

**ASPECTS OF THE CONCEPT OF THE USE OF FORCE  
IN RELATION TO ARTICLE *3bis* OF  
THE CHICAGO CONVENTION**

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## **Abstract**

*International law is considered to be fully developed on the concept of use of force and self-defence by States. Sources of international law, namely customary international law, conventional law, judicial pronouncements, as well as state practice, have dealt with this issue extensively. One of the probable reasons for such a level of development is that the need for States to be able to defend themselves or to defend their territorial integrity and political independence is considered to be one of the cornerstones of the existence of a State. A State that does not have the ability to defend itself might as well cease to exist. Some of the sources of international law have, however, developed more than others on the concept of the use of force. The question of whether the same principle of international law can be governed by both customary and conventional international law has since been settled by the International Court of Justice (ICJ) by concluding that customary international principles can exist alongside treaty law. Whilst this is the case, one may argue, albeit indirectly, that, to avoid inconsistencies, it may be prudent to leave certain aspects of international law, e.g. use of force and self-defence, to be governed by one source of international law. This paper, however, does not dwell much on the inconsistencies between the principle of self-defence formulated by the United Nations (UN) Charter and that formulated by customary law, e.g. the fact that customary international law recognises the right for a State to defend itself against an imminent attack, and the UN Charter is considered not to afford such a right. The interpretation (and as we will see in the paper; it seems the ICJ also has its own interpretation) of what constitutes an armed attack differs from State to State. Despite these differences, however, one principle that States seem to have reached consensus on is that, whenever the right to self-defence is invoked, any action taken in that regard should be proportionate to the attack directed against the defending State.*

## 1. INTRODUCTION

In international law, the concept of sovereignty of the airspace is the cornerstone upon which virtually all air law is built.<sup>1</sup>

The right of sovereignty of airspace is, however, not completely controversy free, as it raises questions of how far States should go to protect their sovereign right. Are States allowed to use force to protect their sovereignty against intrusion by aircraft of other States? If so, under what circumstances and subject to what conditions can States justifiably use force against civil aircraft in the protection of their sovereignly rights? This paper endeavours to detail the impediments that may arise for a State that has exercised its right to use force based on a claim of defending itself against an armed attack by another State.

The other issue which begs investigation is whether the use of weapons against a civil aircraft can be justifiable under any circumstances. Whatever the answer to this question is, however, the reality is that a proper balance between the territorial sovereignty and the protection afforded to civil aircraft and passengers on board is still yet to be drawn. According to the words of Rory Stephen Brown in his article,<sup>2</sup> it is questionable whether it would ever be considered legally and morally acceptable to shoot down a civilian aircraft under any circumstances. This, according to Brown, raises moral questions of whether it is considered acceptable to destroy the lives of the passengers on board an aircraft in favour of saving the lives of people and property on the ground.

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<sup>1</sup> Article 1 of the Convention on International Civil Aviation, which provides that "The Contracting States recognise that every State has complete and exclusive sovereignty over the airspace above its territory+ forming the basis for the right of sovereignty of the airspace.

<sup>2</sup> Rory Stephen Brown: Shooting down of civilian aircraft: Illegal, immoral and just plane stupid 2007 20.1 *Revue Québécoise de droit International*, page 57 . 106.

International law generally prohibits the threat or the use of force by States against the territorial integrity or political independence of any State, or in any manner inconsistent with the purpose of the United Nations.<sup>3</sup>

Under normal circumstances, in the framework of international law, force ought to be used only as a last resort in a world where the maintenance of international peace and security is, or should be, a major priority.

On the other hand, though, we live under different circumstances today from those pertaining during the adoption of the UN Charter in 1945. The new era in which we live has to deal with new threats that were not anticipated at the time of the adoption of the UN Charter. The September 11, 2001 terrorist attacks against the United States, utilising a civilian aircraft, has awoken the international community to a new threat that could strike anywhere and at any time without notice, viz. the use of a civilian aircraft as a weapon of mass destruction. Similarly, technology nowadays is changing considerably and could virtually be utilised by terrorist groups to inflict huge devastation on their adversaries in the blink of an eye. Still, though, international law regulations that govern the international use of force today are based on the norms and structures established under the UN Charter in 1945.<sup>4</sup> Hence, international law scholars like Allen Weiner<sup>5</sup> argue that the structure of the existing international security architecture is not well-suited to address the new security threats, or, as he puts it differently, the international community is utilising the old medicine for [curing] new ills.

In order to address the issue of the use of force against civil aircraft, the International Civil Aviation Organisation (ICAO) enacted Article 3*bis* of the

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<sup>3</sup> Article 2(4) of the UN Charter. Most scholars interpret this Article literally as only prohibiting the use of force against territorial integrity and political independence. However, it has been a widely accepted principle that the prohibition is of general application, subject only to the exceptions prescribed in the Charter itself, i.e. self-defence and authorized use of force by the Security Council.

<sup>4</sup> Allen S. Weiner: The use of force and contemporary security threats: old medicine for new ills?, Stanford law review [Vol. 59:415].

<sup>5</sup> Allen S. Weiner, footnote 4 supra.

Chicago Convention on International Civil Aviation (Chicago Convention). This Article is aimed at prohibiting States from the use of weapons against civil aircraft, except under certain circumstances as prescribed in the article.

The aim of this paper is to examine whether Article 3*bis* of the Chicago Convention has succeeded in achieving its intended purpose. More so, the question is whether the Article has brought about rights and obligations not in existence prior to its enactment, and, if so, to what extent it has succeeded in altering or enhancing the existing customary international law, if at all.

Gerald Fitzgerald<sup>6</sup> states that reference to the UN Charter in Article 3*bis* of the Chicago Convention reiterates the existing rule of customary international law which, in essence, provides that the only exception to the prohibition on the use of force is in the exercise of the inherent right to self-defence. He deduces, however, that this reference means that, even though an aircraft may be misused for a purpose inconsistent with the provisions of the Chicago Convention, this does not justify the use of force against it.

The writer will argue that the elements for the justification of self-defence handed down in Nicaragua<sup>7</sup> case do not justify the use of weapons against a civilian aircraft under self-defence.

This paper will endeavour to deal with the following pertinent issue:

- Whether the right to territorial sovereignty permits States to use force in its protection.

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<sup>6</sup> Gerald Fitzgerald: The use of force against civil aircraft: The aftermath of KAL Flight 007 incident, 1984, 22 Canadian Yearbook of International Law, page 305.

<sup>7</sup> Case concerning Military and Paramilitary activities in and against Nicaragua (Nicaragua v United States of America), I.C.J reports, 1986.

- Whether the wrongfulness of a State's use of force against a civil aircraft can be excluded on the basis of self-defence. If the answer is in the affirmative, under what circumstances can the right of self-defence be invoked?
- The most important issue relates to whether the UN Charter provision dealing with the prohibition of the use of force is not sufficient to deal with the shooting down of civilian aircraft.
- Lastly, an attempt will be made to analyse whether Article 3*bis* of the Chicago Convention provides a shield of protection against the shooting down of aircraft. Furthermore, the paper will deal with the issue of whether Article 3*bis* introduced rights or obligations not in existence under customary international law or the UN Charter.

The first part of the paper will begin by an analysis of the general principles of the concept of sovereignty, with particular reference to the rules governing the concept of sovereignty in the airspace above a State's territory. The concept of the use of force under international law in general is also discussed.

The second part of the paper examines in depth the use of force and the legal connotations relative to it. This part then ventures into the issue of the use of weapons against civil aircraft in flight. The jurisprudence of the International Court of Justice on the concept of self-defence in relation to an armed attack is also analysed.

The last part of the paper will conclude by critically evaluating Article 3*bis* of the Chicago Convention with a view to ascertaining whether it did indeed achieve the purpose for which it was intended. In particular, one of the questions to be elaborated on in this part of the paper is whether Article 3*bis* of the Chicago Convention and Article 51 of the UN Charter formulate the same or similar principles of the proportionality of self-defence.

## 2. SOVEREIGNTY AND RIGHT TO USE FORCE

The aim of this part of the paper is to examine the concept of sovereignty, with specific reference to its origins. The concept of sovereignty in relation to airspace will also be examined. Of more importance, for the purposes of this paper, is the question of how far States are allowed to go in relation to the use of force in order to protect their territorial sovereignty.

This paper will further examine the concept of sovereignty in international air law as well as the concept of the use of force in general under the UN Charter.

The concept of sovereignty lies at the heart of the existence of all States. It is a reflection of States' exclusive, supreme and alienable legal authority to exercise power within their area of governance.<sup>8</sup>

Sovereignty is a concept that does not appear in the UN Charter specifically in relation to limitations on the use of armed force, but it is often part of the analysis of the difference between permissible and non-permissible use of force.<sup>9</sup> Some authors, e.g. Josef Mrázek, consider the issue of sovereignty to be controversial ever since the adoption of the UN Charter as there are deep disagreements about its contents and circumstances.<sup>10</sup>

Under international law, sovereignty is not an absolute right but is relative. Some authors interpret the concept of sovereignty in a very narrow sense, to imply that a sovereign State is not responsible or answerable to anybody and not bound by any prescripts. In the real world, however, there is a generally accepted principle

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<sup>8</sup> Chrystel Erotokritou: Sovereignty over airspace: International Law, current challenges, and future developments for global aviation, *International Student Journal*, 2012, Vol 4 NO. 05.

<sup>9</sup> Jordan J. Paust: Relative Sovereignty and permissible use of armed force: 2011 *Michigan State International Law Review*, Volume 20, page 1.

<sup>10</sup> Josef Mrázek: The right to use force in self-defence, 2011 *Canadian Yearbook of International Law* 2, page 34.



that States have an obligation not to interfere in the affairs of other States,<sup>11</sup> and this notion of non-interference in other States' affairs forms the cornerstone of the right of sovereignty. Furthermore, the legal principle of sovereignty requires States to respect the territorial borders of other States.

However, despite that the UN Charter contains a clear defence of the territorial integrity of States, it simultaneously contains commitments to human rights. Some scholars consider this as a contradiction, whilst on the other hand they acknowledge that even though the concept of sovereignty emphasises non-intervention, it cannot override the proclaimed goal of protection of citizens of a State from flagrant violations of their fundamental human rights, usually by the agents of the State.<sup>12</sup>

According to Robert F. Turner,<sup>13</sup> the principle of sovereignty is embodied in both customary law and conventional international law.

#### **A. Concept of sovereignty in air law**

Airspace refers to the area or portion of the atmosphere above a State's territory, including its territorial waters, which is controlled by that State. In the context of air law, airspace is defined as any part of the atmosphere which can be used by aircraft.

The notion of the right of sovereignty lies at the very heart of international air law because international relations on aviation are based very largely upon it.

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<sup>11</sup> Jordan Paust *supra*, footnote 9, page 2.

<sup>12</sup> Mohammed Ayoob: The concept of humanitarian intervention and state sovereignty: *International Journal of Human Rights*, Volume 6, No. 1 (2002), page 81.

<sup>13</sup> Robert F. Turner: State sovereignty, International Law, and the use of force in Countering Low-Intensity Aggression in the Modern World: *International Law Studies* . Volume 67, page 43

Professor Lissitzyn<sup>14</sup> analyses the concept of sovereignty in its modern development as having three fundamental principles: firstly, that each State has exclusive sovereignty over its airspace; secondly, that each State has complete discretion as to the admission of any aircraft into its airspace; and, thirdly, that airspace over the high seas and other areas not subject to a State's jurisdiction is *res nullius* and is free to the aircraft of all States.

As indicated above, the principle of sovereignty is framed in both customary and international law, as well as in treaty law. Article 1 of the Chicago Convention is the conventional international law basis on which the concept of sovereignty is built.<sup>15</sup> Article 1 of the Chicago Convention provides that:

*“The contracting States recognise that every State has complete and exclusive sovereignty over the airspace above its territory”.*

It is considered worth noting, however, that the Article %recognises+the right to sovereignty as opposed to establishing it. This is the basis upon which it is contended that the Chicago Convention acknowledges that the right to sovereignty was already in existence under the rules of customary international law.

Unlike the case with regard to space law (where the issue of sovereignty is still undeveloped and there is not much of State practice to warrant the development of customary law), the *opinio juris* and state practice with regard to the sovereignty of airspace has always been in existence. It is a generally and universally accepted rule that a State is not authorised to fly its aircraft over the territory of another State without the express consent of the latter. The airspace of

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<sup>14</sup> Oliver Lissitzyn: *International Air Transport and National Policy* (1983), p 365, quoted in R.I.R. Abeyratne: *The philosophy of air law: The American Journal of Jurisprudence* (1992), page 139

<sup>15</sup> The Chicago Convention is, however, not the original source of the concept of sovereignty in international air law. As far back as in 1919, during the development of the Paris Convention of Aerial Navigation, the issue of State sovereignty over its airspace had already been established. Article 1 of the Chicago Convention is the mirror image of Article 1 of the Paris Convention.

all Contracting States to the air law Conventions is, thus, closed *de iure*, until the States decide to open it *de facto*.<sup>16</sup>

The International Court of Justice has emphasised that the principle of respect of territorial sovereignty is directly infringed by the unauthorised over-flight of an aircraft of a State into the territory of another.<sup>17</sup> This principle was emphasised in the Case concerning Military and Paramilitary Activities in and against Nicaragua. I will articulate more about this issue later in this paper.

Under Article 1 of the Chicago Convention, nevertheless, State parties undertook to accord freedom of innocent passage to the aircraft of other State parties in peace time so long as they complied with the rules made under the authority of the Chicago Convention.<sup>18</sup> Furthermore, under international law, States have an obligation to assist distressed aircraft, and this notion, which is brought about by the Chicago Convention, is based on the considerations of humanity.

Professor Lissitzyn<sup>19</sup> asks the question of whether the principle of sovereignty in air law implies that any aircraft entering the sovereign territory without permission is completely at the mercy of the territorial sovereign.

One may hold the view, which is supported by that of Professor Lissitzyn, that in as much as States have full control over their airspace, this does not imply that the States are at liberty to reject outright any object that intrudes into such

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<sup>16</sup> Chrystel Erotokritou, footnote 8, *supra*, page 1.

<sup>17</sup> Malcolm Shaw: *International Law*, page 377.

<sup>18</sup> These rules are embodied in the Annexes to the Chicago Convention. During the negotiations of the Chicago Convention, States were not comfortable with the granting of over-flight freedoms by way of a multilateral treaty. As a result, States usually grant the overflight freedoms to aircraft of other States through Bilateral Air Services Agreements.

<sup>19</sup> Oliver Lissitzyn: *The treatment of aerial intruders in recent practice and international law* (1953), page 559.

airspace without authorisation. This is due to the fact that international law has put some limitations on the States right to sovereignty.<sup>20</sup>

It has to be noted that in this paper emphasis is not placed on an intruding aircraft that has given a signal of distress, for, in such an instance, the sovereign State has an international obligation to offer assistance to such an aircraft. The main emphasis of this paper is with regards to an aircraft which has not identified itself and which has failed to communicate its intentions in any way to the sovereign State, despite several calls to do so.

Professor Lissitzyn answers the question referred to above by indicating that, despite its conceived right of territorial sovereignty, the territorial sovereign State must refrain from exposing an aircraft and its passengers to unnecessary or unreasonable great danger in relation to the harmfulness of the intrusion. Professor Lissitzyn, however, does not go further and examine what recourse is available to the territorial sovereign state in the event that the intruding aircraft fails to comply with the orders given to it to land or to identify itself.<sup>21</sup>

It can, however, be adduced that Professor Lissitzyn<sup>22</sup> acknowledges that the territorial sovereign state can use a considerable degree of force or action against an aerial intruder as long as the force or action is considered to be necessary and reasonable under the circumstances.

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<sup>20</sup> One of the limitations referred to here relates to the obligation States have to maintain international peace and security. Furthermore, States have the obligation to assist any aircraft that is considered to be in distress as indicated above.

<sup>21</sup> Oliver Lissitzyn, footnote 19, supra. This article was drafted in the era prior to the development of Article 3*bis* of the Chicago Convention. Even after the introduction of Article 3*bis*, however, the questions raised by Professor Lissitzyn are still relevant as Article 3*bis* of the Chicago Convention does not deal expressly with such issues apart from acknowledging the right and obligations under the UN Charter and the fact that it is not intended to modify the existing law. Despite the fact that the UN Charter was already in existence at the time, Professor Lissitzyn's article did not deal with the question of the use of force in relation to Articles 2(4) and 51 of the UN Charter.

<sup>22</sup> It is acknowledge, however, that Professor Lissitzyn does not expressly make this conclusion, but it is my contention that she concludes as such by implication.

Professor Lissitzyn, however, concludes<sup>23</sup> that, in time of peace, intruding aircraft whose intentions are known to the territorial sovereign state to be harmless, must not be attacked even if the aircraft does not obey orders to land.

## **B. Right of use of force in international law**

Notwithstanding Article 2(4) of the UN Charter,<sup>24</sup> the use of force, in whatever shape or form, is not absolutely prohibited in international law. There are, however, stringent requirements with regards to what use of force is permitted.

One of the requirements under which a State may lawfully resort to force is if it is acting in self-defence. Article 21 of the Draft Articles on the International Responsibility of States for Internationally Wrongful Acts precludes from wrongfulness the conduct of a State if such conduct constitutes a lawful measure of self-defence taken in conformity to Article 51 of the UN Charter.

The most important authority relating to the use of force against civilian aircraft is Article 3*bis* of the Chicago Convention. This Article, however, does not absolutely prohibit the use of force against civil aircraft either, and it cannot be read in isolation from other sources relative to the use of force under international law. The construction of Article 3*bis* of the Chicago Convention takes cognisance of the fact that certain circumstances, notably the circumstances anticipated under Article 51 of the UN Charter, allow the use of force by States.

The other instances where the use of force is considered legitimate are where the UN Security Council, acting under Chapter VII of the UN Charter, has authorised the use of force, or during war (principles of the latter are governed by humanitarian international law). These issues, however, fall outside the scope of this paper and will not be dealt with extensively. It suffice to mention that the same

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<sup>23</sup> Oliver Lissitzyn, footnote 19, *supra*, page 587.

<sup>24</sup> Article 2(4) of the UN Charter prohibits threat or use of force against territorial integrity of States.

general rules applicable to all uses of force, i.e. the necessity to act under the relevant circumstances and the requirement that any action taken should be proportionate to the threat addressed, are equally applicable to the other instances of use of force.

Article 51 of the UN Charter generally limits the right to use force in cases of self-defence. There are divergent views on the concept of self-defence, and, more particularly, whether self-defence is confined only to circumstances in which an armed attack has commenced or whether a State can use force in defence in relation to a perceived threat of an imminent attack. Most international law scholars, however, consider it unrealistic in practice to suppose that a State must, in all cases, await an actual attack before invoking the right to defend itself, especially considering the magnitude of damage that attacks in this era can cause to a State.

At the dawn of the Second World War, the concept of self-defence was understood to cover situations in which a State perceived that its security was threatened.<sup>25</sup> The concept of self-defence is discussed more fully in a subsequent chapter.

Apart from the UN Charter, customary international law sets out rules applicable to the prohibition of the use of force and the right of self-defence. These rules, together with the provisions of the UN Charter on the subject, have been considered by the ICJ as being identical.<sup>26</sup> The right of self-defence, therefore, though it is inherent, is not autonomous and it must be regarded as limited and not legitimised by law.

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<sup>25</sup> During times of the war, it was considered that customary international law generally permitted the exercise of anticipatory self-defence in the face of an imminent danger. This was, however, an era prior to the pronouncements of the ICJ.

<sup>26</sup> Josef Mrázek, footnote 10, supra page 36.

### 3. SELF DEFENCE: PRINCIPLE OF PROPORTIONALITY AND NECESSITY

It is considered that there is a clear consensus among States that, if there is an armed attack, then the State under such an attack has a right to embark on self-defence. There is, however, no consensus on what constitutes an armed attack.<sup>27</sup> Neither does the UN Charter offer any description of what an armed attack is. What is also incomprehensible is the question of the level of force that the States are lawfully entitled to employ in the process of defending themselves.

During negotiations for the drafting of the UN Charter in 1944, a delegate of the United States made the following statement:

*“Every nation is free at all times and regardless of treaty provisions to defend its territory from attack or invasion and it [the State] alone is competent to decide whether circumstances require recourse to war in self-defence.....”*<sup>28</sup>

The concept of self-defence in international law has its own impediments. There is no consensus in international law as to whether a State can use force to defend itself against a perceived threat, what is generally known as pre-emptive self-defence, or whether a State can defend itself against an anticipated threat, what is generally known as anticipatory self-defence. Green *et al*<sup>29</sup> makes a distinction between anticipatory self-defence and pre-emptive self-defence. Anticipatory self-defence, according to him, refers to action taken in response to an *imminent* (my emphasis) threat, whilst pre-emptive self-defence refers to action taken in response to a perceived threat that is more temporally remote. It is widely accepted that anticipatory self-defence refers to the use of force by a State to repel an attacker before the actual attack has taken place, i.e. the State anticipates that the attack will take place in the near future.

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<sup>27</sup> Rory Stephen Brown, footnote 2 *supra*, page 62.

<sup>28</sup> Quoted by Robert Turner, footnote 12 *supra*, page 63.

<sup>29</sup> James A. Green and Francis Grimal: The threat of force as an action in self-defence under international law, 2011 Vanderbilt Journal of Transnational Law, Volume 44, page 302.

Some writers advance the theory that Article 51 of the UN Charter forbids any right to anticipatory or pre-emptive self-defence in so far as it requires the presence of an armed attack. One of the major obstacles with the concept of anticipatory or pre-emptive self-defence is that it is subjective and this can lead to errors of judgment, sometimes with devastating consequences.

A pre-emptive self-defence enjoys even far less acceptance by States than anticipatory self-defence. A major criticism against pre-emptive self-defence is that because the attack is not imminent, it is not certain if the attack will indeed occur. Even though traditional international law does not necessarily require certainty regarding the time and place of the imminent attack, it does suggest, at least a degree of near certainty.<sup>30</sup> In order to stand a chance of success against liability, a State which defends itself against a perceived or imminent attack has to make very fine calculations of moves by the other State in order to ascertain the right time to strike. A pre-emptive strike that has been embarked upon too soon might be considered to constitute aggression.<sup>31</sup> On the other hand, it is not realistic in practice for a State to await an initial attack before acting in self-defence when, in the present state of dangerous weapons, such attack can well destroy the State's capacity to strike back.

It seems, however, that most States are not very fond of the notion of anticipatory self-defence either. Some authors<sup>32</sup> are also critics of this theory and prefer a narrow interpretation of Article 51 of the UN Charter. The criticism is based on the premise that, if States were to be permitted to attack other States on the subjective belief that they were about to be attacked, then this would open the door for a wide range of aggressive actions disguised as anticipatory self-defence.

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<sup>30</sup> Anthony Clark Arend: *International Law and the Pre-emptive use of military force*, the Washington Quarterly: 2003 page 96.

<sup>31</sup> Malcom Shaw, footnote 1 supra, page 790.

<sup>32</sup> For example, Professor Henkin: *How States behave*, 141, 2<sup>nd</sup> edition, 1979, quoted by Robert Turner, as well as Professor Sørensen who believes that if an aircraft penetrates the airspace of another States and does not obey orders or does not identify itself, force can be used against such aircraft. Professor Sørensen further advocates that Article 51 of the UN Charter outlaws anticipatory self-defence in so far as it requires an armed attack to occur first.



Despite his criticism of anticipatory self-defence, Professor Sørensen acknowledges that, in the modern day era of weapons of mass destruction, this does justify some type of anticipatory self-defence.

In any event, it is an acceptable notion that the right to self-defence is indeed part of customary international law and is considered as not having been created by the UN Charter. It is arguable, however, whether the right to self-defence can be extended beyond the scope of an armed attack as stipulated in Article 51 of the UN Charter. According to Brun-Otto Bryde,<sup>33</sup> Article 51 of the UN Charter delineates the boundaries of legitimate self-defence not only for the purposes of the UN Charter, but also in general international law. This, according to him, leaves no room for invoking the right of self-defence if rights of a State are violated in a way other than by armed attack.

Although there still exists, to this day, some divergent views on whether Article 51 of the UN Charter permits self-defence where there has not been an armed attack, State practice seems to be more receptive to anticipatory self-defence than to pre-emptive self-defence.

#### **A. Level of threat posed by civil aircraft**

Under normal circumstances, a civilian airliner is highly unlikely to pose a level of threat justifying its shooting down unless it is used as a weapon in an act of terrorism, as was the case in the September 9, 2011 attacks against the United States.<sup>34</sup>

It is very difficult to consider a threat posed by an unidentified civil aircraft flying over a State's territory as imminent, in the sense defined by Green, at least not on its own and in the absence of any other factors or indicators, e.g. past relations

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<sup>33</sup> Brun-Otto Bryde: Self-defence, in Bernhardt (ed.) *Encyclopedia of Public International law* [Instalment 1] 1981, page 212.

<sup>34</sup> Malcolm Shaw, footnote 16 supra, page 379.

between the States concerned.<sup>35</sup> The issue of past conduct is based on the idea that a State cannot justify shooting down an aircraft of another State when there is nothing suggesting a strain in the relations between the States concerned.

The threat posed, therefore, by an unauthorised civilian aircraft is likely to be considered to be a perceived threat. Green *et al*, in their distinction mentioned in the preceding paragraph, does not take their distinction further by analysing whether it has any significance in the lawfulness or otherwise of the actions taken in response to a threat. It can be considered, however, a State is more likely than not to succeed in justifying the lawfulness of its actions of self-defence against an imminent threat than it would be against a perceived threat. It is acknowledged that, when it comes to an intruding civilian aircraft in flight, the issue of identifying whether the threat it poses is imminent or perceived depends on the analysis of the fine details of the interaction or on an endeavour of interaction with the aircraft in question. Furthermore, a threat posed by a civilian aircraft in flight can start as being perceived and remote but can ultimately change in a very short space of time to be considered as an imminent threat, e.g. when the aircraft concerned approaches a high security area.

As a result, there is no hard and fast rule which can be used to describe a threat posed by a civilian aircraft, as one case can be considered to be an imminent threat whilst another can be considered to be a perceived threat. A State, therefore, which has exercised its right of self-defence, has the responsibility of proving that the threat posed by the civilian aircraft was imminent rather than remote.

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<sup>35</sup> The argument of past conduct by a State or relationship between the States was considered by the United States in its reliance on self-defence when it attacked Iranian Oil installations in the Oil Platforms case. The Oil Platforms case, decided in 2003, was hot on the heels of the terror attacks on the 11<sup>th</sup> September 2001 on the US.

## B. Necessity and proportionality of self-defence

In its decision in the Case concerning Military and Paramilitary Activities in and against Nicaragua, the ICJ endorsed the view that, in customary international law, whether a response to an armed attack is lawful or not, depends on the observance of the criteria of the necessity and proportionality of the measures taken in self-defence.<sup>36</sup> This view was also expressed by the ICJ in its Advisory Opinion on the Legality of the Threat or use of Nuclear Weapons<sup>37</sup> where the Court indicated that the submission of the exercise of the right of self-defence to the conditions of necessity and proportionality is a rule of customary law.

This part will deal briefly with the issue of necessity and self-defence, whilst more attention will be given to the principle of proportionality.

### ***Necessity***

One of the important requirements for self-defence is that the defensive action must be necessary to defend the threatened interest adequately.

Necessity to use force can, therefore, exist only if there are no available alternative non-forcible measures.<sup>38</sup> This right can also exist if all the other available measures have been employed and the threat still persisted. In other words, “*there must be no practical alternative to the proposed use of force that is likely to be effective in ending or averting the attack*”.<sup>39</sup> A question arises as to whether an appreciation that an alternative non-forcible measure is not equally effective would suffice to satisfy this requirement.

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<sup>36</sup> ICJ reports 1986 page 103, para. 194

<sup>37</sup> ICJ reports 1996 (I), page 245, para 41

<sup>38</sup> Green *et al*, footnote 30 supra, page 323.

<sup>39</sup> These were the words used in the document entitled, %Principles of International Law on the use of force by States in self-defence+prepared by the Chatham House International Law Programme, 2005, as quoted by Green on page 323.

In the Nicaragua<sup>40</sup> case, one of the questions before the Court was whether it was possible for the United States of America to eliminate danger without embarking on military activities in and against Nicaragua. The Court answered this question in the affirmative and concluded that it cannot be said that the military and paramilitary activities by the United States were taken out of necessity.

### ***Proportionality***

There is a profound lack of clarity and consensus about the tests to be applied with regard to the proportionality requirement of self-defence.<sup>41</sup> According to Akande *et al*, proportionality may be used to describe the requirement that a State that is defending itself shall use no more force than is reasonably necessary. On the other hand, proportionality might mean that any defensive action taken by a State must be quantitatively commensurate either with the attack to which it is responding or with the threatened attack if the attack has not commenced.

A third possible alternative interpretation of the principle of proportionality is that proportionality requires that the damage inflicted in self-defence should not be disproportionate in comparison to the pursued objective.<sup>42</sup> In this third alternative, we have to acknowledge that the assessment of the degree of proportionality of the action taken in self-defence will depend on whether the intended objective is to prevent the attack from happening or to minimise its impact, or whether the objective is to deter future attacks.

Neither Article 51 of the UN Charter nor Article *3bis* of the Chicago Convention provide expressly for the requirement of proportionality of self-defence. This requirement, therefore, is derived from customary international law. I will deal in depth with the notion of the relationship between proportionality and the UN

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<sup>40</sup> Nicaragua case, footnote 7 supra.

<sup>41</sup> Dapo Akande and Thomas Lieflander: Clarifying necessity, imminence and proportionality in the law of self defence: 2013 American Journal of International Law, Vol 107, page 565.

<sup>42</sup> Dapo Akande, footnote 39 supra, page 566.

Charter, on the one hand, and proportionality and Article 3bis of the Chicago Convention, on the other hand.

Green *et al*<sup>43</sup> expound on the above point by stating the following with regards to the customary roots of self-defence:

*“the crucial element of the pre-Charter regime was that for a response [to an attack] to be lawful, it must have been both necessary and proportional”.*

According to Green, these two criteria stretch well back into international legal theory. These two criteria have, however, since developed legal content through cumulative state practice and *opinio juris*.

Despite wide differences as to when resort to force is legitimate, there has been an agreement, ever since the adoption of the UN Charter, on the need for any forceful action in self-defence to be proportionate. The concrete application of proportionality, however, and, in particular, the question of what the action should be proportionate to is far from uniform.<sup>44</sup> In more simple terms, proportionality is premised on the broad question as to whether the ends justify the means.<sup>45</sup>

Gardam argues that, in the era prior to the UN Charter, proportionality was part of the rules which determined whether a resort to force was initially warranted. In other words, proportionality was a restraint on a resort to force rather than merely its conduct. Under the UN Charter regime, however, proportionality is considered not as a restraint to the use of force but as a measure of its extent.

On the question of the assessment of proportionality that should arise in relation to a threat (the so called perceived threat which necessitates anticipatory self-

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<sup>43</sup> Green *et al*, footnote 30, *supra*, page 285.

<sup>44</sup> Judith Gail Gardam: Necessity, proportionality and use of force by States, page 11.

<sup>45</sup> Judith Gardam, footnote 43, *supra*, page 30.

defence), Gardam<sup>46</sup> argues that much depends on the past relationship between the States concerned, e.g. if there has been a previous attack or a series of attacks or a threat of a specific action by the one State against the other.

Green *et al*<sup>47</sup> put it eloquently when they indicate that “*the force employed [in self-defence] must not be excessive with regard to the goal of abating or repelling the attack*”. This supports the view that the aim of employing an attack in self-defence is not necessarily meant to defend the interests of the State against the threat, but, rather, is meant to prevent the initial attack from ever taking place. One is inclined to support the view that it would be in the best interests of any State faced with a threat, whether perceived or actual, from an aircraft in flight to prevent the attack from commencing in the first place. Unless the defending State employs the other options made available to it by Article 3*bis* of the Chicago Convention,<sup>48</sup> any other action taken by the State to prevent an attack from an aerial intruder is highly likely to be considered disproportionate.

### **C. The jurisprudence of the International Court of Justice**

An argument relating to the question of the use of force and self-defence by States cannot be complete without an analysis of the judicial pronouncements on the subject as delivered by the ICJ. The ICJ had the first opportunity to clarify the international law aspects relating to the use of force and self-defence<sup>49</sup>. Much to the dismay of the international law scholars however, the ICJ passed on the opportunity of providing reliable precedents on the subject which has sparked so much debate.

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<sup>46</sup> Gardam, footnote 43, *supra*, page 179

<sup>47</sup> Green *et al*, footnote 30, *supra*, page 301.

<sup>48</sup> A State may use all means available e.g. requesting the aircraft to identify itself, request the aircraft to land at a designated place, use its fighter jets to accompany the aircraft, etc.

<sup>49</sup> Johan Lawrence Hargrove: Nicaragua Judgement and the future of the law of force and self-defence: in Appraisals of the ICJ's decision: Nicaragua v United States (merits): 1987 American Journal of International Law Vol 81, page 135.

In the subparts of the paper that follow, I will be examining the judgments of the ICJ in relation to the concept of the use of force and self-defence.

### ***Case concerning Military and Paramilitary Activities in and against Nicaragua***

As indicated above, one of the major questions here is whether the ICJ, in the Nicaragua case, assisted in making the otherwise controversial issue of use of force and self-defence any clearer, or whether it made the already muddy waters even murkier. Some, if not many, international law authors seem to believe that the majority judgment of the ICJ did no more than insert a single pillar to support an already shaking structure.

John Lawrence Hargrove<sup>50</sup> argues that the Nicaragua judgment, in so far as it suggested that there are acts of unlawful force between States where international law forbids a State from defending itself by proportionate force, left the law of force and self-defence poorer than it had found it and also left it with weakened prospects for actual relevance in the international law arena.

One important aspect, though, to have come out of the Nicaragua judgment is that there is nothing prohibiting the rules of customary international law and treaty law from existing alongside each other. The Court affirmed that it cannot dismiss the claims of Nicaragua under principles of customary and general international law simply because such principles have been enshrined in the texts of the Conventions, which were relied upon by Nicaragua. The fact that the abovementioned principles recognised as such have been codified or embodied in conventions, the Court observed, does not mean that they cease to exist and to be applied as principles of customary international law. The Court concluded that such principles continue to be binding as part of customary international law

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<sup>50</sup> John Lawrence Hargrove footnote 48, supra, page 143.

despite the operation of provisions of conventional law in which they have been incorporated.<sup>51</sup>

The ICJ reached this conclusion of the co-existence of treaty law and customary international law in the Nicaragua case when it found itself unable to issue a judgment against the United States for contravention of the base treaties governing the use of force despite the fact that the United States was a signatory to those treaties. This inability arose out of the fact that the United States had made some reservations to some of these multilateral treaties that otherwise govern this issue. The ICJ was, further, called upon to decide what rules of customary international law regulating the use of force and respect for territorial integrity and sovereignty constituted the applicable law in the Nicaragua case.

The judgment of the ICJ in relation to the co-existence of the rules of customary and conventional international law is critical, as will be seen in subsequent parts of this paper, with regards to the issue of the prohibition of the use of force against a civilian aircraft in flight. As of October 2011, Article 3*bis* of the Chicago Convention has been ratified by 143 States, as against a total of 192 States who are signatories to the Chicago Convention. The importance of the ICJ's judgment in the Nicaragua case is that the rules of international customary law governing the use of force against States are considered to be applicable equally to those States who are not signatories to Article 3*bis* as much as they are applicable to those States who are signatories.

Of particular importance is the finding by the ICJ that the fact that recognised principles of customary international law have been enshrined or codified in a treaty does not mean that they cease to exist and be applied as principles of customary law, even with regards to the States that are signatories to such Treaties.<sup>52</sup>

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<sup>51</sup> ICJ Reports, 1984, page 424, para 73.

<sup>52</sup> ICJ Reports, 1984 page 424, para 73.



The ICJ, however, drew more criticism in its judgment in relation to its assertion that the legal basis of self-defence is %subject to the State concerned having been a victim of an armed attack+.<sup>53</sup> This threshold of armed attack envisaged by the ICJ somehow left the States in a more vulnerable position, as, strictly speaking, they are not allowed to strike back, at least not until the intervention reaches the %armed attack+threshold as envisaged by the ICJ.

Most judges in the Nicaragua case delivered separate opinions in which they were in agreement with, and sometimes voted against, certain aspects of the Court's judgment. None of the dissenting views, however, dealt with extensively, or provided some dissenting views to, the requirement of an armed attack as laid down by the Court. Judge Schwebel, however, did observe that the Court's decision not to express a view on the issue of the lawfulness of a response to the imminent threat of an armed attack may have opened the Court's judgment to the interpretation of inferring that a State may react in self-defence only if an armed attack occurs.<sup>54</sup> Judge Schwebel, however, does not pour much water on this possible interpretation, but, rather, cautions that, if it is indeed a correct interpretation of the Court's judgment, then such inference should be considered as *obiter dictum*.<sup>55</sup>

It is this portion of the Court's judgment that leaves matters unclear when it comes to a perceived attack or threat by a civilian aircraft in flight. It is not clear at what

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<sup>53</sup> ICJ Reports, 1986 page 93, para 195.

<sup>54</sup> Indeed, when one considers the scholars' views as quoted above, one gets the impression that most scholars have interpreted the Court's judgment or lack of an express view on the lawfulness of self-defence against an imminent attack as implying that a State may act only when there is an armed attack. One view even goes on to argue that the placing of Article 51 of the UN Charter in Chapter VII leans more to the view that the Article is meant to operate under circumstances which threaten peace and security, and that armed attack falls under such a category.

<sup>55</sup> The statement which Judge Schwebel considers to be *obiter dictum* is the view, expressed by the Court in para 195 that, in the case of individual self-defence, the exercise of the right of self-defence is subject to a State concerned having been a victim of an armed attack. The continuous reference to this statement, however, and the rationale of the ICJ in the Case concerning Oil Platforms, does not suggest that the Court considers the statement as *obiter dictum*. (See ICJ reports 2003 page 187 para. 51 and page 192, para 64).

stage it can be said that a civilian aircraft has embarked on an armed attack which warrants an action of self-defence by the defending State. This, in turn, raises problems for a defending State to assess when to prepare itself for striking back, even more so when the question of the assessment of the proportionality of such strike back is considered. Is the defending State expected to wait for the first strike by the aircraft before it launches an attack in self-defence? As indicated elsewhere in this paper, the Court left the question of whether States are allowed to defend themselves against an anticipatory armed attack unanswered, and, thereby, this aspect of international law is still left underdeveloped.

A United States Secretary of State, Dean Acheson, whilst presenting a paper in an American Society of International Law in 1963,<sup>56</sup> argued that the issue of the survival of a state cannot be a matter of law. These words were interpreted to emphasise that self-defence could, or should, not be governed by law when a grave threat to the power of a state or to its way of life was perceived by that state to be directed against it.

As much as this statement by Dean Acheson drew criticism from international law scholars generally, it cannot be considered as very far from the truth considering that international law has, even to date, left it upon states to decide what is necessary for their own self-defence. Dean Acheson's view, however, was rejected by the ICJ in the Nicaragua case when it concluded that the right to self-defence is fully justiciable.<sup>57</sup>

### ***Case concerning Oil Platforms***

If the ICJ in the Nicaragua case had left open the question of whether a State can exercise self-defence only when it is under armed attack, then any doubts created

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<sup>56</sup> Quoted by Oscar Schachter, *Self-defence and the Rule of law*, 1989 *American Journal of International Law* Vol 83, page 260.

<sup>57</sup> Nicaragua case, *supra*, page 15 . 17, paras 32 . 34. In this case, the Court was called upon to pronounce its view following an argument by the United States of America that the dispute with Nicaragua, which relates to the question of use of force and collective self-defence, is non-justiciable.

about this were settled to some extent in 2003, in the Case concerning Oil Platforms.

In the Case concerning Oil Platforms,<sup>58</sup> the ICJ was called upon to determine whether the United States had demonstrated that it was a victim of an attack of such a nature as to be qualified as an armed attack within the meaning of that expression in Article 51 of the UN Charter and as understood in the customary law on the use of force. The Court, in this case, emphasised that it is necessary to distinguish the most grave forms of use of force, qualifying as armed attacks, and other less grave forms, not qualifying as armed attacks, for purposes of Article 51.<sup>59</sup>

In an article subsequent to the ICJ judgment in this case, the then legal advisor of the United States State Department, William Taft,<sup>60</sup> expressed a US disagreement with the ICJ's treatment of the definition of armed attack and the issues relating to the gravity of attack and questions of proportionality engaged by the problem of an ongoing series of attacks.

### ***Legal Consequences of the Construction of a Wall in the occupied Palestinian Territory, Advisory Opinion***

The ICJ had the opportunity, albeit briefly, to examine the concept of the inherent right of a State to self-defence in the Wall Advisory Opinion case. In this case, Israel claimed a right to self-defence when it resorted to the construction of a wall along its border with Palestine. Israel argued in the UN General Assembly<sup>61</sup> that the [wall] is a measure wholly consistent with the right of States to self-defence enshrined in Article 51 of the UN Charter.

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<sup>58</sup> Case concerning Oil Platforms (Islamic Republic of Iran v United States of America), 2003 ICJ 161, page 189 para 57.

<sup>59</sup> Geoff Gordon: The Oil Platforms Opinion: An elephant in the eye of a needle, 2009 Amsterdam Law Forum, Vol 1, No. 2.

<sup>60</sup> William H. Taft IV: Self-defence and the Oil Platforms decision, 29 YALE J. INT'L L. 295 (2004), quoted by Danie Bethlehem, Principles of self-defence, a brief response, 2013 American Journal of International Law Vol 107, page 581.

<sup>61</sup> See ICJ Reports, 2004, page 194, para. 138.

The Court, however, re-iterated<sup>62</sup> that Article 51 of the UN Charter recognises the existence of an inherent right of self-defence in the case of an armed attack by one State against another State and that Israel did not in any way claim that the attacks against it were imputable to a foreign State. Instead, the threats, which Israel regards as justifying the construction of a wall as a measure of self-defence, originated from within and not outside its territory.

### **Conclusion**

It is clear from the above-named cases<sup>63</sup> that the jurisprudence set by the ICJ in relation to the use of force and the justification of self-defence is one that requires the presence of an armed attack.

Inasmuch as this aspect of the Court's jurisprudence could be argued to have entered through the back door (if we were to accept the argument by Judge Schwebel that the statement relating to this aspect in the Nicaragua case was *obiter* rather than *ratio decidendi*), it has been widely accepted that it subsequently became a permanent fixture of the Court's jurisprudence. Judge Higgins herself, in her separate opinion in the Wall Advisory Opinion case, acceded that this is to be regarded as a statement of the law as it now stands. Judge Higgins, however, still maintained her reservations on the issue.

Generally, the jurisprudence of the ICJ, in so far as it depends on the right of self-defence in the presence of an armed attack, does not enjoy much support, neither from international law scholars, nor from some of the judges of the Court itself. Judge Buergenthal also, in his dissenting opinion in the Wall Advisory Opinion case, came out strongly against the Court's analysis of the concept of

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<sup>62</sup> See ICJ Reports, 2004 page 194, para. 139.

<sup>63</sup> Reference here is made to the Nicaragua, the Oil Platforms, and the Wall Advisory Opinion cases. By quoting only these cases, I do not by any means imply that these are the only cases in which the ICJ has dealt with the concept of use of force and self-defence. These cases are, however, considered to be the most important in that regard.

self-defence. Judge Buergenthal emphasised his observation that the UN Charter, in affirming the inherent right to self-defence, did not make that exercise dependent upon an armed attack by another State.

In reading of the ICJ cases quoted above, one still have to come across a separate opinion of any one of the judges who specifically agrees with the Court's reasoning in this issue.

With the widely criticised view of the ICJ on the criteria for the exercise of the right to self-defence, the question of whether a seemingly innocent passage by a civilian aircraft could qualify as an armed attack in the manner envisaged by the Court, owing to its failure to comply with the request by the subjacent State to identify itself or to land at a designated airport, remains to be seen. This is one of the legal impediments relating to the application of the right of self-defence in the use of weapons against a civilian aircraft in flight.

One is inclined, however, to support the view that the unauthorised overflight of an aircraft does not fall within the ambit of an armed attack, whether grave or not, and, therefore, using the jurisprudence of the ICJ in isolation would mean that a State cannot succeed in its claim of self-defence following the shooting down of a civilian aircraft under any circumstances.

#### **4. ARTICLE 3bis OF THE CHICAGO CONVENTION: DOES IT OFFER ANY PROTECTION TO CIVILIAN AIRCRAFT AGAINST USE OF WEAPONS?**

##### **A. Introduction**

The portion of Article 3bis of the Chicago Convention relevant to this paper provides as follows:

*“(a) The contracting States recognise that every State must refrain from resorting to the use of weapons against civil aircraft in flight and that, in*

*case of interception, the lives of persons on board and the safety of aircraft must not be endangered. This provision shall not be interpreted as modifying in any way the rights and obligations of States set forth in the Charter of the United Nations.*

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

It is of interest to note that Article 3*bis* of the Chicago Convention places the obligation to refrain from resorting to the use of weapons against a civilian aircraft on every State<sup>64</sup> and not just contracting States to the Convention or only those who have ratified Article 3*bis* of the Chicago Convention. This is because the principle alluded in Article 3*bis* of the Chicago Convention is declaratory of existing international law which is binding on all States and not just States which are signatories to Article 3*bis* of the Chicago Convention.<sup>64</sup>

It can, however, be argued that the construction of Article 3*bis* of the Chicago Convention in a way that creates obligations for States that are not signatories thereto nor have ratified it is, or may be found to be, contrary to the provisions of Article 34 of the Vienna Convention on the Law of Treaties. Article 34 of the Vienna Convention provides that a treaty does not create either obligations or rights for a third State without its consent, which consent, according to Article 35, has to be in writing. Not all States that are contracting States to the Chicago

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<sup>64</sup> Gerald Fitzgerald, footnote 6, supra, page 305.

Convention have ratified Article 3*bis* thereof. Can it, therefore, be said that the obligations created in Article 3*bis* are not applicable to such States or can the argument that the Article is applicable, to some extent, equally to those States that have not ratified it as much as it does to those who have been defended or justified? Or do we merely abandon this argument and apply the customary rules of the use of force which would be equally applicable to all States anyway? I certainly think so.

**B. Does Article 3*bis* of the Chicago Convention formulate a rule of proportionality similar to the one formulated by Article 51 of the UN Charter?**

This paper has discussed in depth the basis for the principle of proportionality as encapsulated in the UN Charter as well as in customary international law.

Apart from the UN Charter, the other basis for the principle of proportionality is in international humanitarian law. In actual fact, it can arguably be concluded that this principle arose in this field of international law. This field of international law, however, falls outside the scope of this paper and will not be dealt with extensively. It suffices, however, to mention that the principle of proportionality under the humanitarian international law falls within the same parameters as in the other areas of international law, notably, the UN Charter.

This, however, leaves the question of whether Article 3*bis* of the Chicago Convention formulates a rule of proportionality similar to the one formulated by Article 51 of the UN Charter and customary international law. I will first examine the principle of proportionality formulated under the UN Charter and, thereafter, analyse the same principle under the Article 3*bis* of the Chicago Convention.

### ***The principle of proportionality formulated by Article 51 of the UN Charter***

The principle of proportionality is a fundamental component of the law on the use of force and self-defence. Without such measures or limitations, the objective of the UN Charter of ensuring international peace and security would be severely compromised. It is not plausible to expect States to refrain from the use of force even in circumstances which justify its use. In such case, customary international law and the UN Charter acknowledge the rights of State to use force under certain circumstances in order to defend themselves or their territorial integrity. As alluded to above, the right of use of force is incomplete without the incorporation of boundaries under which it can be exercised. One of those boundaries is the concept of proportionality.

Proportionality is a customary law requirement that provides that the right to the use of force should be proportionate to the unlawful aggression that gave rise to the right. Proportionality and self-defence are, thus, considered to be two sides of the same coin, as one cannot exist without the other.

The ICJ, in Nicaragua case,<sup>65</sup> confirmed that Article 51 of the UN Charter does not regulate all aspects of self-defence, e.g. proportionality and necessity, and that, therefore, resort in relation to these aspects must be had to customary international law.<sup>66</sup>

According to Judge Ago in his dissenting opinion in the Nicaragua case, the requirement of proportionality of the action taken in self-defence concerns the relationship between that action and its purpose, namely that of halting and repelling the attack. It would be mistaken, however, according to Judge Ago, to think that there must be precise proportionality between the conduct constituting the armed attack and the opposing conduct. According to him, the action needed

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<sup>65</sup> See page 94 and 103, paras 176 and 194.

<sup>66</sup> Judith Gail Gardam: Proportionality and force in international law, page 403.



to halt and repulse the attack may well have to assume dimensions that are disproportionate to those of the attack suffered.

Dapo Akande has summarised that the ICJ,<sup>67</sup> by majority decision, seems to suggest that the *jus ad bellum* proportionality calculation involves a comparison of the use of force in self-defence with the original attack. Some international law scholars have rejected this view and have asserted that proportionality simply requires that a State acting in self-defence must do no more harm than is necessarily reasonable under the circumstances. Dapo Akande has observed, however, that some of the *obiter dicta* of the ICJ suggest that the Court leaned in the direction of comparing the harm done and the objective pursued.

In conclusion, an analysis of the writings quoted above reflects that the principle of proportionality formulated by or under the UN Charter requires a State to calculate, with a certain degree of precision, the moves of the threat posed by another State in order to determine the level of force to be used to counter such an attack.

### ***The principle of proportionality formulated by Article 3bis of the Chicago Convention***

It is considered prudent to analyse the principle of proportionality formulated under Article 3bis of the Chicago Convention. At the outset, one may be inclined to assume that the rules or the limitations applicable to the principle of proportionality under Article 3bis of the Chicago Convention should be similar to the ones applicable under Article 51 of the UN Charter. This assumption can be made, in my view, when one considers, in isolation, the fact that both Article 3bis of the Chicago Convention and Article 51 of the UN Charter do not deal expressly with the principle of proportionality, and they have, therefore, left this issue to be considered in relation to customary international law. The conclusion referred to

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<sup>67</sup> See Nicaragua, footnote 7, supra, and Oil Platforms, footnote 57 supra, as quoted in Dapo Akande.

above can also be made when one considers that Article 3*bis* of the Chicago Convention expressly provides that the existing rules of international law apply to any use of weapons against civilian aircraft. Where else can one find these existing rules other than from customary international law and the UN Charter?

On the contrary, though, a close analysis of the principle of proportionality when applied in relation to a threat, whether perceived or imminent, by an aircraft in flight reflects that the assumption referred to above should not readily be made.

In the case of a perceived threat of armed attack by a civilian aircraft, if we were to use the first notion of proportionality as depicted in the preceding paragraphs, i.e. that the harm done should not be more than necessary, a defending State would be faced with a difficult task of assessing whether the same objective, i.e. intercepting the aircraft in flight or stopping it altogether, could not be achieved using a less severe form of force.<sup>68</sup> This is easier said than done in a situation where the defending State has very little time and information to make an assessment of the level of threat posed by the hovering civilian aircraft.

Similarly, if we were to adopt the second notion of proportionality, i.e. commensurability of harm in self-defence and of harm caused or threatened by the attack, this would pose a limitation for a defending State in that it would have to use the same quantity of force as the threat posed by the aircraft. This would equally be close to impossible to equate in relation to a perceived threat of attack by a civilian aircraft because the attack would not have commenced. It has to be borne in mind that the major, and more compelling, interest of the defending State in the circumstances of a threat by a civilian aircraft is to avert the attack in the first place, owing to the massive repercussions an attack of this nature can cause to a state and its citizens, if it were to be left to commence.

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<sup>68</sup> This assumes that a State would have exhausted all the other avenues of attempting to communicate with the intruding aircraft with a view to getting it to land.

One scholar<sup>69</sup> is of the view that the narrower the aim against which the use of force is measured, the more effective proportionality will be as a means of limiting casualties. This means that the aim should not be illegitimate or unjust in order for it not to lose its legitimacy as an action purporting to be self-defence. Applying this principle on the use of weapons against a civilian aircraft where the aim is not necessarily to cause casualties on the aircraft in question, but rather to protect a greater scale of casualties on the ground, it is difficult to fathom how a State can succeed with regard to the argument of proportionality. Can a State argue that it has narrowed the aim by sacrificing the 300 passengers in the aircraft in favour of 3000 persons and property on the ground?

It is arguable, furthermore, whether a State can ever succeed in justifying its actions under self-defence under Article 3*bis* of the Chicago Convention when the principle of proportionality formulated by Article 51 of the UN Charter is taken into consideration. Will it ever be possible for a State to assess proportionality at the time it is making a decision on the appropriate response to a perceived threat of armed attack? One's view is that, in most cases of armed attacks not involving an aerial intruder, it is very possible for a State to assess and apply the proportionality principle. When the perceived threat, however, emanates from an aircraft flying at an alarming speed, it is inconceivable for anyone to expect a State to watch by and wait for the threat to materialise when this could result in tremendous destruction of the State and extensive damage to its property. This, also, is exacerbated by the fact that any State is far more vulnerable from the air than it is from any other approach.

It should, therefore, in my view, be an acceptable conclusion that proportionality cannot, at least to any great extent, expect a state to perform the complex act of balancing the force used in self-defence and that used in the armed attack in a totally satisfactory way, at least not in relation to a threat posed by a civilian aircraft. In as much as Article 3*bis* of the Chicago Convention recognises that the

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<sup>69</sup> Michael Walzer, quote by Judith Gail Gardam, footnote 65, *supra*, page 405.

normal international law rules of self-defence apply, subject to the conditions of necessity and proportionality, it is understood that this naturally raises very difficult issues when applied to threats posed by an aerial intruder.

### **Conclusion**

Article 51 of the UN Charter and Article 3*bis* of the Chicago Convention have a common denominator insofar as they both allow the use of force under circumstances of self-defence. Neither of these Articles, however, regulate or deal with the aspect of self-defence in great length, but they have, instead, left this aspect to be determined under the already established principles of self-defence under customary international law.

As discussed above and on face value, therefore, one may be inclined to argue that neither of the Articles can be said to formulate different principles of proportionality when they both draw those proportionality principles from the same source of international law. As expounded in the preceding paragraphs, however, a close scrutiny of the dimensions involved in the use of force under Article 3*bis* of the Chicago Convention point to the distinction regarding the use of force under Article 51 of the UN Charter.

In conclusion, therefore, Article 3*bis* of the Chicago Convention cannot be construed as formulating the principle of proportionality in the same way as Article 51 of the UN Charter or international customary law, for that matter, do.

### **C. Does Article 3*bis* of the Chicago Convention offer any protection to civilian aircraft?**

A Korean Airliner was shot down over Russian airspace in 1983 which resulted in a fatality of 269 passengers and crew.<sup>70</sup> Following such a catastrophe, the Council

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<sup>70</sup> Although this was not the first incident of a shooting down of a civilian airliner by another State, it was, undoubtedly, the most famous, and certainly the one that resulted in a noticeable action by the ICAO and by the international community in general. The incidents of shooting down of a civilian airliner before the

of ICAO directed its Air Navigation Commission to review the existing international air law instruments urgently with a view to prevent the recurrence of such a tragic incident. The convening of the Air Navigation Commission resulted in the adoption, in 1984, of the amendment to the Chicago Convention, better known now as Article 3*bis* of the Chicago Convention. In a session convened in March 1999, ICAO further adopted a Declaration aimed at affirming the Member States' commitment to ensuring safe international civil aviation and the protection of civilian aircraft. In this session, ICAO urged States who had not done so to ratify the Protocol introducing Article 3*bis* of the Chicago Convention.

The adoption of Article 3*bis* of the Chicago Convention, however, did not prevent the shooting down of an Iranian Airliner five years later by an American warship in the Gulf of Persia with a loss of 290 lives. The United States of America is, interestingly, not a signatory to Article 3*bis* of the Chicago Convention. This raises the question of whether the United States can argue that the prohibition against use of weapons on civilian aircraft is not applicable to the United States, at least not from the point of view of Article 3*bis* of the Chicago Convention. A further question is whether the United States can invoke Article 34<sup>71</sup> of the Vienna Convention on the Law of Treaties in their argument on the non-applicability of Article 3*bis* of the Chicago Convention to the incident involving the Iranian Airliner? I have indicated elsewhere in this paper that the responsibility to refrain from use of weapons against civil aircraft as stipulated in Article 3*bis* of the Chicago Convention is imposed against every State and not only against contracting States to the Chicago Convention or States which had ratified Article 3*bis*. It remains to be seen, therefore, whether a State can succeed in an argument against the applicability of Article 3*bis* of the Chicago Convention to its

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downing of the Korean airliner included: the shooting of a French commercial airliner by the Soviet Union military in 1952; the shooting of a Cathay Pacific flight by China fighter aircraft in 1954; the shooting down of Israel airliner by Bulgarian jet fighters in 1955; the shooting down of a Libyan airliner by Israel fighter jets in 1973; the shooting down of another Korean airliner by Soviet Union military in 1978; and the shooting down of an Iranian airliner by the United States in 1988.

<sup>71</sup> Article 34 of the Vienna Convention on the Law of Treaties provides that a treaty does not create either obligations or rights for a third State without its consent, which consent, according to Article 35, must be in writing.

use of force against an aircraft in flight. In any event, even if we were to assume that the State could succeed in this line of argument, the customary rules of international law as well as the prohibition encapsulated in Article 2(4) of the UN Charter would come to the fore. A State, whether or not it is a signatory to Article 3*bis* of the Chicago Convention, would still have to demonstrate that the use of force could not have been averted under the specific circumstances. Furthermore, the prohibition of the use of force as set out in Article 2(4) of the UN Charter is viewed by a majority of scholars and the ICJ as having a peremptory character, and therefore, a *jus cogens* norm, since the use of force usually involves the systematic killing of human beings, often on a vast scale<sup>72</sup>.

We have seen the shooting down of a Malaysian Airliner Flight MH17 on the border of Russia and the Ukraine with the tragic loss of 298 lives. At the time of the drafting of this paper, none of the two States mentioned above (which have been having an ongoing dispute between them) claimed responsibility for the incident.

A possible argument that could be brought by the State whose missile actually shot down the Malaysian aircraft is that the State was defending itself against a possible threat, not necessarily by the State of Registry of the airline in question, but by the other State with which it is in conflict. With the advent of the use of civilian aircraft as missiles, this argument cannot be considered to be too far-fetched.

It is doubtful, though, whether either of the two States can claim to have been defending itself at the time of the shooting down of the aircraft. At least, the self-defence claim would not be invoked against Malaysia, as the latter is not reportedly involved in the ongoing dispute between Russia and Ukraine. In any event, Article 51 of the UN Charter requires a State which claims to have used

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<sup>72</sup> Dr James A. Green in a paper titled "Questioning the peremptory status of the prohibition of the use of force" published in the *European Journal of International Law*, published on March 17, 2011, questions whether the prohibition of the use of force has met the criteria of a *jus cogens* norm.

force in self-defence to notify the UN Security Council of the measures it took to defend itself. Despite the lapse of more than two months, there has been no report of any of the States approaching the UN Security Council to submit the required report. Instead, the two States have been embroiled in an argument of whose missiles shot down the aircraft. Any report to the Security Council, as stipulated in Article 51 of the UN Charter, has to start with an admission by the State concerned that it did use force before it can justify such use of force as being a measure of self-defence.

Assuming that the shooting State does rely on self-defence, a further question is whether that State would succeed in satisfying the requirements of necessity and, more especially, proportionality as alluded to elsewhere in this paper. The further question is whether the Malaysian aircraft was indeed an aerial intruder, i.e. did it not receive permission for the intended flight path over Russian/Ukrainian airspace? These are all factors to be taken into account in determining whether the Malaysian flight MH17 disaster was merely cross-fire which caught the aircraft concerned at the wrong place at the wrong time.

Considering the ongoing war between the two neighbouring States, Russia and Ukraine, furthermore, another argument that either of the two States can bring is the allegation that the civilian aircraft could have been used by forces of the opponent State in order to avert an attack against the other State. We have not heard from reports that either of the two States has made such a claim. This could lead to a conclusion that the use of force against the Malaysian Flight MH17 cannot be justified as being a measure taken in self-defence.

In any event, the question that has to be dealt with in this part of the paper is whether Article 3*bis* of the Chicago Convention does offer any protection for civilian airliners. Put differently, did Article 3*bis* of the Chicago Convention succeed in achieving the objective that it was intended for by ICAO, namely that of preventing the recurrence of a tragic incident similar to that of the shooting

down of the Korean Airliner in 1983? Even though it is acknowledged that we do not hear of incidents of the shooting down of a civilian airliner very often, there is no convincing argument or evidence that the scarcity of such incidents is as a result of the effectiveness of Article 3*bis* of the Chicago Convention in preventing such occurrences. States, generally, and arguable correctly so, would do almost anything to protect their sovereign rights, and this may, in certain circumstances, involve the use of a certain degree of force against civilian aircraft. As indicated elsewhere in this paper, neither international customary law, nor international conventional law, prohibit altogether, and without any conditions, the use of force against civilian aircraft. The question posed by Professor Lissitzyn<sup>73</sup> and quoted at the beginning of this paper, which relates to the extent to which a territorial sovereign can go in the protection of its sovereign right, therefore, remains largely unanswered in my view. There is, furthermore, a grey line between the lawful and the unlawful use of force by States, and the fact that international law has left it upon States to decide where to draw this line does not offer any assistance.

## 5. CONCLUSION

Unlike in the regime of territorial sea, the law of the air does not recognise a right of innocent passage for the aircraft of one State over the territory of another State. This is due to the fact that a State is considered to be at its most vulnerable from the air,<sup>74</sup> and, naturally, this is the area of which States would be most over-protective. The States, during the negotiations relating to the development of the Chicago Convention, declined to grant the right of passage in a multilateral arrangement, and they opted instead to leave it between States to negotiate and grant this right in bilateral air service agreements.

In the era leading to the development of Article 3*bis* of the Chicago Convention, the use by terrorists of a civilian aircraft to inflict extensive damage on their

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<sup>73</sup> Oliver Lissitzyn, footnote 19, *supra*.

<sup>74</sup> Gbenga Oduntan: *Sovereignty and jurisdiction in the Airspace and outer space: Legal criteria for spatial delimitation*, 2012, page 151. The events of the September 11, 2001 are a sufficient proof to this effect.



opponents was something that existed only in theory, until the September 11, 2001 events made this threat a reality. The advent of drones and unmanned flying vehicles in this era, furthermore, may continue to make the problem of aerial intrusion even more difficult for States to deal with. The development of technology, which can fall into, and be used by, the wrong hands creates a further hazard, which may cause States to feel more vulnerable, resulting in the shooting down of any aerial intruder.

Even with the shield that was meant to have been created by the UN Charter, Article *3bis* of the Chicago Convention, and the customary international law principles relating to use of force and self-defence, the unfortunate incidents of the shooting down of civilian aircraft will still be reported from time to time.

One of the pertinent questions posed in the beginning of this paper is whether the wrongfulness of a State's use of force against a civil aircraft can be justifiable on the basis of self-defence. Having analysed the principles of international law around this issue, one reaches a conclusion that a State can justify its use of force against a civil aircraft, but only if such use of force constitutes an anticipatory self-defence. A State is likely to face severe criticism on the use of force against a civil aircraft where such use of force constitutes a pre-emptive strike.

Another question posed was whether the UN Charter or customary law provisions dealing with the prohibition of the use of force can be considered to be sufficient to deal with the aerial shooting of civilian aircraft. The conclusion that can be reached is that these provisions did suffice in dealing with the use of force against a civilian aircraft in the same way as they did in relation to any other use of force. Therefore, Article *3bis* of the Chicago Convention served only as an emphasis of an already existing aspect of international law.

## 6. BIBLIOGRAPHY

**Akande, Dapo and Lieflander, Thomas:** %Clarifying necessity, imminence and proportionality in the law of self defence+, 2013 *American Journal of International Law*, Vol 107 page 563

**Ayoob, Mohammed:** The concept of humanitarian intervention and state sovereignty: *International Journal of Human Rights*, Volume 6, No. 1 (2002), page 81 - 102

**Brown, Rory Stephen:** %Shooting down civilian aircraft: Illegal, immoral and just plane stupid+, 2007 20.1 *Revue Québécoise de droit International*, page 57

**Bryde, Brun-Otto:** %Self-defence+, in Bernhardt (ed.) 1981 *Encyclopedia of Public International law* [Instalment 1]

**Case concerning military and paramilitary activities in and against Nicaragua** (Nicaragua v United States of America), 1986 ICJ Reports

**Case concerning Oil Platforms** (Islamic Republic of Iran v United States of America), 2003 ICJ Reports 161

**Charter of the United Nations, 1945**

**Convention on International Civil Aviation, 1944**

**Erotokritou, Chrystel:** %Sovereignty over airspace: International Law, current challenges, and future developments for global aviation+, 2012 *International Student Journal*, Vol 4 NO. 05

**Fitzgerald, Gerald:** %The use of force against civil aircraft: The aftermath of KAL Flight 007 incident+, 1984, 22 *Canadian Yearbook of International Law*, page 291

**Gardam, Judith Gail:** %Necessity, proportionality and use of force by States+, 2004 Cambridge University Press

**Gardam, Judith Gail:** %Proportionality and force in international law+, 1993, American Journal of International Law, Vol 87, page 391

**Gordon, Geoff:** %The Oil Platforms Opinion: An elephant in the eye of a needle+, 2009 Amsterdam Law Forum, Vol 1, No. 2

**Green, James A and Grimal, Francis:** %The threat of force as an action in self-defence under international law+, 2011 Vanderbilt Journal of Transnational Law, Volume 44, page 285

**Hargrove, John Lawrence:** %Nicaragua Judgement and the future of the law of force and self-defence: in Appraisals of the ICJ's decision: Nicaragua v United States (merits), 1987 American Journal of International Law, Vol 81

**Lissitzyn, Oliver:** %The treatment of aerial intruders in recent practice and international law+, 1953 American Journal of International Law, Vol 47, page 559

**Mrázek Josef:** %The right to use force in self-defence+, 2011 Canadian Yearbook of International Law 2, page 33

**Oduntan, Gbenga:** Sovereignty and jurisdiction in the Airspace and outer space: Legal criteria for spatial delimitation, 2012, London; New York: Routledge Publishers

**Paust, Jordan J:** %Relative Sovereignty and permissible use of armed force+, 2011 Michigan State International Law Review, Volume 20, page 1

**Shaw, Malcolm N:** International Law, 2008, 6<sup>th</sup> edition: Cambridge University Press

**Turner, Robert F:** %State sovereignty, International Law, and the use of force in Countering Low-Intensity Aggression in the Modern World+, International Law Studies . Volume 67

**Sucharitkul, Sompong:** %Procedure for the protection of civil aircraft in flight+, 1994, Loyola of Los Angeles International and Comparative Law Review, Volume 16, page 513

**Weiler, Joseph H. H:** %Korean Airlines incident+ 1983 in R. Bernhard (ed), Encyclopaedia of Public International Law, Volume III (1987)

**Weiner, Allen S.:** %The use of force and contemporary security threats: Old medicines for new ills?+, Stanford law review, Vol. 59 page 415