, 358. The position of the United Kingdom may be compared to that adopted by the allied High Commissioners following the USSR's destruction of an Air France airliner in 1952. See Lissitzyn supra n 17, 574.
46. 1959 ICJ Pleadings Memorial of the United States supra n 17, 210.
47. Ibid 242.

such".[48] Once Bulgaria decided to use force against the airliner, it was subject to the duty to take into consideration the elementary obligations of humanity and not to use a degree of force in excess of what is commensurate with the reality and gravity of the threat (if any).[49] Bulgaria itself impliedly recognised that its failure to exhaust all other means of terminating the unauthorised entry before its resort to armed force rendered it liable for the resulting damage.[50]

Different interpretations as to the legitimacy of the use of force against airliners can be made in the light of the ICAO's condemnation of Israel's destruction of a Libyan airliner in 1973 which had intruded a mere twelve miles into occupied Sinai.[51] It has been argued that it indicates that the security risk posed by a civilian airliner must be more than the mere flight over a prohibited or restricted area in order to justify the use of armed force.[52] However, it is submitted that the better interpretation of the ICAO's resolution is that it is evidence of a desire to uphold the elementary considerations of humanity which require that a pilot be offered a safe alternative before the use of force is employed. Much reliance was placed upon the presentation of tapes which tended to confirm allegations that the Libyan airliner had been attacked without any prior warning whatsoever. The tapes also revealed that the pilot had realised he had lost direction due to instrument failure, and, believing that the aircraft was over Egyptian territory, had been communicating with Egyptian ground control when the shots were fired. It is submitted that the ICAO can be said to have been deploring Israel's employment of force *under these circumstances* rather than categorically denying that the use of force against civilian aircraft can ever be proportionate to the security risk posed by an unauthorised flight over prohibited or restricted areas.[53]

48. 1959 ICJ Pleadings Memorial of Israel supra n 17, 89.
49 Ibid 79
50. See W J Hughes "Aerial Intrusions by Civil Airliners and the use of Force" (1980) 45 J Air L Com 595, 619
51 The ICAO concluded that there was "no justification for the shooting down of the Libyan civil aircraft", ICAO Resolution of 4 June 1973 (reprinted at (1973) 12 ILM 1180).
52 See J T Phelps "Aerial Intrusions by Civil and Military Aircraft in Time of Peace" [1985] 107 Mil L Rev 255, 293-294 and McCarthy supra n 7, 200
53 Note that Israel subsequently agreed to pay compensation to the families of the victims in deference to humanitarian considerations

It is the most recent incident prior to the downing of Kal 007 that best illustrates the circumstances in which the use of force is lawfully permitted against an identified civil aircraft. In the most serious intrusion among the incidents reviewed, on 20 April 1978, a Kal Boeing 707 flew ninety degrees off course into a highly sensitive military zone over the Kola Peninsula in the USSR — an area strictly off limits to foreigners. Accepting the facts as reported by Tass, which remain unchallenged, the airliner had failed "to abide by the international rules of flight", refused to obey the demands of Soviet fighters to follow them in order to land at an airfield and attempted evasive action in order to escape to Finland.[54] Having exhausted all the available interception procedures in an attempt to provide the airline pilot with a safe alternative, the USSR perceived that the risk to its national security was so great that the use of force could legitimately be employed to terminate the flight. Soviet interceptors then fired upon the airliner forcing its landing upon a frozen lake near Murmansk. The gravity of the security risk and the acknowledged rejection at the time of the incident of the internationally recognised interception signals explains the minimal condemnation of the USSR's action from the world community. Indeed, despite an absence of diplomatic relations with the USSR and the fact that two passengers were killed (one of them a Korean national) and eleven injured, the Republic of Korea far from condemning their action, expressed gratitude to the USSR for the release of the surviving passengers, pilot and navigator.[55] Nor did other states which had taken positions with regard to such incidents in the past, condemn the USSR publicly. This incident addresses the issue left open in the memorial of the United States following the Bulgarian incident in 1955: is it lawful for a state to employ force against a civil aerial intruder when the offended state asserts an articulable security necessity and the intruding airliner refuses

54. The captain and navigator of the Korean airliner, while in the Soviet Union before being released, confirmed that they had received, understood and disregarded the signals given by the Soviet interceptors. See Whitney "Soviets Free Last Two in Korean Plane Case" New York Times 30 April 1978, A1 col 5. Note that the pilot subsequently denied that he was given signals from the Soviet interceptors. See Lohr "Pilot in the '78 Incident Recalls His Experience" New York Times 9 Sept 1983, A11 cols 5-6.

55. See Apple "South Korean Plane Plunged 30,000ft After Being Fired Upon" New York Times 24 April 1978, A10, col 4.

to comply with instructions from the intercepting aircraft? It is submitted that under these circumstances the question must be answered in the affirmative, with the following qualification: the procedures for the interception of civil aircraft outlined in Attachment A of Annex II of the Chicago Convention must be adhered to.[56] That is, the pilot of the intruding aircraft must be given clear and unambiguous signals that he or she is operating in unauthorised airspace and be afforded the opportunity either to return to the scheduled flight path or to follow interceptors to land.[57] Notwithstanding that these procedures serve only as recommended practices devised by the ICAO and therefore, because of their advisory nature, cannot automatically be given the status of binding treaty law,[58] they have, by force of widespread state practice and opinion, become part of customary international law. Indeed, the most striking aspect of all the prior incidents is the absence of a claim by any of the offended territorial states to an unqualified right to use force against civilian intruders. Even the USSR which places greater emphasis upon its sovereignty than most other states[59] —

56. See McCarthy, supra n 7, 201 and Hughes supra n 50, 620.
57. It has been argued that the security necessity rule is not part of customary international law because the United States has never exercised it as an option notwithstanding that Aeroflot aircraft have on numerous occasions overflown its sensitive military services See J R Fox "International Law and the Interception of Civil Aircraft: Flight 007" (1984) 88 Dick L Rev 237, 241-242 However, such an argument ignores the fact that these Soviet intruders allowed themselves to be led back on course ie they took advantage of the safe alternative offered to them
58. Recommended practices proposed by the ICAO do not acquire this status unless a signatory so wishes and unless its decision is followed by domestic legislation (see arts 12, 37 of the Chicago Convention). Attachments are described as "guidance material intended to eliminate or reduce hazards inherent in interception undertaken as a last resort" See F Hassan "The Shooting Down of Korean Airlines Flight 007 by the USSR and the Future of Air Safety for Passengers" [1984] 33 ICLQ 712, 720.
59. The Preamble to Soviet Border Law provides: "The protection of the state boundary of the USSR shall be the most integral part of defending the Socialist Fatherland The state boundary of the USSR is inviolable. Any attempts to violate it shall be resolutely suppressed." (Reprinted at (1983) 22 ILM 1055) Soviet Foreign Minister Andrei Gromyko stated at the Conference on Security and Cooperation in Europe held in Madrid that "in the Soviet territory the borders of the Soviet Union are sacred"; see Darnton "Gromyko Defends Action of Soviets in Plane Incident" New York Times 8 Sept 1983, A1 col 1. The Soviet position is best explained by Dimitri Simes of the Carnegie Endowment for International Peace who stated that "their image of the Korean plane is different from ours; for us, it is a tragedy of 269 innocent people. Their emphasis is not on what they did to the plane, but on what the plane did to their airspace"; see Willey, Cullen, Shabad "The Stonewall" Newsweek 19 Sept 1983, 19. See also "Legal Argumentation in International Crises: The Downing of Korean Airlines Flight 007" (1984) 97 Har L Rev 1198, 1205-1206

something that has marked its attitude toward international law in general — felt compelled to cite failure to heed warnings as the aggravating circumstance justifying its use of force against Kal 007.[60]

Proceeding on the basis that Kal 007 was engaged in espionage activities and that it repeatedly ignored all the clearly conveyed international interception procedures including the offer of an opportunity to land at a designated airfield in the USSR, the question remains whether its intrusion posed such a security risk to the USSR's sovereignty as to justify its destruction and the death of 269 civilians. It has been argued that a civilian passenger airliner which enters the airspace of another state without authorisation does not pose a threat to that state's sovereignty justifying a response to the trespass with the use of armed military force.[61] Proponents of this view point, among other things, to the ICAO's condemnation of Israel's shooting down of the Libyan airliner in 1973 arguing that it impliedly rejected the assertion that civilian aircraft may pose security risks justifying their destruction. As noted previously, it is submitted that this conclusion cannot be confidently drawn.[62] Although the threshold for a valid security interest may be high, the possibility nevertheless exists that the resort to armed force against civil intruders will be authorised by international law in certain circumstances. Professor Lissitzyn maintains that "in times of peace, intruding aircraft whose intentions are known to the territorial sovereign to be harmless must not be attacked even if they disobey orders to land, to turn back or to fly on a certain course".[63] If this proposition is accepted, one faces the difficulty of assessing whether a trespassing civilian aircraft is, in fact, harmless. It can be strongly argued that if an airliner fails to adhere to clear

60. Marshal Nikolai Ogarkov, the Chief of Staff of the Soviet Armed Forces stressed that "thousands of planes pass close to Soviet airspace or even stray into it accidentally without coming to harm"; see "Transcripts of Soviet Official's, Statement and Excerpts from News Session New York Times 10 Sept 1983, A4 col 1. It should be noted that although the failure to observe warnings is the most common aggravating factor cited by offended states, the Republic of China claimed that a Cathay Pacific airliner attacked by its fighters in 1954 was offered no warnings because it was mistaken for a Nationalist Chinese military aircraft.
61. See Phelps supra n 52, 293-294 and McCarthy supra n 7, 200.
62. See text accompanying notes 51-53
63. Lissitzyn supra n 17, 587

and unambiguous internationally accepted interception signals, fails to respond to any attempts at communication and resorts to evasive action, it cannot be confidently classified as harmless. Although the USSR did not suggest that Kal 007 was engaged in such activity, it should be noted that it is possible for a plane (even a civilian airliner) to carry an atomic weapon — action that would make the destruction of the intruder not only proportional to the risk posed, but imperative.[64] If one considers the diminished capacity of the USSR to protect its 280 million citizens from potential nuclear obliteration as a result of the United States surveillance of their strategic internal defence system, ballistic missile tests and their sea based forces, the security risk posed by Kal 007's intrusion is of sufficient magnitude to justify the employment of the Soviet military instrument. To maintain that the USSR could have secured adequate protection against the intrusion of espionage aircraft through diplomatic channels[65] is to suggest a closing of the international gate after the intruder has bolted. Restriction of a subjacent state's retaliation in this manner would, in practical effect, amount to an international invitation to foreign states to engage in similar coercive activities, as the offending state may well view the benefits of such an intelligence-gathering bonanza as outweighing the backlash of world criticism of their use of civil aircraft for espionage purposes.[66] In the age of advanced nuclear technology breaches of Soviet sovereignty of this nature must be seen as such serious threats as to justify the destruction of intruders that refuse to respond to all other practicable methods to terminate the flight. Indeed, under these circumstances such a right is indispensible to the maintenance

64. Soviet Foreign Minister Andrei Gromyko was quick to point this out following the U-2 spy incident in 1960. See Q Wright "Legal Aspects of the U-2 Incident" (1960) 54 AJIL 836, 840.

65. See, for example, 1959 ICJ Pleadings Memorial of the United Kingdom supra n 17, 363, Memorial of Israel, 87 and Lissitizyn supra n 17, 587

66. As Ernest Volkman, editor of the American journal Defence Science said, "As a result of the Kal incident United States intelligence received a bonanza the likes of which they have never received in their lives. Reason: Because of the tragic incident it managed to turn on just about every single Soviet electromagnetic transmission over a period of about four hours and an area of approximately 7,000 square miles, and I mean everything... [it was] a christmas tree, lit up". The American intelligence writer James Bamford confirmed Volkman's assessment, stating that "in terms of electronic intelligence the violation was an intelligence treasure chest." See Johnson supra n 4, 265, 268.

of even the minimum of world order. Until the international community renders this safeguard unnecessary states must conduct their affairs with this realisation in mind. As the crew of Kal 007 left the USSR with no effective alternative other than to resort to the use of force, it is submitted that its action must be seen as being in conformity with both the limited right to the use of force against intruding civil aircraft and the right of self-defence permitted under customary international law.

Although the misuse of civil aircraft by states may not compromise the civil nature of an aircraft, the use of such aircraft for military purposes confers upon them the status of state aircraft, thereby withdrawing their operation from the application of the Chicago Convention.[67] However, the line between the military use and the misuse of the civil aircraft by states can be very fine. The open and identified use by a state of civil aircraft in military services may pose no difficulty, but the covert use by a state of civil aircraft for the purposes of espionage against a foreign state presents a problem of characterization.[68] Although there appears to be a presumption under the terms of the Chicago Convention in favour of the civil character of the aircraft, it is submitted that a subjacent state does not have to present cogent proof of the military mission of an intruder before it is entitled to treat it as such.[69] The better view is whether it was reasonable in all the circumstances for the sovereign state to make such an assessment. Such an objective interpretation is supported by the aftermath of world opinion following the Kal 1978 incident. Although it could be argued that the plane which overflew the Kola Peninsula did not, in fact, pose a national security risk, it was generally accepted (certainly by the Republic of Korea) that the plane had been reasonably perceived as being engaged in military service. Similarly, even if Kal 007 was not, in

67. See art 3(a)(b). This is not inconsistent with an argument advanced by Y Korovin, "Aerial Espionage and International Law" International Affairs June 1960, 49-50 that "the fact that a violation of airspace...is sometimes effected...by 'unarmed' civil aircraft does not alter matters. Whatever category a plane formally belongs to, its character is determined by the function that it performs. A plane used for military purposes will always be regarded as a reconnaissance plane, just as a transport plane used as a bomber cannot expect to be treated as a commercial aircraft".

68. See Richard supra n 40, 156.

69 Hassan supra n 58, 725 and "A Legal Analysis of the Shooting of Korean Airlines Flight 007 by the Soviet Union" (1984) 49 J Air L Com 555, 588 takes the opposite view.

fact, an espionage aircraft, given its most unusual behaviour, its proximity to strategic military installations and the possible motives for its intrusion, it is submitted that the USSR reasonably concluded that it was engaged in military service and, therefore, was entitled to treat it as such.[70] With respect to military aircraft, a much lower threshold in terms of the use of force is apparent. The unprotested U-2 incident in 1960 supports the proposition that force may be applied without warning against a military aircraft which has intruded into the territory of another state on a deliberate military mission, even if the intruder does not, or is unlikely to, attack.[71] However, there is some support for the notion that this right is qualified, especially in peacetime. When the USSR shot down a Swedish aircraft in 1952 there were assertions, most notably by the Swedish government, that even in the case of military aircraft, warnings must be issued before they are fired upon.[72] In any event, given that the USSR exhausted all the international interception procedures before opening fire upon Kal 007, its action cannot be said to have infringed either of these interpretations. Thus, its resort to force can be viewed as having been in conformity with customary international law concerning the treatment of espionage aircraft.

70. There is considerable evidence that the misuse of civilian transport for military purposes has taken place and that such misuse is on the increase The CIA has actually admitted to the past use of civilian airliners for espionage over East Germany, see Gelb "Korean Jet: Points still to be settled" New York Times 26 Sept 1983, A6 col 3. Other states identified as having engaged in such activity include the USSR, Israel, Czechoslovakia, Cuba, Libya and Finland; see Clubb supra n 5, 84 See also Johnson supra n 4, 238.

71. The United States did not attempt to justify its action in terms of international law or protest at the USSR's shooting down of their U-2 espionage plane or the subsequent trial and imprisonment of its pilot See O J Lissitzyn "Some Legal Implications of the U-2 and RB-47 Incidents" (1962) 56 AJIL 135, 138, Wright supra n 64.

72 Phelps supra n 52, 276 submits that the aftermath of the Yugoslav's use of force against two American military planes in 1946 is also support for this assertion.

Review of Arthur Seldon, *Law and Lawyers in Perspective: Justice and Law in English Society,* Harmondsworth: Penguin Books, 1987. pp 1-170. $12.95

PETER HANDFORD*

This book, according to the author, "is intended to be a compendium of the observations and arguments of academics and professionals in various fields of law ... collated to give a general picture of the law of England and Wales as a whole, intelligible to those with little experience of the law and enabling them to participate in the current controversies concerning its administration". A second aim is "to dispel many common misconceptions concerning the law".

In pursuit of the first aim of the book, much of it is descriptive. After a couple of introductory chapters, the author deals in turn with the rules of procedure in criminal cases, the role of the police, the organisation of courts (in a chapter somewhat mysteriously entitled "The Independence of the Judiciary"), judges, juries, the legal profession, legal aid and punishment. It can be seen that treatment of the criminal process predominates. The book is completed by a chapter entitled "The Evaluation of a Legal System", which compares the independence of the judiciary in England and the USSR and then deals with the law relating to public order, and a final chapter on international law and Common Market law.

In many ways, the purely descriptive passages are the most valuable parts of the book. The author presents concise and up to date accounts of a number of important aspects of the English legal

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system. He does not however shrink from stating his views about what is wrong with the system. The book's subtitle is "Justice and Law in English Society", and Chapter One, entitled "Law and Justice", sets out a fundamental theme of the book: that lawyers claim they administer not only the law but also justice (so enabling them to occupy an elitist position in English society), and that there are characteristics of English law which are difficult to reconcile with any concept of justice. It is in developing this theme that the author moves into his second aim of dispelling common misconceptions about the law — for example that:

> Some believe that police officers are incorruptible, independent and individual holders of public office ... Others believe the courts, judges and lawyers are the epitome of impartiality and arrive at faultless decisions. Yet others believe the jury is a peculiar English institution and that when a person has been found guilty by a jury, a life sentence passed by the judge means precisely what it says.

The author puts forward a number of controversial views on various topics, for example, that the police, and also members of the legal profession (particularly those who preside at courts and tribunals) should consider whether membership of the Freemasons is compatible with their public duties; that even after the setting up of a Police Complaints Authority in 1986 the investigation of complaints against the police remains generally in the hands of the police, and individuals attempting to pursue civil actions against the police are seriously handicapped; that the court system is in reality under the control of the executive, because it is administered by the Lord Chancellor's Department, and that it would be preferable for the courts to be controlled by a truly independent body; that the judiciary is not as independent and free from political pressure as it claims to be, and that political appointments continue to be made, albeit in a more clandestine manner than formerly, and that court support staff can influence the outcome of the case by arranging for a particular judge to sit (Rumpole, it may be recalled, manages to achieve this through his clerk Henry, who stars in amateur dramatics with Miss Osgood of the Old Bailey listings office); that it is undemocratic for judges to be appointed on the recommendation of the executive and thereafter to be outside the control of any authority, and that instead judges should be elected by and accountable to the public and capable of being removed after a set term of office; that if judges cannot handle complicated commer-

cial or labour matters because they involve policy issues then they are unable to serve the community in an area of law that is becoming increasingly important; that there is a strong case for the reintroduction of the special jury, that the divided profession and the silk system are unjustifiable, and that barristers should not have any special immunity from liability for negligence; that the Law Society, as a solicitor's trade union, should not have disciplinary responsibility for the profession or any role in the administration of the legal aid system, which should instead be administered by a government department having salaried lawyers; and that because the standard of different prisons differ it is the prison authorities who allocate prisoners to prisons who determine the type of sentence which a particular prisoner shall undergo.

Some minor infelicities and inaccuracies occasion disquiet. The author consistently renders the plural of "counsel" as "counsels", and we are also given "Court Christians" instead of "Courts Christian" and "a change in legislature" instead of "a change in legislation". The author can perhaps be forgiven for suggesting that Britain was conquered by the Romans in the time of Julius Caesar, but not for making reference to the "Petition of Rights 1623", rather than the Petition of Right 1627. A book for the lay reader does not need case citations, but if they are given they should at least enable the reader to find the case being referred to. Those on page 97, the only case references in the book, are incomplete and therefore useless. These blemishes cause one to regard with some suspicion some of the more unorthodox statements in the book, such as, for example, the part played by Roman law in the formation of the early common law, or that the requirement of Magna Carta that common pleas should be "held in some certain place" was the origin of classification of courts into civil and criminal courts. The bibliography is somewhat idiosyncratic, as shown by the inclusion (in a list totalling 24 items) of Hoebel's *The Law of Primitive Man* and the autobiography of Harold MacMillan. Nonetheless this is a worthwhile book. Lawyers will be able to find things of interest in it, as will the lay persons for whom it was written.