Korean Airline Flight 007: Stalemate in International Aviation Law - A Proposal for Enforcement

Jeffrey D. Laveson

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The Korean Airline Flight incident in September 1983 marked a turning point in international civil aviation and maritime law. The incident dramatized the limitations inherent in international law enforcement and the vulnerability of civilian passengers during international travel. Existing enforcement schemes have been useful but still leave much to be desired. World opinion, deterrence by armed force, and international tribunals have been the mainstay of an eroding enforcement equation. Economic motivation seems to provide the only common thread among a world of diverse ideologies. Yet piecemeal applications of economic sanctions are rarely effective and often prohibitively burdensome on the imposing parties. Several new multilateral economic enforcement schemes are proposed which balance the interest of national security with safe international travel.

INTRODUCTION

We the Peoples of the United Nations to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, . . . and to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained, . . . [and] for these ends . . . to practice tolerance and live together in peace with one another as good neighbors, . . . and to ensure, by the acceptance of principles and the institution of methods, that armed force shall not be used, save in the common interest, . . . have resolved to combine our efforts to accomplish these aims . . . [and] do hereby establish an international organization to be known as the United Nations.¹

On September 1, 1983, a Soviet military aircraft shot down a civilian airliner, Korean Air Lines flight 007 (KAL 007), which flew over Soviet coastal territory while on a scheduled international flight to Seoul, Korea.² Two hundred sixty-nine passengers and crew mem-


bers were killed.\textsuperscript{3}

The response of the western world was unanimous in characterizing this action as unjustifiable and contrary to both the letter and spirit of prevailing international law.\textsuperscript{4} Many governments, airline pilot unions, and private citizens imposed sanctions against the Soviet Union to express their protest.\textsuperscript{5} Most notably, eleven of sixteen nations with direct air service to the Soviet Union temporarily terminated flights to Moscow.\textsuperscript{6}

As evidence uncovering the circumstances of the incident was consolidated from several sources and released by the United States government, the Soviet Union’s official posture evolved.\textsuperscript{7} The Soviet government’s initial response to the incident effectively denied responsibility for the aircraft’s destruction.\textsuperscript{8} Later, in the face of uncontroversial evidence, the Soviets acknowledged responsibility, justifying their action as legitimate self-defense.\textsuperscript{9} They also reaffirmed their defense policy which calls for the use of armed force in the event of unauthorized overflight of Soviet territory.\textsuperscript{10} Yet such use of force is expressly prohibited by international maritime\textsuperscript{11} and avia-

In the wake of the incident, the Soviets refused permission for international participation in search and rescue operations in Soviet territorial waters and openly interfered with U.S. and Japanese salvage operations conducted in international waters. This interference successfully frustrated the western world’s attempt to verify Soviet allegations that proper internationally recognized intercept procedures were used and to explain why the airliner strayed off course into Soviet airspace.

Two international agreements are called into question by this incident. The United Nations Conference on the Law of the Sea (UNCLOS III) regulates the safe and equitable use of the world’s oceans for international navigation and resource exploitation. Its aviation analogue, the Convention on International Civil Aviation (Chicago Convention) regulates international air navigation and safety. Although UNCLOS III predominantly concerns maritime law, it also addresses overflight of high seas. For example, in the case of “transit passage” of aircraft through straits for international navigation,
gation, UNCLOS III requires adherence to the Chicago Convention. Likewise, while the Chicago Convention regulates international air navigation, it also addresses several traditional maritime issues, such as search and rescue operations at sea. This overlap between UNCLOS III and the Chicago Convention is more than coincidence. International aviation and maritime law share a common heritage and embody fundamental principles of international law which address issues relevant to both. Not surprisingly, both UNCLOS III and the Chicago Convention present common problems of enforceability.

The KAL 007 incident illustrates many of the still unresolved problems inherent in international law, particularly the problem of enforceability. This Comment examines the international law applicable to the KAL 007 incident under UNCLOS III and the Chicago Convention, the problems of enforceability, and the need for compliance verification through investigatory access. A proposal is

gation and overflight solely for the purpose of continuous and expeditious transit [through a] strait between one part of the high sea or an economic exploitation zone (EEZ), and another ....” UNCLOS III, supra note 11, art. 38 (Right of transit passage). See also, infra note 143 (EEZ defined). Article 39 of UNCLOS III delineates duties of ships and aircraft during transit passage, similar to the restrictions placed on ships during innocent passage through a “territorial sea.” The doctrine of transit passage (passage of ships and aircraft through straits), unlike that of innocent passage (passage of ships through territorial seas) recognizes the right of aircraft overflight. See UNCLOS III, supra note 11, arts. 34-44 (Straits used for international navigation).

20. Annex C, art. 3 of the Chicago Convention recognizes the right “to fly over a strip of territory five kilometers wide on each side of the narrow part of the Straits.” Chicago Convention, supra note 12, Annex C, art. 3. The “Chicago Convention” is the popular name for the Convention of International Civil Aviation. “ICAO” is the International Civil Aviation Organization, the body governing international civil aviation. The former is the document which serves as the charter for the second. However, they are often used somewhat interchangeably. Within this Comment, “Chicago Convention” refers to the agreement drafted in Chicago; “ICAO” refers to the governing body. Part II of the Chicago Convention establishes the International Civil Aviation Organization (ICAO). Id. pt. II. ICAO later became affiliated with the United Nations. Cooper, The Chicago Convention - After Twenty Years, 19 U. MIAMI L. REV. 333 (1985), reprinted in J. COOPER, EXPLORATIONS IN AEROSPACE LAW 440 (Vlasic ed. 1978).


22. Article 26 of the Chicago Convention addresses investigation of aircraft accidents occurring in the territory of another contracting state. This presumably includes the airspace overlying the state’s territorial seas. See Chicago Convention, supra note 12, art. 26 (Investigation of accidents). Article 3 of UNCLOS III defines the territorial sea of a coastal state as that water extending up to a limit not exceeding 12 nautical miles, measured from the baseline (generally the low-water line) along its coast. See UNCLOS III, supra note 11, arts. 3 & 5 (definition of “baseline”). Article 23 of the Paris Convention, the predecessor of the Chicago Convention, specifically addressed aviation incidents at sea. It stated that “With regard to the salvage of aircraft wrecked at sea, the principles of maritime law will apply in the absence of any agreement to the contrary.” The Paris Convention of 1919, 3 U.S.T.; Treaties, Conventions, Int’l Acts, Protocols and Agreements Between the U.S. and other Powers, Dept’t of St. Publication, at 3768.

presented suggesting an expansion of existing economic sanctions to motivate state compliance with current international civil aviation and maritime law.24

THE KAL 007 INCIDENT

On September 1, 1983, a Soviet military fighter aircraft shot down a civilian Boeing 747 airliner (KAL 007) which flew over Soviet coastal territory25 while on a scheduled international flight en route from New York, via Anchorage, Alaska, to Seoul, Korea.26 Upon learning of the disappearance of the aircraft, the United States government slowly accumulated available information from several sources in an attempt to uncover the circumstances of the incident.27 The official posture of the Soviet Union was modified several times to conform to this information.28 The Soviet’s first response to the incident denied responsibility for the destruction of the aircraft.29 Almost a week later, after the presentation of convincing evidence at the United Nations by United States Ambassador Kirkpatrick,30 the

24. In international law, “state” generally refers to a country or nation, and the government thereof.


28. See supra note 7. The Soviets seemed to continually modify their position to correspond to the evidence as it was released.

29. See supra note 8.

30. Ambassador Kirkpatrick’s presentation of evidence at the U.N. Security Council included a transcript of the radio transmission of the Soviet interceptor pilot reporting to “DEPUTAT,” the Soviet ground station controller. It provided, in part:

MIG-23 (163) AT 1818:56 GMT: “Roger, I’m at 7500, course 230.”
SU-15 (805) AT 1819:02 GMT: “I’m closing the target.”
SU-15 (805) AT 1826:20 GMT: “I have executed the launch.”
SU-15 (805) AT 1826:22 GMT: “The target is destroyed.”
SU-15 (805) AT 1826:27 GMT: “I am breaking off the attack.”
Soviets acknowledged responsibility for the aircraft's destruction stating that "it was the sovereign right of every State to protect its borders, in particular its airspace [under] the commonly recognized principles of international law on which [the] relations of States rest."31

Much controversy surrounded the circumstances of the incident. The aircraft was approximately 300 miles off course, first violating Soviet airspace by passing over Kamchatka Peninsula, and then a second time, by passing over Sakhalin Island.32 Both of these areas support sensitive Soviet military installations.33 The Soviets alleged that KAL 007 was on a "premeditated, thoroughly planned intelligence operation" ordered by the United States,34 that it was flying without its navigation lights, that it failed to respond to proper intercept procedures as required by International Civil Aviation Organization (ICAO) flight rules, and that it maneuvered to evade interception.35 They later added the allegation that the United States deliberately staged the incident to provoke a Soviet response calcu-

For a full text of the transcript played at the U.N. Security Council on Sept. 6, 1983, see, 38 U.N. SCOR (2471st plen. mtg.) at _, U.N. Doc S/P.V.2471, at 6-10 (1983). The Soviets contended that there were errors in the translation presented to the Security Council misstating several words spoken by the Soviet pilots. However, these errors did not change the basic nature or meaning of the translation. See FAA Administrator Helm's Statement, ICAO Council, Montreal, Sept. 15, 1983, reprinted in Dep't St. Bull., Oct. 1983, at 17. The United States later issued a revised translation changing "I have enough time" to "They do not see me," and "rockets" to "now I will try rockets," and adding a previously unintelligible phrase "I am firing cannon bursts." Dep't of St. Statement of Sept. 11, 1983 (made available to news correspondents by acting Department spokesperson Brian Carleson), reprinted in Dep't St. Bull., Oct. 1983, at 14.

33. See Kennelly, supra note 26, at 1.
34. B. Marshal Nikolai v. Ogarkov's statement at a foreign press conference held in Moscow following the incident. Inquest on a Massacre, supra note 5, at 18. Such use of a civil aircraft would violate the specific prohibition in article 4 of the Chicago Convention in which contracting states agree "not to use civil aviation for any purpose inconsistent with the aims of [the] Convention." Chicago Convention, supra note 12, art. 4. However, Soviet use of non-military aircraft and ships for intelligence gathering has been suspected by the United States. The Aeroflot flight to Dulles Airport on November 8, 1981 was one of numerous incidents. See infra notes 84-87 and accompanying text. The Soviets have denounced use of civilian aircraft for intelligence gathering in the aftermath of the KAL 007 incident. The allegations by the Soviet Union that KAL 007 was on a deliberate spying mission have not been discounted by all nations in the west. Legal Issues, supra note 1, at 3.
35. See Soviet Foreign Minister Gromyko's statement to U.S. Dep't of State on September 1, 1983, reprinted in Dep't St. Bull., Oct. 1983, at 8. The Soviets also alleged that KAL 007's departure was timed to coincide with certain satellite orbital positions or passages, supporting their "intelligence gathering" allegation. The ICAO investigation, however, discounted any deliberate timing of the departure, beyond insuring an on-time arrival at 0600 (local time) at Seoul, as was the routine practice of Korean Air Lines. 23 I.L.M. 894 (1984).
lated to influence world opinion against the Soviet government. Ko-
area and the United States responded that the use of a civilian air-
liner for intelligence gathering or propaganda purposes was “unimaginable.” The United States released recordings of the voice communications received by Japanese air traffic control from KAL 007 and the radio transmissions of the Soviet intercept fighter pilots, indicating both that KAL 007’s navigation and strobe lights were reported in sight by a Soviet pilot and that the aircrew of KAL 007 apparently were unaware of the Soviet interception.

There was speculation that the Soviets had misidentified the KAL airliner as a United States Air Force RC-135 electronic intelligence aircraft which had been operating just east of Soviet territory several hours earlier and may have at one time crossed the flight path of KAL 007. Others explained this Soviet action as a simple conditioned reflex accomplished in accordance with Soviet Border Law adopted in November, 1982.

The positions of each side have changed only slightly since the incident. During the last week of August 1984, after a year-long re-
view, the United States Department of State expressed its opinion that Soviet Air Defense believed KAL 007 to be a United States intelligence aircraft when the Soviet fighters fired the air-to-air mis-

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38. See supra note 30 (transcript of the Soviet intercept pilot's radio transmis-
sions); see also infra note 39.

39. See Why the Russians Did It, NEWSWEEK, Sept. 19, 1983, at 22-23. See also Legal Issues, supra note 1, at 3. The U.S. later alleged that the closest point of approach of the two aircraft was 75 nautical miles, and that at the moment of actual interception of KAL 007, the RC-135 had been at its base in Alaska for more than one hour. FAA Administrator Helm's Statement, ICAO Council, Montreal, Sept. 15, 1983, reprinted in DEP’T ST. BULL., Oct. 1983, at 20. In contrast, the Soviets maintained that the RC-135 and KAL 007 flights were both tracked on Soviet radar, and that the radar contacts merged and remained together for approximately 10 minutes. 38 U.N. SCOR (2471st plen. mtg.) at ___ U.N. Doc. S/P.V.2471, at 22 (1983).

40. Soviet Border Law addresses military response among other things, aerial in-
siles which destroyed the airliner.\textsuperscript{41} Earlier that same week, Novosti, an official Soviet news agency, asserted that KAL 007 deliberately flew into Soviet airspace while a second South Korean airliner broadcasted “false radio messages” to confuse air traffic controllers. It also reasserted the Soviet position that the United States government wanted the plane destroyed to enable the United States “to launch a large-scale propaganda campaign against the U.S.S.R.”\textsuperscript{42}

**Search and Rescue Operations**

A substantial discrepancy exists between the Soviet accounting of the KAL 007 incident and the evidence accumulated by the United States government.\textsuperscript{43} Retrieval of KAL 007’s cockpit voice recorder and flight data recorder\textsuperscript{44} most probably would have provided the evidence needed to determine whether proper intercept procedures were used by the Soviets as they alleged, and to explain why the aircraft strayed off course by 300 miles. An intensive search-and-rescue effort to salvage these recorders, the remains of passengers, and aircraft debris, became the new focus of world attention during the weeks following the crash.\textsuperscript{45}

In accordance with *International Standards and Recommended Practices of ICAO*, each party state is called on to “grant any necessary permission for the entry of such aircraft, vessels, personnel or equipment into its territory and make necessary arrangements . . . with a view to expediting such entry” to facilitate search and rescue operations.\textsuperscript{46} However, the Soviets refused permission for interna-
tional search and rescue participation within their territorial waters.\(^\text{47}\) This effectively thwarted the attempt of the Korean and United States governments to verify the Soviet's claimed adherence to prescribed ICAO interception procedures and to dispel Soviet allegations of intelligence gathering by the Korean aircraft.\(^\text{48}\)

As the search shifted to international waters, the Soviet, Japanese and American governments conducted salvage operations focusing on the flight data recorder. The recorder's homing beacon was detected "pinging" in the northern Sea of Japan.\(^\text{49}\) This search brought with it numerous complaints by the United States against the Soviets for rules of the road violations.\(^\text{50}\) Soviet ships allegedly interfered with United States search efforts by passing, at top speed, within thirty yards of United States ships and by deliberately snagging the anchor line of one search ship.\(^\text{51}\) Soviet patrol ships also allegedly warned

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Chicago Convention, \textit{supra} note 12, arts. 25 & 26 (Aircraft in distress, Investigation of Accidents). The Soviets refused to permit international participation in the KAL 007 search and rescue operations, contrary to Chicago Convention requirements. 23 I.L.M. 892 (1984). The Soviets also refused to permit the Korean officials to participate in the turn over of debris found during search efforts by the Soviets. The wooden boxes of debris found by the Soviets were handed over to American and Japanese authorities on Sept. 26, 1983. \textit{See Soviets Hand Over Debris From Korean Plane}, N.Y. Times, Sept. Sept. 27, 1983 at A19, col. 1 (late ed.). \textit{See also U.S. Protests to Soviet Over Jet Debris Search}, New York Times, Sept. 27, 1983 at A8, col. 1 (late ed.). The Soviets later justified their refusal to allow international participation by relying on the position of article 26 of the Chicago Convention, which states "The State in which the accident occurs will institute an inquiry into the circumstances of the accident in accordance, so far as its laws permit, with the procedures which may be recommended by the ICAO. . . ." (emphasis added). The Soviets further declare that "No other inquiry is contemplated by the provisions of the 1944 Chicago Convention," and then refers to Soviet law, i.e., 1) The Air Code of the USSR, 2) The State Frontier Law of the USSR, 3) The Rules of the Air applicable to foreign aircraft in the airspace of the USSR, and 4) Accident Investigation regulations applicable to civil aircraft of foreign States in the Territory of the USSR, as establishing the exclusive right of the State Commission for Civil Aviation Flight Safety in the USSR (Gosavianadzor) to conduct the investigation. Arguably, search and rescue investigatory access, as required by article 25 of the Chicago Convention, becomes moot when the aircraft's destruction is realized, based on the impossibility of any survivors. Any search operation would then be most appropriately characterized as a "salvage" operation which would not fairly be included within the meaning of article 25. Similarly, the investigatory access required by article 26, if narrowly construed, perhaps also became mooted once the Soviets admitted responsibility for the aircraft's destruction, thus revealing the cause of the aircraft-crash.

\(^\text{47}\) \textit{See supra} note 13 and accompanying text.
\(^\text{48}\) \textit{See supra} note 15 and accompanying text.
\(^\text{49}\) This search covered a fourteen square mile area west of Sakhalin Island in the northern Sea of Japan. \textit{U.S. Said to be Closer to "Black Box"}, N.Y. Times, Oct. 28, 1983 at A3, col. 18 (late ed.).
\(^\text{51}\) \textit{Id.}
away ships belonging to Japan’s Maritime Safety Agency which had approached within 650 yards of Soviet ships. Soon after, the flight data recorder’s homing signal expired; the search was abandoned, leaving undiscovered many facts surrounding the incident.

*World Response*

The overwhelming response by all countries of the western world characterized this Soviet action as unjustifiable and contrary to prevailing international law. Demands made by the Korean government to the Soviet Union via the United Nations included a full and detailed accounting of the circumstances of the incident, a full apology and complete compensation for the loss of lives and the aircraft, and punishment of those Soviet individuals responsible. The Koreans further demanded a guarantee of unimpeded access to the crash site to representatives of impartial international organizations such as the ICAO and return of any remains or debris that might be found, and specific, concrete, effective, and credible guarantees against a recurrence of such actions against unarmed civilian airplanes anywhere in the world. Similar demands were made by the United States via the U.S. Department of State. Both the Korean and United States governments presented formal notes through United States diplomatic channels to Soviet Deputy Chief of Mission (DCM) Sokolov on September 12, 1983, demanding monetary compensation. Soviet DCM Sokolov, however, refused receipt of these

52. *Id.* Arguably, as property belonging to Korean Airlines, an exclusive right to salvage the recorders arguably belongs to the company or to the Korean government, or their designated agents. Once these recorders were discovered submerged in international waters, this exclusive Korean right to salvage them seems to overshadow the duty imposed upon the Soviets under the Chicago Convention to conduct an investigation of an aviation accident occurring within their territory. See Chicago Convention, *supra* note 12, art. 26. The salvage operations of the Japanese and U.S. governments, as invited representatives of the Korean government, is evidence of an intent to preempt the Soviet search effort. See Dep’t St. Press Release No. 327, *reprinted in Dep’t St. Bull.*, Oct. 1983, at 1 (Sept. 1, 1983). Soviet interference with U.S. and Japanese search and salvage efforts appears to have been designed to prevent retrieval of the recorders by the United States or Japan, thus precluding the direct evidence needed to contradict the Soviet version of the circumstances of the incident.


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notes. Most other western and third world nations similarly denounced the Soviet action and called for a full accounting and apology from the Soviets.

The United Nations Security Council met at the request of the United States, the Republic of Korea, and Japan to debate and ratify a resolution denouncing the destruction of the Korean airliner and declaring the use of armed force against international civil aviation as incompatible with the norms governing international behavior. After lengthy debate, the resolution was vetoed in the Security Council by the Soviet Union.

Actions taken by the United States government included suspending the Soviet airline Aeroflot’s right to sell air transportation in the United States and prohibiting airlines registered in the United States from selling or honoring Aeroflot tickets or tickets for trips which included connections with Aeroflot flights. The United States Civil Aeronautics Board (CAB) estimated that these sanctions cost the Soviet airline $1.5 to 2 million annually in United States currency. In response to a call by the International Federation of Air Line Pilot Associations (IFALPA), eleven of sixteen nations with direct air service to Moscow halted their Moscow flights.

58. Id.
63. See Korean Airliner Incident, supra note 4, at 20-31.
64. The vote on the draft resolution was nine in favor (France, Jordan, Malta, Netherlands, Pakistan, Togo, United Kingdom, United States, Zaire) to two against (Poland, U.S.S.R.) with four abstentions (China, Guyana, Nicaragua, Zimbabwe). The provisional draft, having passed by a majority vote in the Security Council, was defeated when the U.S.S.R. exercised its veto privilege. See Korean Airliner Incident, supra note 4, at 19-20.
67. Inquest on a Massacre, supra note 5, at 19. Nations temporarily terminating their Moscow air service included Britain, France, West Germany, Switzerland, the Netherlands, Denmark, Norway, Sweden, Finland, Spain, Italy and Japan. Eleven Nations Halt Moscow Service to Protest Downing, AVIATION WEEK & SPACE TECH., Sept. 19, 1983, at 26. The International Federation of Air Line Pilot Associations (IFALPA) called for a 60-day suspension of Moscow service by member organizations. Inquest on a Massacre, supra note 5, at 19. NATO Countries fail to take joint action against Soviets, Wash. Post, Sept. 10, 1983, at A14, col. 1. The President of the United States proclaimed Sunday, September 11, 1983, a national day of mourning. During the previous week, flags were flown at half staff at Federal installations and U.S. Military bases.
These sanctions, however, primarily economic in nature, served only as token expressions of western world opinion. Despite one of the strongest world reactions ever to a single use of force, the Soviets, as yet, have announced no change in their position.

Previous Incidents

International law is generally founded in custom.\textsuperscript{68} Much of this custom is eventually codified in the form of treaties, agreements, and protocols.\textsuperscript{69} State ratification of such codified international practices fortifies the expectations upon which nations rely to anticipate the behavior of other nations and on which nations depend to justify their own actions. Numerous international incidents have laid the foundation for such international precedent.

Perhaps the most significant example of Soviet reliance and invocation of international maritime law is that of the Soviet submarine intrusion into Swedish waters in 1981. A Soviet submarine ran aground inside a restricted security zone nine miles southeast of the Karlskrona Naval Base, deep within Swedish territorial waters.\textsuperscript{70} The Swedish government ultimately concluded "that the submarine had intentionally violated Swedish territory to gather intelligence."\textsuperscript{71} Intelligence gathering activity and submerged transit within the territorial waters of another state are activities expressly prohibited under UNCLOS III.\textsuperscript{72}

Responding to Swedish government protests regarding the submarine incident, the Soviet government stated:

\begin{quote}
It was expected, of course, that authorities would abide by existing international norms under which if a foreign warship does not even (sic) observe the rules of a coastal State regarding passage through its territorial waters, the only thing the coastal State may do with respect to the given warship is to demand that it leave its territorial waters.\textsuperscript{73}
\end{quote}

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\textsuperscript{68} V. Rollo, \textit{supra} note 23, at 269.

\textsuperscript{69} Id.

\textsuperscript{70} This incident occurred on the night of Oct. 27, 1981. \textit{Uncharted Waters: Non-innocent Passage of Warships in the Territorial Sea}, 21 \textit{San Diego L. Rev.} 625, 626, n.2. During the following 11 days, another submarine periscope was sighted in Swedish territorial waters, and a Soviet salvage vessel was ordered to depart after entering Swedish territorial waters. Id. at 627, n.11 (1984).

\textsuperscript{71} Id. at 627, n.11 (1984).

\textsuperscript{72} UNCLOS III, \textit{supra} note 11, art. 20. Article 20 of UNCLOS III requires submarines navigating in the territorial sea to remain on the surface and display their flag. This incident was the culmination of many earlier incidents detecting unidentified submerged submarine transit through Swedish territorial waters. Froman, \textit{supra} note 70, at 627, n.11 (1984).

The Soviet Union alleged that the submarine's "unintentional" entrance into the territorial waters of Sweden was caused by a failure of its navigational equipment and poor weather conditions which resulted in inaccurate position marking.\textsuperscript{74} Interestingly, navigation error was the probable cause of KAL 007's 300 mile deviation from "Red-20," the airway designated for its intended route of flight.\textsuperscript{75}

This violation of international maritime law by the Soviets is not an isolated incident. For example, in March 1984 a Soviet submarine collided with the United States aircraft carrier \textit{Kitty Hawk} in the Sea of Japan while "shadowing" a United States task group.\textsuperscript{76} Such action violates international maritime law which is designed to enhance safety at sea.\textsuperscript{77}

Nor was the KAL 007 incident the first instance of Soviet action against a civil airliner. In 1978, a Soviet MIG aircraft fired a missile at a Korean airliner which strayed into Soviet airspace, shearing off fifteen feet of the aircraft's wing.\textsuperscript{78} In the incident, testimony given by the Korean pilot indicated that the aircraft was tracked by the Soviets for several hours, and then fired upon without warning.\textsuperscript{79} This accounting contradicted Soviet allegations at the time that "fair warning" was given to the aircraft using internationally recognized

\textsuperscript{74} Id.

\textsuperscript{75} \textit{See What are the Rights of the Passengers? - Against Whom?}, \textit{AIR & SPACE LAW.}, Fall 1983, at 14, 15. \textit{See infra} note 154 (discussion of international air route "Red-20").


\textsuperscript{79} \textit{See} Ambassador Kirkpatrick's statement, \textit{infra} note 78 (discussion of the testimony of the pilot, Kim Chang Kyu, to the N.Y. Times) and accompanying text.
ICAO procedures.  

The use of arms in cases of interception of civil aircraft was condemned by Leonid Brezhnev, former President of the Soviet Union, after a Soviet aircraft on which he was traveling was intercepted en route to Morocco. 80 Mr. Brezhnev’s aircraft was warned by radio, and then, absent a response, by warning shots. The plane was forced to leave the sixty kilometer Air Defense Identification Zone (ADIZ) designated by France during the Franco-Algerian War. 82 In his protest Mr. Brezhnev argued that France lacked power under its state sovereignty to regulate, intercept, or open fire upon flights above the high seas. 83 The French-Soviet incident, however, is distinguishable from the KAL 007 incident. The former occurred over the high seas; 84 the KAL 007 incident occurred in territorial airspace subject to the exclusive jurisdiction of a coastal state. 85

Another recent aerial incident involved a Soviet airline Aeroflot flight to Dulles Airport in Washington, D.C., on November 8, 1981. The Aeroflot airliner entered United States airspace at an unauthorized point in New England, flying over New England land area, although its clearly demarcated route was almost exclusively over open waters. 86 It continued over Pease Air Force Base and the Naval Facility at Groton, Connecticut. 87 On the aircraft’s return flight several days later, it flew the identical unauthorized route. 88

80. Id.

81. See N. Matte, supra note 78, at 176, n.203.

82. Id. Air Defense Identification Zones (ADIZ) are common today. The United States has established an ADIZ which extends seaward approximately 50-250 nautical miles from U.S. coast lines. Aircraft maneuvering within or transmitting through this ADIZ are required to file flight plans which facilitate their identification. Unidentified or unauthorized flights within this zone are subject to military aircraft interception for identification and escort out of the zone.

83. See N. Matte, supra note 78, at 176, n.203.

84. In this context, “high seas” refers to the waters extending beyond a coastal state’s territorial sea. Article 3 of UNCLOS III establishes the outer limit of a state’s territorial sea at 12 nautical miles from the normal baseline (low water line). Most states assert a 12 nautical mile territorial sea, although several assert a lesser limit. For purposes of executing art. 86 of UNCLOS III, which recognizes freedom of the high seas for navigation and overflight, this 12 mile maximum limit establishes the boundary of the “high seas.” See UNCLOS III, supra note 11, arts. 3 & 86.

85. UNCLOS III, supra note 11. Chicago Convention, supra note 12. It is noteworthy that KAL 007 was shot down while retreating from Soviet airspace, within approximately one minute of re-entering international airspace. Id.


87. Id.

88. Id. The U.S. responded to this violation of its airspace by filing a note of protest via diplomatic channels. Id. The U.S., however, cannot claim clean hands. For example, on May 1, 1960, American intelligence-gathering overflights of the Soviet Union resulted in the shooting down of a military reconnaissance aircraft piloted by Gary Francis Powers. The aircraft was forced to land in Soviet territory. See N. Matte, supra note 78, at 175, n.199. See also 5 Whiteman’s Digest 714-15 (1973) (U-2 Incident). But see 5 Whiteman’s Digest 810-12 (1973) (RB-47 incident, 1960). See generally Lissitzyn,
The Soviet's selective adherence to international law not only appears self-serving but has created extremely inconsistent precedent. Such inconsistency breeds insecurity in the international forum, undermining the viability of international law.

INTERNATIONAL AVIATION LAW

Historical Development of International Aviation Law

The legal regime which addresses the use of "airspace" above the high seas is analogous to the legal regime of the high seas itself under maritime law. Each evolves from the same heritage of maritime law and applies common principles. Unarguably, aircraft and ships serve the same general purposes; they function as transportation vehicles for goods and people, providing a vital link between the nations of the world. They also serve as platforms for reconnaissance and weapon delivery, calculated to protect individual states' interests, including self-preservation. Both carry out these functions in international territory, i.e., the high seas and the airspace above it, and both raise the issues of freedom of navigation and sovereign authority. Further, the evolution of maritime and aviation international law underscores their common nature.

The concept of international law evolved in the sixteenth century in Europe in the midst of developing nationalism. Courts were established by many coastal states to resolve maritime disputes. National control of coastal waters usually extended to three miles, the approximate limit of defendable coastal waters, although some states asserted sovereignty over entire seas. Within this setting, Albericus Gentilis (1552-1608) was among the first to recognize the

The Treatment of Aerial Intruders in Recent Practice and International Law, 47 Am. J. Int'l Law 559 (1953).

89. See V. Rollo, supra note 23, at 274.
90. Id. at 274-78.
91. Id. at 274.
92. See supra note 84.
93. See V. Rollo, supra note 23, at 272.
94. Id.
95. The boundary was set in accordance with the distance that cannon fire was able to afford protection to the coast land. N. Matte, supra note 78, at 73. "The State that wishes to reign over the liquid plain, Without might, will have power in vain, And the bullet launched from the cannon tower, Marks the limit of sovereign power." Id. at n.1 (translation by N. Matte). The eighteenth and nineteenth centuries established the principle of freedom of the high seas. States then began to recognize three mile territorial seas.
96. Id.
universal principle that the high seas should be open to the ships of all nations.\textsuperscript{97}

Gentilis' work was eventually overshadowed by that of Hugo Grotius (1583-1645).\textsuperscript{98} Grotius was motivated by his observations of the inhuman and cruel practices of nations at war.\textsuperscript{99} He advocated reforms based on reason and justice, to achieve a higher degree of humanity during times of international conflict.\textsuperscript{100} He, like Gentilis, asserted the concept of freedom of the sea\textsuperscript{101} and air for all nations as the common property of all mankind.\textsuperscript{102}

Aviation began to develop in the late nineteenth century.\textsuperscript{103} Because aircraft could easily enter, overfly, and depart a foreign state, aviation brought with it new threats to the concepts of guarded boundaries, fortified centers of population, and national sovereignty over airspace.\textsuperscript{104} These were problems formerly not encountered with ships. The traditional concept of the common heritage of man which supported common rights to the use of the air and high seas took on new meaning.\textsuperscript{105} While aviation brought with it uniquely valuable potential, it also posed unique risks to national security.\textsuperscript{106} As a result, aviation became the subject of numerous treaties, no less important than the maritime treaties which regulated ships at sea.

The end of the nineteenth century saw the use of aerial craft as vehicles of war; this drew serious international attention.\textsuperscript{107} During the Franco-Prussian War (1870-1871), balloons were employed to carry newspapers and mail out of Paris while the city was surrounded by Russian forces.\textsuperscript{108} The Hague Conference of 1899 prohibited the discharge of projectiles and explosives from balloons.\textsuperscript{109}

\begin{footnotes}
\footnote{97. V. Rollo, supra note 23, at 273. Gentilis was born in Italy and eventually moved to England. \textit{Id.} He is also given credit for proposing rules to be used in drafting peace treaties, which he analogized to contracts. \textit{Id.}}
\footnote{98. \textit{Id.} Grotius' the \textit{De Jure Belli et Pacis} was published in 1626, becoming the standard reference on international law for 300 years. \textit{Id.}}
\footnote{99. \textit{Id.}}
\footnote{100. \textit{Id.} See also, Froman, \textit{supra} note 70, at 625, 631 and n.23.}
\footnote{101. V. Rollo, \textit{supra} note 23, at 273. Grotius took a position against the theory of \textit{mare clausum}, and his work, \textit{De Jure Praedae} (in Chapter XII entitled "\textit{mare liberum}") had a decisive effect on the preservation of this principle (\textit{mare clausum}, "the closed sea" conceptually opposed the former contention that a nation could in some cases claim jurisdiction over certain parts of the open ocean even beyond the immediate vicinity of its coast). 2 \textit{Bouvier's Law Dictionary}, 311 (1897). See also, N. Matte, \textit{supra} note 78, at 78-79.}
\footnote{102. \textit{Id.}}
\footnote{103. V. Rollo, \textit{supra} note 23, at 275.}
\footnote{104. In the earliest stages of aviation development, overflight of foreign states was accomplished by the use of balloons and dirigibles. \textit{Id.} at 275.}
\footnote{105. See N. Matte, \textit{supra} note 78, 78-79.}
\footnote{106. V. Rollo, \textit{supra} note 23, at 283.}
\footnote{107. \textit{Id.}}
\footnote{108. \textit{Id.}}
\footnote{109. \textit{Id.}}
\end{footnotes}
The Second Hague Conference in 1907 again denounced the use of aircraft in times of war between contracting States. However, few major powers ratified these agreements, primarily because of their technological superiority in aircraft development and a desire to use aircraft to their own military advantage.

By 1914, with the outbreak of World War I in Europe, sophisticated dirigibles and primitive fixed-wing aircraft were used to locate and plot troop movement and to drop bombs on a limited basis. Aviators were ordered to limit bombing to strategic military targets, although lack of precision resulted in many civilian casualties.

Because planes could cross national boundaries and were nearly impossible to stop, new legal questions arose regarding accidental penetrations, innocent passage, and intentional intrusion. In the western hemisphere, the 1916 meeting of the Pan American Aeronautic Federation (PAAF), in Santiago, Chile, recognized national sovereignty and control of the airspace overlying each state’s territory. However, aircraft of states in the Americas had already enjoyed reciprocal overflight rights. There were no formal acceptances of the PAAF, but a foundation of theory for the Americas had been achieved.

The Paris Convention was adopted in 1919 amidst these attempts to develop a body of international aviation law. It ruled civil air commerce in Europe for the next twenty years. The Paris Convention recognized national sovereignty over the airspace above a state’s land and water territory. The Convention also regulated bilateral innocent passage rights, required aircraft airworthiness certif-

110. Id. at 284. See also, R. Fixel, supra note 23, at 27; The Hague Peace Conferences of 1899 and 1907, 2 Scott Documents 152, 154 (1899) (Proceedings of the Hague Tribunal).
111. 2 Scott Documents 152, 154 (1899). See also, V. Rollo, supra note 23, at 284.
112. V. Rollo, supra note 23, at 285.
113. Id.
114. Id. Intentional intrusion, in this case, refers to aerial reconnaissance and attack.
115. Id. See also, R. Fixel, supra note 23, at 31.
117. V. Rollo, supra note 23, at 286. See generally N. Matte, supra note 78, at 103-118.
118. The formal name of the Paris Convention was the International Convention for the Regulation of Air Navigation; 3 U.S.T.; Treaties, Conventions, International Acts, Protocols and Agreements Between the United States and Other Powers, Dep’t of St. Publication, at 3768; R. Fixel, supra note 23, at 32.
119. Fixel, supra note 23, at 32.
120. See V. Rollo, supra note 23, at 286.
icates and crew certification, recognized the rights of nations to favor their own aircraft in domestic air transport (cabotage rights), and provided for the deposit of security funds to substitute for aircraft seizure under patent infringement claims.\textsuperscript{121} However, the Convention did not deal with military use of aircraft.

To regulate this still unaddressed area of international aviation, a group of European jurists gathered at The Hague in 1922 to draft The Hague Rules of Air Warfare (1923),\textsuperscript{122} which gave neutral nations the right to (1) refuse the aircraft of warring nations admittance to the neutral's airspace, (2) allow use of force to protect such airspace penetration, (3) permit movement of goods, including aircraft, through its jurisdiction at will, and (4) seize the aircraft and crewmembers of warring nations violating their sovereign airspace.\textsuperscript{123} The participating nations, however, failed to ratify The Hague Rules of Warfare, although a number of nations announced that they would voluntarily abide by the rules, no doubt hoping for reciprocal adherence by other nations.\textsuperscript{124}

Meanwhile, the Madrid Convention held in 1926 laid the framework for the Havana Convention of 1931. The Havana Convention developed a uniform international agreement for civil aviation in the Americas. The agreement was similar to the Paris Convention, its European counterpart.\textsuperscript{125} The Havana and Paris Conventions prevailed in their respective hemispheres until they were replaced in 1944 by the Chicago Convention.\textsuperscript{126}

The Comité International Technique d'Experts Jurisdiques Aériens (CITEJA) was formed in 1925 to address areas of private aviation law not yet considered in earlier international conventions.\textsuperscript{127} CITEJA conducted several important conferences, including the Warsaw Convention of 1929 on the air carriage of property and persons,\textsuperscript{128} Conventions regarding damage by aircraft to persons or

\textsuperscript{121} Id.
\textsuperscript{122} Id. at 287. \textit{N. Matte}, supra note 78, at 93-95.
\textsuperscript{123} See \textit{V. Rollo}, supra note 23, at 287, 288.
\textsuperscript{124} Id. at 288.
\textsuperscript{125} The Havana Convention. Id. at 289. \textit{See generally \textit{N. Matte}}, supra note 78, at 199-222.
\textsuperscript{126} Both the Paris and Havana Conventions were superceded by the Chicago Convention of 1944. Article 80 of the Chicago Convention specifically states that "Each contracting State undertakes, immediately upon the coming into force of this Convention, to give notice of denunciation of the [Paris Convention or Havana Convention]. As between contracting States, the Chicago Convention supercedes the Conventions of Paris and Havana." \textit{Chicago Convention}, supra note 12, art. 80.
\textsuperscript{127} See \textit{V. Rollo}, supra note 23, at 288.
\textsuperscript{128} \textit{Id.} Warsaw Convention, \textit{opened for signature} Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11. The Second International Diplomatic Conference on Private Air Law, later to be known as the "Warsaw Convention," met in Poland in 1929. See \textit{V. Rollo}, supra note 23, at 292. It satisfied an important need in international civil aviation law by establishing criteria to compensate air customers for the loss of air cargo
property on the ground,129 and the Convention on the Salvage of Aircraft at Sea.130 The work of CITEJA in Paris during 1936 laid the legal foundation for all future international air law.131 This work was continued by the Provisional International Civil Aviation Organization (PICA0), established in 1944.132 The Chicago Convention convened on November 1, 1944, at the invitation of the United States government.133 It was motivated by post-World War II sentiment against the use of aircraft as vehicles of destruction, and by the problems of enforcing the “absolute sovereignty” principle of the Paris Convention. The “final act” of this conference produced the text of a “Convention,” three “Agreements,” twelve technical “Annexes,” and formally established the International Civil Aviation Organization (ICAO).

Today, Chicago Convention serves as the international agreement regulating international civil aviation, administered by ICAO.134 Its maritime analogue, UNCLOS III, and is administered by the

or baggage. See V. Rollo, supra note 23, at 292. The Warsaw Convention standardized waybills, claim checks, and ticket documentation, and established liability limits for airline passenger injury or loss of life. See V. Rollo, supra note 20, at 292. The Warsaw Convention continues to exist today, independent of other international aviation law, regulating this narrow area of international civil aviation. Treaties in force, Jan 1, 1984, at 207. See Warsaw Convention, opened for signature Oct. 12, 1929, 49 Stat. 3000, T.S. No. 876, 137 L.N.T.S. 11. However, it has undergone revision since 1929, most notably by the Montreal Agreement of 1966, which increased airline liability to $75,000 in cases where tickets are sold in the United States, or when a scheduled point of departure, stop, or arrival is in the United States. See V. Rollo, supra note 23, at 292. This modification, drafted by the United States, enabled the U.S. to continue ratification of the Warsaw Convention.

129. The Rome Conventions of 1933 and 1952 provide for reimbursing third parties on the ground or water in cases of personal injury or property damage caused by civil aircraft operation. Convention for the Unification of Certain Rules relating to Damages caused by Aircraft to Third Parties on the Surface, Rome, May 29, 1933, Hudson, 6 Int. Leg. 334. See V. Rollo, supra note 23, at 294, 295.


131. See V. Rollo, supra note 23, at 289.

132. Id. at 295.

133. Id. at 296, 297. On Nov. 1, 1944, in response to a British initiative, President Roosevelt invited all the allied powers as well as some neutral governments to convene at Chicago for a conference in civil aviation. Diedersks - Verschoor: An Introduction to Air Law at 9 (1982). On Dec. 7, 1944, some fifty states signed the Chicago Convention with the two agreements annexed to it, i.e., the International Air Services Transit Agreement, 59 Stat. 1693, EAS 487, 3 Bevans 916, 84 U.N.T.S. 389 (Two Freedoms Agreement) and the International Air Transport Agreement, 59 Stat. 1701, EAS 488, 3 Bevans 922 (Five Freedoms Agreement). Id. at 10. Fifty three states attended this conference. Id.

The drafters of both the Chicago Convention and UNCLOS III justified these treaties as necessary instruments to achieve international peace, safety, and mutual benefits. The Chicago Convention solicits cooperation among nations for universal peace and the development of international civil aviation in order to "promote sound and economic regulations." Likewise, UNCLOS III solicits mutual understanding and cooperation by states in the use of the sea, thereby reaffirming the goals of peace, justice, security, friendly relations, and progress for all peoples of the world. Like most treaties, UNCLOS III and the Chicago Convention are mutually beneficial to contracting states by the exchange of privileges.

UNCLOS III, although a maritime treaty, inherently affects international civil aviation in many ways. Both UNCLOS III and the Chicago Convention expound common principles historically shared by maritime and aviation law. Each sets forth provisions regulating the use and control of airspace overlying international waters consistent with their charters of peace and cooperation. This overlap between UNCLOS III and the Chicago Convention gives rise to common issues.

135. Chicago Convention, supra note 12.
136. Id. at Preamble. See also N. Matte, supra note 78, at 131 e1981).
137. UNCLOS II, supra note 11.
138. International law governs relations between independent States. The rules of law binding upon States, therefore, emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between those co-existing independent communities or with a view to the achievement of common aims.


139. An analysis of the text of UNCLOS III reveals its relevance to the Chicago Convention, its Annexes, and international civil aviation in general:
- UNCLOS III subjects - articles which affect the Chicago Convention
  a) Airspace over territorial seas - art. 2.
  b) Airspace above waters forming straits used for international navigation - arts. 34, 38 & 39.
  c) Airspace over archipelagic waters - arts. 2, 49, 53 & 54.
  d) Overflight over the EEZ - art. 58.
  e) Airspace above the continental shelf - art. 78.
  f) Freedom of the High Seas - art. 87.
  g) Regime of islands - art. 121.
  h) Right of transit for land-locked States - arts. 124 & 125.
  i) Airspace superadjacent to the Area - art. 135.
  j) Pollution from or through the atmosphere - arts. 194, 212 & 222.
  k) Pollution by dumping - arts. 1, 194, 210 & 216.
  l) Sovereign immunity of aircraft owned or operated by a State and used on government non-commercial service - art. 236.

Milde, supra note 44, at 529, 531.
The ocean is generally subdivided into areas to delineate various rights of states to its use, and which allocate jurisdictional control over this use. The predominant subdivisions include the internal waters, the territorial sea, the contiguous zone, the economic exploitation zone (EEZ), and the high seas. In defining rights to airspace above the ocean, the terms “territory” and “high seas” are used in both the Chicago Convention and UNCLOS III in a similar but not necessarily identical manner.

Under UNCLOS III, foreign vessels enjoy the right of innocent passage navigation through the territorial waters of a state, subject only to customs, police, health, and safety regulations of the territorial state. However, passage of foreign aircraft through the airspace above these same territorial waters is not permitted under UNCLOS III or the Chicago Convention. This limitation is motivated by the inherent political, military, and security implications of air travel. UNCLOS III specifically recognizes exclusive state sovereignty and control over the airspace overlying both its land territory and territorial sea waters. Similarly, article 1 of the Chicago

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140. “Internal waters” generally refers to river inlets, bays, and other waters on the landward side of the territorial sea (e.g., lakes, canals, and rivers). See UNCLOS III, supra note 11, arts. 8-10.
141. See supra note 84.
142. The “contiguous zone” is a zone of the high seas contiguous to and not extending beyond 12 miles from the “territorial sea” of a coastal state, and is subject to coastal state jurisdiction in matters concerning customs, fiscal, immigration or sanitary regulations. See UNCLOS III, supra note 11, pt. II.
143. The economic exploitation zone extends contiguous from the territorial waters seaward to 200 nautical miles. See UNCLOS III, supra note 11, pt. V (1982).
145. In the Chicago Convention, “territory” seems to include both land territory as well as territorial seas (as defined within UNCLOS III), while “high seas” refers to the waters beyond the territorial sea limit. The EEZ is not specifically mentioned in the Chicago Convention.
146. Article 18 of UNCLOS III defines innocent passage as “(a) traversing that sea with entering the internal waters or calling at a roadstead or port facility outside internal waters; or (b) proceeding to or from internal waters or a call at such roadstead or port facility.” It requires passage to be “continuous and expeditious,” but to include stopping and anchoring when incidental to ordinary navigation or “as rendered necessary by force majeure or distress or for the purpose of rendering assistance to persons, ships or aircraft in danger or distress.” UNCLOS III, supra note 11, art. 18.
147. UNCLOS III, supra note 11, art. 21.
150. Most States claim sovereignty over territorial seas which extend out to 12 miles beyond their coastline.
Convention recognizes each state’s exclusive control of the airspace overlying its “territory.” The use of “territory” in this context contemplates both land territory and the territorial sea. It is this sovereignty, recognized under both UNCLOS III and the Chicago Convention, which the Soviets asserted in the destruction of KAL 007.

It is universally recognized that each state has the right to exercise its sovereign power within the borders of its land and the airspace overlying its land and territorial sea. In the case of regulating the airspace above EEZ waters, however, the dividing line apportioning jurisdiction between the state and ICAO is ambiguous. International air routes, such as “Red 20,” the intended route of KAL 007, customarily pass through the airspace overlying EEZs, usually without incident. These air routes have been widely recognized by ICAO and its contracting states. Thus, present customary usage treats the airspace above EEZs as it does airspace above the high seas for the purpose of aircraft overflight, subject to limitations imposed by states designed only to protect their exploitation interests in and below EEZ waters in accordance with UNCLOS III. While the passage of aircraft through the airspace overlying EEZs is recog-

151. Article 1 of the Chicago Convention states: “The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory.” Article 2 states: “For the purposes of this Convention the territory of a State shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protections or mandate of such State.”

152. See generally J. COOPER, supra note 148, at 194. This use of “territory” does not, however, seem to contemplate exclusive state jurisdiction over the airspace above a state’s claimed EEZ. Id. See also infra notes 153-57 and accompanying text.


154. The flight track assigned to KAL 007 is called Red 20 (R20), one of five tracks across the north Pacific used by an average of 100 planes a day in both directions. Although Red 20 is the northern-most of these five routes and passes within fifty miles of the Soviet-occupied Kuril Islands, it is the favored great circle route between Japan and Anchorage. Federal Aviation Administration (FAA) charts contain the following warning: “WARNING, Aircraft infringing upon Non-Free Flying Territory may be fired upon without warning.” Likewise, Jeppesen charts, those often used in the United States and other countries, state: “Warning, Pilots flying northern routes between North Routes and Japan avoid approaching or overflying Soviet controlled territory, specifically the Kuril Islands.” See Kennelly, supra note 26, at 15, 16.

155. During a meeting convened in Montreal on November 12-13, 1981, the U.S.S.R. acknowledged R20 and agreed to “provide separation, in accordance with applicable ICAO provisions, between aircraft under their control and the airspace to be protected in respect to proposed route R20, i.e., the airspace bounded by a line 50 [nautical miles] north of the route center.” In doing so, the U.S.S.R. acknowledged not only the existence of Red 20 but also the “relatively less precise nature of navigation used on long, overwater flights.” FAA Administrator Helm’s Statement, ICAO Council, Montreal, Sept. 15, 1983, reprinted in Dep’t St. Bull., Oct. 1983, at 19.

156. Under UNCLOS III, coastal states may regulate overflight of their EEZ only with respect to their exclusive jurisdiction over artificial islands, installations, structures, and other activities aimed at the economic exploitation of the zone, scientific research, and preservation of the marine environment. N. MATTE, supra note 78, at 137.
nized both in custom and by implication in the Chicago Convention,\textsuperscript{157} neither the coastal state nor ICAO can claim *exclusive* jurisdiction in this airspace.

*Intrusion*

Having recognized the exclusive sovereignty of a state over its land territory and territorial waters, the Chicago Convention addresses aerial intrusion over these areas (non-consensual overflight). Overflight of a state's sovereign airspace, by aircraft of foreign states which do not otherwise enjoy territorial overflight privileges,\textsuperscript{158} violates the sovereignty principles proclaimed in article 1 of the Chicago Convention, and is subject to ICAO rules regarding unauthorized overflight.\textsuperscript{159} Aircraft of states which do enjoy territorial overflight privileges might still "intrude" into airspace in violation of the Chicago Convention by overflying state-designated *prohibited areas.*\textsuperscript{160} Even had there been a bilateral agreement between the Korean and Soviet governments exchanging routine overflight privileges, KAL 007 had overflown sensitive military areas.\textsuperscript{161} These areas were most certainly the subject contemplated by ICAO in providing for state designation of prohibited areas. Overflight of such prohibited areas by *any* foreign aircraft, privileged or not, would constitute an intrusion violation under the Chicago Convention.

\textsuperscript{157} The Chicago Convention recognizes innocent passage over the "high seas." Arguably, it contemplates those waters which extend beyond the territorial sea, including the EEZ and contiguous zone.

\textsuperscript{158} Overflight privileges may be the result of specifically negotiated bilateral agreements between states. See, e.g., Civil air transport agreement with exchange of notes, November 4, 1966, 17 U.S.T. 1909, T.I.A.S. No. 6135, 675 U.N.T.S. 3; Arrangement relating to the inauguration of air service between New York and Moscow, July 8, 1968, 19 U.S.T. 6020, T.I.A.S. No. 6560, 702 U.N.T.S. 392; Protocol on questions relating to the expansion of air services under the civil air transport agreement of November 4, 1966, 17 U.S.T. 1909, T.I.A.S. No. 6135, with agreed services and Annex, 24 U.S.T. 1506, T.I.A.S. No. 7658. However, overflight privileges are more frequently exchanged among ICAO members by means of a state's ratification of either the International Air Services Transit Agreement or the International Air Transport Agreement, both of which were adopted in Chicago on December 7, 1944, supplemental to the Chicago Convention itself. International Air Services Transit Agreement, 59 Stat. 1693, E.A.S. 487, 3 Bevans 916; International Transit Service Agreement, 59 Stat. 1701, E.A.S. 488.

\textsuperscript{159} Chicago Convention, *supra* note 12.

\textsuperscript{160} Article 9 of the Chicago Convention provides for the designation of prohibited areas for reasons of military necessity or public safety, applicable to all states or a non-discriminatory basis, and of reasonable extent and location so as not to unnecessarily interfere with air navigation. Thus, aircraft from states, which by special agreement, have territorial overflight privileges, are nonetheless denied overflight of these prohibited areas.

\textsuperscript{161} See *supra* note 33 and accompanying text.
Aerial intrusions may be voluntary or involuntary. Voluntary intrusions might be motivated to accomplish numerous objectives such as spying (as was alleged by the Soviets in the KAL 007 incident) or terrorism. Involuntary intrusions can result from atmospheric conditions, mechanical malfunction, or inflight emergencies which require immediate landing.

Non-consensual overflight of a state’s territory has an impact on both the safety of the aircraft and its passengers, as well as on the security of the overflown state. Such unauthorized overflights are the subject of regulation in a number of provisions within the Chicago Convention. For example, article 3, paragraph (d), declares that the national regulation of state aircraft shall have due regard for navigational safety of all civil aircraft within the state’s territory. Article 25 requires member states to provide all measures of assistance to aircraft in distress. Article 26 provides for inquiries following accidents or incidents and requires investigation, coordinated between representatives of the overflown state and representatives of the state to whom an aircraft in distress belongs. Taken together, these articles, in effect, limit the remedies available to contracting states in cases of aerial intrusion. The scope of available remedies, although undefined, clearly stops short of armed conflict during times of peace.

The Use of Weapons Against Civil Aircraft — Amendment (Article 3 bis) to the Chicago Convention

The forcing down of commercial aircraft, which because of atmospheric or uncontrollable technical reasons penetrate sovereign air-

162. Kennelly, supra note 26, at 1.
163. See N. Matte, supra note 78, at 175.
164. Id.
165. Id.
166. These were the two predominant issues presented by the opposing sides in the KAL 007 incident. Annex 17 of the Chicago Convention addresses “Security - Protection of International Civil Aviation Against Unlawful Intervention.”
167. N. Matte, supra note 78, at 176.
168. Chicago Convention, supra note 12, art. 3, para. (d). See also N. Matte, supra note 78, at 176.
170. In addition, Annex 2, appendix A, attachment A, section 8.1 specifically states “Intercepting aircraft should refrain from the use of weapons in all cases of interception of civil aircraft.” (emphasis added) The Annexes to the Chicago Convention are not generally ratified. Rather, they serve as supplemental regulations devised by ICAO, and are thus advisory in nature. As such, they are not binding upon the states which have otherwise ratified the Chicago Convention. Id.
171. See infra notes 176 & 183 and accompanying text.
172. See supra notes 1, 136-138 and accompanying text.
space without permission, had been condemned by ICAO prior to the KAL 007 incident.\footnote{N. Matte, supra note 78, at 176. This was in response to the Libyan Air Lines incident on February 21, 1973, which ended in 108 deaths. Id.} On June 5, 1973, ICAO requested contracting states to avoid intercepting civil aircraft unless necessary as a last resort, and then, by using only the procedures and signals found in Annex 2 of ICAO regulations.\footnote{Id.} At the same time, ICAO specified that intercepted aircraft must follow the instructions of the intercepting aircraft and, if possible, advise the controlling Air Traffic Service.\footnote{See Chicago Convention, supra note 12, supplement A (emphasis added).} ICAO further specified that the "intercepting aircraft should refrain from the use of weapons in all cases of interception of civil aircraft."\footnote{This may be the strongest factor causing the Soviets to maintain their position that KAL 007 was on an intelligence flight directed by the United States. See generally supra notes 39 & 40, and accompanying text.} Based on these recommended practices which were in effect at the time of the incident, states were hard pressed to justify the use of destructive force against any intruding civil aircraft.\footnote{The Use of Weapons against Civil Aircraft - Amendment (Article 3 bis) to the Chicago Convention, Air & Space Law., Fall 1984, at 7 [hereinafter cited as The Use of Weapons].}

In September 1983 the ICAO Council held an Extraordinary Session to consider the KAL 007 incident, and to consider an amendment to the Chicago Convention which would require states to abstain from the use of force against civil aircraft, subject only to the provisions of article 51 of the United Nations Charter regarding the individual or collective right of self-defense by states.\footnote{Id.} This meeting was the impetus behind the 25th Extraordinary Session of the ICAO Assembly on May 10, 1984, where an amendment was adopted to article 3 of the Chicago Convention.\footnote{Id.} The key provision of article 3 bis is found in the first sentence of paragraph (a), which states: "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."\footnote{Id.} Paragraph (b), however, recognizes that all states are "entitled to require the landing . . . of a civil aircraft flying above its territory without authority or if there are reasonable grounds to conclude that it is being
used for any purpose inconsistent with the aims of this Convention . . . “181 Paragraph (c) requires aircraft to comply with an order to land in conformity with paragraph (b), and paragraph (d) requires contracting states to “take appropriate measures to prohibit the deliberate use of any civil aircraft registered in that State . . . for any purpose inconsistent with the aims of [the] Convention.”182

This amendment is an important first step in responding to the KAL 007 incident in a way which recognizes the competing interests of states’ security and aircraft safety in international travel. That which was formerly recommended non-binding policy is now binding international law. However, the ICAO Assembly has failed to address the overriding issue of enforcement.

**Balancing Interests**

By ratifying agreements such as UNCLOS III, the Chicago Convention, and the UN Charter, states implicitly recognize their obligation to respond to unauthorized overflight with measures short of armed conflict.183 Involuntary intrusions due to environmental conditions, navigation malfunctions, and other aircraft emergencies are realities often beyond human control.184 These situations are now addressed by viable procedures which promote rather than jeopardize safety of flight.185 While these procedures permit states to defend themselves against deliberate intrusions which substantially threaten national security, they prohibit the use of arms against unarmed civil aircraft engaged in international travel.186 Such use of arms undermines trust, reliance, and expectation — the very fabric of international law. The Soviet’s reluctance to modify their announced policy to use force against intruding aircraft casts a shadow over the international agreements in which they participate.

UNCLOS III, like its predecessor treaties, recognizes the right of innocent passage through the “territorial waters” of all states. Passage is “innocent” when it is not prejudicial to the peace, good order, or security of the coastal state.187 Article 21 of UNCLOS III allows

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181. *Id.* at 8.
182. *Id.*
183. N. MATTE, *supra* note 78, at 175, n.201.
184. *Id.*
185. See *The Use of Weapons, supra* note 178, at 7-9.
186. *Id.*
187. Under article 19 of UNCLOS III, innocent passage becomes “prejudicial” when it entails (1) activities which use or threaten the use of force against the sovereign, (2) exercises or practice with weapons of any kind, (3) intelligence gathering, (4) propaganda dissemination, (5) launching or recovering aircraft (the right to innocent passage overflight of the territorial sea of a state is not recognized), (6) the launching or recovering of any military devices or commodities, currency, or persons, contrary to the customs, fiscal, immigration or sanitary laws of the coastal state, (7) willful and serious pollution, (8) fishing, (9) research or surveying, (10) meaconing or jamming, or any other activity
states to enforce innocent passage, generally to protect their own interests in the territorial sea. Article 25 permits the designation of specified off-limit territorial sea areas when required to protect a state's national security. Such areas are similar in nature to the "prohibited areas provided for under the Chicago Convention." Thus, UNCLOS III, like the Chicago Convention, recognizes valid economic and self-defense interests of coastal states.

Recognition of these interests is further reflected in the enforcement provisions of UNCLOS III. Article 25 recognizes the power of coastal states to enforce innocent passage limitations by taking "necessary" measures. This logically implies the use of least necessary measures. In the case of warships, article 30 of UNCLOS III specifically provides that "[i]f any warship does not comply with the laws and regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance therewith which is made to it, the coastal State may require it to leave the territorial sea immediately." In this context, the remedy of a coastal state is limited to requiring a warship to leave, exerting the least threatening method necessary to accomplish the offending ship's exit. This was the provision relied upon by the Soviet Union when its submarine ran aground in Swedish territorial waters in

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not having a direct bearing on passage. UNCLOS III, supra note 11, art. 19 (Meaning of innocent passage). Passage of submarines are not innocent unless accomplished on the surface. Id. art. 20 (Submarines and underwater vehicles).

188. UNCLOS III, supra note 11, art. 25. See also supra note 161 and accompanying text.

189. UNCLOS III, supra note 11, art. 25.

190. [F]or . . . measures to be legitimate, they must be taken for an essentially defensive and preventative purpose . . . . The use of force is justifiable only by its being necessary. In its attempt at self-preservation the State should be guided by the principles of good faith and the dictates of humanity. In particular, there should be nothing unreasonable or excessive going beyond the needs of the case and out of all proportion to the injury which the State has first set out to avert or redress.


It is not hard to imagine a case in which the risk to the security of the territorial State is so clear (a flight of three intercontinental bombers off course in the airspace of another State with whom relations are tense) that almost immediate destruction of the intruder aircraft could be justified under every standard of law and humanity. Where the risk is not so clear, however, and perhaps in all cases where the risk is only to intelligence security of the territorial State, it is much harder to justify destruction of such aircraft in accordance to the same standards of law and humanity.

Legal Issues, supra note 1, at 3.

191. UNCLOS III, supra note 11, art. 30 (emphasis added).
While article 30 applies only to warships, articles 26-28 provide for limited jurisdiction over other foreign ships, allowing for seizure of ships to levy charges or exercise limited criminal or civil jurisdiction. However, an important limitation in implementing such a seizure is the corresponding right of the flag state to a vessel to post a bond or other financial security to obtain its release. Thus there exists a limited right of an intruded-upon state to use least-necessary force to accomplish a legitimate seizure of a vessel or to effect its exit from a state's territorial sea.

UNCLOS III and the Chicago Convention closely parallel each other in purpose. Each agreement recognizes rights of passage and safety of ships and aircraft, respectively, during international travel. Both promulgate measures which require enforcement without use of arms. Each agreement demonstrates a concern for human life by mandating search and rescue assistance to vessels and aircraft in distress. The right of states to assert sovereign power in recognized situations is overshadowed by the Chicago Convention, UNCLOS III, and UN Charter requirements which call for the use of peaceful means to settle all disputes. However, the permissible use of "least-threatening" force under UNCLOS III against ships in violation of international law during innocent passage has no counterpart in aviation. It is difficult to envision the use of any measure of force against an airborne aircraft which could not potentially destroy the aircraft or threaten the lives of persons on board. Yet the need remains for an enforcement scheme, short of armed response, which finds an appropriate balance between the competing interests of states' security and safety of flight.

The Illusory Nature of Sanctions

Some scholars assert that international law is non-existent. This assertion derives from a perceived inability, short of armed conflict, to enforce the agreements, customs, and moral guidelines which exist among nations. Consensus, agreement, and consent are, in effect, the substance of international law. Enforcement is generally accomplished through the pressures of world opinion, exchange of mu-

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192. See supra note 73 and accompanying text.
193. UNCLOS III, supra note 11, art. 30 (Non-compliance by warships with the laws and regulations of the coastal State).
194. See id. art. 292 (Prompt release of vessels and crew).
195. See id. art. 25 (Aircraft in distress).
196. See id. art. 98 (Duty to render assistance); Chicago Convention, supra note 12, art. 25.
197. Chicago Convention, supra note 12, art. 1; UNCLOS III, supra note 11, Pre-amble; U.N. CHARTER, art. 1.
198. V. ROLLO, supra note 23, at 269.
199. Id.
tual benefits, economic sanctions, and the deterrence posed by the potential for armed conflict. The KAL 007 incident serves as a vivid example of the illusory nature of these enforcement mechanisms. Despite unprecedented expressions of outrage throughout the world, and temporary termination of reciprocal landing rights by many nations, the Soviets have not altered their announced policy to prevent the unauthorized overflight of their territory by unmitigated use of armed force.

Use of armed force against the Soviets in retaliation for their action against KAL 007 might strengthen Soviet resolve to defend the integrity of its borders against future intrusion by military and civilian aircraft. Further, such use of force would clearly be as violative of international law as was the Soviet's action against KAL 007. Moreover, as a practical matter, armed conflict between the United States and the USSR, in the midst of continuing nuclear build-up and the recent impasse in bilateral nuclear arms reduction, seems at the very least imprudent and potentially devastating. Such inherent weaknesses in resorting to the use of armed conflict to enforce international law render it intuitively untenable and a potentially self-defeating undertaking.

Likewise, economic sanctions are most often not without substantial detriment to the imposing party. For example, the United States tourist industry allegedly will have lost close to $500 million as a result of the revocation by the United States of reciprocal landing rights previously held by the Soviet airline Aeroflot. This United States boycott continues at the expense of the tourist and airline industries. The termination of flights to the Soviet Union by other nations in response to the KAL 007 incident was only temporary, arguably to minimize the detrimental economic impact on affected airlines, passengers, and national economies in general.

Economic sanctions, imposed independently, have been effective only as token expressions of protest. An organized world-wide boycott would prove more effective. A mechanism for implementation of such a boycott against an airline registered in a contracting state currently exists. Article 87 of the Chicago Convention provides: "Each contracting State undertakes not to allow the operation of an..."
airline of a contracting State through the airspace above its territory if the Council (ICAO) has decided that the airline concerned is not conforming to the final decision rendered in accordance with the previous articles.\textsuperscript{204}

In the KAL incident, this sanction, although in spirit appropriately enforceable against the USSR, technically fails to qualify for application. It was the military arm of the Soviet government, rather than a Soviet commercial airline (e.g., Aeroflot), which had violated international law. The Soviet government's military action and subsequent refusal to allow international participation in search and rescue efforts, to make compensation, or to change its policy has been addressed by ICAO only by a resolution condemning Soviet action in this incident.\textsuperscript{208} This appears to be the limit of action presently authorized under the Chicago Convention against states themselves.

\textbf{ENFORCEMENT: PROPOSED CHANGES}

Enforcement of the international law contained within UNCLOS III and the Chicago Convention depends upon voluntary compliance by each contracting state. Both UNCLOS III and the Chicago Convention provide numerous alternatives to effect peaceful resolution of disputes between party states. States are expected to choose among enumerated or other mutually agreeable methods.\textsuperscript{208} Refusal to submit to jurisdiction under one of these methods, however, remains an option often used with limited consequence.\textsuperscript{207}

\begin{footnotesize}
\textsuperscript{204} Chicago Convention, \textit{supra} note 11, art. 87.


\textsuperscript{206} Part XV of UNCLOS III addresses settlement of disputes. Generally, it allows contracting states to settle their disputes using any mutually agreeable means, including negotiations, arbitration, or submission to various international tribunals for adjudication. Similarly, Chapter XVIII of the Chicago Convention addresses disputes and defaults. Articles 87 and 88 prescribe penalties for nonconformity by airlines and states, respectively. Under the Chicago Convention, the penalty for a non-conforming airline is essentially an economic sanction, \textit{i.e.}, suspension of its international operating privileges.

\textsuperscript{207} Under the Chicago Convention, the penalty for nonconforming states is limited to the suspension of that state's voting privileges in the ICAO Assembly. Many states ratify treaties with reservation, taking exception to those provisions requiring submission to the jurisdiction of international tribunals or binding arbitration for the resolution of disputes. For example, under the multilateral treaty entitled "Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage) Agreement," the USSR, in its ratification notice, states:

\begin{quote}
The Government of the Union of Soviet Socialist Republics does not consider itself bound by the provisions of paragraph 1 of Article 14, which provide that disputes concerning the interpretation or application of the Convention shall be submitted to arbitration or to the International Court of Justice at the request of one of the Parties to the dispute.\end{quote}

Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aircraft, Sept. 23, 1971, 24 U.S.T. 564, T.I.A.S. No. 7570. The Ukrainian Soviet Socialist Republic ratified this treaty with the same exception and the Romanian Soviet Socialist Republic ratified it with a similar optional consent declaration. \textit{Id.} No other signatories
\end{footnotesize}
The Paris Convention provided for the deposit of security funds with host nations to substitute for the seizure of an aircraft held pursuant to a claim of design or mechanical patent infringement. In practice, when a host country seized an aircraft under a claim of patent infringement, the aircraft's owner or state of registry could post a bond, in lieu of seizure, to protect the manufacturer's technological patent integrity. When the Paris Convention was replaced by the Chicago Convention in 1944, article 27 of the Chicago Convention expressly prohibited the seizure of aircraft to enforce patent infringement claims, consequently eliminating the need for the security deposit procedure. However, a remaining vestige of this procedure is found in article 292 of UNCLOS III, which provides for the exchange of security funds for seized vessels and crewmembers.

Use of security deposits in lieu of aircraft under the Paris Convention was an effective way to protect patent interests in aircraft tech-

to this Convention have taken issue with these partial ratifications. However, regarding the Convention on the International Recognition of the Rights in Aircraft, in response to reservations made by Mexico in its ratification of the treaty, the United States and the Netherlands have stated that they are “unable to accept these reservations” and declare that they do not regard the Convention as in force between Mexico and their governments. Convention on the International Recognition of Rights in Aircraft, June 19, 1948, 4 U.S.T. 1830, T.I.A.S. No. 2847, 310 U.N.T.S. 151. However, the import of this conflict seems minimal, as U.S.- and Mexican-registered privately owned and commercial aircraft exercise reciprocal landing privileges. See generally 9 Whiteman's Digest 340, 41 (1973) (Incidents involving the wrongful shooting down of U.S. military aircraft which were not within the jurisdiction of the International Court of Justice).

208. Article 18 of the Paris Convention stated:
Every aircraft passing through the territory of a contracting State, including landing and stoppages reasonably necessary for the purpose of such transit, shall be exempt from any seizure on the ground of infringement of patent, design or model, subject to the deposit of security the amount of which in default of amicable agreement shall be fixed with the least possible delay by the competent authority of the place seized.

Early plane manufacturers jealously guarded their prototypes; the science of aviation was so new that each improvement in design gave a manufacturer a great advantage. V. ROLLO, supra note 23, at 286.

209. UNCLOS III, supra note 11, art. 292 (Prompt release of vessels & crews), provides that:
Where the authorities of a State Party have detained a vessel flying the flag of another State Party and it is alleged that the detaining State has not complied with the provisions of this Convention for the prompt release of the vessel or its crew upon the posting of a reasonable bond or other financial security . . . upon the posting of [a] bond or other financial security determined by the court or tribunal, the authorities of the detaining State shall comply promptly with the decision of the court or tribunal concerning the release of the vessel or its crew.

UNCLOS III, supra note 11, art. 292. See also supra notes 185-86 and accompanying text.
nology. Under UNCLOS III, similar use of the security deposit protects the right asserted by offended states as well as the rights of offending vessel owners and their crewmembers. With the political, religious, and ideological differences which exist among the nations of the world, there is great potential for conflicts which jeopardize life and property, as evidenced by the KAL 007 incident. Property is replaceable but costly, and human life can be neither replaced nor adequately compensated for. These interests deserve at least as much protection in the context of international civil aviation law as that afforded vessels at sea under UNCLOS III.

Enforcement of UNCLOS III and the Chicago Convention would be greatly enhanced by forced jurisdictional submission. However, as discussed above, such submission has been essentially voluntary unless enforced by the use of arms.

Economic success is essential to each state's existence and is a common thread among all states. Herein lies the most viable motivation for jurisdictional submission by party States. Two proposals, one offensive in nature, the other defensive, would increase this motivation.

Offensively, the Chicago Convention should be amended to give ICAO economic sanction power against commercial airlines whose aircraft intrude upon the airspace of foreign states by unauthorized overflight. Two offensive schemes are suggested. First, a substantial predetermined fine, payable to an offended state, should be imposed by ICAO against an offending airline. Such a fine would 1) motivate airlines to exercise an increased level of care in international navigation, and 2) motivate offended states to exercise an increased level of care in accurately identifying intruding aircraft for the purpose of reporting violations to ICAO for adjudication and monetary compensation. A logical extension of this monetary fine scheme would provide for the posting of a security deposit to affect the release of an aircraft which is intercepted and required to land in an offended state's territory. Aircrew who fail to comply with orders to land by intercepting state aircraft should give rise to airline liability for an additional fine. This would further motivate states to utilize prescribed intercept procedures to identify intruding aircraft in lieu of the use of armed response, as well as motivate airlines to cooperate with interception and seizure procedures when utilized by offended states.

Jurisdiction without the power to enforce it is a fiction. Existing boycott procedures found in article 87 of the Chicago Convention gives ICAO power to enforce such a monetary fine against offending airlines.

210. See supra note 183 and accompanying text.
Defensively, amendment of the Chicago Convention expanding the boycott power of ICAO under article 87 for use against states who resort to the use of unjustified armed force is appropriate and necessary to complete the enforcement formula. This will help displace much of the burden inherent in "economic sanctions" borne by individual governments, groups, and citizens. This economic sanction might be temporary in duration, or require either monetary settlement or the posting of a security bond in lieu of a monetary settlement, pending adjudication in an acceptable international law tribunal. This would motivate offended states to limit their use of force to situations of bona fide self-defense.

Investigatory access is a necessary tool in the adjudication of conflicts which give rise to ICAO's exercise of authority. The proposed enforcement schemes must also be implemented against states or airlines who deny access for investigation of aircraft accidents or of ICAO violations.

CONCLUSION

More than 750 million passengers traveled to international destinations in 1982. Each of the 151 members of ICAO have agreed to respect certain principles and obligations, as codified in the Chicago Convention and its annexes, to facilitate this travel. The Soviet Union must, as an ICAO member, adhere to these principles and obligations on a consistent basis. Soviet action in the KAL 007 incident is clearly inimical to the letter and spirit of the Chicago Convention. Having just recently ratified UNCLOS III, the Soviet Union, by its action against KAL 007, has wasted little time in sending a clear message to the rest of the world that it cannot be expected to be held bound by its international agreements. This highlights the problem of enforcing international law, specifically the Chicago Convention and its maritime analogue, UNCLOS III. Both the Chicago Convention and UNCLOS III require amendment, to fortify jurisdiction over the international highways of travel found on the ocean's surface and in the airspace above it, and to expand the scope of remedies available for misuse of these media of interna-

211. "Verification" has been a key issue in the recent nuclear and space arms-control negotiations between the United States and U.S.S.R. While disagreeing on implementation, each side recognizes the importance of verification access to ensure mutual compliance with nuclear weapon inventory limitations. See generally, W. Potter, Verification and SALT: The Challenge of Strategic Deception (1980).

tional travel. While intrusion of the territorial airspace of another state clearly violates the sovereignty principles proclaimed in both UNCLOS III and the Chicago Convention, international law has dedicated itself to peaceful means for the resolution of such violations. By their actions, the Soviets have invited a reevaluation of the viability of both of these agreements. On September 16, 1983, the ICAO Council passed a resolution calling for a full investigation and review of the provisions of the Chicago Convention, its annexes, and other related documents, to consider possible amendments to prevent a recurrence of this tragic incident. This resulted in an amendment to the Chicago Convention which codified existing policy proscribing the use of armed force against civil aircraft.

To date, the Soviet Union has made no reparations, nor altered its announced policy to shoot down commercial aircraft which might unintentionally enter Soviet airspace. Until the Soviets recommit themselves to existing international law under UNCLOS III and the Chicago Convention, these agreements will fail in much of their peace-promoting mission.

Sanctions imposed by individual governments and organizations have been individually burdensome, temporary in nature, and ineffective. This reflects the exploitable nature of international law which is inherently limited by voluntarily participation of states.

Economic motivation is one which cuts across the ideological differences which exist in the world. Predetermined economic consequence on a much larger scale is required to motivate states to comply with international law and to resolve the stalemate between the policy of the Soviets and that of the rest of the world regarding international civil aviation.

The monetary fine and security deposit procedures suggested in this Comment would motivate airlines to exercise greater care in international navigation, and cooperate in the event of interception and seizure of the aircraft. ICAO's power to implement the boycott procedure against offending airlines is necessary to enforce the fine system and to increase these motivations. As beneficiaries of the monetary fine and security deposit, offended states would be motivated to utilize prescribed peaceful methods rather than armed destructive response in cases of non-threatening intrusion. These offensive mechanisms provide economic incentive in favor of offended states, rather than punitive action against them, and encourages adherence to in-

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213. The Resolution was passed by a vote of 26 to 2; the USSR and Czechoslovakia voted against it. Algeria, China, and India abstained, and Iraq and Lebanon were absent.
215. See supra note 178 and accompanying text.
international law.

The proposed expansion of article 87 of the Chicago Convention also provides for a boycott imposed by ICAO against states who fail to adhere to either the provisions of the Convention or other supplemental regulations passed by ICAO. This defensive scheme is appropriately invoked in cases similar to the KAL 007 incident where use of armed force to destroy civil aircraft is favored over adherence to prescribed intercept procedures.

Enforceability is a problem which demands immediate attention. It is unacceptable to await repetition of the KAL 007 incident to draw international support for amendment to the Chicago Convention. Economic sanction is the only viable alternative to bring meaningful enforceability into the international law forum. The future of the Chicago Convention, UNCLOS III, and all international law, depends upon effective enforcement schemes to bring full meaning and life to international law.

JEFFREY D. LAVESON