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THE RIGHTS AND OBLIGATIONS OF A STATE UNDER ARTICLE 3BIS OF THE CHICAGO CONVENTION PURUSANT TO AN INTRUSION OF ITS SOVEREIGN AIR SPACE BY CIVILIAN AIRCRAFT (DURING PEACE TIME)

by

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1. INTRODUCTION

1.1 Abstract

Article 2(1) of the UN Charter states that "the organisation is based on the principle of the sovereign equality of all its Members." It cannot be disputed that the international community as a whole supports the fact that a state's right to sovereignty is considered to be its most sacred international law right, which also includes sovereignty over its air space. Without this right, a state cannot exist and the United Nations cannot function.

The parameters are clear and entrenched in international law as to when and how a state may use force against intrusion by a foreign military aircraft of another state in order to protect its right to sovereignty over its air space. However, international uncertainty and much debate exist as to the nature of civilian aerial intrusions into the airspace of another state.

From an objective perspective, it appears that international law provides for a clear legal framework in that force may not be used against a civilian aircraft intruder unless it is facing an armed attack and acting in self-defence as defined in the Charter of the United Nations. This statement could not be further from the truth and it seems that even in our current modern, technologically advanced society we live in today where we can put a man on the moon and operate our household appliances from our phones, we cannot reach consensus as to what constitutes an armed attack by civilian aircraft or when and how a state may use force when a civilian intrusion of its airspace occurs. Consider the following scenario:

*A civilian aircraft of state A takes off on a route which requires it to cross the sovereign air space of state B. State B does allow for this type of crossing, provided that the civilian aircraft keeps to its designated route and does not enter any unrestricted areas of state B which requires pre-authorisation before entering. The civilian aircraft enters the airspace of state B, however, for no apparent reason, it deters from its designated route and heads towards a restricted area of state B. Air Traffic Control ("**ATC**") of state B calls upon the pilot to return to its designated route, however due to some form of malfunction error, no communication can be established or alternatively, communication is established, but the pilot confirms it is heading to state C and proceeds to travel on the unauthorised route. In*

*the absence of knowing the aircraft's intention and in fear for state B's national security, state B immediately sends an interceptor jet in an attempt to intercept the aircraft, but to no avail can either ATC or the interceptor jet manage to establish contact with the aircraft. As a last resort, the interceptor jet attempts to force the aircraft to land at the closest runway but the aircraft refuses/fails to take any recognisance of this attempt and proceeds on the unauthorised route (hereinafter referred to as "**the Scenario**").*

Even with the inception of Article 3bis (as further described in 2.3 below), which was adopted for this specific international issue, there are still a lack of agreement amongst the international community as to the parameters in which to operate when a state finds itself in a situation as set out in the Scenario. This issue forms the *crux* of this paper and the writer will attempt to, by applying various applicable international laws, including customary laws, establish a universal set of guidelines which states can apply when having to deal with situations similar to the Scenario.

1.2 Problem Statement

Although it had been stated that Article 3bis constitutes a step in the right direction with regards to the shoot down of civilian aircraft in flight during a time of peace, it has left open for debate a situation occurring as set out in the Scenario.

It is undisputed that to date, states have not yet established universal rules and parameters for the shooting down of a civilian aircraft entering foreign airspace without authorisation[1] (hereinafter referred to as "**the intruding civilian aircraft**") and any attempt that has been made so far by states to justify the use of force against an intruding aircraft, has fallen short of complying with the proportionality requirement of self-defence.

In creating the Scenario, the writer has attempted to mimic a universal "one size fits all" situation based on the historic incidents of civilian aircraft shoot-downs (as discussed in Part 4) which forms the subject matter of this paper and which the writer will assess when considering the provisions of Article 3bis in conjunction with other applicable international

[1] Or in situations where the foreign aircraft has authorisation but breaches the authorisation by going off course.

laws in order to establish what the rights and duties are of a state when faced with such an intrusion. The basic question which the writer will attempt to answer in this paper is: Can a state, faced with the Scenario and in defending its sovereignty, shoot down the intruding civilian aircraft without incurring international liability, and if so, what pre-emptive measures will the state first need to apply in order to trigger the right to self-defence as justification of the use of force.

The writer will show that since the 9/11 terrorist attack against the United States of America ("**USA**") there has been an international outcry for the rules relating to the Scenario to be brought in line with modern aerial threats states are faced with today. Technology is not stagnant and as such the law should adapt to whichever new means of threats states are faced with. This viewpoint finds particular application in an attempt to dismiss the restrictive interpretation of the inherent right to self-defence as contained in article 51 of the Charter of the United Nations of 1945 ("**Article 51 of the UN Charter**").

1.3 Research Aims

The aim of this research is to provide an academic underpinning to create legal clarity as to the parameters within Article 3bis and other applicable international laws in which a state may operate when faced with an unauthorised intrusion by civilian aircraft of its sovereign airspace through the process of critical legal analysis and interpretation.

The writer is of the opinion and will attempt to show that by achieving the above, a set of universal guidelines can be set through an analysis of existing and already established state practice and international laws in order to assist a state in determining how and when to use force when faced with a situation as set out in the Scenario in order to protect its right to sovereignty and to avoid infringing on international peace.

1.4 Delimitation of Study Area

This paper focuses only on the rights and duties of states during an intrusion of its sovereign airspace by civilian aircraft within the context of the international law sphere.

1.5 Delimitation

The writer will not discuss domestic law in this paper as the aim of this research is to establish universal guidelines which are applicable to all states, and as such the writer will only discuss scenarios where foreign civilian aircraft enters the airspace of a sovereign state and not its own. Military aircraft intrusions will also not be discussed in this paper.

Although it is evident that the human rights of passengers on board a civilian aircraft traveling into foreign airspace without authorisation will be breached when action is taken against such an aircraft, no further mention will be made in this regard.

The writer will not, when discussing historic incidents of shoot downs elaborate on compensation paid towards victims' families, as that will not promote the aim of this thesis.

1.6 Critical research questions

The critical research questions that will be addressed are:

- What role does the right to aerial sovereignty play in terms of the prohibition as contained in Article 3bis? Does this right permit the use of force?
- Is Article 3bis customary international law?
- What effect does the inherent right to self-defence in terms of Article 51 of the UN Charter have on the prohibition as enshrined in Article 3bis? Will the requirements of necessity and proportionality be able to be satisfied in the Scenario?
- By examining historic events relating to the use of force against civilian aircraft, what is the international state practice that can be drawn from it?
- By examining international law as well as state practice, can a standard set of guidelines be established to assist a state when faced with the Scenario in order not to trigger state responsibility?

1.7 Outline of this Paper

Part 2: History of Article 3bis

In keeping with the spirit of the great Maya Angelou's statement that "If you don't know where you've come from, you don't know where you're going," and before addressing the *crux* of the legal matter, the writer will firstly provide a brief chronological synopsis of the most relevant events which gave rise to the adoption of Article 3bis which started prior to the birth of commercial civilian air transport.

The writer will also touch on the subject as to the reasoning of states for not incorporating Article 3bis into the Chicago Convention as an annex, an area left open amongst most readings, but which the writer is of the opinion is important in order to fully grasp the *Magna Carta* of the prohibition against the use of force in a situation such as the Scenario.

Part 3: International norms, laws and custom applicable to use of force against civilian aircraft in flight

The writer will examine applicable international laws in order to, in conjunction with international state practice as established in Part 4, determine what the duties and rights are of states when conflicted with an intruding aircraft.

Principles of aerial sovereignty will be examined in order to determine whether the right to absolute sovereignty is sufficient to justify the use of force against an intruding aircraft.

Article 51 of the UN Charter will be examined in order to determine whether the restrictive interpretation thereof as confirmed in international jurisprudence is sufficient to address the Scenario or whether a wider interpretation is needed. The writer will examine the requirements that must be satisfied before Article 51 of the UN Charter may be triggered and whether it is at all a possibility within the scope of the Scenario to satisfy those requirements. In light hereof, the writer will also address the issue regarding the validation of pre-emptive self-defence as an existing and acceptable practice in the international community when dealing with a situation as set out in the Scenario.

Lastly, the writer will examine whether the reference made to the UN Convention in Article 3bis(a), is reference to Article 51 of the UN Charter and what the relationship between the two articles is.

Part 4: Historic incidents of the use of force against civilian aircraft in flight

The writer will examine whether the prohibition of use of force as curtailed in Article 3bis falls under customary international law and what the effect of the codification of the prohibition entails.

Similar historic events pursuant to the use of force against civilian aircraft in flight will be assessed in order to determine if common state practice can be established when using force against an intruder aircraft. A brief explanation of the facts will be given as well as the reasons for why each incident finds importance in this paper.

Part 5: Conclusion

The writer will provide a brief summary of the findings of this paper based on her subjective viewpoint. The writer will also, in combining applicable international laws as discussed in Part 3, common state practice as set out in Part 4, together with a critical analysis of Article 3bis, establish a standard set of criteria of which a state must satisfy before firing upon an intruder aircraft. In other words, these criteria will need to be satisfied before the right to self-defence in terms of Article 51 of the UN Charter will be triggered.

2. HISTORY OF ARTICLE 3BIS

In order to fully understand the right to use force against an intruding civilian aircraft, it will be beneficial to briefly examine the historic events that lead up to and paved the way for the adoption of Article 3bis.

2.1 World War I and the establishment of the Paris Convention

During World War I, aircrafts were mainly used for military purposes and there was no codified standard as to how to deal with an intruding aircraft. Each country determined how to regulate aircraft traveling within its own airspace, with some states deciding to close its airspace to states participating in the hostilities. The majority of the states decided that, when dealing with an intruding aircraft, warning should first be given before firing, some states decided that firing on a military aircraft without warning would be allowed.[2]

The 1919 Paris Convention[3] was the first attempt by the international community to establish a regulatory mechanism to control the international aviation industry. However, the rules regarding the firing at a civilian aircraft when entering a sovereign's air space were omitted, the boundaries of which each state could dictate on its own terms. There existed only one provision requiring a pilot to give a distress signal upon becoming aware that he was flying over a prohibited area.[4] Article 1 of the Paris Convention acknowledged the inherent right to aerial sovereignty and held that: "The High Contracting Parties recognise that every Power has complete and exclusive sovereignty over the air space above its territory."

2.2 World War II and the establishment of the Chicago Convention and ICAO

It was not until World War II that commercial air travel started to flourish which led to an international conference on the regulation of aviation, held in 1944 in Chicago which

[2] Foont, B. (2007). Shooting down civilian aircraft: Is there an International Law? Journal of Air Law and Commerce, 72(4), p.698.
[3] Paris Convention for the Regulation of Air Navigation (1919), 11 L.N.T.S. 173 (hereinafter cited as "the Paris Convention"). Signed on 13 October 1919 whereby twenty six countries participated in the convention. The convention dealt with all technical, operational and organizational aspects of civil aviation. http://library.arcticportal.org/1580/ (accessed 14 October 2017).
[4] Foont, B. (2007), supra n 2, at pp.698-700.

resulted in the Convention on International Civil Aviation, known as the Chicago Convention, the core document regulating international civil aviation.[5] Part II of the Chicago Convention, established the International Civil Aviation Organisation ("**ICAO**"), with its main purpose being to facilitate discussions and negotiations involving legal and technical issues of international aviation as entrenched in article 44 of the Chicago Convention.[6]

As with the Paris Convention, the Chicago Convention also accepted the inherent right to aerial sovereignty and provided that every state (not only member states) has complete and exclusive sovereignty over the airspace above its territory,[7] however the Chicago Convention also refrained from explicitly addressing the issue as to when a country may fire on an intruding civilian aircraft, nor did it prohibit a state from doing so.

2.3 Events after the downing of KAL 007 – Article 3bis

"*On 1 September 1983, Korean Air Lines Flight 007 was a civilian aircraft that was shot down by the Soviet Union when it intruded the Soviet airspace. When the aircraft started deviating from its intended path, Soviet military jets were sent to intercept the Boeing 747. The Soviet authorities may have feared that the civilian aircraft was an American intelligence aircraft that was overflying the peninsula of Kamchatka at the same time on a reconnaissance mission. The fights jets launched two air to air missiles that completely destroyed their target. All 269 passengers and crew on board were killed. This shot down provoked waves of indignation in the international community and led to the adoption of article 3bis of the Chicago Convention[8] that prevents States from using force against civilian aircrafts."*[9]

Due to the downing of KAL 007 by the Soviet Union ("**SU**"), and its denial of its liabilities toward the victims' families, the members of ICAO on 17 September 1983 adopted a resolution whereby it, *inter alia*:

[5] Brown, R. (2007). Shooting down Civilian Aircraft: Illegal, immoral and just plain stupid. Quebec Review of International Law, (20.1). p.61.
[6] Foont, B. (2007), supra n2, at pp.698-700.
[7] Article 1.
[8] Chicago Convention on International Civil Aviation, 7 December 1944 (hereinafter referred to as "the Chicago Convention").
[9] Erotokritou, C. (2012). Sovereignty Over Airspace: International Law, Current Challenges, and Future Developments for Global. Inquiries, [online] 4(5). Available at: http://www.inquiriesjournal.com/a?id=645 [Accessed 20 May 2015].

"*recognised that such a use of force against international civil aviation is incompatible with the norms governing international behaviour and elementary considerations of humanity and with the rules, Standards and Recommended Practices enshrined in the Chicago Convention and its Annexes and evokes generally recognised legal consequences, reaffirming the principle that States, when intercepting civil aircraft, should not use weapons against them*."[10]

On 10 May 1984, the members of the ICAO Assembly, still in reaction to the downing of KAL 007, amended the Chicago Convention by introducing and unanimously adopting Article 3bis[11] to the Chicago Convention, thereby codifying the already inherent international customary prohibition on the use of force against civilian aircraft in flight. This came as a result of the realisation that, *inter alia*, the claim to an absolute right to sovereignty[12] by states of their airspace as justification to shoot down civilian aircraft, could pose a great threat to the international community. Article 3bis only came into effect in 1998 when Guinea and Cuba ratified the protocol.[13] Article 3bis states that:

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

*(b) The contracting States recognize 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. Each contracting State agrees to publish its regulations in force regarding the interception of civil aircraft.*

[10] International Civil Aviation Organization ("ICAO") Consideration, 22 I.L.M. 1149, 1150 (1983); ICAO BULL., Nov. 1983, at 10.
[11] the USA did not ratify the Protocol introducing the new Article 3bis; while the USA never explicitly explained its hesitations on Article 3bis and its rejection of amendment 27 to Annex 2, it is apparent that the real cause is the fact that the interpretation of the Chicago Convention and of the Annexes may, on appeal from the ICAO Council decision under Article 84 of the Convention, become the subject of compulsory jurisdiction of the ICJ – a serious policy matter for the US government. See Milde, M. (2008). Essential Air and Space Law. The Netherlands: Eleven International publishing, p.53.
[12] Article 1 of the Chicago Convention recognises that each state has complete and exclusive sovereignty over its airspace. This right applies to all states and not just to parties to the Chicago Convention.
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(c) *Every civil aircraft shall comply with an order given in conformity with paragraph (b) of this Article. To this end each contracting State shall establish all necessary provisions in its national laws or regulations to make such compliance mandatory for any civil aircraft registered in that State or operated by an operator who has his principal place of business or permanent residence in that State. Each contracting State shall make any violation of such applicable laws or regulations punishable by severe penalties and shall submit the case to its competent authorities in accordance with its laws or regulations.*

(d) *Each contracting State shall take appropriate measures to prohibit the deliberate use of any civil aircraft registered in that State or operated by an operator who has his principal place of business or permanent residence in that State for any purpose inconsistent with the aims of this Convention. This provision shall not affect paragraph (a) or derogate from paragraphs (b) and (c) of this Article.*"[14]

The amendment only came into effect on 1 October 1998 when 102 ratifications had been reached, a mere 14 years later[15], with two subsequent regulations being adopted to urge member countries to ratify the amendment.[16]

2.4 Why was the prohibition against the use weapons not incorporated into the Chicago Convention as an annex?

ICAO serves a *quasi*-legislative function as it has the authority to adopt and amend[17] Standards and Recommended Practices ("**SARP's**") under Articles 37 and 38 of the Chicago Convention on numerous matters relating to civil aviation. These SARP's are contained in 19 annexes to the Chicago Convention which may be amended by the ICAO Council with two thirds vote. [18] The recommended practices are not binding, however the standards are binding on all states, unless a difference is filed with ICAO.[19]

Annex 2 which deals with the manner in which interceptors must operate, originally contained a provision prohibiting the use of weapons, however this provision was removed

[14] Protocol relating to an amendment to the Convention on International Civil Aviation, signed at Montreal on 10 May 1984.
[15] Currently, 155 member states had ratified the Protocol, excluding the USA. A list of state parties to who ratified Article 3bis can be found at https://www.icao.int/secretariat/legal/List%20of%20Parties/3bis_EN.pdf (last visited 13 October 2018)
[16] Foont, B. (2007), supra n2, at p.710.
[17] In terms of articles 54 and 90 of the Chicago Convention.
[18] Opolot, A. (2017). The work of ICAO in the legal field. (seminar held at Nairobe, Kenya).
[19] Ibid at Article 38.

in 1984. It was believed that since this prohibition already formed part of the international customary law, it would be a dangerous act to include it in an annexure as a state can escape that obligation in terms of article 38 by merely filing a difference with ICAO.[20]

2.5 Conclusion

The fact that Article 3bis only came into effect in 1998, half a decade after the downing of KAL 007, shows the international communities' strong support for the fact that state sovereignty should reign supreme. However, this deeply entrenched believe was soon diluted when public outcry demanded a shift in paradigm with a strong support for basic human rights of those on board the intruding civilian aircraft which needed to be considered when faced with the Scenario and not just the right to sovereignty. This shift proofed that sovereignty (territorial integrity or political independence) was not an absolute right, and that it is subject to limitations as set out by international law, such as Article 3bis and Article 51 of the UN Charter (as further discussed below).

[20] Huskisson, D. (2004). The Air Bridge Denial Program and the shootdown of civil aircraft under international law. LLM. McGill University. p28.

3. INTERNATIONAL NORMS, LAWS AND CUSTOM APPLICABLE TO THE USE OF FORCE AGAINST CIVILIAN AIRCRAFT IN FLIGHT

3.1 Introduction

International law governs relations between states and is either based on international conventions to which states consent or customary international law which develops by way of conduct of the states. In terms of article 38(1) of the Statute for the International Court of Justice ("**ICJ**") the primary sources of international law are international conventions, international custom and general principles of law recognised by civilised states. Subsidiary sources for the determination of rules of law are judicial decisions and teachings of the world's most highly qualified publicists.[21]

Since the inception of commercial aircraft usage, a great deal of international laws have developed (based on already established international customary law principles) relating to the use of weapons against civilian aircraft in flight.[22] The majority of international law in this area is either part of customary international law or is codified in international conventions.[23]

In this Part, the writer will investigate different sources of applicable international law and jurisprudence which will be applied in conjunction with state practice as set out in the next Part in order to determine in Part 5, whether use of force against civilian aircraft is justifiable and what the parameters should be when faced with the Scenario.

3.2 Sovereignty over territorial air space

Article 2(1) of the UN Charter states that "the organisation is based on the principle of the sovereign equality of all its Members." The principle that every state has exclusive and

[21] Statute of the International Court of Justice, June 26 1945.
[22] See Part 2.
[23] Huskisson, D. (2004), supra n20, at p.20.

complete sovereignty over the airspace[24] above its territory[25] is according to Hughes, "one of the most rapidly accepted customary rules of the twentieth century".[26] This principle was accepted in public national law and in international treaties to be part of international customary law since World War 1 and as such, articles 1 of the Paris Convention and the Chicago Convention[27] do not create new law, but merely serves a declaratory function of already established international customary law.[28]

It is unequivocal that sovereignty (territorial integrity or political independence) is not an absolute right,[29] and that it is subject to limitations as set out by international law, such as Article 3bis and Article 51 of the UN Charter. However, as will be shown in Part 4, many states have attempted to exploit the right to absolute sovereignty, in an attempt to justify the illegal use of force against intruding aircrafts. Such states have claimed that they have the arbitrary right to control all flight in their airspace, which is subject to no qualifications apart from what they voluntarily agree.

It is accepted that the unauthorised intrusion of a state's airspace, is in fact an infringement on its's right to sovereignty,[30] however the manner in which a state may react to such intrusion, has been the subject of much debate.

International law has placed certain limitations on the right to sovereignty. In this paper, the limitations that finds applicability are Article 3bis as well as the right to self-defence as contained in Article 51 of the UN Charter which set certain parameters in which a state may protect its sovereignty.[31] Furthermore, as discussed in Part 4, state practice has shown that

[24] It is accepted that a state's airspace extends horizontally and vertically. Horizontally refers to the state's sovereign borders and includes its territorial waters. The vertical border (wherein aircrafts operate) is traditionally set at 80 to 120km above ground surface. It also includes the airspace above a state's territorial waters. See Elmar Giemulla, L. and Weber, L. (2011). International and EU Aviation Law. Selected Issues. Norwell: Wolters Kluwer Law & Business, p.49.
[25] Territory is defined in article 2 of the Chicago Convention which shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzeranity, protection or mandate of such state.
[26] Hughes, W. (1980). Aerial Intrusions by Civil Airliners and the Use of Force. Journal of Air Law & Commerce, 45(3), p.595.
[27] See par. 1.2. and 1.2.2 in Part 1.
[28] Engvers, A. (2001). The Principle of Sovereignty in the Air: To what extent can it be upheld against aerial intruders? LLM. University of Lund, p.16.
[29] Paust, J. (2011). Relative Sovereignty and Permissible Use of Armed Force. Michigan State International Law Review, 20(1), p.2.
[30] Case Concerning Military and Paramilitary Activities in and Against Nicaragua, (Nicaragua v. United States of America), 1986 ICJ Reports.
[31] Another example, is the duty on states to assist a civilian aircraft which is in distress as contained in article 25 of the Chicago Convention, however such situation will not be discussed in this paper.

the right to air sovereignty should not be absolute as this right is restricted by customary human values which later became entrenched and codified in Article 3bis.

The *crux* of the matter, as will be discussed below is that a state's sovereignty may only be protected by the use of force against civilian aircraft intrusion if the force is proven to be necessary and proportionate to the potential threat that is inflicted (or to be inflicted).

3.3 Use of force against civilian aircraft

Phelps is of the view that the only situation where force could be used against an aerial intruder in order to protect one's sovereignty would be in circumstances involving self-defence as defined by Article 51 of the UN Charter.[32] Huskisson goes further, and states that there are situations beyond the scope of "an armed attack" and Article 51 of the UN Charter where the international community would accept the shoot down of a civilian aircraft as being justified, such as to preserve human life and to protect the essential interests of the state. An example of such a situation is where a private aircraft malfunctions and it is evident that the aircraft is headed towards a populated area where it will crash.

The use of force against civilian aircraft in flight is prohibited by Article 3bis(a) and article 2(4) of the Charter of the United Nations.[33] Impinging these articles would result in an international act of wrongfulness. However, in terms article 21 of the Draft Articles on the International Responsibility of States for Internationally Wrongful Acts, such use of force may be excused if it is conducted in conformity with Article 51 of the UN Charter whereby it is held that:

"*Nothing in the present Charter shall impair the inherent right of individual or collective* ***self-defence*** *if an* ***armed attack*** *occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under*

[32] Phelps, J. (1985). Aerial Intrusions by Civil and Military Aircraft in Time of Peace. Military Law Review, 107, p.301.

[33] "all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

The inherent right to self-defence is also part of international customary law which is invoked by an "armed attack," the definition of which was deliberately omitted from the Charter of the United Nations.[34] Herein lies the most debatable questions in terms of the right to self-defence, namely what constitutes an armed attack in order to trigger the right to self-defence?; and must Article 51 of the UN Charter be interpreted in such a way as only to be triggered upon the occurrence of an armed attack or does it provide for a wider interpretation to also include, *inter alia*, a pre-emptive threat?

3.3.1 What constitutes an armed attack under Article 51 of the UN Charter?

Some scholars apply the restrictive interpretation[35] of Article 51 of the UN Charter in reliance on outdated jurisprudence by insisting that Article 51 of the UN Charter only applies to an "armed attack" in the strictest sense of the term which armed attack must have already been inflicted by state actors. In the *Nicaragua case* it was said that "States do not have a right of armed response to acts which do not constitute an 'armed attack."[36] The ICJ had also indicated that an attack must be "most grave" in order to trigger the right of self-defence and that other less grave forms shall not qualify as an armed attack.[37]

It is the view of the writer that the jurisprudence relied upon in order to come to such a strict interpretation of Article 51 of the UN Charter is senseless as it is outdated and not in keeping with modern state practice and to follow it would lead to ludacris absurdity. It is evident that there exists a dire need for the law to be brought in tune with the modern threats inflicted on by states today.

The writer supports the wider interpretation of Article 51 of the UN Charter which is more in line with modern state practice, namely:

[34] Nicaragua case, supra n 30.
[35] As in the Nicaragua case and the case concerning Oil Platforms (Islamic Republic of Iran v United States of America), 2003 ICJ Reports 161.
[36] Nicaragua case, supra n 30.
[37] Ibid.

a) The right to the use of force in self-defence is not limited to an "armed attack" and can be triggered in the lack thereof;[38]

b) a single attack by a non-state actor can constitute an armed attack; and

c) a state can respond to a perceived imminent threat, before it actually occurs.

Irrespective of which viewpoint is accepted, it is undisputable that the bar for what constitutes an "armed attack" in order to trigger the inherent right to self-defence in terms of Article 51 of the UN Charter has been set exceptionally high with the emerging view that it should be set even higher when it is in response to an attack by non-state actors.

It is generally accepted practice that an armed attack may be inflicted by non-state actors and that a single attack may reach the threshold of what constitutes an "armed attack".[39]

3.3.2 Does a pre-emptive right to self-defence exist?

In terms of customary international law as well as Article 51 of the UN Charter, two requirements need be fulfilled prior to triggering the right to self-defence, , namely the self-defence must be necessary and proportionate to the armed attack.[40] Article 51 of the UN Charter recognizes the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. The test as decided in the *Caroline case*[41] and set out below, applies in cases where Article 51 of the UN Charter in its strictest sense cannot be applied as a pre-emptive or defensive action was taken in self-defence before an armed attack occurred.

[38] President Bush's Graduation Speech delivered at West Point, New York. 1 June 2002: "'America will act against such emerging threats before they are fully formed. We cannot defend America and our friends by hoping for the best. So, we must be prepared to defeat our enemies' plans, using the best intelligence and proceeding with deliberation."
[39] Dictum in the Oil Platforms case, supra n 35.
[40] Legality of the Threat or Use of Nuclear Weapons Case, Advisory Opinion, [1996] I.C.J. Rep. 226 at par. 41.
[41] Caroline Incident, 29 B.F.S.P. 1137 – 1138. The requirement of necessity and proportionality was further confirmed in the Oil Platforms case, supra n 35.

3.3.2.1 Necessity

The requirement of necessity entails that the defensive action must be necessary to protect the threatened interest adequately.

The ICJ held in the *Caroline case* that pre-emptive self-defence would be justifiable by necessity, provided that the necessity is "instant, overwhelming, leaving no choice of means, and no moment of deliberation."[42]

Based on the requirements set out in the *Caroline case*, it is clear that the following requirements need to be met in order for the defensive action to be justified as necessary:

a) the threat must be instant, in other words, there must not be time for deliberation (if the state does not act immediately, the threat will materialise);

b) there must be no alternative less intrusive measures that could be applied instead of the use of force to eliminate the threat;

c) all other available means have been utilised and there is no alternative but to use force.

The writer supports the opinion by Duffy and many other scholars that the Caroline test is part of customary international law.[43] It is because of this reason that the writer is of the view that the principles as set out in the Caroline case, although having occurred prior to the invention of civilian aircraft, can be transferrable to situations when determining whether the right to the pre-emptive use force in self-defence as set out in the Scenario is justifiable. However, there seems to be numerous issues that may materialise, especially when one takes into account that what is considered imminent now may have evolved from what was considered to be imminent when the Caroline-case was decided, which the writer sets out below.

[43] Duffy, H. (2005) "Peaceful resolution of disputes and use of force," in The 'War on Terror' and the Framework of International Law. Cambridge: Cambridge University Press, pp. 144–214.

3.3.2.2 Issues regarding the pre-emptive right to self-defence

The *Caroline case* confirms the existence of a pre-emptive right to self-defence. It is the international view that a state does not need to wait for an actual attack to occur in order for it to trigger the right to self-defence. Self-defence in international law requires an attack to have occurred or, at the very least, to be imminent.[44]

It is interesting to note that in the *Oil Platform and Nicaragua cases* the ICJ did not address the issue regarding the pre-emptive right to self-defence[45] and it the view of the writer that it was purposefully omitted, as the Court feared that a judgment refuting such right, could create unspeakable international atrocities.

The difficulty lies in establishing universal limits for such pre-emptive rights to self-defence as free reign in this regard will surely open the door to abuse by states in becoming "trigger happy" and too hasty. There is also the possibility that the imminent threat may become neutralised right before incurring, thereby causing the state to retaliate to a potential threat that would never have materialised. This can also open the door for state abuse masking an act of aggression as pre-emptive self-defence.

In order to avoid states abusing this pre-emptive right to self-defence, it is said that some realisation of hostility, leading to the reasonable conclusion that an attack is imminent, must be present.[46]

3.3.3 Proportionality

In order for the proportionality requirement to be satisfied it is said that no more force than what is reasonably necessary to overcome the threat[47] may be applied in order to prevent the attack from taking place.[48] There must also be no less intrusive alternative available.

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[44] Brown, R. (2007), supra n 5, at p. 68.
[45] Ochoa-Ruiz, N. and Salamanca-Aguado, E. (2005). Exploring the Limits of International Law relating to the Use of Force in Self-defence. European Journal of International Law, 16(3), p.522.
[46] Brown, R. (2007), supra n 5, at p. 69.
[47] "Threat" does not only pertain to state security, but can be stop the initial attack from incurring.
[48] The aim of the self-defence is not necessarily to protect the integrity of the victim State. See

The *Oil Platforms case* set the requirement to be as follows: "there must be proportionality between the conduct constituting the armed attack and the response in self-defence,"[49] which followed the approach set out in the *Nicaragua case* namely "when it asserted that self-defence only warrants 'measures which are proportional to the armed attack and necessary to respond to it."[50]

The action taken against the intruder must be proportionate to the expected harmfulness of the violation. This means that a warning to land or change course should be given before the aircraft is attacked and the attack should not be carried out unless there is reason to believe that the intruder poses a real threat to the security of the sovereign state.

The issue with regards to civil aircraft, is that it is exceptionally difficult to determine how a purely pre-emptive action against a civilian aircraft could be proportionate. Once an aircraft has manifested hostility, by deviating from a flight path, entry into a no-fly zone, erratic flying, or by threatening radio messages, the nature of the problem changes.

3.4 Relationship between Article 3bis and Article 51 of the UN Charter

Huskisson is of the opinion that Article 3bis was drafted at a time when the international community was of the believe that states would utilise aircraft to inflict damage onto other states, hence the included "safety net" which is Article 51 of the UN Charter. In other words, Article 51 of the UN Charter can be utilised as a means of justification for infringing on the international law prohibition of use of weapons against civilian aircraft in flight.

Article 3bis(a) provides that every state must refrain from using force against civilian aircraft in flight, however this duty not to use force is subject to an all-encompassing exception as the last sentence of Article 3bis(a) provides that: "This provision hold not be interpreted as modifying in any way the rights and obligations of states set forth in the Charter of the United Nations".

[49] Oil Platforms case, supra n 35.
[50] Nicaragua case, supra n 30.

Upon examination of the Charter of the United Nations, it is evident that the intention was to refer to the right of self-defence stated in Article 51 of the UN Charter.[51]

3.5 Conclusion

The right to sovereignty awarded to each state is not an absolute right as it can by restricted by the provisions of Article 3bis and Article 51 of the UN Charter. Hence, the right to absolute sovereignty will not suffice as justification for the use of force against civilian aircraft in flight without satisfying the requirements as contained in the *Caroline case*.[52] It has been said that "the right to self-defence is not a static concept but rather one that must be reasonable and appropriate to the threats and circumstances of the day,"[53] thus evidencing that the issue at stake is not the scale of the attack, but it is rather a question of necessity and the proportion with which to retaliate.

The pre-emptive right to self-defence is accepted by the post-9/11 international community as a highly regarded right to protect a state's sovereignty as without it, states may find themselves with their hands tied behind their backs waiting for an imminent threat to first transpire into a full-scale armed attack before being able to defend themselves.

Although the leading caselaw on this subject matter is the *Nicaragua and Oil Platforms cases* which applies the more restrictive view of what actions trigger the inherent right to self-defence the writer agrees with Zemanek in that:

"*One must, however, take into account that both judgments in the Nicaragua Case (1984 and 1986) declared the law as the Court found it at the time of the judgments. That law may not be the same today. The cardinal point in the Court's reasoning was the emphasis on the customary nature of the applicable international law, and custom is a dynamic body subject to modification by a change of opinio iuris confirmed by corresponding State practice. To determine the law as it now stands therefore requires a review of its application during the last decades and its possible development in that process.*"[54]

[51] Foont, B. (2007). Shooting down civilian aircraft: Is there an International Law?. Journal of Air Law and Commerce, 72(4), p 711.
[52] Caroline incident, supra n 41.
[53] Bethlehem (2012) 106 Am. J. Int'l L 770 at 776.
[54] Zemanek, K. (2013). Armed Attack. In: Max Planck Encyclopaedia of Public International Law. Oxford Public International Law.

By applying the rules relating to sovereignty and self-defence as discussed above, it is clear that the use of force against a civilian aircraft, clearly identifiable as such, cannot be justified even if that aircraft enters the airspace above a state without authorisation.[55] It has also been confirmed that, the striking down of an aircraft for deterring from its designated route (KAL 007) or an aircraft flying over a sensitive military base and perhaps spying without manifesting any intent to conduct an armed attack (the 1973 case of Libyan Airlines Passenger jet being shot down by Israel because it was over a military base) would not be permissible reasons to shoot down a plane under a self-defence claim under Article 51 of the UN Charter.[56] This leads the writer to the conclusion that even when applying the wider interpretation to the right to self-defence, the threshold that need to be met to trigger such right remains exceptionally high.

Although this approach is a step in the right direction and most definitely a better approach than the narrow interpretation based on outdated jurisprudence, it is not without its own issues.

By applying the *Caroline case* requirements to the Scenario, the following issues are present:

a) It will seldom be possible to establish whether it will be necessary to shoot down a civilian aircraft used as a suicide missile. A situation in flight can change in mere seconds (the bomb can be disabled, the suicide victim can change his mind, the air Marshall can detain the wrongdoer) or it may just be a hoax communicated to ATC;

b) To require some form of hostility may be redundant as "threat" situations on board a civilian aircraft does not portray hostility until it is too late;

c) Aircraft identification mechanisms are not an exact science and there is high probability for error, especially when decisions need to be made in haste (USS Vincennes incident);

[55] Hughes, W. (1980), supra n 26, at p.606.
[56] Beckman, J. (2015). Nation-State Culpability and Liability for Catastrophic Air Disasters: Reforming Public International Law to Allow for Liability of Nation-States and the Application of Punitive Damages. FIU Law Review, [online] 10(2), p.615. Available at: https://ecollections.law.fiu.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1262&context=lawreview [Accessed 20 Oct. 2017].

d) The requirement that there must not be any alternative less intrusive means available to counter-act the threat, raises issues. In most situations, ATC will have only minutes, if not seconds and very little information available to make a determination and may act differently than when he had longer time to consider the situation as a whole.

In some instances, it could be insinuated as an "act of playing God" in some sense as ATC will most likely have to weigh the lives onboard the aircraft against the lives of those on the ground. This will entail a purely subjective analysis which can lead to errors of judgment. When acting on an imminent attack it will also involve a "what if" thought process which can result in unrealistic matters which may not even have transpired.

This approach will clearly be the object of international criticism should the wrong decisions have been made during that split second. It is easier to judge a situation when it already transpired and when not faced with a split-second life or death moment.

What it comes down to is that each situation will have to be assessed based on its facts and there is not a "one size fits all" approach. Victim states having to enforce the right of self-defence have to determine themselves whether an armed attack has occurred, at least until the Security Council steps in to reinstate the peace[57]

What is clear is that by attempting to apply the ICJ matters above whereby the strict sense of self-defence is followed would lead us further down the rabbit hole with no means to an end.

[57] Zemanek, K. (2013), supra n 54.

4. HISTORIC INCIDENTS OF USE OF FORCE AGAINST CIVILIAN AIRCRAFT IN FLIGHT

4.1 Introduction

The aim of Part 4 of this paper, in conjunction with Part 3, is to establish what the rights and duties are of a state when faced with an unauthorised civilian aircraft intrusion of its sovereign airspace as set out in the Scenario. Applicable international laws and customs have already been examined in Part 3.

In this Part, in order to establish state practice, the writer shall investigate past incidents whereby states have resorted to the use of force in retaliation of an (alleged) intrusion by civilian aircraft. The writer has distinguished between those incidents that occurred prior to the adoption of Article 3bis and those that occurred post its adoption. The reason for this distinction is to analyse whether there was a shift in state practice due to the adoption of Article 3bis so as to further strengthen the statement that the prohibition as curtailed in Article 3bis constitutes international customary law.

The writer will begin by first addressing the issue of whether Article 3bis is considered customary international law based on general international principles.

4.2 Is Article 3bis international customary law?

"States are not only bound by international agreements that they sign and ratify, but also by norms that are developed through state practice."[58] International custom is "evidence of a general practice accepted by law"[59] and that practice may be supported by "general principles of law recognised by civilised nations."[60] The ICJ may also rely on international custom, as evidence of a general practice accepted as law when adjudicating on disputes before it.[61]

[58] Huskisson, D. (2004), supra n20, at p.35.
[59] Article 38b of the Statute of the International Court of Justice.
[60] Article 38c of the Statute of the International Court of Justice.
[61] Article 38(1)(b) of the Statute of the International Court of Justice.

To be considered customary law, a law must satisfy two criteria: Firstly, it must be in accordance with general international practice; and secondly, the international community must accept it as law.[62] The writer will show that by way of historic examples, that it has been the view of the international community prior to the adoption of Article 3bis that the obligation not to use force against civilian aircraft in flight has always been general practice and principle as accepted by civilised states.

During the time of the adoption of Article 3bis, it was the view of ICAO and the international community that existing international law already prohibited the use of weapons against civilian aircraft in flight, however there was a need present to codify this principle in international law.[63]

Brown is of the opinion that Article 3bis is a reaffirmation of already established customary international law for two reasons: Firstly, paragraph (a) of Article 3bis seems indicative of already established international customary law preceding the Chicago Convention and secondly, during the discussions of this rule at the ICAO Assembly in 1984, no state challenged the statement that the prohibition on the use of force against civilian aircraft has been part of the general international law.[64]

Paragraphs (b), (c) and (d) of Article 3bis were inserted at the insistence mainly of the USSR and their allies to appear as partly mitigating the strength of paragraph (a) by confirming the right of states to require landing of an aircraft if there are reasonable grounds to believe that the aircraft is being used for purposes inconsistent with the Convention and the corresponding duty of the states of registration to make the compliance by their aircraft with the request to land mandatory.[65]

It is Milde's[66] opinion that the meetings of the ICAO Assembly pursuant to the downing of KAL 007 was twofold:

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[62] Foont, B (2007) p 703.
[63] Technically, Article 3bis can only be enforced against the states that ratified it, however due to the fact that Article 3bis is considered a reaffirmation of already established international customary law, it is applicable and can be enforced against all states, irrespective of whether the state has ratified the treaty.
[64] Brown, R. (2007), supra n 5, at p. 62.
[65] Milde, M. (2008), supra n 11, at p.55.
[66] (2008) at pp. 55-56.

"*a)* *The Assembly shared the views expressed by the Council of ICAO in its Resolutions of 16 September 1983 and 6 March 1984 on the illegality of the USSR action under than applicable international law and were convinced that existing international law already ruled out the use of force against civil aircraft in flight; and*

b) *The wording of Article 3bis(a) – not accidentally, but knowingly and intentionally – follows verbatim the introductory words of Article 1 of the Chicago Convention that does not create the concept of sovereignty over national air space but recognizes its existence under the general customary international law.*"

Brown has a similar view as Milde's and states that: "Two main clues as to the status of this article in international law can be gleaned from the text and *travaux préparatoires* of the major amendment undertaken in 1984. Firstly, the wording of Article 3bis(a) seems indicative of the existence of a rule of customary international law preceding the text of the Chicago Convention.[67] Secondly, during the discussion of this rule at the Extraordinary ICAO Assembly in 1984, "no delegation challenged the fact that the prohibition of use of force against civil aircraft is already part of general international law." [68]

Another reason swaying the notion that Article 3bis is international customary law is the fact that Article 3bis was adopted by way of unanimous vote, giving notion to the fact that all member states did not tolerate the use of force against civilian aircraft. This is supported by the fact that no case in which firing on a civilian aircraft has been accepted as a favourable decision.[69]

Article 3bis places the duty not to use force against intruding aircraft on all states, not just states which are members. The reason for this is because it is widely accepted that the prohibition of the use of force is established customary international law with Article 3bis being merely declaratory in nature. It is for this specific reason why it cannot be eluded that Article 3bis is *ultra vires* of Articles 34 and 35 of the Vienna Convention on the Law of

[67] The use of the words "contracting States recognise that every State must refrain" seems indicative that this amendment is a codification of existing customary international law already binding on all States, not just member States.
[68] Brown, R. (2007), supra n 5, at p.62.
[69] Foont, B (2007) p 719.

Treaties which provides that a treaty does not create obligations or rights for third states without their written consent.[70]

4.3 Incidents prior to the adoption of Article 3bis

4.3.1 April 1952

An Air France airliner on route from West Germany to Berlin was fired on by Soviet fighter jets in April 1952 through three or four separate attacks.[71] The airliner managed to land with only some passengers having sustained injuries. The SU alleged that the airliner had intruded its air space without authorisation and thereby violated SU's air regulations, however contradictory views showed that the aircraft travelled within the Berlin corridor. The SU claimed that the aircraft had deviated from its route, and refused to obey orders to land, which warranted the SU to fire at it. The SU further contended that the shots fired at the airliner, were warning shots to land and were not intended to shoot the airplane down.[72] The Allied High Commissioners of the occupying forces in Germany stated the following in response: "Quite apart from these questions of fact, to fire in any circumstances, even by way of warning, on an unarmed aircraft in time of peace, wherever that aircraft may be, is entirely inadmissible and contrary to all standards of civilized behaviour."[73]

4.3.2 July 1954

A Cathay Pacific airliner on route from Bangkok to Hong Kong was shot down by interceptors from the People's Republic of China ten miles east of the international air corridor off Hainan Island. Ten of the nineteen passengers on board died.[74] The captain of the airliner who survived the flight confirmed that the Chinese interceptor jets started firing without the slightest warning, intentionally aimed at the petrol tanks and continued to shoot

[70] Fitzgerald, G. (1984). The use of force against civil aircraft: The aftermath of KAL Flight 007 incident. Canadian Yearbook of International Law (22), p.291.
[71] Hughes, W. (1980), supra n 26, at p.600.
[72] Ibid.
[73] Foont, B. (2007). Shooting down civilian aircraft: Is there an International Law?. Journal of Air Law and Commerce, 72(4), p 704.
[74] Prendergast, L. (2014). Spectator archive: A history of passenger planes shot down. The Spectator. [online] Available at: https://blogs.spectator.co.uk/2014/07/civilian-plane-crashes-through-the-eyes-of-the-spectator/ [Accessed 22 May 2018].

at the aircraft until it impacted with the water. The USA labelled this as an attack of barbarity.[75] The Chinese apologised for the attack and attempted justification therefor being that it was assumed that the airliner was a military aircraft on an attack mission.[76] They implied that their military would not knowingly open fire on unarmed civilian aircraft.[77] Speculative theories were raised in that the aircraft was shot down as it was believed to have carried high ranking officials of enemy states.[78] This statement proofs the fact that the prohibition against use force against civilian aircraft was already entrenched in international customary law.

4.3.3 July 1955

An Israeli operated airliner on route from London to Israel was shot down by Bulgarian interceptors over the Greek-Bulgarian border, killing all 58 passengers on board. The aircraft strayed from its designated route and entered Bulgarian air space without authorisation. The aircraft was intercepted by Bulgarian fighter jets which ordered it to land at a military airbase. The aircraft complied with the order, however as it was making its approach for landing, it was fired at. Bulgaria, *inter alia*, alleged that it only fired once the aircraft refused to obey orders to land and due to the fact that it was unable to identify the aircraft. This statement was retracted with Bulgaria refuting responsibility, however offering to pay *ex gratia* compensation.[79]

Israel labelled this attack as "shocking recklessness" and "a wanton disregard for human life and for elementary obligations of humanity,"[80] The British response to this incident was that “H.M. Government cannot accept that any Government is in its right in shooting down a civilian aircraft in time of peace.”[81] The USA declared that the "brutal attack" on the Israeli airliner was a "grave violation of all principles of international law."[82] Bulgaria, in a later

[75] Hughes, W. (1980), supra n 26, at p.602.
[76] Foont, B. (2007). Shooting down civilian aircraft: Is there an International Law?. Journal of Air Law and Commerce, 72(4), p 705.
[77] Milde, M. (2008), supra n 11, at p.51.
[78] Beckman, J. (2015), supra n 54, at pp.593-594.
[79] Foont, B. (2007), supra n 5, at pp 705-706.
[80] Hughes, W. (1980), supra n 26, at p.603.
[81] Hughes, W. (1980), supra n 26, at p.603.
[82] Ibid.

statement admitted that the air defences had "shown hastiness" and had failed to take all necessary measures to force the aircraft to change direction.[83]

The just of the arguments raised by the three states with regards to the use of force against the intrusion of civilian aircraft are indicative of what the international community considered customary international law with regards to the use of force against civilian aircraft during time of peace: Before resorting to violence against a civilian aircraft which enters a sovereign's airspace without authorisation and which can be identified as such, the pilot must first be provided with an opportunity or alternative[84] to keep himself and his passengers from being killed. In other words, there must be some sort of warning and pre-emptive measures attempted and exhausted before considering using force against such aircraft as a last resort.[85]

All three states relied on the *Corfu Channel case*[86] to show that there is a duty on states not use unnecessary force against the rights of other states, particularly in peacetime, and, if they are going to use such force, they must first give warning. It was alleged that Bulgaria failed to adhere to the first principle and failed to take notice of the second. [87]

The case of *Garcia vs United States*[88] was also used in this matter to illustrate that "the mere violation of territorial sovereignty does not justify the use of extreme force. Force should be used only if the interests sought to be protected can justify the threat to human life. Prior to force being applied, other alternatives should be considered. Finally, if force is used, it must be used in such a way so as to not create unnecessary danger, except if it is being employed with the intention of killing."[89]

[83] Ibid.
[84] An alternative means that the aircraft would be notified that it was off course and interceptors would lead it out of the intruded airspace to a designated airport. See Hughes, W. (1980), supra n 26, p.615.
[85] Hughes, W. (1980), supra n 26, at p.605.
[86] Corfu Channel Case (UK v Alb.), 1949 I.C.J.4. The court held, based on well recognised general principles, that Albania was obliged to warn vessels of mine fields located within its territorial waters.
[87] Phelps, J. (1985), supra n 32, at p.285.
[88] Garcia Case (Mexico v. United States), 4 R. Int'l Arb. Awards 119 (1928).
[89] Phelps, J. (1985), supra n 32, at p.286.

The merits of the various arguments as to the status of the use of force against intruding civilian airliners under international law were unfortunately never reached by the ICJ as Bulgaria refused to submit to the court's jurisdiction."[90]

4.3.4 February 1973

A Libyan airliner was shot down by Israeli interceptors on route from Tripoli to Cairo over the Israeli occupied Sinai peninsula.[91] After the aircraft deterred off route, warning shots were fired and Israeli interceptor jets demanded it to land,[92] which commands the Libyan airliner ignored because of the poor relations between Israel and Libya at the time and as such, the aircraft was shot down. Of the 113 people on board, 108 died, with the majority of the casualties being Egyptians.[93] Israel noted 3 grounds in defence to the shoot down: Firstly, the pilot was instructed to land; Secondly, the action taken against the aircraft was done with the intention to force it to land rather than destroy it; Thirdly, the aircraft had flown over a sensitive area, this together with the refusal to land led Israel to believe it was on a spy mission. In conclusion, Israel justified the shoot down by claiming it was a matter of defence of its national security interests in maintaining the secrecy of its secret air base.[94] This accident was later labelled as "a monstrous and savage crime which is full of perfidy and which is not only a violation of international law but of all human values"[95] by Cairo. ICAO also took a very strong stand on this incident and on 4 June 1973, after proper investigation adopted a resolution whereby it, *inter alia*, confirmed that the actions of Israel by shooting down the aircraft was in violation of the principles enshrined in the Chicago Convention and that there was no justifiable grounds for shooting down the aircraft.[96]

This incident differs from the rest as it was not an "intrusion shootdown," the aircraft was shot down as it was seen to be a threat. The ICAO Council concluded that the criteria used to determine whether the aircraft was a threat, was insufficient and that Israel acted in haste.[97]

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[90] Hughes, W. (1980), supra n 26, at p.610.
[91] This incident resulted in ICAO adopting a resolution that condemned the shoot down. See ICAO Council Resolution of June 4, 1973, ICAO Bulletin 13 (July, 1973).
[92] Prendergast, L. (2014), supra n 74.
[93] Ibid.
[94] Foont, B. (2007), supra n 5, at pp 706-707.
[95] Hughes, W. (1980), supra n 26, at p.611.
[96] ICAO Council Resolution of June 4, 1973, ICAO Bulletin 13 (July, 1973).
[97] Huskisson, D. (2004), supra n20, at p.41.

4.3.5 April 1978

A Korean airliner on route from Paris to Seoul was shot at and forced to land by Soviet interceptors after entering Soviet air space and flying through a Soviet high security zone after it lost its way, killing two passengers and injuring eleven. It was disputed whether the fighter jets gave warning signals before firing. The SU claimed it was under the impression that the aircraft was on an espionage mission.[98]

4.3.6 September 1983

Article 3bis was adopted in 1984 and came into operation in 1998 as a result of the shooting down of a civilian aircraft, Korean Airlines Flight 007 on 1 September 1983[99] which claimed the lives of 269 passengers. The undisputed facts of the incident are that KAL Flight 007 departed from New York towards South Korea and drifted off its designated route over Soviet air space where it was shot down by a Soviet interceptor jet. The events that lead up to the shooting down of the airliner raised many contradictory views and accusations, both by the USA and the SU.[100]

The SU released two reports which stated that: 1) the aircraft was on an American espionage mission; 2) the unidentified airplane rudely violated the SU's airspace as it deviated from its designated route in the direction of the SU territory by up to 500 kilometres and spent more than two hours over the SU territory; 3) in violation of international regulations, the plane a) flew without navigation lights; b) did not react to radio signals of the Soviet dispatcher services; and c) made no attempt to establish communications with them; 4) interceptor jets were sent to attempt communication signals with the aircraft and navigate it to the nearest airfield, however the pilot ignored them all; and 5) after receiving command, the Soviet fighter jets fired a missile at the plane which lead to its crash in the ocean and death of the passengers.[101]

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[98] Foont, B. (2007), supra n 5, at p 707.
[99] De Hoon, M. (2017). Navigating the Legal Horizon: Lawyering the MH17 Disaster. Utrecht Journal of International and European Law, [online] 33(84), p 38. Available at: http://doi.org/10.5334/ujiel.368 [Accessed 5 Jul. 2018].
[100] https://ti.arc.nasa.gov/m/profile/adegani/Crash%20of%20Korean%20Air%20Lines%20Flight%20007.pdf
[101] Hassan, F. (1984). A Legal Analysis of the Shooting of Korean Airlines Flight 007 by the SU. Journal of Air Law and Commerce, [online] 49(3), pp 557-558. Available at: https://scholar.smu.edu/jalc/vol49/iss3/3 [Accessed 15 Sep. 2017].

The USA, being lead at the time by President Ronald Reagan, published its own statements whereby it, disputed[102] the reports issued by the SU. The following main discrepancies were drawn which were left unresolved, namely whether:[103] 1) the aircraft was shot down without warning after being intercepted; 2) the airliner did in fact deter from its route and for so long and so far over sensitive military ground as the SU alleged; 3) ATC realised that the airliner strayed off its designated course; 4) it was possible that the SU was unable to identify the airliner as not being a military aircraft; and 5) a distress signal was in fact sent by the airliner.[104]

It is interesting to note that in an interview held with the New York Times in 1996, 13 years after the incident, retired fighter pilot Gennadi Osipovich, who shot down KAL Flight 007 and is considered a war hero in his country, stated the following when asked whether he knew the aircraft that he shot down was civilian:

"I saw two rows of windows and knew that this was a Boeing. "I knew this was a civilian plane. But for me this meant nothing. It is easy to turn a civilian type of plane into one for military use."

Osipovich furthermore confirmed that he omitted to notify the ground traffic controllers that the aircraft was a Boeing. He also confirmed that he did not use his radio to try and call the pilot as he claimed there was no time and the pilot would not have understood Russian. He shot the plane down within a mere 20 to 25 seconds of it reaching neutral territory where it would have been prohibited from shooting the aircraft down.[105]

What many papers omit to note is that another Korean Air Lines aircraft flying within a few minutes of KAL Flight 007 was transporting at least four American Senators.[106] It is the

[102] The global reaction to this incident was also against the SU.
[103] Hassan, F. (1984) supra n 99, at p.559.
[104] In an investigation led by ICAO of the aircraft after the incident, it was found that the crew did not deliberate deviate from the designated rout and was furthermore it was evident from the cockpit voice recorder that the crew were unaware of the attempted interception and that the strike took them by complete surprise (the missile did not instantly destroy the aircraft when it hit). Ten years after the incident and based on the location of the debris of the aircraft found, it was discovered that the aircraft was possibly attached outside Soviet airspace but in international airspace. See Milde, M. (2008), supra n 11, at p.53.
[105] https://www.nytimes.com/1996/12/09/world/ex-soviet-pilot-still-insists-kal-007-was-spying.html
[106] Prendergast, L. (2014), supra n 74.

writer's speculation that the SU may have intended the airstrike to be for this airliner, however they targeted the wrong aircraft.

4.4 Incidents post the adoption of Article 3bis

4.4.1 July 1988

A US navy ship by the name of the *Vincennes* was engaged in military combat with Iranian gunboats in the Persian Gulf. During this combat the Vincennes fired on and destroyed a civilian Iran aircraft en route from Iran to Dubai which killed all 248 passengers on board and which the *Vincennes* had mistaken to be a fighter jet.[107] It was further alleged that the *Vincennes* encountered computer and tracking system malfunctions which made it impossible to identify the aircraft as civilian. It was stated, and accepted by the majority of the International community, that the USA had no intention of firing on the aircraft and that it believed that it was a military aircraft in combat. Similar to the Chinese, the USA claimed that because the shooting down was due to a reasonable error and it acted in (mistaken) self-defence, the use of force was justified[108] and not unlawful. International intolerance for this type of actions was high with the just being that the international community requires more positive identification before it would tolerate such shootdowns.[109]

4.4.2 February 1996

Brothers to the rescue, was a Miami-based humanitarian organisation engaged in searching for and aiding Cuban refugees in the Straits of Florida and also took part in bold political protests, conducting up to 1,700 violations of Cuban airspace.[110] Two of its aircrafts were shot down by the Cuban Air Force over international waters outside Cuban air space. Evidence showed that the Cubans acted wilfully as it was their intention to shoot to kill. There were also no warnings given before opening fire on the aircrafts. In reaction to this incident, the USA stated that the aircrafts knowingly unarmed posed no threat to Cuba's national security and that there existed no legal basis under international law for the attack.

[107] Fisher, M. (2013). The forgotten story of Iran Air Flight 655. The Washington Post. [online] Available at: https://wapo.st/15GCUC9?tid=ss_mail&utm_term=.23e67eee5396 [Accessed 17 Apr. 2017].
[108] Foont, B. (2007), supra n 5, at p. 712.
[109] Huskisson, D. (2004), supra n 20, at p.45.
[110] Huskisson, D. (2004), supra n 20, at p.45.

The USA further stated that it relied on customary international law of the prohibition against use of force against civilian aircraft and not Article 3bis which Cuba had not yet ratified at that time[111]. The UN Security Council also condemned the shootdown, stating that it violated customary international law as contained in Article 3bis and the annexes of the Chicago Convention. The fact that Cuba issued warnings the previous year that any aircraft that violated its air space would be shot down,[112] did not mitigate the situation for Cuba. Although Cuba refuted liability, it altered its actions accordingly when a subsequent civilian aircraft intruded on its airspace whereby Cuba, instead of firing on it as it had warned previously, escorted the aircraft out of its airspace and pursued diplomatic channels with the USA[113]

4.4.3 August 1999

A USA civilian aircraft that was traveling from Italy to South Africa was shot down by Ethiopian military over Ethiopian airspace, during a time of war between Ethiopia and Eritrea. The shoot down occurred without warning, thereby killing the two passengers on board. It was later shown that the aircraft was traveling on a designated pre-authorised flight plan with permission to enter Ethiopian air space.[114] Ethiopia claimed that it had mistaken the aircraft to be an Eritrean jet,[115] and it was currently at war with Eritrea. However, because there were only two casualties, very little evidence and information have stemmed from this incident. Over a course of 6 months in 2006 and 2007, Foont attempted to get a response from the Ethiopian embassy on this incident, to no avail.[116] This incident is highlighted to show that the number of casualties may have an impact on the response from international community.

[111] Cuba ratified the Protocol on 28 September 1998. See footnote 13.
[112] CNN. (1996). U.S civilian planes shot down near Cuba. [online] Available at: http://edition.cnn.com/US/9602/cuba_shootdown/25/ [Accessed 19 Apr. 2017].
[113] Foont, B. (2007), supra n 5, at p 713.
[114] The Guardian. (1999). Ethiopia admits killing European nationals in plane shooting. [online] Available at: https://www.theguardian.com/world/1999/sep/01/ethiopia [Accessed 23 Oct. 2018].
[115] As previously done by the USA and China as well.
[116] Foont, B. (2007), supra n 5, at p. 714.

4.4.4 May 2001

A Lebanese civilian aircraft was stolen by a student pilot who flew through a restricted military zone in Lebanon and illegally entered Israeli airspace. This was during a time when Israel was on high alert for terrorist attacks and as such, immediately begun tracking the aircraft using interceptor jets. Israel established radio contact with the pilot and attempted to communicate with him, however the pilot refused to respond or identify himself. Eye contact was made with the pilot and a warning shot was fired across the pilot's path of travel, but the pilot proceeded on route. As the aircraft started to approach a populated area and Israel feared it may be a suicide mission, Israel fired at the aircraft which crashed on its own naval training facility, killing the pilot.[117]

The pilot, who stole the aircraft, was the only person on board the aircraft and it was accepted that the pilot may have been involved in terrorist activities. As such, the international community and ICAO did not question Israel's actions in this incident,[118] irrespective of some contradictory versions of events raised by Lebanon.

4.4.5 October 2001

A civilian aircraft on route from Israel to Siberia exploded and crashed in the Black Sea, killing all 78 passengers on board after it had been shot down by a misfired Ukrainian missile while doing test shootings. Putin ruled out the idea that the airliner could have been shot down by the Ukraine and stated that "the weapons used in those exercises had such characteristics that make it impossible for them to reach the air corridor through which the plane was moving."[119] However, three weeks later, Ukraine accepted responsibility of the incident and compensated the victims' families, thereby accepting the general practice of paying compensation when use of force was improper or erroneous.[120]

[117] The Guardian (2001). Israel shoots down Lebanese plane. [online] Available at: https://www.theguardian.com/world/2001/may/24/israel2 [Accessed 24 Oct. 2018].
[118] Foont, B. (2007), supra n 5, at p.p. 714 – 715.
[119] Philips, A. and Sparrow, A. (2001). Airliner blasted out of sky. The Telegraph. [online] Available at: https://www.telegraph.co.uk/news/worldnews/europe/ukraine/1358586/Airliner-blasted-out-of-sky.html [Accessed 24 Oct. 2017].
[120] Foont, B. (2007), supra n 5, at p 716.

4.4.6 17 July 2014

Malaysia Airlines Flight 17 on route from Amsterdam to Malaysia, was shot down over eastern Ukraine on 17 July 2014 by Russian armed forces, killing all 298 passengers on board. Up and until the date of this Paper, Russia has maintained its stance by refuting its involvement and its liability in respect of the incident which is currently being investigated. Audio recordings have shown a panicked militant saying MH17 was shot down in the mistaken belief that it was a military plane. In a written statement, Australia's foreign minister, Julie Bishop, said: "That a sophisticated weapon belonging to the Russian army was dispatched and used to shoot down a civilian aircraft should be of grave international concern."[121]

4.5 Conclusion

In comparing the incidents that occurred before the adoption of Article 3bis to those that occurred post-adoption, it is evident that states did not act any differently or use any alternative means of justification for their actions, thus further strengthening the notion that Article 3bis is a reaffirmation of already established customary international law and that it did not add anything further to the already established customary law prohibition.

In all of the incidents above all wrongdoing states felt the need to justify their actions since there was no support for states to have an unqualified, absolute right to use force against intruding civilian aircrafts,[122] and as such, it would appear that it was the international view that the right to aerial sovereignty did not create an absolute right in itself giving states the power to do as they please with aircrafts entering their airspace, but that it is a right given to all states which is restricted as determined by "human values" and which human values later become codified in Article 3bis of the Chicago Convention.[123]

Upon assessing the abovementioned incidents, and taking into consideration the factual disputes, misjudgements and the fact that some incident occurred during times of war or

[121] Osborne, S. (2018). Flight MH17 shot down by Russian military-sourced missile, investigators conclude. The Independent. [online] Available at: https://www.independent.co.uk/news/world/europe/mh17-missile-ukraine-2014-russia-military-netherlands-deaths-investigation-a8366721.html [Accessed 29 Oct. 2018].
[122] Engvers, A. (2001), supra n 28, at p 31.
[123] Brown, R. (2007), supra n 5, at p. 62.

high alert, it is evident that it is state practice that the use of force is almost universally condemned except under the most extreme circumstances. In comparing the above incidents, it is clear that the following situations have not succeeded in warranting the use of force:

a) When recognising that an aircraft that enters a sovereign's airspace without authorisation is civilian, a state may not use force against such aircraft for the mere fact of it **trespassing**. To use weapons to **warn** an aircraft in such circumstances is also highly condemned. In other words, "there is no *prima facie* right to use force based upon the mere violation of territorial airspace, regardless of whether the intrusion was intentional or unintentional"[124]

b) Failure to follow **instructions** from interceptors or an **attempted escape** has never been accepted by the international community as acceptable grounds for the use of force. Bulgaria, Yugoslavia, Israel, and the SU have all used this justification, but, in each case, it has been rejected by the majority of nations as unacceptable.[125]

c) The use of force may be justified in situations where there were an overriding **security interest** at stake. However, based upon international practice and opinion, the security interest involved must be more than just the flight of an intruder over prohibited or restricted areas and must be of extreme importance before hostile force can be used.[126]. This believe is further supported by the fact that should a security threat arise which is of extreme importance, the requirement of first giving a warning prior to the use of force will have to be adhered to.[127] Furthermore, the proportionality test of the loss of life versus the security threat involved would also first need to be weighed, which in peacetime, would be an almost impossible requirement to fulfil.

[124] Phelps, J. (1985), supra n 32, at p.293.
[125] Ibid.
[126] Ibid.
[127] As stated in the *Corfu Channel case* and *Garcia cases*. supra n 86 and n 88.

5. CONCLUSION

5.1 Introduction

The aim of this paper was to attempt to establish the parameters pursuant to Article 3bis in which a state may operate when faced with an intrusion of civilian aircraft in flight.

What can clearly be confirmed right from the onset, is that Article 3bis in itself does not provide sufficient relief and it needs to be interpreted and applied with other international law principles such as Article 51 of the UN Charter as well as customary state practice, such as the principles as set out in the Caroline-case when it comes to pre-emptive self-defence.

What can furthermore be confirmed, is that it is not possible to create a set of guidelines which will act as a "one size fits all" mechanism to be applied when having to determine duties imposed on states when faced with aerial intrusion, even more so when considering the rise in modern technology and the advances made to aerial flight. Each situation that arises will have to be assessed, with the sovereign state being the subjective decision maker, on the basis of the unique facts it presents. It is only after the incident had incurred, that the sovereign state will face international scrutiny.

By confirming that Article 3bis is a mere affirmation of already established international customary law, as the writer does, further shows that the law has been stagnant for far too long and that modern state practice have nonetheless been forced to adapt to the ever-changing threats it faces, irrespective of the fact that the law does not provide therefor. This statement is supported by the fact that the current jurisprudence regarding Article 51 of the UN Charter still interprets it in the strictest sense possible by only allowing for an armed attack to fall under Article 51 of the UN Charter and not expressly recognising states' pre-emptive right to self-defence.

As shown by common state practice in Part 4 of this paper, it is the writer's submission that irrespective of what the law dictates, when it comes to a state protecting its sovereignty, political factors carry more weight than legal obligations and states are willing to infringe on legal duties in order to protect their sovereignty as they see fit as it has been the case in

many situations where states adapt the notion of "act now and later, massage the law in order to justify its infringement".

However, this is not all at a loss as Article 3bis is clearly an outcry from the international community for codification and rules that provide more clarity on the contradictory prohibition on the use of force and the right to self-defence. It is the writer's view that Article 3bis is a step in the right direction and in conjunction with already mentioned international laws and customary law, it can create more clarity on what is required by states to protect their sovereignty when faced with aerial intrusion.

The writer will proceed to set out a brief summary of her findings in terms of the paper and finally, she will finish with a brief set of objective criteria extracted from the paper as a set of guidelines to be applied by states when faced with an unauthorised civilian intrusion of their air space.

5.2 Sovereignty

It has been shown in this paper that the right to aerial sovereignty did not create an absolute right in itself by allowing states free reign to do as they please with aircrafts entering their airspace, but that it is a right given to all states which is restricted as determined by "human values" and which human values later became codified in Article 3bis of the Chicago Convention.

5.3 Article 3bis

"*Article 3 bis clearly settles the issue concerning the use of force; there can be no doubt that force can be used in only the most extreme circumstances. Incidents such as KAL-007 will become as they should, diplomatic incidents with diplomatic and economic consequences. This is the most positive step that has been taken since the advent of flight concerning the treatment of aerial intruders. For the first time, there is clearly written standard to which the nations of the world will be asked to adopt as their standard of practice*."[128]

Article 3bis places the duty not to use force against intruding aircraft on all states, not just states which are members. The reason for this is because it is widely accepted that the

[128] Phelps, J. (1985), supra n 32, at p.303.

prohibition of the use of force is established customary international law with Article 3bis being merely declaratory in nature.

Seeing as Article 3bis is already recognised as international customary law, it is unlikely that certain states will ratify it as it has been argued that it will be superfluous to do so and due to the fact that those ratifying states will then be bound by the same dispute resolution process as contained in the Chicago Convention, due to the fact that Article 3bis forms part of the Chicago Convention and not a treaty on its own. It is less likely that after September 2011 incidents in New York, that states would be willing to have the question of when to shoot and not to shoot decided by a quasi-judicial body or the ICJ.[129]

5.4 Article 51 of the UN Charter

The use of force against civilian aircraft in flight is prohibited by Article 3bis(a) and article 2(4) of the Charter of the United Nations.[130] By impinging Article 3bis(a) and article 2(4) of the Charter of the United Nations would result in an international act of wrongfulness. However, in terms article 21 of the Draft Articles on the International Responsibility of States for Internationally Wrongful Acts, such use of force may be excused if it is conducted in conformity with Article 51 of the UN Charter.

There are many contradictory views as to the application of Article 51 of the UN Charter. By following the wider interpretation of Article 51 of the UN Charter, which interpretation is supported by modern state practice (lead by the USA),[131] it is accepted that in order to trigger the right to self-defence, there must exist an armed attack or an imminent threat, thereby justifying the pre-emptive right to self-defence. This notion is further supported when one considers the U.N.'s 2004 High-Level Panel on Threats, Challenges and Change wherein a less restrictive, but qualified view was taken:

"[a threatened State], according to long established international law, can take military action as long as the threatened attack is imminent, no other means would deflect it and the

[129] Huskisson, D. (2004), supra n20, at p.35.
[130] "all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."
[131] Supra, n 38 and 5.4 below.

action is proportionate. The problem arises where the threat in question is not imminent but still claimed to be real: for example the acquisition, with allegedly hostile intent, of nuclear weapons making capability."

Further examples of pre-emptive use self-defence by states which shows modern state practice include: the Cuban Missile Crisis in 1962;[132] the Six Day War in 1967;[133] Operation Opera (Osirak Bombing) in 1981;[134] Operation Infinite Reach (Al Shifa Bombing) in 1998;[135] Invasion of Iraq by the USA in 2003;[136] and Operation Orchard (Al Kibar Bombing) in 2007[137]

The requirements as set out in the *Caroline case*[138] will need to be met in order to react to an imminent threat by the use of force namely it must be justifiable by necessity, provided that the necessity is "instant, overwhelming, leaving no choice of means, and no moment of deliberation". It must also satisfy the proportionality requirement namely, no more force than what is reasonably necessary to overcome the threat[139] may be applied in order to prevent the attack from taking place. There must also be no less intrusive alternative available.

5.5 State practice

By applying the requirements in terms of the right of self-defence, the requirements in terms of Article 3bis as well as previously established state practice it is clear that the use of force against a civilian aircraft, clearly identifiable as such, cannot be justified even if that aircraft enters the airspace above a state without authorisation. It has also been confirmed that, the

[132] When the Soviet Union began building missiles in Cuba, the USA instituted a "defensive quarantine" against Cuba without Cuba or the Soviet Union attacking the USA.
[133] The war began when Israel launched a surprise attack against Egypt and alleged that it was repelling an assault which posed an imminent threat.
[134] Israel launched an airstrike against a nuclear reactor in Iraq, as it feared that the nuclear reactor had the potential of producing material necessary for a nuclear bomb.
[135] The USA, in a pre-emptive act of self defence, launched a missile attack on a factory in Sudan, that it alleged produced chemical warfare ammunition for Osama bin Laden.
[136] The USA sent its military troops into Iraq in 2003 on the basis of UN Security Council resolutions, as well as a claim of self-defence. The USA held that Saddam Hussein's regime presented a threat to the USA as the regime was armed with weapons that could cause mass destruction.
[137] Israel launched an airstrike against a covert nuclear reactor that had been constructed by Syria in a remote part of that country.
[138] Supra, n 41.
[139] "Threat" does not only pertain to state security, but can be stop the initial attack from incurring.

striking down of an aircraft for deterring from its designated route (KAL 007) or an aircraft flying over a sensitive military base and perhaps spying without manifesting any intent to conduct an armed attack (the 1973 case of Libyan Airlines Passenger jet being shot down by Israel because it was over a military base) would not be permissible reasons to shoot down a plane under a self-defence claim under Article 51 of the UN Charter.

5.6 Rights and obligations when faced with aerial intrusion

An acceptable set of criteria would have to apply more restrictive successive standards such as the following:[140]

a) ATC must exhaust all measures in an attempt to identify the intruding aircraft through the appropriate air traffic authorities and to establish contact with the aircraft. ATC must notify the aircraft that it is traveling through unauthorised territory as it may not be aware of its infringement, as was the situation with KLA 007.

b) Should this fail, ATC may send interceptor jets to investigate and to establish contact with the aircraft. In terms of Annex 2 to the Chicago Convention the sovereign state has the right to intercept the aircraft to either lead it to safety or to force it to land[141] at a designated landing strip.[142]

c) Interception should only be utilized in rare instances and with the safety of the civilian intruder as the prime consideration.[143] Proper visualisation signals must be given in terms of Annex 2. Using tracer bullets to send warning signals should be avoided as much as possible.

d) If the intruding aircraft still refuses to comply with the commands of the sovereign state, makes no attempt to land or end the offense, and there is no apparent reason for the failure to comply, such as a mechanical or communications problem, the requirements

[140] Foont, B. (2007), supra n 5, at pp.720-721.
[141] Article 3bis(b) of the Chicago Convention.
[142] Article 3bis(c) requires the intruding aircraft's national law to comply with the demand of an interceptor of the overflown state which will remove any doubt on the part of the pilot as to whether to co-operate or not. This in turn would reduce the possibility of force being used so long as proper interception procedures were utilized.
[143] Phelps, J. (1985), supra n 32, at p.295.

as per the *Caroline case* should be applied in order to assess whether the right to self-defence is triggered and whether to determine what proportion of force may be inflicted to counter-act the threat. This obligation can be used at any step of this outline and will depend on how imminent the threat is. It may be so dire and time-sensitive, and the need to defend so great, that a state may decide to avoid any of the above steps.

e) When assessing whether to use of force, the following guidelines as set out in the *Gracia case*[144] can be applied:

   i. the act of firing, always dangerous in itself, should not be indulged in unless the sovereign state reasonably perceives a threat from the intruding aircraft that is more than mere speculation, such as information that the aircraft is probably engaged in an act of terrorism or is heading into a populated area or towards a strategically significant or particularly vulnerable target.

   ii. force should not be used unless the importance of preventing the threat by shooting is proportionate to the danger arising from it to the lives of the offenders and other persons in their vicinity;

   iii. force should not be used if there are less intrusive means available to end the threat;

   iv. force should only be used with sufficient precaution not to create unnecessary danger, unless it is the shooter's intention to hit, wound, or kill.[145]

f) If the sovereign state uses force in compliance with the above criteria and people are injured or killed, the sovereign state should make *ex gratia* payments to compensate the victims or their families, unless it is determined that the aircraft was actually engaged in an act of perfidy or terrorism.[146]

[144] Supra n 88.
[145] Phelps, J. (1985), supra n 32, at p.286.
[146] Foont, B. (2007), supra n 5, at p.725.

The above criteria provide for the fact that an assessment of the situation will first need to be made as to whether the threat is great enough in order to act thereon by means of force, as proper defensive action under Article 51 of the UN Charter.

References

Beckman, J. (2015). Nation-State Culpability and Liability for Catastrophic Air Disasters: Reforming Public International Law to Allow for Liability of Nation-States and the Application of Punitive Damages. *FIU Law Review*, [online] 10(2), pp.593-594. Available at:https://ecollections.law.fiu.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1262&context=lawreview [Accessed 20 Oct. 2017].

Brown, R. (2007). Shooting down Civilian Aircraft: Illegal, immoral and just plain stupid. *Quebec Review of International Law*, (20.1).

Caroline Incident, 29 B.F.S.P. 1137 – 1138.

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.

Chicago Convention on International Civil Aviation, 7 December 1944.

CNN. (1996). *U.S civilian planes shot down near Cuba*. [online] Available at: http://edition.cnn.com/US/9602/cuba_shootdown/25/ [Accessed 19 Apr. 2017].

Corfu Channel Case (UK v Alb.), 1949 I.C.J.4.

De Hoon, M. (2017). Navigating the Legal Horizon: Lawyering the MH17 Disaster. *Utrecht Journal of International and European Law*, 33(84).

Duffy, H. (2005). *Peaceful resolution of disputes and use of force, in The 'War on Terror' and the Framework of International Law*. Cambridge: Cambridge University Press, pp. 144–214.

Elmar Giemulla, L. and Weber, L. (2011). *International and EU Aviation Law. Selected Issues*. Norwell: Wolters Kluwer Law & Business.

Engvers, A. (2001). *The Principle of Soveriegnty in the Air: To what extent can it be upheld against aerial intruders?*. LLM. University of Lund.

Erotokritou, C. (2012). Sovereignty Over Airspace: International Law, Current Challenges, and Future Developments for Global. *Inquiries*, [online] 4(5). Available at: http://www.inquiriesjournal.com/a?id=645 [Accessed 20 May 2015].

Fisher, M. (2013). The forgotten story of Iran Air Flight 655. *The Washington Post*. [online] Available at: https://wapo.st/15GCUC9?tid=ss_mail&utm_term=.23e67eee5396 [Accessed 17 Apr. 2017].

Foont, B. (2007). Shooting down civilian aircraft: Is there an International Law?. *Journal of Air Law and Commerce*, 72(4).

Garcia Case (Mexico v. United States), 4 R. Int'l Arb. Awards 119 (1928).

Hasssan, F. (1984). A Legal Analysis of the Shooting of Korean Airlines Flight 007 by the Soviet Union. *Journal of Air Law and Commerce*, [online] 49(3), p.89. Available at: https://scholar.smu.edu/jalc/vol49/iss3/3 [Accessed 15 Sep. 2016].

Hughes, W. (1980). Aerial Intrusions by Civil Airliners and the Use of Force. *Journal of Air Law & Commerce*, 45(3), p.595.

Huskisson, D. (2004). *The air bridge denial program and the shootdown of civil aircraft under international law*. LLM. McGill University.

ICAO Council Resolution of June 4, 1973, ICAO Bulletin 13 (July, 1973).

International Civil Aviation Organization ("ICAO") Consideration, 22 I.L.M. 1149, 1150 (1983); ICAO BULL., Nov. 1983.

Legality of the Threat or Use of Nuclear Weapons Case, Advisory Opinion, [1996] I.C.J. Rep. 226.

Milde, M. (2008). *Essential Air and Space Law*. The Netherlands: Eleven International publishing.

Milde, M. (2008). *Rendition Flights and International Air Law*. [online] Redress. Available at: https://redress.org/wp-content/uploads/2018/01/Jul-08-Rendition-Flights-and-International-Air-Law.pdf [Accessed 16 Oct. 2018].

Ochoa-Ruiz, N. and Salamanca-Aguado, E. (2005). Exploring the Limits of International

Law relating to the Use of Force in Self-defence. *European Journal of International Law*, 16(3), p.522.

Opolot, A. (2017). *The work of ICAO in the legal field*.

Osborne, S. (2018). Flight MH17 shot down by Russian military-sourced missile, investigators conclude. *The Independent*. [online] Available at: https://www.independent.co.uk/news/world/europe/mh17-missile-ukraine-2014-russia-military-netherlands-deaths-investigation-a8366721.html [Accessed 29 Oct. 2018].

Paris Convention for the Regulation of Air Navigation (1919), 11 L.N.T.S. 173.

Paust, J. (2011). Relative Sovereignty and Permissible Use of Armed Force. *Michigan State International Law Review*, 20(1).

Phelps, J. (1985). Aerial Intrusions by Civil and Military Aircraft in Time of Peace. *Military Law Review*, 107.

Philips, A. and Sparrow, A. (2001). Airliner blasted out of sky. *The Telegraph*. [online] Available at: https://www.telegraph.co.uk/news/worldnews/europe/ukraine/1358586/Airliner-blasted-out-of-sky.html [Accessed 24 Oct. 2017].

Prendergast, L. (2014). Spectator archive: A history of passenger planes shot down. *The Spectator*. [online] Available at: https://blogs.spectator.co.uk/2014/07/civilian-plane-crashes-through-the-eyes-of-the-spectator/ [Accessed 22 May 2018].

President Bush's Graduation Speech delivered at West Point, New York. 1 June 2002.

Protocol relating to an amendment to the Convention on International Civil Aviation, signed at Montreal on 10 May 1984.

Statute of the International Court of Justice, June 26 1945.

The Guardian (2001). Israel shoots down Lebanese plane. [online] Available at: https://www.theguardian.com/world/2001/may/24/israel2 [Accessed 24 Oct. 2018].

The Guardian. (1999). *Ethiopia admits killing European nationals in plane shooting*. [online] Available at: https://www.theguardian.com/world/1999/sep/01/ethiopia [Accessed 23 Oct. 2018].

Zemanek, K. (2013). Armed Attack. In: *Max Planck Encyclopedia of Public International Law*. Oxford Public International Law.

Websites

https://www.icao.int/secretariat/legal/List%20of%20Parties/3bis_EN.pdf (last visited 13 October 2018)

https://ti.arc.nasa.gov/m/profile/adegani/Crash%20of%20Korean%20Air%20Lines%20Flight%20007.pdf (Accessed 15 Sep. 2017).