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# States' interpretation of the rules of international law regarding the use of force against civil aircraft in cases before the International Court of Justice

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# States' interpretation of the rules of international law regarding the use of force against civil aircraft in cases before the International Court of Justice

*by Zoltán Papp**

## *1. Introduction*

This paper discusses the rules of international law regarding the use of force against civil aircraft in the interpretation of states in their written submissions presented to the International Court of Justice. Some of the findings herein described were presented by this author on 11 December 2015 in Győr (Hungary) at the conference for PhD students entitled *uniqueness of jurisprudence*—organized by the Postgraduate Doctoral School of Law and Political Sciences of *Széchenyi Egyetem*.

This paper is structured as follows: in the second section, following the introductory remarks, the research methodology is outlined; the third section contains general observations with respect to the subject matter; the fourth section examines the destruction of a civil aircraft during peace time (1955) over Bulgarian airspace—an issue that was one of the first major well documented incidents of the use of armed force against a civil flight.[1] In addition, this latter section discusses a more recent aerial incident (1988) concerned with the destruction of an Iranian civil aircraft that occurred against the backdrop of an international armed conflict extended to the Persian Gulf. The Iranian incident arose after the adoption, but prior to entry into force, of the first international convention banning the use of force against civil aircraft (Article 3 bis of the *Chicago Convention*). In the fifth and final section an attempt is made to draw some conclusions in order to shed some light on the impact of state submissions discussed in this paper have had on the eventual formulation of the relevant rules governing international law. Moreover, contemporary developments and challenges will briefly be presented.

The states' written submissions (memorials) subject to analysis in this paper are all the more relevant today as they eventually *contributed* to the codification of customary international law and may, by the same token, contribute to a better understanding of current developments and challenges.

All references to the *Chicago Convention* refer to the "Chicago Convention on international civil aviation (1944)",[2] whereas the term *Montreal Convention* refers to the "Montreal Convention for the suppression of unlawful acts against the safety of civil aviation (1971)".[3]

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[1] Two other noteworthy international incidents preceded the above mentioned Bulgarian related ICJ case; namely, an aerial attack on an Air France flight by Soviet MIGs over East Germany (1952) and the shooting down of a scheduled Cathay Pacific Airways flight by Chinese combat aircraft (1954). In the case of the first, the aircraft ultimately managed to carry out an emergency landing in Berlin. In the case of the second incident, China assumed full responsibility for mistaking the British aircraft for a Chinese nationalist enemy military aircraft. For more details see: *William J. Hughes*, Aerial Intrusions by Civil Airliners and the use of force, 45 J. Air L. & Com. 595, 1979-1980, pp. 600-602.

[2] 1944 Convention on International Civil Aviation, ICAO Doc 7300/9, Ninth Edition 2006 http://www.icao.int/publications/Documents/7300_cons.pdf (14 February 2016).

[3] Convention for the suppression of unlawful acts against the safety of civil aviation concluded at Montreal 23 September, 1971. No. 14118. https://treaties.un.org/doc/db/Terrorism/Conv3-english.pdf (16 February 2016).

## 2. *Adopted research methodology*

The written positions and arguments provided by states were examined. Specifically, those that were submitted to the ICJ in the form of applications instituting proceedings, memorials, preliminary objections. The overall objective being to identify what the relevant international law is, including indications of relevant state practice and *opinio iuris.* An additional objective being to discover how states interpret and implement relevant international conventions and norms.

However, such an approach to research has a number of limitations since to date, the ICJ has never delivered any judgement with respect the merits of any aerial incident case—and in light of the fact that, relatively speaking, only a small number of states are involved in such cases. The official web-site of the International Court of Justice was used to find and analyse states' written submissions to the ICJ.[4]

## 3. *General comments regarding aerial incident cases*

### a) *Aerial incident cases before the International Court of Justice*

The so-named aerial incident cases before the ICJ may be characterised in the following way:

> *Where a state uses lethal or non-lethal force against an aircraft—usually, but not exclusively, against a military aircraft—that is registered in another state.*

Specifically, several aerial incident cases were brought before the ICJ at the height of the Cold War in the 1950s.[5] From a Hungarian perspective it is of historical interest that Hungary was a respondent together with the Soviet Union in respect of the seizure of a U.S. state aircraft and the treatment of its crew in Hungary. In that particular case, the treatment of the U.S. personnel by the local authorities—with respect to the court proceedings instituted against the U.S. servicemen—was the main thrust of the complaints and proceedings instituted by the United States.[6]

The aerial incident cases are not only limited to issues related to the use of force, but have given rise to other type of disputes, such as the division of competences between the ICJ and the UN Security Council (see Lockerbie case).[7] The present paper shall exclusively deal with the former category of aerial incident cases where force was used against a civil aircraft by a state. It is noteworthy that cases before the ICJ concerned with legal disputes other than aerial incidents may occasionally have some relevance to the subject matter of this paper. However, the use of

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[4] http://www.icj-cij.org/homepage/

[5] For example: *Aerial Incident of 4 September 1954 (United States of America v. Union of Soviet Socialist Republics), Aerial Incident of 10 March 1953 (United States of America v. Czechoslovakia).* By way of example of a post-Cold War aerial incident: *Aerial Incident of 10 August 1999 (Pakistan v. India).*

[6] *Treatment in Hungary of Aircraft and Crew of United States of America (United States of America v. Hungarian People's Republic).* For details, see: *Oliver J. Lissitzyn,* The Treatment of Aerial Intruders in Recent Practice and International Law, 47 Am. J. Int'l L. 559, 1953, pp. 581-585.

[7] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America) 1992 and Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom) 1992.*

force against civil aircraft never played a preponderant role in the cases mentioned thus far and similarly to the aerial incident cases no judgement has been given by the ICJ with respect to specific allegations.[8]

The facts related to such aerial incidents, and in particular the circumstances regarding the use of force, are typically a point of disagreement among concerned parties. The injured Party usually brings the case before the International Court of Justice to seek inter alia a legally binding decision *declaring* a breach of one or more international obligations and to *request the award of* corresponding *reparations* for injury caused. As a result of such, states go beyond mere political declarations and submit legal arguments during the proceedings before ICJ. However, such legal issues do not exist in a vacuum, in that they cannot be disentangled from the factual and political context in which they arise. Such is the case for the state submissions presented to ICJ.

The International Court of Justice was *debarred from ruling* on the aerial incident cases as a result of two principal factors: it either lacked jurisdiction to adjudicate on such disputes or the Parties ultimately requested a case be removed from the court's list. In the absence of a ruling on a case, the International Court's efforts were confined to addressing jurisdictional issues, especially in interpreting Article 36 of the Statute of the Court.

*b) Aerial incidents - the wider international context*

Many of such incidents may not only lead to loss of life but also create conditions for *inter-state disputes* between the state using armed force and the state in which the attacked aircraft is registered—in addition to the involvement of state of nationality of the victim(s) through the exercise of diplomatic protection.

The loss of human life and its effect on relations between states is therefore a *matter of general international concern*.[9] In response to such incidents the experience has been that different organs of the United Nations become involved in such matter, either individually or simultaneously; these including the Security Council, the General Assembly, ICAO Council, ICAO Assembly[10], and the International Court of Justice. The power relations between states involved in an aerial incident has a decisive influence on the outcome of proceedings. The

[8] The Democratic Republic of Congo claimed that Uganda (and/or Burundi and/or Rwanda) shot down (on 9 October 1998 at Kindu) a Boeing 727 that was the property of Congo Airlines, thereby causing the death of 40 civilians. See: International Court of Justice Application Instituting proceedings filed in the Registry of the Court on 23 June 1999 Armed Activities on the Territory of Congo (Democratic Republic of Congo v. Uganda) p. 17. The ICJ did not examine the allegations made by DRC. The particular incident was not invoked by DRC during the proceedings. The reason may lie in the fact that no factual evidence was available to corroborate allegations. The Court found in its judgment that it had no convincing evidence as to the town of Kindu having been taken by Ugandan forces in October 1998. See *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 168 at p. 208, para. 83. In 2001 the DRC v. Burundi and DRC v. Rwanda cases were discontinued at the request of DRC. In 2002 the DRC reinstituted proceedings against Rwanda and submitted the same allegations pertaining to the shooting down of a civil Congolese aircraft at Kindu on the 9th of October 1998. The DRC qualified the acts violations of inter alia the UN Charter, Chicago Convention and Montreal Convention. In 2006 the ICJ ruled that it had no jurisdiction to entertain the application filed by DRC in 2002. See *Armed Activities on the Territory of the Congo (New Application : 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, p. 6.

[9] 927 (1955) UNGA Resolution entitled question of the safety of commercial aircraft flying in the vicinity of, or inadvertently crossing, international frontiers. This resolution was adopted by the UN General Assembly in the wake of the 1955 Bulgarian aerial incident case.

[10] International Civil Aviation Organization (see article 43 of the Chicago Convention), a U.N. specialized agency.

Security Council, for example, has condemned the destruction of civil aircraft only on very rare occasions.[11]

### *4. Two aerial incident cases that are the subject of an in-depth study*

#### *a) General remarks*

Of the two cases under examination, the first case study is that of an aerial incident occurring on 27 July 1955. This was a case whose principal focus concerned the interpretation of customary international law pertaining to the use of force by a state against a civil aircraft inadvertently straying into its airspace. In the second case study, an aerial incident occurring on 3 July 1988, the key issue was the interpretation of conventional and customary international law pertaining to the use of force by a state purporting to exercise self-defence against a civil aircraft during an international armed conflict.

#### *b) Aerial incident occurring on 27 July 1955*

*Factual background:* On 27 July 1955 a civil aircraft on a scheduled flight from Vienna to Lod (Lydda) belonging to EL AL Israel Airlines was shot down over Bulgaria by units of the Bulgarian Security Forces. Fifty-one passengers of various nationalities and seven crew members were killed.[12] It was submitted that, contrary to Bulgarian statements, no prior warning was given to the Israeli plane prior to the use of armed force against it. Furthermore, the aircraft was not permitted to leave Bulgarian airspace and was prevented from making an emergency landing.[13]

After fruitless protracted diplomatic negotiations between Israel and Bulgaria, Israel initiated proceedings, in 1957, against the government of Bulgaria before the ICJ. In addition, exercising diplomatic protection with respect to their nationals, the U.S. and U.K. presented claims before the same court on behalf of (relatives of) deceased passengers. The three applicant states argued that the jurisdiction of ICJ was substantiated by Bulgaria's acceptance of the compulsory jurisdiction of the Permanent Court of International Justice (PCIJ) made on 29 July, 1921. The World Court, however, eventually accepted Bulgaria's preliminary objection and ruled that since Bulgaria was not a founding signatory to the UN Charter (and ICJ Statute), the rules foreseeing the continuity of the declarations accepting the compulsory jurisdiction of the PCIJ were not applicable to Bulgaria.[14] The cases were discontinued at the request of the applicants.

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[11] One of the few exceptions, or probably the only exception, when destruction of civil aircraft was condemned by UNSC is the shooting down of two civil aircraft registered in the U.S. on 24 February 1996 by Cuba. See S/RES/1067 (1996) http://www.un.org/en/ga/search/view_doc.asp?symbol=S/RES/1067(1996) (14 February 2016). With respect to the destruction of the Iran Air Flight the Security Council did not condemn the U.S., but solely expressed "deep distress" and "profound regret" at the occurrence of the incident. UNSC Resolution 616 (1988) of 20 July 1988. http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_res_616.pdf (22 January 2016). The Soviet Union another Permanent Member of the UN Security Council was never condemned by the Security Council for shooting down an aircraft (e.g. in respect of the KAL-007 tragedy).

[12] *Application instituting proceedings on behalf of the Government of Israel 16 October 1957. Aerial incident of 27 July 1955. p. 5. I.C.J. Pleadings, Oral Arguments, Document.*

[13] See for example Memorial submitted by the Government of the United States of America of 2 December 1958, pp. 177-183, para. 207, pp. 204 and 239. Memorial of the Government of Israel of 2 June 1958 (SECTION B.-PLEADINGS), pp. 94-95, paras. 80-83.

[14] *Case concerning the Aerial Incident of July 27th, 1955 (Israel v. Bulgaria) Preliminary Objections, Judgement of May 26th, 1959: I.C.J. Reports 1959, p. 127. Case concerning the Aerial Incident of 27 July 1955 (United States*

*Written legal arguments submitted by the states concerned:* The applicant states submitted that opening fire in times of peace to destroy a clearly marked unarmed civil aircraft that inadvertently (e.g. owing to distress or necessity) strays into foreign airspace without prior authorization is a *violation of international law*.[15] Elementary humanitarian obligations were repeatedly invoked to condemn the Bulgarian act, including reference to the judgment of the ICJ in the Corfu Channel case.[16] Moreover, the duty to provide assistance to persons in distress, based on analogies with maritime law and Article 25 of the Chicago Convention, was invoked.[17]
The United Kingdom submitted that armed force against a foreign ship or aircraft was not justified under international law, *unless* it was used in the *legitimate exercise of the right of self-defence*. This principle is reflected in Article 2 (4) of the Charter of the United Nations, which states that there is a general prohibition on the use of force in relations among states. Furthermore, the U.K.—relying on the Corfu Channel case (I.C.J. reports 1949)—emphasized that international law condemns actions by states in peace time that *unnecessarily* or *recklessly* involves *endangering* the lives of nationals of other states or the destruction of their property.[18] Moreover, the U.K. alluded to other case law, thereby suggesting that the use of force against civil aircraft was *not* exclusively concerned with the prohibition of the use of force in inter-state relations, but rather had another dimension: namely, the duty of a state to protect individuals. The Garcia case (1926) is relevant in this regard, in which the Mexican/U.S. Claims Commission held that the use of lethal force by a U.S. border guard against Mexican nationals crossing the border illegally constituted a violation of international law.[19] Furthermore, the U.K. submitted that as Article 9 c) of the Chicago Convention does not sanction the use of force against aircraft flying above *prohibited* or *restricted* areas, no contracting party should be in a stronger position in respect of using force against a civil aircraft overflying parts of a state's territory other than prohibited or restricted areas.[20]
It is noteworthy that the United States and Israel made some hints in their submissions that could be interpreted in such a way that the use of force may be justified under certain circumstances that fall outside the *stricto sensu* right of legitimate self-defence. The U.S. stressed that under international law in *extreme* cases *security* and special *security*

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*of America v. Bulgaria), Order of 30 May 1960: I.C.J. Reports 1960. p. 146. Case concerning the Aerial Incident of 27July 1955 (United Kingdom* ***v.*** *Bulgaria) Order of 3 August 1959: I.C.J. Reports 19-59, p. 264.*

[15] Memorial of the Government of Israel of 2 June 1958 (SECTION B.-PLEADINGS), p. 85, para. 63, p. 87. para. 66.
Memorial submitted by the Government of the United States of America of 2 December 1958, pp. 237, 240-241, para. 6.
Memorial submitted by the Government of the United Kingdom of Great Britain and Northern Ireland of 28 August 1958, p. 354, para. 55, p. 356, para. 59, p. 358, para. 66, pp. 365-366, para. 81.

[16] Memorial of Government of Israel of 2 June 1958 (SECTION B.-PLEADINGS), p. 53, para. 15, p. 71, para. 42, p. 84, para. 61.
Memorial submitted by the Government of the United Kingdom of Great Britain and Northern Ireland of 28 August 1958, p.58, paras. 67-68.
Memorial submitted by the Government of the United States of America of 2 December 1958. para I. p. 240.

[17] Memorial submitted by the Government of the United States of America of 2 December 1958, pp. 222- 227.
and Memorial submitted by the Government of the United Kingdom of Great Britain and Northern Ireland of 28 August 1958, pp. 358-361, paras. 68-72.

[18] Memorial submitted by the Government of the United Kingdom of Great Britain and Northern Ireland of 28 August 1958, p. 358, para. 66.

[19] Memorial submitted by the Government of the United Kingdom of Great Britain and Northern Ireland of 28 August 1958, p. 362, para. 76. For details concerning the Garcia case (1926-9, see: *Reports of International Awards – Recueil des sentences arbitrales Teodoro García and M. A. Garza (United Mexican States) v. United States of America 3 December 1926 Volume IV pp. 119-134*. http://legal.un.org/riaa/cases/vol_IV/119-134.pdf (8 February 2015).

[20] Memorial submitted by the Government of the United Kingdom of Great Britain and Northern Ireland of 28 August 1958, para.78, pp. 363-364.

*considerations* may leave *no* alternative to the destruction of an airplane.[21] While taking note of the legitimate interests of a state to protect its national sovereignty, Israel for its part emphasized that the *degree* of violence used by Bulgaria was out of proportion to, and *in excess of,* any possible threat the civil aircraft could have possibly presented to Bulgaria.[22]
The United States described an example of a set of circumstances leaving *no* option to a state but the destruction of an aircraft: the case of an unauthorized, unforewarned flight of a *military* aircraft at great speed that refuses to listen to or comply with reasonable orders from air traffic control; or, an airborne fighter that fails to identify itself, bearing no clear markings, which proves by its character and conduct in other ways to possess, by all objective evidence, a clearly *hostile* intent, directing its flight without deviation toward a *high security area*.[23]
Israel and the United States submitted that, according to the practice of civilised nations (customary international law) at the time of the incident, a state confronted with the a scenario of a non-intentional breach of airspace sovereignty—such as one made by a clearly identifiable civil aircraft—has *two* options at its disposal, namely: a) through diplomatic channels, take the matter up with the registered Government of the State of the aircraft; or, b) in the case of a security violation, require the aircraft to land at an appropriate facility.[24] Given that Bulgaria was not a State Party to the Chicago Convention on international civil aviation, Israel relied upon the Chicago Convention only to the extent that it restated customary international law.

Initially in the direct aftermath of the tragedy, Bulgaria recognised its responsibility and promised to punish the perpetrators as well as offer compensation to the relatives. In this regard Bulgaria acknowledged that its armed forces acted with certain *"haste*" and did not take all necessary measures to force the aircraft to land.[25] However, in 1957 the Bulgarian government reversed its earlier position and offered to make only *ex gratia* payment to relatives of the victims as a gesture of good-will. Bulgaria thus relied on a humanitarian approach (as opposed to recognising legal responsibility) and also made reference to certain treaties to calculate the amount of compensation—namely, to the Warsaw Convention on the unification of certain rules relating to liability of air carriers.[26] Bulgaria justified its offer for compensation by reference to the before mentioned convention regulating the liability of the air carrier towards passengers. Both Israel and the United Kingdom rejected this interpretation.[27] Sofia was of the view that the dispute fell within the *internal competences* of Bulgaria; moreover, available domestic remedies had *not* been exhausted by the families of the victims.[28] Sofia argued that the principles of international law were *not* applicable to the case and that the shooting down of the airplane was *in accordance with the law*; as a result of which, Bulgarian responsibility was *not* involved.[29] Notwithstanding the fact that domestic regulations were in place permitting the bringing down of intruding foreign aircraft not responding to warning shots, Bulgaria did

[21] Memorial submitted by the Government of the United States of America of 2 December 1958, p. 239, subparas. (v) - (vi), p. 24, para. 3.
[22] Memorial of the Government of Israel of 2 June 1958 (SECTION B.-PLEADINGS), pp. 84-86, paras. 60-65.
[23] Memorial submitted by the Government of the United States of America of 2 December, 1958, p. 239.
[24] Memorial submitted by the Government of the United States of America of 2 December 1958, pp. 210-211, 235-236. and Memorial of the Government of Israel of 2 June 1958 (SECTION B.-PLEADINGS), pp. 86-87, para. 66.
[25] Memorial of Government of Israel of 2 June 1958 (SECTION B.-PLEADINGS), pp. 56-60, paras. 24-28.
[26] Memorial submitted by the Government of the United Kingdom of Great Britain and Northern Ireland of 28 August 1958, p. 357, para. 63.
Memorial of Government of Israel of 2 June 1958 (SECTION B.-PLEADINGS), p. 81, para. 54.
[27] Memorial of Government of Israel of 2 June 1958 (SECTION B.-PLEADINGS), para 100.p. 105.and Memorial submitted by the Government of the United Kingdom of Great Britain and Northern Ireland of 28 August 1958, p. 357, para. 63.
[28] Exceptions préliminaires du Gouvernement de la République Populaire de Bulgarie (Israel c. Bulgarie) déclinatoire de compétence, le 4 décembre 1958, p. 132.
[29] Memorial submitted by the Government of the United Kingdom of Great Britain and Northern Ireland of 28 August 1958 para 61-62 p. 356 and Israel Memorial of 2 June 1958, p. 79, para. 51.

not rely on the decree as justification for its acts.[30] Rather, Bulgaria put the blame on the airline company that allegedly caused the tragedy in the first place—by intruding and penetrating into Bulgaria's airspace without permission ("*sans preavis*").[31]

*Interim conclusions:* The aerial incident in question brought to light a broad range of reactions by the states involved. On the one hand, the applicant states were of the view that the dispute was of an international character, concerned with the *violation of international law.* From the Bulgarian perspective, on the other hand, the use of force against a civil aircraft flying in its national airspace was a purely *domestic matter*. The three states asserted that during peace time the *non-intentional* breach of sovereignty of a state by a *clearly marked* civil aircraft (e.g. owing to being in distress and acting without prior authorisation) carrying the registration mark of another state *did not* justify use of armed force against the straying aircraft. Elementary considerations of humanity were invoked inter alia in reference to the judgement of the ICJ in the Corfu Channel case. According to the interpretation by the three states of international customary law at the time of the events, the use of force against civil aircraft was *prohibited* quasi-universally, *subject only* to the right of self-defence by states under the United Nations Charter and other narrowly defined exceptions. As regards the other possible causes for exoneration from responsibility, the U.S. referred to *special security* considerations, whereas Israel invoked the principle of *proportionality*. The U.S provided a hypothetical example of permitted use of force to destroy an aircraft. The circumstances described to that effect referred to a military aircraft demonstrating a hostile intent. The U.K. was the most categorical among the three states in rejecting the use of force and in *strictly* limiting exceptions thereof to self-defence under the UN Charter.[32] The three states had to rely on international *customary law* in their submissions due to the fact that Bulgaria was not a state party to the Chicago Convention on international civil aviation at the time of the occurrence of the aerial incident. Apparently, despite the non-state character of the civil aircraft involved in the event, the states concerned considered the case an *inter-state affair.* This conclusion is supported by the following elements: the applicant states espoused the claims of their citizens; Israel apologised for the violation of Bulgarian airspace, although the aircraft was not a state organ of Israel;[33] U.K. referred to Article 2 (4) of the Charter. Having said that, in the U.K. memorial reference was also made to the Garcia case (1926), which adds another dimension to the consideration of the subject matter—namely, the rights of individuals travelling on civil aircraft to be protected by states under international human rights law.

*c) Aerial incident occurring on 3 July 1988*

*Factual background:* On 3 July 1988 Iran Air flight 655—a scheduled flight between Bandar Abbas and Dubai—was destroyed over Iranian territorial airspace by surface-to-air missiles

[30] Memorial submitted by the Government of the United States of America of 2 December 1958, pp. 237-240.
[31] Memorial submitted by the Government of the United Kingdom of Great Britain and Northern Ireland of 28 August 1958, p. 347, para. 41, p. 348, para. 43.
[32] *Hughes, op.cit.*, pp. 608, 615-617.
[33] Memorial of the Government of Israel of 2 June 1958 (SECTION B.-PLEADINGS), pp. 87-88, para. 67.

launched from USS Vincennes, a United States warship, killing 290 passengers and its crew.[34] This aerial incident occurred in the midst of an armed engagement between Iran and the U.S.[35] The case was brought before the ICAO Council by Iran and subsequently on 17 May 1989 Iran initiated proceedings against the U.S. before the ICJ. The United States submitted preliminary objections to the application. In 1996 the case was discontinued upon joint notification of the agent of the parties notifying the International Court that the two governments had entered into a full and final settlement of disputes, differences, claims, counterclaims and matters directly or indirectly related to the case.[36]

Initially, in sharp contrast to its previous position concerning the destruction of South Korean civil flight KAL-007 by the Soviet Union, the U.S. saw no binding obligation to compensate Iran for the death of its citizens and loss of the plane.[37] Ultimately, the U.S. paid compensation to the families of the victims of the tragedy on an *ex gratia* basis, but refused to pay damages for the airplane.[38] This policy was in line with the U.S. interpretation of the principles governing liability for damage arising from military operations, which includes the option of *ex gratia* payment without acknowledging, and irrespective of, legal liability.[39]

The following description of the case and positions is based on the memorial on 24 July 1990 submitted by Iran and the preliminary objections on 4 March 1991 submitted by the U.S. The Iranian observations from 9 September 1992—made in response to the preliminary objections of the U.S.—are not discussed due to length constraints.

*Written legal arguments submitted by the concerned states:* Iran claimed in its application and memorial inter alia that the US had violated *Article 2 (4) of the UN Charter*, the customary rules of international law prohibiting the use of force, the sovereignty of Iran, the principle of non-intervention, the Chicago Convention, the Montreal Convention, the rules of neutrality in armed conflict, the law of the sea, and the bilateral treaty of amity signed between Iran and U.S. Furthermore, the ICAO Council resolution of 17 March 1989 was *erroneous* and that the U.S. had committed an international crime.[40] Iran, in a letter addressed to the UN Secretary-General, qualified the incident as a premeditated *act of aggression* by the United States which violated, in particular, Articles 1 and 2 of the Chicago Convention on airspace sovereignty.[41] Iran qualified the act of the U.S. as an armed attack against Iranian territorial sovereignty.[42] With reference to the practice of the ICAO Council pertaining to past cases of acts of shooting down aircraft, Iran was seeking condemnation of the U.S. by the Council that, however, never

[34] ICJ Application instituting proceedings, filed in the Registry of the Court on 17 May 1989 Aerial Incident of 3 July 1988 (Islamic Republic of Iran v. United States of America) p. 4. and Memorial submitted by the Islamic Republic of Iran; Case concerning the aerial incident of 3 July 1988 (Islamic Republic of Iran v. United States of America) Volume I., 24 July 1990, p. 1.

[35] Preliminary objections submitted by the United States of America; Case concerning the aerial incident of 3 July 1988 (Islamic Republic of Iran v. United States of America), Volume II., 4 March 1991, p. [9].

[36] *Aerial incident of 3 July 1988 (Islamic Republic of Iran v. United States of America), Order of 22 February 1996, I.C.J. reports 1996, p.9.*

[37] *Kay Hailbronner, Daniel Heilmann*, Aerial cases before International Courts and Tribunals Max Planck Encyclopedia of Public International Law, March (2009), para. 17.

[38] *Kay Hailbronner, Daniel Heilmann*, Aerial cases before International Courts and Tribunals, Max Planck Encyclopedia of Public International Law, March (2009), para. 20.

[39] *Brian E. Foont,* Shooting down civilian aircraft: is there an international law? Journal of air law and commerce, Volume 72, Fall (2007) Number 4, p. 172.

[40] Memorial submitted by the Islamic Republic of Iran, Case concerning the aerial incident of 3 July 1988 (Islamic Republic of Iran v. United States of America) Volume I. 24 July 1990, pp. 2-3, 99-100, 237-238, 244, 258, 273 and 292.

[41] Ibid., p. 187.

[42] Ibid., pp. 136, 291-294.

materialized. Iran rejected this perceived double standard.[43] Iran maintained that the U.S. breached Articles 1, 2, 3bis, 44 a), 44 h) and Annex 2, Annex 11 and Annex 15 of the Chicago Convention.[44] The destruction of an aircraft was a threat to general security in Iran's view.[45] *Article 3bis* of the Chicago Convention on the prohibition of weapons against civil aircraft in flight reflected a norm of *customary international law*.[46] A connection was made between Article 3 bis and the general *ius cogens* rule on the prohibition of the use of force enshrined in Article 2 (4) of the UN Charter.[47] Iran alluded to the ICJ judgement in the Corfu Channel case, the U.K. memorial in the Bulgarian aerial incident of 1955 discussed earlier in this paper and to the Garcia v. United States arbitration case (1926) to substantiate that the U.S. *recklessly risked* the *lives of innocent persons,* as well as put civil aviation in danger.[48]

In Iran's assessment the U.S. military presence in the Persian Gulf, including the intrusion of U.S. warships into Iranian territorial waters, was a contributing factor to the shooting down of the civil aircraft and to the endangerment of civil aviation.[49] The U.S. failed to use proper means of civil-military co-operation.[50] The military of a third state do not enjoy any rights in respect of a Flight Information Region (FIR) where civil air traffic services are provided by an authority designated by the *state of the FIR*.[51] Iran submitted that the NOTAMs[52] creating a "floating defence identification zone" around the U.S. warships issued by the U.S. with respect to the Persian Gulf prior to the aerial incident were unlawful and *ultra vires*. The said NOTAMs violated ICAO standards and practices. Only a designated civil ATS authority had a mandate to issue such NOTAMs in respect to their FIR.[53]
Iran argued that not only natural persons but also governments or armed forces may commit offences against civil aviation prohibited by the Montreal Convention; for example, in the context of state terrorism.[54] As a justification for rejection of the plea of self-defence by the U.S., Iran submitted that a civil aircraft is *incapable* of mounting an armed attack. If the U.S. actions were indeed in response to an armed attack, which was not the case, even then the military response by the U.S. neither met the requirements of *necessity* nor that of *proportionality*.[55] Iran submitted that the U.S. violated the international customary and conventional rules on neutrality, including the 1907 Hague Convention—by aiding Iraq in the Iran-Iraq conflict, which eventually led to the treatment of the Iran Air flight as a hostile aircraft and its destruction.[56] Iran rebutted the accidental argument and submitted that the

[43] Ibid., pp. 106, 110, 259, 261-262 and 292. Resolution of ICAO Council dated 17 March 1989 *deplored* the tragic incident which occurred as a consequence of *events and errors* in identification of the aircraft which resulted in the *accidental destruction* of the airliner and loss of 290 lives [emphasis added]. See full text of ICAO resolution reproduced on p. 106 of the Memorial submitted by the Islamic Republic of Iran.
[44] Memorial submitted by the Islamic Republic of Iran case concerning the aerial incident of 3 July 1988 (Islamic Republic of Iran v. United States of America) of 24 July 1990 Volume I 24 July 1990, p. 141.
[45] Ibid., p. 143.
[46] Ibid., pp. 147-152, 154.
[47] Ibid., pp. 185-187.
[48] Ibid., pp. 188-190, 216, 236-237, 258 and 265-266.
[49] Ibid., pp. 209-216, 259, 293.
[50] Ibid., p. 238.
[51] Ibid., pp. 159-160.
[52] Definition of NOTAM in Annex 15 to the Chicago Convention on International Civil Aviation *Aeronautical Information Services Fourteenth Edition* July 2013 p. 1-6: "A notice distributed by means of telecommunication containing information concerning the establishment, condition or change in any aeronautical facility, service, procedure or hazard, the timely knowledge of which is essential to personnel concerned with flight operations."
[53] Memorial submitted by the Islamic Republic of Iran, Case concerning the aerial incident of 3 July 1988 (Islamic Republic of Iran v. United States of America) of 24 July 1990 Volume I 24 July 1990, pp. 170-171, 210, 217-227.
[54] Ibid., pp. 174-177, 246, 256-257.
[55] Ibid., pp. 200-205, 247-251.
[56] Ibid., pp. 206, 208, 211, 230-235.

misidentification of the aircraft was not a credible argument in light of the highly advanced technical capabilities of the USS Vincennes.[57] Iran recalled that in previous aerial incidents the U.S. had strongly condemned use of armed force against aircraft.[58] The Iranian Government demanded punitive or exemplary damages because of the "criminal nature of the act".[59] Iran made some critical remarks to the ICAO Report instituted to investigate the circumstances of the incident.[60]

The United States argued that the destruction of the aircraft cannot be separated from the events that preceded it. A hostile environment existed due to Iran's actions, including Iranian attacks on U.S. naval vessels that were deployed to assist merchant vessels in the Persian Gulf. The USS Vincennes was forced to act in *self-defence* as a result of attacks by Iranian gunboats. In the midst of these skirmishes an approaching aircraft that *failed* to respond to repeated warnings was *perceived as being a military aircraft* with hostile intentions. The USS Vincennes fired on the aircraft as a matter of *necessity*. The United States immediately expressed its deep regret and promised to compensate the families.[61] According to the investigation into the incident initiated by U.S. Iran *shared responsibility* for the tragedy by endangering one of its civil airliners by allowing it to fly on a relatively low altitude air route in close proximity to ongoing hostilities. The outcome of the investigation, which largely formed the basis of the ICAO report, concluded that the downing of Iran Air 655 was *neither* the result of any *negligent* nor any *culpable* conduct by any U.S. navy personnel associated with the incident.[62] The U.S. strongly *rejected* the assertion that the U.S. had committed an international crime and reminded the ICJ that it was not established as a criminal court.[63]
The United States explained at length that Iran's claims had *no* connection with the Montreal Convention and stated that the Convention *did not* apply to acts of states against civil aircraft—particularly acts committed by armed forces of states. Their counter assertion was that the Montreal Convention, the well-established *laws of armed conflict* that contain the inherent right of self-defence (Article 51 of UN Charter)—encompassing the right of military units to defend themselves from attack—applied to actions of the United States.[64] The U.S. consistently applied the law of armed conflict, including the 1949 Conventions, to all of its hostile encounters with Iranian forces during the relevant period preceding the destruction of the aircraft.[65] The actions in question were attributable to the U.S. and *not* to persons as contemplated by the Montreal Convention. This was not a situation where individual terrorists might have been covertly directed or assisted by a state.[66] The U.S. asserted that the Montreal Convention does not serve as a basis for condemnation by the ICAO Council of the use of armed force against a civil aircraft by a military aircraft in the course of an armed conflict. In the assessment of the U.S, the Iranians at no time considered the incident in the light of the Montreal Convention until it was decided to approach the ICJ and began searching for a legal basis that would permit it to do so.[67]

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[57] Ibid., pp. 240-244.
[58] Ibid., pp. 252-255.
[59] Ibid., pp. 275, 283-284, 294.
[60] Ibid., Appendix.
[61] Preliminary objections submitted by the United States of America, Case concerning the aerial incident of 3 July 1988 (Islamic Republic of Iran v. United States of America), Volume II., 4 March 1991, pp.[10], [11], [42], [227-228].
[62] Ibid., pp. [53] [54] [55].
[63] Ibid., p. [86].
[64] Ibid., pp. [4], [147], [165-200].
[65] Ibid., pp. [202-204].
[66] Ibid., pp. [172], [209]-[210].
[67] Ibid., p. [163].

The U.S., on the one hand, suggested in a footnote that the Chicago Convention did not apply to the present case due to it not being concerned with the conduct of surface vessels engaged in active combat. In this regard reference was made to Articles 3 and 89 of the Chicago Convention.[68] On the other hand, the U.S. stressed the fact that Article 3 bis of the Chicago Convention—referring to the UN Charter (self-defence)—is an exception to the general prohibition on the use of weapons against civil aircraft, as it is a testament to the drafters' intention to address (through Article 3 bis) *actions by military forces* in armed conflict.[69]
The U.S. expressed displeasure at the fact that the Government of Iran did not approach the United States directly, but instead sought political condemnation of U.S. by the Security Council of United Nations and the ICAO.[70] The U.S. submitted that in the case of contracting parties having a disagreement over the application of the Chicago Convention they can either submit the dispute to quasi-judicial proceedings under article 84 of the Convention or request the ICAO Council to act and discuss the matter from a policy and technical point of view under Article 54-55 to the Convention. These two options are mutually exclusive. The ICJ has no jurisdiction to review the policy and technical decisions of the ICAO Council. The international court may only review those decisions of the ICAO Council that were taken in the application of Article 84 of the Chicago Convention.[71]
The U.S. recalled that in accordance with ICAO rules it had asked the competent States of the Persian Gulf to issue the U.S. NOTAMs containing defensive precautions. Iran, however, rejected the NOTAM and ruled it illegal. Iran refused to comply with its responsibility to warn civil aviation of potential dangers. Iran failed to co-operate with military authorities responsible for activities that could affect civil aviation in the Gulf region. In light of the foregoing the U.S. had no other choice but to publish the NOTAM by itself. Finally, on 1 March 1989, the U.S. withdrew the NOTAM it had issued for the Gulf and again asked regional states to issue the NOTAM as their own document. Nearly all concerned states complied with the U.S. request.[72]
The U.S. underlined that the ICAO Air Navigation Commission—having examined the ICAO report on the incidence, which was largely based on the U.S. investigation—found that no significant amendments were needed to the relevant ICAO Standards and Practices.[73]

*Interim conclusions:* The incident under review was the *first* before the ICJ that occurred after the adoption, albeit prior to entry into force, of the special norm of conventional international law banning the use of weapons against civil aircraft in flight. It is telling to note that the U.S. invoked self-defence, which is the sole exception to general prohibition on the use of weapons permitted under Article 3 bis.[74] The U.S. emphasized *international state responsibility* over any possible *individual criminal liability* of U.S. servicemen under the Montreal Convention. The United States deemed that the special legal regime relating to *an international armed conflict* was applicable to the incident under discussion. It may have been that the intention was to suggest that *different* rules, including a different threshold, applied in times of war than in times of peace in respect of the use of force against civil aircraft. It is reassuring to note, however, that apparently the U.S. has *neither questioned* the customary legal status of Article 3 bis *nor* its applicability during an armed conflict. Furthermore, Iran acknowledged that Article 3 bis was a rule of customary international law. The presumption being that Iran only made a connection between Article 3 bis and Article 2 (4) of the UN Charter as a result of the aircraft

[68] Ibid., p. [91].
[69] Ibid., compare footnote on p. [91] to p. [205].
[70] Ibid., pp. [42], [56]-[60].
[71] Ibid., pp. [108], [132]-[137].
[72] Ibid., Annex 2., pp. [1]-[7].
[73] Ibid., Annex 2., p. [67].
[74] *Lutz Horn*, Die Anwendung militärischer Gewalt auf zivile Passagierflugzeuge im Friedensvölkerrecht und ihre Rechtsfolgen, Europäische Hochschulschriften - Reihe II, Broschiert, 1992, pp. 183, 221.

being shot down in its national airspace. Besides the self-defence argument, the *error* or *mistake* in identifying the aircraft played a preponderant role in the legal arguments, substantiating exoneration from responsibility put forward by the U.S. In the present author's view invoking error or mistake as a ground for exoneration from international responsibility should not be accepted or limited to such exceptional cases—otherwise innocent passengers and crew will bear the brunt of such acts or omissions committed by a third state, which cannot remotely be considered acceptable or justifiable.[75] Taking all factors into consideration, the modalities of civil-military co-operation in civil aviation during international and non-international armed conflict remains a topical and timely issue as of today. The issue is all the more challenging where non-state actors are involved in the armed conflict, as non-state actors do not automatically assume obligations arising from international law, including obligations stipulated under the Chicago Convention in respect of the territories that they control. The tragedy of Malaysian Airlines flight MH-17 in the airspace over the Ukraine in 2014 demonstrated once again that appropriate civil-military co-operation in civil aviation during an armed conflict is a prerequisite for safeguarding the safety of civil aviation.

## *5. Overall conclusions*

No judgement on the merits of any aerial incident case was ever delivered by the ICJ due to the World Court's lack of jurisdiction. No state involved in such an incident brought before the World Court ever acknowledged international responsibility for its acts and/or omissions.[76] Instead compensation was offered and paid solely out of humanitarian considerations, on an *ex gratia* basis. Nonetheless, the written submissions of the parties to such cases do provide valuable information on the concerned states' interpretation of international law pertaining to the use of force against civil aircraft. The applicant states in the first aerial incident case discussed in this paper submitted that a rule of customary *international law* existed prohibiting the use of force against civil aircraft, subject solely to narrow exceptions. The three concerned states had a somewhat different interpretation as to the actual scope of the exceptions. Bulgaria denied that the shooting down of a foreign aircraft was an international matter subject to rules of international law.

The fact that the first aerial incident was no more than a mere violation of national airspace, where *neither* an overflight over a *prohibited zone* nor *espionnage* activities—nor any other *direct threat* to the national security of Bulgaria—were involved, may have contributed to the *categorical* condemnation under international law of the acts of Bulgaria by the three applicant states. At any rate, at the time of their submissions the arguments of the three applicant states were of a rather progressive character. Sadly, however, the interpretation of international law *did not* necessarily reflect the actual state practice of the 1950s or that of the ensuing decades. For example, the UN General Assembly Resolution adopted in the wake of the Bulgarian aerial incident addressed the destruction of the aircraft solely from a humanitarian perspective, without going into issues pertaining to responsibility, condemnation of the perpetrator, nor other elements relevant from the perspective of international law.[77] In actual fact, for certain states,

[75] For a comprehensive study, with a focus on mistake analysis of the aerial incident, see *David K. Linnan*: Iran Air Flight 655 and Beyond: Free Passage, Mistaken self-defence, and State Responsibility, 16 Yale J. Int'l L. 245 (1991).

[76] It is to note that China acknowledged her responsibility for mistakenly shooting down the Cathay Pacific flight in 1954. See *Hughes, op. cit*., pp. 601-602.

[77] *Kay Hailbronner*, Der Schutz der Luftgrenzen im Frieden, C. Heymann, 1972, p. 35. and *Lutz, op.cit.*, pp. 169-172.

the protection of sovereignty over airspace and the fear associated with the misuse of civil aviation *prevailed* over humanitarian considerations (e.g. KAL-007 tragedy). The taking of human life was not considered a disproportionate measure compared to ensuring the protection of real or perceived threats to national security that fell well short of an armed attack.[78] It is also relevant that some decades later two of the applicant states in the first aerial incident also used force against civil aircraft, albeit under different circumstances (Israel in 1973, the U.S. in 1988). Nonetheless the thrust of the arguments put forward by the three applicant states, particularly the categorical rejection of the use of force by U.K., were eventually reflected in Article 3 bis of the Chicago Convention prohibiting the use of armed force against a civil aircraft (1984) adopted in the aftermath of the KAL-007 tragedy of 1983.[79]

It is noteworthy that in the second aerial incident case discussed in this paper, the U.S. relied on self-defence under the UN Charter— this being the only permitted exception to the general prohibition against the use of force under Article 3 bis. One possible reading regarding the fact that the U.S. invoked the rules concerning the *law of armed conflict* is that the special legal regime may contain a different level of protection for civil aircraft against use of force than the corresponding rules applicable in times of peace. In its submissions in the stated aerial incident case, the U.S.—which has yet to ratify[80] Article *3 bis*—has neither questioned the customary legal status of Article 3 bis, nor its applicability during an armed conflict. This exception of self-defence, enshrined in the UN Charter,[81] may be subject to different interpretations with regards to the requirements that must be fulfilled for an attack to qualify as an armed attack (minimum level of gravity, minimum threshold of state involvement, timeline etc.). As we have seen in the second aerial incident case the U.S. considers the right of individual military units to defend themselves from an attack as a legitimate exercise of self-defence under the UN Charter. This is a vast and complex subject that has a direct bearing on the purview of protection of civil aircraft afforded by international law. Trying, however, to address it in detail would go beyond the scope of the present paper.

The above mentioned Article 3 bis of the Chicago Convention declares customary international law.[82] In academic literature views diverge, however, as to whether the codification was actually more restrictive or broader in scope than the actual customary state practice that was codified.[83] Be that as it may, the significance of the codification was that general threats to the

[78] For a comprehensive review of the proportionality principle see *Lutz, op.cit.*, pp. 92-102.
[79] *Lutz, op.cit.*, p. 179.
[80] For status of ratification of Article 3 bis of the Chicago Convention see: http://www.icao.int/secretariat/legal/List%20of%20Parties/3bis_EN.pdf (09 February 2016) Iran deposited its instrument of ratification on the 17th of June 1994 so the said amendment to the Chicago Convention was not in force in respect of Iran at the time of the aerial incident. To date the U.S has not ratified Article 3 bis of the Chicago Convention.
[81] The most relevant provision of Article 3 bis is as follows [emphasis added] (a) The contracting States recognize that every State must refrain from resorting to the use of weapons against civil aircraft in flight and that, in cases where there is an interception, the lives of persons on board and the safety of aircraft must not be endangered. This provision shall *not be interpreted as modifying in any way the rights and obligations of States set forth in the Charter of the United Nations*.
[82] *Michael Milde*, Interception of Civil Aircraft vs. Misuse of Civil Aviation (Background of Amendment 27 to Annex 2), Annals of Air and Space Law, Vol. XI. (1986), pp. 125-126.
[83] *A. Majid*, Treaty amendment inspired by the Korean Plane Tragedy: Custom clarified or confused? German Yearbook of International Law, Vol 29 (1986) pp. 206, 223. Majid argues that (at the time of codification in 1984) customary rule of international law forbidding use of force against civil aircraft had a wider scope than Article 3 bis of the Chicago Convention. For an opposite interpretation see *John V. Augustin*, ICAO and the use of force against civil aerial intruders Thesis Institute of Air and Space Law Faculty of Law McGill University, 1998, p. 213. Augustin is of the opinion that Article 3 bis did not coincide with international law before 10 May 1984 in the sense that it seems to lay down an obligation to refrain from using weapons in circumstances where the pre-existing law would allow it.

security of a state (e.g violation of airspace) and/or criminal use of aviation (e.g. drug smuggling) could no longer justify the use of force against a civil aircraft.[84] The outcome of the codification was by no means a foregone conclusion in 1984, as at the 25th Extraordinary Session of the ICAO Assembly (devoted to drafting Article 3 bis) the former socialist states made a last-ditch effort to create a ground for exculpation for shooting down a civil aircraft—such as when the state of registry of an aircraft does not prevent an intrusion, or any other use inconsistent with the purposes of the Chicago Convention.[85] Calls for an appropriate balance between principles of non-use of force against civil aircraft and non-use of such aircraft for inappropriate purposes (and inviolability of sovereignty) have not ceased. Such positions re-emerged in the context of the shooting down of two aircraft by Cuba in 1996.[86] In the wake of the tragic events of 11 September, 2001 a new form of misuse of civil aviation emerged as a tangible threat to national security: namely, civil aircraft being seized by non-state actors to endanger the lives of persons and property on the ground. This new phenomenon raised new questions and challenges in terms of the interpretation of relevant rules of international law pertaining to the use of force against civil aircraft.

It has emerged from the state submissions analysed in this paper that the set of international rules applicable to the use of force against civil aircraft seem to exhibit dual characteristics whereby, on the one hand it is qualified as a prohibition of use of force between states under Article 2 (4) of the UN Charter and on the other, as the relationship between a state and natural persons governed by human rights and humanitarian law.[87] France—being one of the two original co-sponsors of what was to become Article 3 bis—indicated, during the negotiations, that the term *use of force* was taken from Article 2 of the UN Charter; this could only be that of Article 2 (4).[88] Any reference to Article 2 (4) of the UN Charter implies that the aircraft is an external symbol of the state of registry,[89] although the actual operations of such an aircraft are not necessarily attributable to the state of registry under international law. From a different perspective, this interpretation apparently places the emphasis on the obligations of states to guarantee and promote the safe and orderly growth of civil aviation as spelt out in the Chicago Convention.[90] The human rights aspect, on the other hand, is considered to be the duty of a state

http://digitool.library.mcgill.ca/webclient/StreamGate?folder_id=0&dvs=1455266338894~249 (12 February 2016).

[84] *Milde, op.cit.*, p. 125.

[85] *Fitzgerald*, The use of force against civil aircraft: the aftermath of the KAL Flight 007 Incident, 22 Can. Y.B. Int' L. 291 (1984), pp. 302-303.

[86] UN Security Council Press Release 27 July 1996 See for example statements made by Cuba, the Russian Federation and China. Russia and China abstained from adopting UNSC resolution 1067 (1996). http://www.un.org/press/en/1996/19960727.sc6247.html (12 February 2016)

[87] One must note that various scholars consider reference to the United Nations Charter—and especially to Article 2 (4) in Article 3 bis of the Chicago Convention—to be based on a misinterpretation of the question of how a state should deal with civil aircraft. This being, in essence, one of the treatment of nationals/foreigners, and it should have been approached as such. See *Bin Cheng*, the Destruction of KAL Flight KE 007 and Article 3 bis of the Chicago Convention in Air Worthy, Liber Amicorum honouring professor I. H. Ph. Diederiks-Verschoor, Kluwer Law and Taxation Publishers, 1985, pp. 70-71. For an opposing view, which holds that the use of force against civil aircraft is indeed a breach of the general prohibition on the use of force in relations among states enshrined in Article 2 (4) the UN Charter, see *Horn, op.cit.*, pp. 37-80.

[88] Doc 9438A25-Min EX/1 p. 8. http://www.icao.int/Meetings/AMC/Pages/Archived-Assembly.aspx?Assembly=a25 (14 February 2016).

[89] *Tom Ruys*, Armed attack and Article 51 of the UN Charter. Evolutions in Customary law and Practice, Cambridge University Press, 2013, pp. 199-204. According to Ruys civil aircraft and ships may for certain purposes be considered an external manifestation of a state.

[90] See Preamble and Article 44 of the Chicago Convention (1944). The International Court of Justice in the Corfu Channel case concluded that the obligation of Albania to warn the approaching British warships of the imminent danger to which the minefield exposed them to were not only based on considerations of humanity, but among

to protect the lives of persons on board a civil aircraft. Of course, these two elements are closely interrelated, as states should refrain from the use of force against another state under Article 2 (4) for purposes inconsistent with the Purposes of the United Nations, including promoting and encouraging respect for human rights and fundamental freedoms.[91] This focus on the perspective of human rights and humanitarian law—including the observance of the principle of proportionality, understood in the strict sense of weighing the harm inflicted by a measure against the benefit gained—remains relevant in inter alia; providing certain rules and guidelines as to how to address the extremely complex instances where a civil aircraft is used as a weapon against civil targets on the ground.[92]

other considerations on *the principle of the freedom of maritime communication* [emphasis added]. *ICJ Corfu Channel Case. Judgement of April 9th, 1949.I.C.J. Reports 1949, p.4.* p. 22.

[91] *Majid, op.cit,* p. 195.

[92] *Gábor Sulyok,* An assessment of the destruction of rogue civil aircraft under international law and constitutional law, Fundamentum 2005, pp.10, 12-13, 17-18, 23-24. http://www.fundamentum.hu/english-edition-2005/cikk/assessment-destruction-rogue-civil-aircraft-under-international-law-and-co (15 February 2016). Also *German Constitutional Court,* Judgment of the First Senate of 15 February 2006 on the basis of the oral hearing of *9 November 2005* – 1 BvR 357/05 http://www.bverfg.de/entscheidungen/rs20060215_1bvr035705en.html (15 February 2016). For an opposing view, concluding that there is no definitive international law, only some widely accepted norms that are restricted to certain conditions with respect to firing on civilian aircraft, see *Foont, op.cit.,* p. 724.