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Article 3*bis* of the Chicago Convention: Outdated or Evolving

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Abstract

Article 3*bis* of the Chicago Convention on International Civil Aviation obligates States to refrain from the use of weapons against civil aircraft in flight. Adopted in 1984, Article 3*bis* has successfully addressed incidents where airliners were shot down to airspace violations. Unfortunately, it has failed to prevent further incidents of States using weapons against civil aircraft in flight. During the 1990s civil aircraft suspected of committing illegal acts were shot down. On September 11th, 2001, four hijacked airliners were used as weapons. Furthermore, there were additional incidents of State militaries shooting down civilian airliners from the ground. Four decades after its adoption, Article 3*bis* is again at the forefront of world attention as there have been additional shoot downs of civil airliners by State surface-to-air missiles. This paper analyzes the rights and obligations of States regarding Article 3*bis* and their evolution by examining the provision's ambiguities as well as the two disputes over its application and interpretation before the Council. The outcome of these disputes will shape the future interpretation of Article 3*bis*. This paper suggests measures to strengthen efforts to prevent the use of weapons against civil aircraft in flight and enhance international air safety.

1.0 Introduction

Article 3bis of the Chicago Convention on International Civil Aviation (Convention) obligates States, *inter alia*, to refrain from the use of weapons against civil aircraft in flight.¹ It also specifies that this provision should not be interpreted to modify the rights and obligations of States under the U.N. Charter. Adopted in 1984, it was the first substantive amendment to the Convention after the downing of Korean Air flight 007 (KE007) by the Soviet Union on 1 September 1983.² The amendment has successfully addressed incidents where airliners were shot at by intercepting fighter aircraft due to a violation of State airspace. Unfortunately, Article 3bis has failed to prevent further incidents of States using weapons against civil aircraft in flight. Notably, during the 1990s civil aircraft suspected of committing illegal acts have been shot down.³ On September 11th, 2001, the world witnessed the use of four hijacked airliners as weapons against the United States.⁴ Furthermore, there were additional incidents of State militaries shooting down civilian airliners from the ground.⁵

Four decades after its adoption, Article 3bis is again at the forefront of world attention as there have been three additional shoot downs of civil airliners by State surface-to-air missiles (SAM) since 2014.⁶ As a result, ICAO has identified the threat of SAMs as ‘the most significant

¹ Convention on International Civil Aviation, (adopted 7 December 1944, entered into force 4 April 1947) 15 UNTS 295 (Chicago Convention), art. 3bis. Protocol relating to an amendment to the Chicago Convention on International Civil Aviation, Article 3bis (adopted 10 May 1984, entered into force 1 October 1998) ICAO Doc. 9436. 2122 UNTS 337.

² ICAO, *Report on the Destruction of Korean Airlines Flight 007 on 31 August 1983*, 16 Jul. 1993. [HL7442.pdf](#) (accessed 28 Mar. 2026)

³ During the 1990s, the U.S. Air Bridge Denial Program, intended to stem the flow of narcotics out of South America, resulted in additional incidents and further questions about the interpretation of Article 3bis. U.S. Senate Select Committee on Intelligence, *Report on a Review of United States Assistance to Peruvian Counter-Drug Air Interdiction Efforts and the Shootdown of a Civilian Aircraft on April 20, 2001*, Oct. 2001 (USGPO). An additional relevant incident was the shootdown of two Cessnas by the Cuban Air Force in 1996. ICAO Secretary General, *Report of the Investigation Regarding the Shooting Down of Two U.S.-Registered Private Civil Aircraft by Cuban Military Aircraft on 24 February 1996*, C-WP/10441 Restricted 20 Jun. 1996.

⁴ National Commission on Terrorist Attacks upon the United States, *The 9/11 Commission Report*, (USGPO 2004), 153-54. *Id.* 40-45 regarding the United States willingness to shootdown any hijacked aircraft on 9/11. The German Federal Constitutional Court ruled that the shooting down of a hijacked aircraft would violate the German Basic Law. Bundesverfassungsgericht [BVerfG] Feb. 15, 2006, 1 BvR 357/05, English. [Bundesverfassungsgericht - Decisions search - Judgment of 15 February 2006](#) (accessed 28 Mar. 2026). Wyrok Trybunału Konstytucyjnego z 30.09.2008 r. K 44/07. For a summary in English see M. Łukasik (Trans.) Judgment of 30th September 2008, K 44/07 Permissibility of shooting down a passenger aircraft in the event of a danger that it has been used for unlawful acts, and where state security is threatened.

⁵ In 1988, a U.S. Navy destroyer in the Persian Gulf accidentally shot down Iran Air flight 655. U.S. DOD, *Formal Investigation into the Circumstances Surrounding the Downing of Iran Air Flight 655 on 3 July 1988*, 19 Aug. 1988. [Formal Investigation into the Circumstances Surrounding the Downing of Iran Air Flight 655 on 3 July 1988.pdf](#) (accessed 28 Mar. 2026). In 2001, a Ukrainian air defense unit accidentally shot down a Russian airliner over the Black Sea during joint-military exercises. Interstate Aviation Committee, *Final Report on the investigation of flight accident involving aircraft Tu-154M RA-85693 of OAO Aviakompaniya Sibir of the West-Siberia OMTUVT under the Russian Ministry of Transport on 4 October 2001, 187km from Sochi Airport, 29 Oct. 2001* (Moscow). [20011004_T154_RA-85693.pdf](#) (accessed 28 Mar. 2026)

⁶ The three incidents referred to are the shootdown of Malaysia Air flight 17 over Eastern Ukraine on 17 July 2014 by SAMs, the shootdown of Ukraine Air flight 752 by Iranian SAMs near Tehran on 8 January 2020, and the crash of Azerbaijan Airlines flight 8243 at Aktau, Kazakhstan due to damage sustained by Russian SAMs while on approach to Grozny, Russia on 25 December 2024.

risk to civil aircraft operating over or near conflict zones.’⁷ Notable differences between the shootdown of KAL007 and more recent occurrences are that KE007 was intentionally shot down in peacetime after being intercepted and identified by a Soviet fighter for violating Soviet airspace, while recent incidents were likely accidental acts over or near zones of conflict by the use of SAMs. In 2025, the ICAO Council adopted its first ever decision on the merits in a dispute brought under Article 84 of the Convention by the Netherlands and Australia against the Russian Federation regarding the shoot down of Malaysia Air flight 17 (MH17) over Eastern Ukraine in July 2014.⁸ The Council’s decision attributed the downing of MH17 by a SAM to the Russian Federation and as such, held that Moscow was in non-conformance with Article 3bis. The Russian Federation has appealed the decision to the International Court of Justice.⁹ In addition, there is a pending dispute before the Council brought by Canada, Sweden, Ukraine and the United Kingdom against Iran asserting its violation of Article 3bis regarding the 2020 shootdown of Ukraine Air flight 752 near Tehran.¹⁰

This paper examines the rights and obligations of States with regard to Article 3bis and how it has evolved from one that was derived from an intentional shootdown of a civilian airliner that was off course and not in communication with State interceptors to more modern scenarios where, despite technological advances, civil aircraft continue to be casualties when the provisions of Article 3bis are not adhered to by States. Although States and the aviation industry have made great strides in improving navigational accuracy, means of global communication and additional in-flight procedures, achieving the objectives of the drafters of Article 3bis is still not a simple matter. This paper examines each paragraph of Article 3bis to identify ambiguities in the provisions and where applicable explain State practice as a reflection of how Article 3bis is interpreted. The paper then discusses the two disputes before the Council regarding Article 3bis and how these disputes will shape the future interpretation of the provision. It seeks to identify weak or shortfalls in Article 3bis based on State practice and suggests how it may be strengthened in the future to prevent the hazard of weapons being used against civil aircraft in flight and enhance international air safety.

2.0 Background of Article 3bis (6180 words/3934 without footnotes)

Article 3bis of the Chicago Convention was adopted on 10 May 1984 by unanimous vote at ICAO’s 25th Extraordinary Assembly and went into effect on 1 October 1998. It is one of only two substantive amendments to the Convention in its 80-plus year history.¹¹ The adoption of Article 3bis was a result of concern on the part of ICAO Member States and other stakeholders in

⁷ ICAO, *Risk Assessment Manual for Civil Aircraft Operations Over or Near Conflict Zones*, (3rd) Doc. 100084 (2023), para. 1.1.4.

⁸ ICAO Council, *Decision of the Council of the International Civil Aviation Organization in the Matter: Australia and the Kingdom of the Netherlands and the Russian Federation* (2022), C-DEC 235/11, 30 Jun 2025. Under Article 84 of the Convention the ICAO Council is authorized to decide on disputes between Member States regarding the interpretation and application of the Convention and its annexes.

⁹ *Appeal from the Decision of the ICAO Council under Article 84 of the Convention on International Civil Aviation* (Russian Federation v. Commonwealth of Australia and the Kingdom of the Netherlands), (Application) 18 Sept. 2025.

¹⁰ *Appeal Relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation* (Islamic Republic of Iran v. Canada, Sweden, Ukraine and the United Kingdom), (Application) 17 Apr. 2025. At present, Iran is appealing the jurisdiction of the Council to hear the matter under Article 84 of the Convention.

¹¹ The other substantive amendment is Article 83bis on the transfer of certain responsibilities under the Chicago Convention from the State of Registry to other contracting States. Protocol relating to an amendment to the Chicago Convention on International Civil Aviation, Article 83bis (signed 6 Oct. 1980, entered into force 20 Jun. 199) 1997 UNTS 209.

international civil aviation to address the shootdown of civil airliners by State aircraft when the airliners strayed into their national airspace.¹² This hazard to civil aviation was not new as there had been other incidents of the States shooting down aircraft for territorial violations.¹³ However, the impetus for the adoption of Article 3bis was the shootdown of Korean Air flight 007 (KE007) on the night of 1 September 1983, near the Sakhalin Islands in which a Boeing 747 with 289 souls on board was destroyed by a Soviet fighter.

The immediate action came from the ICAO Council which adopted a resolution which, among other things, reaffirmed the principle that States, when intercepting aircraft, should not use force [use force or use weapons?] against them, and directed the ICAO Secretary General to initiate an investigation into the incident. The Council further directed ICAO's Air Navigation Commission to consider amendments to the Convention or its annexes to prevent future incidents and examine ways to improve civil-military communications and aerial intercept procedures.¹⁴ Following the final report by ICAO Secretary General over the downing of KE007, on 6 March 1984, the ICAO Council adopted a resolution deeply deploring the Moscow's failure to cooperate in the investigations and condemning the action of the Soviet Union, stating,

[w]hatever the circumstances which, according to the Secretary-General's report, may have caused the aircraft to stray off its flight plan route, such use of armed force constitutes a violation of international law, and invokes generally recognized consequences.¹⁵

The 25th Extraordinary ICAO Assembly was then held between 24 April and 10 May 1984 leading to the adoption of Article 3bis. The text of Article 3bis was a compromise between Member States regarding the principles of the Convention contained in other articles such as Article 1 on the sovereignty of national airspace,¹⁶ Article 4 prevention of the misuse of civil aviation¹⁷ and Article 3(d) the obligation of States to ensure that their state aircraft operate with due regard for the safety of international civil aviation.¹⁸ Several Member States proposed drafts to amend the Convention including a joint resolution by Austria and France, which served as the foundational proposal, and individual proposals from the United States, Ecuador, South Korea and

¹² One such stakeholder, the International Federation of Airline Pilot Associations (IFALPA) initiated a 60-day boycott of flights to Moscow on 6 September 1983. Gerald F. Fitzgerald, "The Use of Force against Civil Aircraft: The Aftermath of the KAL Flight 007 Incident," (1984) Canadian YIL 291 at 294.

¹³ Notable incidents prior to the adoption of Article 3bis include the downing of an El Al airliner by Bulgaria in 1955, the shootdown of a Libyan Arab Airlines aircraft in 1973 and the use of weapons by a Soviet fighter against Korean Air flight 902 in 1978. See William J. Hughes, "Aerial Intrusions by Civil Airliners and the Use of Force," (1980) 45 J. Air L. & Comm, 595 at 600-614.

¹⁴ ICAO Council, 'Resolution Adopted by the Council on 16 September 1983 at its Extraordinary Session,' A24-WP/49, P18 Appendix.

¹⁵ ICAO Council, 'Resolution Adopted by the Council on 6 March 1984 at its Extraordinary Session,' 23 I.L.M. 937 (1984) Attach. B.

¹⁶ Chicago Convention, Article 1 recognizes that 'every State has complete and exclusive sovereignty over the airspace above its territory.'

¹⁷ Chicago Convention, Article 4 states, 'Each contracting State agrees not to use civil aviation for any purpose inconsistent with the aims of this Convention.'

¹⁸ Chicago Convention, Article 3(d) specifies that 'contracting States undertake, when issuing regulations for their state aircraft, that they will have due regard for the safety of navigation of civil aircraft.' ICAO's objectives under the Convention are, *inter alia*, to 'Insure the safe and orderly growth of international civil aviation throughout the world', Article 44(a), and 'Promote safety of flight in international air navigation', Article 44(h).

the Soviet Union.¹⁹ Article 3bis contains four paragraphs that emphasize core principles of air law. An examination of the text of the paragraphs reveals important ambiguities in the article, some which have been interpreted by States through declared policies and acts, and others which remain unclear.

2.1 Article 3bis(a) Refraining from the Use of Weapons

The foundation of Article 3bis is its first paragraph containing language to avoid the destruction of civil aircraft in flight. Article 3bis paragraph (a) states,

The contracting States *recognize* that *every State* must *refrain* from resorting to the *use of weapons* against *civil aircraft in flight* and that, *in case of interception*, the *lives of persons on board* and the *safety of aircraft* must *not be endangered*. 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*.²⁰

Paragraph (a) thus contains three core principles. In the first clause of the first sentence, it constrains the use of weapons against civil aircraft in flight. The term *recognize* is intended to convey that the provisions of paragraph (a) are declaratory in nature of customary international law in existence before the protocol on Article 3bis.²¹ The phrase *every State* conveys that this obligation is universal and not limited to ICAO Member States, the number of which was 203 at the time of adoption.²² The use of the verb *refrain*, as opposed to other verbs proposed at the ICAO Assembly such as *abstain*,²³ *not to resort*,²⁴ *must not use*,²⁵ indicates that while weapons should not be used against civil aircraft in flight, it is not an absolute prohibition.²⁶ The Austrian-French draft and several other drafts proposed limitations or prohibitions on the *use of force* against civil aircraft in flight.²⁷ However, the delegates eventually agreed on language proposed by the Soviet Union to refer to the *use of weapons* as it was the use of weapons, as an extreme use of force, that was to be avoided.²⁸ The Soviet reasoning for the language was that more limited actions could be considered as a use of force, such as the interception of an intruding civil aircraft and its diversion out of sovereign airspace or forcing it to land; actions authorized under Article 3bis(b)

¹⁹ Jean-Claude Piris, “L’interdiction du recours à la force contre les aéronefs civils, l’aménagement de 1984 à la Convention de Chicago,” (1984) 30 *Annuaire français de droit international*, 711 at 717.

²⁰ Chicago Convention, art. 3bis(a) emphasis added.

²¹ Michael Milde, “Interception of Civil Aircraft vs. Misuse of Civil Aviation,” (1986) 11 *Annals Air & Space L.* 105 at 113. For a less definitive analysis see Bin Cheng, “The Destruction of KAL Flight KE007, and Article 3bis of the Chicago Convention,” in Bin Cheng, *Studies in International Air Law: Collected Works of Bin Cheng* (Leiden: Brill Nijhoff 2018) 343 at 354-355.

²² Gerald F. Fitzgerald, “The Use of Weapons Against Civil Aircraft – Amendment (Article 3bis) to the Chicago Convention,” (1984) 2(1) *Air and Space Lawyer* 7 at 8.

²³ [need citation for the original French proposal]

²⁴ Proposal by the Latin American Civil Aviation Commission (LACAC), ICAO, A25-WP/9, 25 Apr. 1984.

²⁵ Proposal of South Korea, ICAO, A25-WP/10, 25 Apr. 1984.

²⁶ Bin Cheng, “The Destruction of KAL Flight KE007, and Article 3bis of the Chicago Convention,” in Bin Cheng, *Studies in International Air Law: Collected Works of Bin Cheng* (Leiden: Brill Nijhoff 2018) 343 at 356-357.

²⁷ J.C. Piris, ‘L’interdiction du recours à la force contre les aéronefs civils, l’aménagement de 1984 à la Convention de Chicago,’ 30 *Annuaire français de droit international*, 711, 722 (1984).

²⁸ Executive Committee, Report, Minutes and Document, ICAO Doc. 94358, A25-EX ICAO Doc. 9438, A25-EX, p. 65.

and the Convention's Annex 2 *Rule of the Air*.²⁹ The principle in the first clause concludes with the scope of the constraint in refraining from resorting to the use of force applies to *civil aircraft in flight*. It does not define the term *in flight*, however, the more appropriate definition is 'from the moment when power is applied for the purpose of take-off until the moment the landing run ends.'³⁰ More problematic is its application to civil aircraft.

2.2 Civil Aircraft as Criminal Instruments

The definition of *civil aircraft* in paragraph (a) raises two contentious issues. The first issue is whether the term applies universally to civil aircraft, including civil aircraft flying within their own State of registry, or does the Convention's Article 1 regarding State sovereignty proscribe the application of Article 3bis to domestic aircraft. Michael Milde, [Milde's position at the time] who participated in the preparations for and the course of the 25th Session (Extraordinary) of the ICAO Assembly, has written that Article 3bis applies only to foreign aircraft and not aircraft registered in one's own State, as to interpret the text otherwise would exceed the scope and constitutionality of the Convention.³¹ According to Milde, 'it was a clear intention of the drafters to apply Article 3bis only to "foreign" aircraft.'³² However, Bin Cheng has argued that since the drafters changed the original wording in the Austrian-French proposal from 'aircraft of the other contracting State' to civil aircraft, a textual interpretation of the term would apply to all civil aircraft including aircraft of a State's own registration.³³ While recognizing that the domestic law of a State governs its nationals, Jean-Claude Piris supports the conclusion of Bin Cheng in that as the rule reflects a general principle of law it is unclear why the provision would not apply to all aircraft.³⁴ [could States recognize the Article 3bis protections in their domestic law to resolve the two views?]

²⁹ Delegate of the USSR, Minutes of the Sixth Meeting, 30 Apr. 1984, A25-EX06, Para. 12, p. 64-65. Executive Committee, Report, Minutes and Document, ICAO Doc. 94358, A25-EX ICAO Doc. 9438, A25-EX, p. 65.

³⁰ Convention on Offences and Certain Other Acts Committed on board Aircraft (Tokyo Convention) defines *in flight* as from the moment when power is applied for the purpose of take-off until the moment the landing run ends. (signed 14 September 1963, in force 4 December 1969), UNTS 220, art. 1(3). Similarly, the 1952 Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface (Rome Convention), applies the same definition. 310 UNTS 181 (signed 7 October 1952, in force 4 February 1958), art. 1(2). For an alternative definition see the Convention for the Suppression of Unlawful Seizure of Aircraft, 16 Dec. 1970, 860 UNTS 105 (entered into force 14 October 1971), art. 3(1), and the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, (Montreal Convention) 23 Sept. 1971, 974 UNTS 177 (entered into force 26 January 1973), art. 2(a). The Hague and Montreal Conventions define *in flight* as 'from the moment when the external doors of the aircraft are closed following embarkation until the moment when any such door is opened for disembarkation.' Such a definition would preclude the use of force on the ground to retake a hijacked aircraft.

³¹ Michael Milde, "Interception of Civil Aircraft vs. Misuse of Civil Aviation," (1986) 11 *Annals Air & Space L.* 105 at 126, The regulation of one's own aircraft falls within their exclusive domestic jurisdiction.

³² Michael Milde, *International Air Law and ICAO* 3rd ed (The Hague: Eleven International Publishing, 2016), 61. Milde notes that there are other provisions of domestic law that would preclude the use of weapons against domestic aircraft in flight, but such actions would not trigger Article 3bis.

³³ Bin Cheng, "The Destruction of KAL Flight KE007, and Article 3bis of the Chicago Convention," in Bin Cheng, *Studies in International Air Law: Collected Works of Bin Cheng* (Leiden: Brill Nijhoff, 2018) 343 at 358-359. See Kimberley Trapp, "Uses of Force against Civil Aircraft," *EJIL: Talk* 28 June 2011. [Uses of Force against Civil Aircraft – EJIL: Talk!](#) 'Article 3bis, however, goes beyond both because it is not limited to foreign registered civil aircraft – the prohibition must be read to include uses of force against civil aircraft registered to the State using force. This interpretation of Article 3bis is the most consistent with the object and purpose of the Chicago Convention – which is (in part) to promote the safety of all international civil aviation.'

³⁴ Jean-Claude Piris, "L'interdiction du recours à la force contre les aéronefs civils, l'aménagement de 1984 à la Convention de Chicago," (1984) 30 *Annuaire français de droit international*, 711 at 723.

The second issue regarding the term *civil aircraft* is whether it is qualified. One interpretation is that a civil aircraft engaged in criminal activity loses the protection that civil aircraft enjoy under Article 3bis. If so, what types of criminal activity limit those protections.³⁵ This issue was a concern raised at the 25th ICAO Assembly (Extraordinary) by several Latin American countries in terms of the misuse of civil aviation but was not squarely addressed in the text of Article 3bis.³⁶ Since then, States have differed in their interpretation of civil aircraft. In the 1990s both Peru and Colombia allowed for the use of weapons against suspected drug trafficking aircraft if those aircraft failed to follow the instructions of aviation authorities and intercepting aircraft.³⁷ As a result, the United States temporarily suspended its air interdiction support for its Airbridge Denial Program in May 1994.³⁸ In a subsequent meeting with the U.S. State Department's Assistant Legal Advisor Robert Harris, Colombian Ministry of Defense Deputy Legal Advisor Patricia Bulla, explained Bogota's position on the issue of shooting down aircraft and specifically why Colombia's policy was consistent with Article 3bis. Legal Advisor Bulla stated that Colombia's policy was in accordance with the Chicago Convention as Article 3bis only applied to commercial aircraft and other international aircraft that had filed a flight plan with the government and complied with international law.³⁹ While acknowledging that the term 'civil aircraft' included all international non-state aircraft, the restrictions on the use of weapons did not apply to 'those suspect narcotrafficking aircraft that violated international law and the sovereignty of a country by not filing a flight plan, ignoring directions from air traffic controllers and disobeying internationally recognized signals to land.'⁴⁰ At one point in the summer of 1994, the United States considered advocating for a narrow exception to Article 3bis to allow the use of weapons against drug trafficking aircraft which ignored the instructions of interceptors.⁴¹

³⁵ Bin Cheng, "The Destruction of KAL Flight KE007, and Article 3bis of the Chicago Convention," in Bin Cheng, *Studies in International Air Law: Collected Works of Bin Cheng* (Leiden: Brill Nijhoff, 2018) 343 at 360-362.

³⁶ Delegate of Peru, Minutes of the Thirteenth Meeting 8 May 1984, A25-EX13, Para. 25, p. 135. At the Executive Committee meetings, Mexico, Venezuela, Guatemala and Cuba all indicated the concerns regarding the criminal use of civil aviation.

³⁷ President of the Peruvian Republic, 'Declaran en Estado de Emergencia todos los Aeropuertos existentes en la Zona Huallaga y otras donde se siembre coca,' (State of emergency declared for all airports in the Huallaga Zone and other areas where coca is cultivated.) Decreto Ley No. 25426, 9 Apr. 1992. [25426-feb-9-1992.pdf](#) Article 4 of the declaration provided for enforcement measures including the shootdown of any aircraft which failed to provide the required information or follow the instructions of the relevant aviation authorities. For Colombia's 1994 policy see Department of State, Office of Foreign Language Services, *Ministry of National Defense Information and Press Office: Press Release*, March 2, 1994. GWU National Security Archive. [Shootdown in Peru](#)

³⁸ Department of State, Bureau of International Narcotics Matters, *Talking Points: Implication of DOD's Forcedown Decision*, May 9, 1994, CONFIDENTIAL (declassified on 12 Dec. 2000). GWU National Security Archive. [Shootdown in Peru](#) While the issue of Article 3bis was part of the U.S. policy discussion, the other concern is that U.S. personnel cooperating in the downing of civil aircraft could subject them to criminal prosecution under the Aircraft Sabotage Act of 1984 [need citation for the Act] as codified in 18 U.S.C. § 32(b)(2) or at least aiding and abetting crimes under the Act under 18 U.S.C. § 2(a).

³⁹ U.S. Embassy Bogotá, *Revised Colombian Interception Procedures*, 7 Feb. 1994, CONFIDENTIAL (declassified 12 Dec. 2000). GWU National Security Archive. [Shootdown in Peru](#)

⁴⁰ U.S. Embassy Bogotá, *Revised Colombian Interception Procedures*, 7 Feb. 1994, CONFIDENTIAL (declassified 12 Dec. 2000). GWU National Security Archive. [Shootdown in Peru](#)

⁴¹ Department of State Action Memorandum, *Implementing the President's Decision on Colombia Peru Forcedown Policies*, 23 Jun 1994, CONFIDENTIAL (declassified 12 Dec. 2000). GWU National Security Archive. [Shootdown in Peru](#) The drafter of this document refers to Article 3(d) of the Chicago Convention which obligates States to regulate their aircraft to exercise due regard for the safety of flight of civil aircraft, however, it is possible that the drafter confused Article 3(d) with Article 3bis of the Convention as this was the article of contention within interagency discussions. On the other hand, as the United States had not signed the Article 3bis Protocol, it has taken the position

The issue was resolved between the United States, Colombia and Peru when the NDAA for FY1995 provided immunity for host government and U.S. personnel to interdict aircraft suspected of drug trafficking if the President of the United States determined that interdiction is necessary because of the extraordinary threat posed by illicit drug trafficking to the national security of that country and the ‘country has appropriate procedures in place to protect against innocent loss of life in the air and on the ground in connection with interdiction,’ to include an effective means to identify and warn an aircraft before the use of force directed against it.⁴² In December 1994, President Clinton signed Presidential Findings to that effect for both Colombia and Peru, allowing U.S. surveillance assistance to continue despite concerns over provisions of the Chicago Convention.⁴³

On 20 April 2001, with the ABDP still in place, a Cessna 185 floatplane with a U.S. missionary family on board was flying above the Amazon River from Islandia to Iquitos Peru. The floatplane was first identified as suspicious by a U.S. tracker aircraft and was subsequently misidentified by both the host nation rider on board and the Peruvian A-37 intercept aircraft.⁴⁴ After failing to confirm that the aircraft was on a valid flight plan and receiving no response to radio interrogatories, the A-37 received permission and fired on the floatplane killing the mother and infant daughter of the family and wounding the pilot. The pilot was able to land the aircraft on the river. In the aftermath, the U.S. suspended the program with both Colombia and Peru. Several investigations followed. One of the findings in a U.S. Government Inspector General (IG) Report was that including the failure to identify the plane through its registration number, failure to recognize that the flight behavior of the aircraft was dissimilar to those of a typical drug trafficking aircraft, failure to adhere to established intercept procedures, including the use of visual signals, failure to fire warning shots before shooting at the aircraft and a failure to follow the Peruvian chain-of-command and received the proper authorization.⁴⁵ The IG Report assessed 14 prior shootdowns involving U.S. tracker aircraft and noted that over time and for various reasons, established intercept procedures were not followed.⁴⁶ As a report by the U.S. Senate Select Committee on Intelligence stated, ‘Participants in the program seemed to have an operational assumption that an intercepted plane without a flight plan was a drug trafficker.’⁴⁷ The ABDP was reinstituted with Colombia in August of 2003 after additional safety protocols were added to its

that it views the provisions of Article 3bis as customary international law and therefore cited Article 3(d) of the Convention implicating the requirement of State aircraft to exercise due regard.

⁴² National Defense Authorization Act for Fiscal Year 1995 (Public Law 103-337) Section 1012, 5 Oct. 1994, 108 Stat. 2837.

⁴³ Presidential Determination 95-7, Resumption of U.S. Drug Interdiction Assistance to the Government of Colombia, 1 Dec. 1994. Federal Register (Vol. 59, No. 240) 15 Dec. 1994. Presidential Determination 95-9, Resumption of U.S. Drug Interdiction Assistance to the Government of Peru, 8 Dec. 1994. Federal Register (Vol. 59, No. 242) 19 Dec. 1994.

⁴⁴ Department of State, Bureau of International Narcotics and Law Enforcement Affairs, Peru Investigation Report: The April 20, 2001 Peruvian Shootdown Accident, (Washington, DC: 2001). See also U.S. Senate Select Committee on Intelligence, ‘Report on a Review of United States Assistance to Peruvian Counter-Drug Air Interdiction Efforts and the Shootdown of a Civilian Aircraft on April 20, 2001,’ Oct. 2001, (Washington DC: USGPO 2002), 8 (Table 1).

⁴⁵ CIA Inspector General, Report of Investigation: Procedures Used in Narcotics Airbridge Denial Program in Peru, 1995-2001, 25 Aug. 2008, SECRET (approved for release 1 Nov 2010) 118-120.

⁴⁶ CIA Inspector General, Report of Investigation: Procedures Used in Narcotics Airbridge Denial Program in Peru, 1995-2001, 25 Aug. 2008, SECRET (approved for release 1 Nov 2010) 118-120.

⁴⁷ U.S. Senate Select Committee on Intelligence, ‘Report on a Review of United States Assistance to Peruvian Counter-Drug Air Interdiction Efforts and the Shootdown of a Civilian Aircraft on April 20, 2001,’ Oct. 2001, (Washington DC: USGPO 2002), 21. The Government of Peru claimed to shootdown 38 suspected drug trafficking aircraft between 1995-2000, though U.S. tracker aircraft only assisted in 14 shootdowns with three known fatalities. *Id.* 15-22.

intercept procedures.⁴⁸ It wasn't until 2023 when a new Non-Lethal Aerial Interception Agreement between the United States and Peru was signed, providing additional U.S. assistance in exchange for Peru's commitment not to shoot at civil aircraft.⁴⁹

Not all States share the view of Peru and Colombia in the 1990s. Canada has taken the position that short of self-defense, the shooting down of civil aircraft was impermissible.⁵⁰ At the 25th ICAO Assembly (Extraordinary) the Canadian delegate held the view that there were other means to address the situation in which an intercepted aircraft refused to obey an order to land, including the responsibility of the State of Registry and other States addressed through diplomatic channels and measures under the Convention. Milde agrees in that any use of weapons against the aircraft would be a death sentence to all persons on board. At the same time, referencing 9/11, he states 'No State is obliged to remain idle and follow the destruction of its vital interests by criminal acts.'⁵¹

The next core principle contained in the second clause of the first sentence of paragraph (a) states that in case of interception the lives and the *lives of persons on board* and *the safety of aircraft* must *not be endangered*. This clause suggests several limitations on State aircraft intercepting civil aircraft in flight. Many States allow its aircraft effecting an intercept to fire warning shots as a means to get the attention of the pilot of the subject and to apply a coercive warning should the pilot of the intercepted aircraft not comply with the directions of the intercepting aircraft. It is common practice to use warning shots on the high seas with vessels, however, while vessels may stay afloat if damaged by gunfire, the hazards to aircraft in flight from an errant round are exponentially more dangerous. Convention Annex 2 *Rules of the Air* articulates the procedures civil aircraft are to follow upon intercept. [insert core intercept procedures from Annex 2 or ICAO Manual on intercepts] Even prior to the adoption of Article 3bis, Annex 2 stated that intercepting aircraft should refrain from the use of weapons and the current version of Annex 2 repeats that same provision albeit as a note.⁵² Nonetheless, the Standards for the interception of aircraft in Annex 2 emphasize the hazardous nature of aircraft intercepts and stress their use as a last resort.⁵³

2.3 The Use of Civil Aircraft as a Weapon

The third core principle of Article 3bis(a) contained in the second sentence states that despite the obligations in the first sentence to refrain from the use of weapons and not endanger the passengers or aircraft in case of intercept, such obligations on the part of States do not modify their rights and obligations under the UN Charter. As such, States may exercise their right to self

⁴⁸ U.S. GAO, 'Air Bridge Denial Program in Colombia has Implemented New Safeguards, but its Effect on Drug Trafficking is not Clear,' GAO-05-970, Sept. 2005, 5.

⁴⁹ U.S. Embassy in Peru, 'United States and Peru sign Non-Lethal Aerial Interception Agreement,' 31 Aug. 2023. [United States and Peru sign Non-Lethal Aerial Interception Agreement - U.S. Embassy in Peru](#)

⁵⁰ Delegate of Canada, Minutes of the Seventh Meeting, 1 May 1984, A25-EX07, Para. 2, p. 69.

⁵¹ Michael Milde, *International Air Law and ICAO* 3rd Ed (The Hague: Eleven International Publishing, 2016), at 62. Milde stated 'Any act of interception or other enforcement measure not involving the use of weapons against civil aircraft in flight is legitimate and acceptable.' Michael Milde, "Interception of Civil Aircraft vs. Misuse of Civil Aviation," (1986) 11 *Annals Air & Space L.* 105 at 127.

⁵² Chicago Convention, Annex 2 *Rules of the Air*, App. 2, para. 1.1. Some Member States take the view that constitutionally, the Convention and its annexes cannot regulate State aircraft and therefore Annex 2 Appendix 2 is only applicable to intercepted aircraft. See Michael Milde, "Interception of Civil Aircraft vs. Misuse of Civil Aviation," (1986) 11 *Annals Air & Space L.* 105 at 114.

⁵³ Chicago Convention, Annex 2 *Rules of the Air*, App. 2, para. 1.1(a).

and collective defense under Article 51 of the Charter and are obligated to comply with the provisions of Article 2(4) to ‘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.’⁵⁴ Ambiguity remains as to when a State could use weapons against a civil aircraft in flight in the name of self-defense. The use of a civil aircraft in flight as a weapon may not rise to traditional descriptions of an armed attack as the ‘most grave form of the use of force.’⁵⁵ Furthermore, States have different measures as to when they may exercise the right of self-defense.⁵⁶ Nonetheless, the beginning of the 21st century witnessed the profound impact of civil airliners used as a weapon.

The multi-prong attacks by Al-Qaeda on the United States on 11 September 2001 created a paradigm shift in the way authorities and the general population think about aircraft hijacking.⁵⁷ Before 2001, the method of dealing with hijacked aircraft was to negotiate with the hijackers in an attempt to keep the aircraft on the ground and the passengers from harm. The focus was on the safety of the passengers and crew on board. The 9/11 hijackers targeted the political and economic institutions of the United States. The immediate response by the U.S. leadership was to order the shoot down of any remaining hijacked aircraft, though U.S. military pilots flying that day never had to execute the order.⁵⁸ The aftermath of that day has caused States to rethink how to address future hijackings where the intent of the perpetrators is to use the aircraft as a weapon against something or someone else. Some States have left their policy unstated, providing their political leadership some flexibility in their options. However, other States attempted to address the threat with legislation to authorize the use of weapons on a civil aircraft being used as a weapon itself.

In the early 2000s, notable legislative efforts occurred in Germany and Poland. Section 14.3 of Germany’s Aviation Security Act allowed for the direct use of armed force on a civil aircraft in flight if other measures fail, the aircraft is intended to be used as a weapon against human lives and the direct use of armed force is the only means to avert this imminent danger.⁵⁹ It required a number of procedures to be followed before the incident would be considered a ‘grave circumstance’ that could warrant force based on a final order from the Minister of Defense or her designee.⁶⁰ The German Constitutional Court held the statute unconstitutional. The Court held, among other things, that such a provision would be impermissible under the German Constitution as an individual cannot be obligated to sacrifice his or her life in the interest of society as a whole, even if it is the only means available and authorized by proper authority.⁶¹ The Constitution

⁵⁴ UN Charter arts. 2(4) and 51.

⁵⁵ Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, para. 191.

⁵⁶ U.S. Department of Defense, *Law of War Manual*, Jul. 2023, para. 1.11.5.2 stating ‘The United States has long taken the position that the inherent right of self-defense potentially applies against any illegal use of force.’ See also William H. Taft IV, Legal Adviser, Department of State, “Self-Defense and the Oil Platforms Decision,” (2004) 29 Yale J. Int’l L. 295 at 300-301.

⁵⁷ National Commission on Terrorist Attacks. *The 9/11 Commission Report*. (New York: WW Norton, 2004) at 344-348.

⁵⁸ National Commission on Terrorist Attacks. *The 9/11 Commission Report*. (New York: WW Norton, 2004) at 40-42.

⁵⁹ Act Revising Aviation Security Tasks (*Gesetz zur Neuregelung von Luftsicherheitsaufgaben*) of 11 January 2005 (Federal Law Gazette, *Bundesgesetzblatt – BGBl I* p. 78) Aviation Security Act (Luftsicherheitsgesetz – LuftSiG) § 14.3.

⁶⁰ Aviation Security Act (Luftsicherheitsgesetz – LuftSiG) § 14.4 and 14.2.

⁶¹ Bundesverfassungsgericht [BVerfG] Feb. 15, 2006, 1 BvR 357/05, para. 135.

precludes turning an individual into the object of the State in furtherance of its security goals.⁶² Furthermore, the Court expressed concern over the information and communication challenges in such a scenario and the inherent danger that a decision to shoot down an aircraft will be ‘made too early on an uncertain factual basis.’⁶³

The Polish Sejm passed similar legislation to address the use of an aircraft as a weapon in the case of hijacking. Article 122a of the Act of 3rd July 2002 – The Aviation Law permitted the shooting down of a civil aircraft if necessary for state security if the aircraft is being used for a terroristic attack.⁶⁴ Some six years later the Polish Constitutional Court invalidated the provision.⁶⁵ The logic of the Polish Constitutional Court was similar to that of the German Constitutional Court in that an individual, even one in a hijacked aircraft, could not become the object of state action even if that action’s purpose is to save the lives of others on the ground.⁶⁶ It also shared the concern that there was too much uncertainty in both an assessment that the action would achieve its goals and the ability of the State in such a scenario to be able to accurately weigh the tradeoffs between the innocent people on the aircraft and those on the ground.⁶⁷

⁶² Bundesverfassungsgericht [BVerfG] Feb. 15, 2006, 1 BvR 357/05, para. 121. Ausgehend von der Vorstellung des Grundgesetzgebers, dass es zum Wesen des Menschengeschlechts, in Freiheit sich selbst zu bestimmen und sich frei zu entfalten, und dass der Einzelne verlangen kann, in der Gemeinschaft grundsätzlich als gleichberechtigtes Glied mit Eigenwert anerkannt zu werden, [...] schließt es die Verpflichtung zur Achtung und zum Schutz der Menschen würde vielmehr generell aus, den Menschen zum bloßen Objekt des Staates zu machen.

⁶³ Bundesverfassungsgericht [BVerfG] Feb. 15, 2006, 1 BvR 357/05, para. 127.

⁶⁴ Art. 122a Ustawy z dnia 3 lipca 2002 r. – Prawo lotnicze Dz. U. z 2006 r., Nr 100, poz. 696. Article 122a para. 1.1 stated, ‘If required by considerations of state security, and if the air defense command authority—taking into account, in particular, information provided by air traffic service providers—determines that a civil aircraft is being used for unlawful activities, and specifically as a means of an aerial terrorist attack, such aircraft may be destroyed in accordance with the principles set forth in the Act of 12 October 1990 on the Protection of the State Border.’ (Jeżeli wymagają tego względy bezpieczeństwa państwa i organ dowodzenia obroną powietrzną, uwzględniając w szczególności informacje przekazane przez instytucje za pewniające służby ruchu lotniczego, stwierdzi, że cywilny statek powietrzny jest użyty do działań sprzecznych z prawem, a w szczególności jako środek ataku terrorystycznego z powietrza, statek ten może być zniszczony na zasadach określonych w przepisach ustawy z dnia 12.10.1990 r. o ochronie granicy państwowej). See also Przemysław Szczepański, “Tribunał Konstytucyjny a Terroryzm – Analiza Wybranych tez z Uzasadnienia do Wyroku TK 44/07,” *Acta Universitatis Lodziensis. Folia Iuridica*, (2012) 71. <https://doi.org/10.18778/0208-6069.71.08> (The Constitutional Tribunal and Terrorism – An Analysis of Selected Points from the Rationale of Constitutional Tribunal Judgment 44/07). See also Artur Banach, “Shooting down manned and unmanned aircraft in Polish law,” *The Law of New Technologies. Shooting down manned and unmanned aircraft in Polish law - Prawo nowych technologii - drony, elektromobilność*. (accessed 2 Aug. 2026).

⁶⁵ Przemysław Szczepański, “Tribunał Konstytucyjny a Terroryzm – Analiza Wybranych tez z Uzasadnienia do Wyroku TK 44/07,” *Acta Universitatis Lodziensis. Folia Iuridica*, (2012) 71 at 115 n. 9. <https://doi.org/10.18778/0208-6069.71.08> (The Constitutional Tribunal and Terrorism – An Analysis of Selected Points from the Rationale of Constitutional Tribunal Judgment 44/07).

⁶⁶ Wyrok Trybunału Konstytucyjnego z 30.09.2008 r. K 44/07, para 8.2 referencing the German Constitutional Court the Polish Constitutional Court stated, ‘[T]he consequence of applying the contested provision is the “depersonalization” and “reification” of the non-aggressor individuals (passengers and crew members) on board a “Renegade” aircraft. These persons are reduced to mere objects of a rescue operation aimed at preventing hypothetical, further, and likely greater losses that a targeted terrorist strike could cause.’ ([S]kutkiem zastosowania zakwestionowanego przepisu jest „depersonalizacja” i „reifikacja” znajdujących się na pokładzie samolotu RENEGADE, niebędących agresorami ludzi (pasażerów i członków załogi). Osoby te stają się jedynie obiektem (przedmiotem) akcji ratunkowej, skierowanej na zapobieganie hipotetycznym, dalszym i prawdopodobnie większym stratom, jakie mogłoby wywołać celowane uderzenie terrorystyczne.)

For an English summary of the decisions main points see Marek Łukasik (Trans), ‘Judgement of 30th September 2008, K 44/07: Permissibility of shooting down a passenger aircraft in the event of a danger that it has been used for unlawful acts, and where state security is threatened,’ [Polonia-30settembre2008.pdf](#)

⁶⁷ Wyrok Trybunału Konstytucyjnego z 30.09.2008 r. K 44/07. [need specific language]

The German and Polish Constitutional Courts invalidated the use of force on hijacked civil aircraft on the base of their respective Constitutions as those document guarantee that citizens, even those aboard a hijacked aircraft, may not be objects of the State in responding to a threat from that same plane. One can agree or disagree with that conclusion and the respective authorities and courts in other States may make a different determination. More relevant for Article 3bis is that both the German and the Polish Constitutional Courts identified uncertainty of the situation, deficient communications and the potential for rapid changes in circumstances as a factor in support of prohibiting the use of weapons against a civilian airliner. An example of this uncertainty is seen in the case of United Airlines flight 93 (UA93) on 11 September 2001. In brief, UA93 was successfully hijacked by Al Qaida operatives who then began to maneuver the aircraft towards its intended target in Washington DC.⁶⁸ However, at the time there was confusion as to what was going on with UA93 and whether there was a reported bomb on board.⁶⁹ U.S. Air Force fighter aircraft were aware that there may be additional aircraft targeting U.S. cities and been conveyed the authorization to shoot down such aircraft by the U.S. National Command Authority.⁷⁰ And yet, the passengers on board were able to find out what had happened earlier that morning and make a courageous attempt to retake the plane.⁷¹ Unfortunately, in the process of that act they did not survive as UA93 crashed in a Pennsylvania field. Their actions exemplify potential for an ever-changing scenario. In theory, they may have retaken the aircraft but due to a perceived threat and incomplete communications still have been determined a national threat by intercepting aircraft and shot down. There is not easy solution to such a scenario, but the Constitutional Court's caution about decisions being 'made too early on an uncertain factual basis.' Governments and their respective airlines continue to make improvements to prevent another 9/11 and additional advances in aviation technology, such as the ability to override the controls of a hijacked aircraft may not be far off. Regardless of those advances there should be a continued discussion about the challenges of such threats and the appropriate response on the part of States, in order to refrain from the use of weapons on civil aircraft in flight, absent the necessity to exercise their rights under the UN Charter.

2.4 Article 3bis(b)

Article 3bis(b) emphasizes the rights of States to exercise sovereignty over their airspace and enforce their domestic laws. It states,

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

⁶⁸ National Commission on Terrorist Attacks upon the United States, *The 9/11 Commission Report*, (Washington DC: USGPO, 2004), 11-12.

⁶⁹ National Commission on Terrorist Attacks upon the United States, *The 9/11 Commission Report*, (Washington DC: USGPO, 2004), 12.

⁷⁰ National Commission on Terrorist Attacks upon the United States, *The 9/11 Commission Report*, (Washington DC: USGPO, 2004), 40-45.

⁷¹ National Commission on Terrorist Attacks upon the United States, *The 9/11 Commission Report*, (Washington DC: USGPO, 2004), 13-14.

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. To ensure the principle of airspace sovereignty each contracting State can require the landing of an aircraft if it *reasonably concludes* that it is operating in a purpose inconsistent with the Convention.⁷²

Paragraph (b) emphasizes State sovereignty in that where there are grounds to suspect illegal activity by a civil aircraft or an act inconsistent with the Convention it can take steps to address such situations by forcing the aircraft to land or giving other instructions. The right of a State to force a civil aircraft to land at a designated airport, however, is limited in two respects. First, the grounds for suspecting unlawful activity or activity inconsistent with the aims of the Convention must be reasonable. Whether there are reasonable grounds for suspecting illegality is fact dependent and is similar to the language of Article 110 of the UN Convention of the Law of the Sea regarding the right of warships to visit foreign ships on the high seas.⁷³ Second, while States have broad discretion as to the means they choose to address aerial violations, those means must be consistent with international law and in particular paragraph (a) of Article 3bis. [How do intercept procedures demonstrate this? Peru and Cuba did not follow intercept procedures – tie in with German and Polish concerns on uncertainty] This reinforces and reminds States of their obligation to ensure their aircraft refrain from the use of weapons against civil aircraft in flight. It also suggests that aerial interceptions should either use the intercept procedures in Annex 2 *Rules of the Air* or the procedures specified in their own aeronautical information publications (AIP) that proscribe endangering the safety of an aircraft during the course of an intercept. Failure to follow such procedures can be considered an internationally wrongful act as it deprives pilots of the intercepted aircraft of the opportunity to comply with the directions of the intercepting aircraft. For example, in the shoot down of two civil aircraft just outside on Cuba's territorial waters, an ICAO Report found that the two Cuban fighters failed to conduct the intercept procedures in both Annex 2 and in their own AIP.⁷⁴

2.5 Article 3bis(c) Severe Penalties

In support of the provisions of paragraph (b), Article 3bis(c) obligates States of Registry and States of Operators to punish crewmembers that fail to comply with the orders of an intercepting aircraft. Paragraph (c) states,

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

⁷² Chicago Convention, art. 3bis(b) (emphasis added).

⁷³ Michael Ramsden, "Reasonable Grounds to Believe," MPIL Sept. 2022. [Oxford Public International Law: Reasonable Grounds to Believe](#). United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397 (UNCLOS), art. 110.

⁷⁴ ICAO Secretary General, *Report of the Investigation Regarding the Shooting Down of Two U.S.-Registered Private Civil Aircraft by Cuban Military Aircraft on 24 February 1996*, C-WP/10441 Restricted 20 Jun. 1996, 81-82. The ICAO investigation found that Cuba failed to used interception as a last resort, failed to communicate the action required from the intercepted aircraft, crossed the flight path of the intercepted aircraft creating a hazard of wake turbulence, did not guide the aircraft to land or depart the national airspace and likely did not initiate the required signals for intercept.

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. *Civil aircraft are obligated to comply with the orders of an intercepting aircraft and contracting States are obligated to make such compliance mandatory.*⁷⁵

States are therefore obligated to enact air regulations requiring their aircraft to comply with intercept procedures and the orders of intercepting aircraft of other contracting States. Additionally, in the case where an aircrew violates such rules, that case is to be submitted to a competent authority. If found guilty of such a violation, State laws should provide for a punishment of severe penalties. At the time of Article 3bis' adoption, similar provisions for the imposition of 'severe penalties' are found in the relevant air treaties for hijackers and individuals guilty of the unlawful destruction of aircraft and navigational facilities.⁷⁶ Establishing severe penalties for failing to follow the directions of an intercepting aircraft are determined by individual States and may depend on the gravity of the violation.⁷⁷ It is not known if any pilots have been prosecuted for failing to follow the instructions of an intercepting aircraft.

2.6 Article 3bis(d) Misuse of Civil Aviation

Finally, Article 3bis(d) emphasizes the obligation of States of Registry and States of Operator to prohibit the misuse of civil aircraft and to take appropriate measures to address such acts. Article 3bis paragraph (d) states,

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."

This article was added as a compromise to Poland and other allies of the Soviet Union at the time to address activities on the part of civil aircraft that did not conform to the Convention's obligations. In addition, although the language in Article 3bis(d) 'for any purpose inconsistent with the aims of the Convention' mirrors the language used in Convention Article 4 on State misuse of civil aviation, Milde argues they mean different things. According to Milde, Article 3bis(d) not only covers the aims of the Organization 'but any violation of the law and public order of the State concerned; [as] in the Assembly discussions, specific references were made to transport of illicit drugs, contraband, gun running, illegal transport of persons and any other common crimes.'⁷⁸

⁷⁵ Chicago Convention, art. 3bis(c) (emphasis added).

⁷⁶ Convention for the Suppression of Unlawful Seizure of Aircraft, 16 Dec. 1970, 860 UNTS 105 (entered into force 14 October 1971), art. 2. Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 23 Sept. 1971, 974 UNTS 177 (entered into force 26 January 1973), art. 3. [Examples of penalties imposed by States found in implementing legislation to the Hague and Montreal Conventions]

⁷⁷ The United States, for example, however, allows for the suspension of an airman certificate but also provides for a fine of \$100,000 or a prison sentence of not more than one year or both for the first offence and a fine of \$250,000 or five years imprisonment or both for subsequent offenses. 49 U.S.C. § 46307.

⁷⁸ Michael Milde, "Interception of Civil Aircraft vs. Misuse of Civil Aviation," (1986) 11 Annals Air & Space L. 105 at 125.

A possible example of a State falling short of this obligation is that of the United States and the group Brothers to the Rescue (*Hermanos al Rescate*). Operating out of airports in southern Florida, Brothers to the Rescue started as a group of volunteer pilots and observers who flew over the waters between Cuba and the United States to assist Cuban refugees in rafts reach the United States or at least a U.S. vessel in its territorial waters.⁷⁹ The group, however, was vehemently anti-Castro and on a number of flights they flew over the territory of Cuba without authorization to include flying low level over the capital city. Cuba had complained about the group to the United States for over a year and a half with very little action on the part of the U.S. Federal Aviation Administration (FAA), other than to conduct briefings to the group emphasizing remaining clear of Cuba's airspace. The FAA finally initiated administrative action to suspend pilot's license of the group's leader, Jose Basulto, after his low-level flight over Havana on 13 July 1995, however, after two further incidents in January 1996, the Cuban leadership ordered the shoot down of two of the organization's aircraft on 24 February 1996 just outside Cuba's territorial waters.⁸⁰ Mr. Basulto was in a third aircraft that managed to return safely to the United States. The FAA finally issued cease and desist letter grounding Mr. Basulto on 29 February 1996, and his license permanently revoked several months later.⁸¹ While one cannot excuse the acts of the Cuban government in this incident, one wonders had the FAA been more timely in prohibiting those activities of Brothers to the Rescue that violated the Chicago Convention, the lives of the other crew members may have been spared.

3.0 Preventative and post-accident obligations

A more significant threat to international civil aviation has come not from air-to air intercepts, but from the use of SAMS whose operating crews and systems misidentify civil aircraft in flight for military targets. In 1988, the Vincennes, a U.S. Navy destroyer was on patrol in the Persian Gulf when its crew mistakenly thought Iran Air 655, an Airbus 300 with 290 passenger and crew onboard, was an Iranian F-14 fighter jet descending towards the ship at a high rate of speed.⁸² In fact, it was merely a civilian airliner climbing within an international airway from Bandar Abbas to Dubai.⁸³ On 4 October 2001, during a Russo-Ukrainian joint military exercise, Ukraine accidentally shot down a Sibir Airlines flight 1812, a Tupolev 154 aircraft with 78 passengers and crew on board, over the Black Sea.⁸⁴ In both cases, subsequent investigations identified significant errors in identification and rules of engagement that led to the tragic incidents.

⁷⁹ ICAO Secretary General, *Report of the Investigation Regarding the Shooting Down of Two U.S.-Registered Private Civil Aircraft by Cuban Military Aircraft on 24 February 1996*, C-WP/10441 Restricted 20 Jun. 1996, 82.

⁸⁰ ICAO Secretary General, *Report of the Investigation Regarding the Shooting Down of Two U.S.-Registered Private Civil Aircraft by Cuban Military Aircraft on 24 February 1996*, C-WP/10441 Restricted 20 Jun. 1996, 77-78. The ICAO investigation found that the two aircraft were shot down 9 and 10 nautical miles outside of Cuban airspace.

⁸¹ ICAO Secretary General, *Report of the Investigation Regarding the Shooting Down of Two U.S.-Registered Private Civil Aircraft by Cuban Military Aircraft on 24 February 1996*, C-WP/10441 Restricted 20 Jun. 1996, 87.

⁸² ICAO, 'Destruction of Iran Airbus A300 in the Vicinity of Qeshm Island, Islamic Republic of Iran on 3 July 1988, Report of ICAO Fact-Finding Investigation, Nov 1988, published in ICAO Circular AN-260/154, paras. 3.1.23 and 3.1.24. Formal Investigation into the Circumstances Surrounding the Downing of Iran Air 655 on 2 July 1988, 28 Jul. 1988, E-10, E-51.

⁸³ ICAO, 'Destruction of Iran Airbus A300 in the Vicinity of Qeshm Island, Islamic Republic of Iran on 3 July 1988, Report of ICAO Fact-Finding Investigation, Nov 1988, published in ICAO Circular AN-260/154, para. 3.1.9.

⁸⁴ [\[need citation and to find full report on the incident\]](#) [Crash of a Tupolev TU-154M in the in Black Sea: 78 killed | Bureau of Aircraft Accidents Archives](#)

The most recent interpretation of state obligations under Article 3bis is currently being played out in two disputes under the Convention's Article 84 before the ICAO Council. Article 84 provides that the ICAO Council decide on the interpretation and application of the Convention and its annexes.⁸⁵ Both disputes involve the likely unintentional shootdown of civilian airliners by military SAMs in areas of conflict. The first dispute is over the shootdown of Malaysia Air flight 17 (MH17) over Eastern Ukraine in 2014 by forces of proxy forces of the Russian Federation. The second dispute is over the shootdown of Ukraine Air flight 752 (PS752) by Iranian forces near Tehran on 8 January 2020. Both disputes are significant for defining the rights and obligations of States under the Convention. The MH17 dispute resulted in the first ever decision on the merits by the ICAO Council in which it found the Russian Federation to be in non-conformance with Article 3bis.⁸⁶ As required by its *Rules of Procedures for the Settlement of Differences*, the Council decision contains the Council's conclusions with its reasons for reaching them.⁸⁷ Moscow has appealed the decision to the International Court of Justice (ICJ) as is allowed for under the dispute resolution provisions of the Convention.⁸⁸ The appeal will provide the Court the opportunity to rule on the correctness of the Council's decision on the merits and may clarify some of the ambiguities in Article 3bis. In the PS752 dispute, the respondent, Iran, objected to the jurisdiction of the Council, however, the Council decided that it in fact had jurisdiction over the dispute under Article 84 of the Convention. Tehran has made an application to the ICJ appealing the Council's jurisdictional decision.⁸⁹ It is likely, however, that the ICJ will affirm the jurisdiction of the Council in the matter paving the way for an additional decision by the Council on the interpretation or application of Article 3bis in just a few short years.⁹⁰

3.1 The ICAO Council Decision on MH17 and State Obligations under Article 3bis

In its decision on the shootdown of MH17, where it found the Russian Federation in non-conformance with Article 3bis, the Council reiterated the obligation of contracting States to refrain from the use of weapons against civil aircraft in flight but observed that if a State used weapons in

⁸⁵ Chicago Convention, art. 84.

⁸⁶ ICAO Council, 'Decision of the Council of the International Civil Aviation Organization in the Matter: Australia and the Kingdom of the Netherlands and the Russian Federation (2022),' C-DEC 235/11 30 Jun. 2025.

⁸⁷ ICAO, *Rules for the Settlement of Differences* (Doc. 7782/3Rev 2024) (*Rules*), art. 15(2)(v).

⁸⁸ Appeal from the ICAO Council decision dated 30 June 2025 (*Russian Federation v. Australia and Netherlands*), Application Instituting Proceedings, 18 Sept. 2025. [Application instituting proceedings](#). For appeals see Chicago Convention, arts 84 and 86. See also David Woodworth, "Article 86," in Steven Truxal and Benjamyn Scott (Eds.) *Legal Commentary on the Chicago Convention on International Civil Aviation*, (Forthcoming 2026).

⁸⁹ ICAO Council, 'Decision of the Council of the International Civil Aviation Organization in the Matter: Canada, the Kingdom of Sweden, Ukraine and the United Kingdom of Great Britain and Northern Ireland and the Islamic Republic of Iran (2024),' 17 Mar. 2025, found in Annex 1 of Appeal relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation, (*Islamic Republic of Iran v. Canada, Sweden, Ukraine and the United Kingdom*), Application Instituting Proceedings, 17 Apr. 2025.

⁹⁰ Where the ICAO Council is to decide on specific articles of the Chicago Convention, the Court has given the Council broad discretion. Appeal Relating to the Jurisdiction of the ICAO Council (*India v. Pak.*), (Judgment) [1972] ICJ Rep. 46, para. 45, 'Since the Court holds that the Council did and does have jurisdiction, then, if there were in fact procedural irregularities, the position would be that the Council would have reached the right conclusion in the wrong way. Nevertheless, it would have reached the right conclusion.' The Court also stated, 'the integrity of the Council's dispute settlement function would not be affected if the Council examined issues outside matters of civil aviation for the exclusive purpose of deciding a dispute which falls within its jurisdiction under Article 84 of the Chicago Convention.' Appeal Relating to the Jurisdiction of the ICAO Council Under Article 84 of the Convention on International Civil Aviation (*Bahr., Egypt, Saudi Arabia and U.A.E. v. Qatar*), Judgment, I.C.J. 2020 Rep. 81 (July 14) para. 61.

accordance with the UN Charter or in the case of armed conflict in accordance with international humanitarian law (IHL) it would not be a violation of Article 3bis.⁹¹ This confirms that if a State was acting in self-defense or if in an armed conflict, applied the principles of proportionality and discrimination under IHL it would not violate its obligations under Article 3bis.⁹²

The decision noted that a number of Council members took the position that Article 3bis applied in both peacetime and war, however, the exact number was not disclosed on this point and so it has yet to be conclusively decided.⁹³ The position of Moscow is that the Convention does not apply in armed conflict and in the alternative Article 3bis standing alone would be inapplicable.⁹⁴ [elaborate on the Russian position on Article 89?] However, taking into consideration that Article 89 of the Convention does not limit the freedom of action of states in case of war, Article 3bis would still apply as it does not preclude acts of self-defense and in armed conflict would still be consistent with the requirement to not target civilians.⁹⁵

The Council further decided that while there was an obligation on the part of States to refrain from the use of weapons against civil aircraft in flight, this obligation did not extend to the prevention of the use of weapons against civil aircraft in flight.⁹⁶ Therefore, a State would not be responsible for the acts of a third party that was not under its direction and control. The applicants in this dispute had posited that the Buk SAM system responsible for the downing of MH17 was operated by Russian forces or in the alternative by Russian proxy forces.⁹⁷ Despite the Council's determination that States were not obligated to prevent violations of Article 3bis, the Council found that the use of the Buk SAM system or conduct non-conforming to Article 3bis was by Russian military personnel, other Russian authorities that are State Organs of the Russian Federation, or alternatively that the conduct was directed or controlled by those State Organs thereby placing the responsibility of the downing of MH17 on the Russian Federation.⁹⁸

The Council's findings of fact were largely based on the findings from two investigations into the destruction of MH17 – the accident investigation by the Dutch Safety Board (DSB) in accordance with Article 26 and Annex 13 of the Convention and the findings of a criminal investigation of a Joint Investigation Team (JIT) made up of members from four different States three of which had nationals on board the flight and Ukraine as the State of Occurrence.⁹⁹ The

⁹¹ ICAO Council, 'Decision of the Council of the International Civil Aviation Organization in the Matter: Australia and the Kingdom of the Netherlands and the Russian Federation (2022),' C-DEC 235/11 30 Jun. 2025, para. 1.

⁹² [need IHL citation]

⁹³ ICAO Council, 'Decision of the Council of the International Civil Aviation Organization in the Matter: Australia and the Kingdom of the Netherlands and the Russian Federation (2022),' C-DEC 235/11 30 Jun. 2025.

⁹⁴ Appeal from the ICAO Council decision dated 30 June 2025 (*Russian Federation v. Australia and Netherlands*), Application Instituting Proceedings, 18 Sept. 2025, para. 36.

⁹⁵ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 135.

⁹⁶ ICAO Council, 'Decision of the Council of the International Civil Aviation Organization in the Matter: Australia and the Kingdom of the Netherlands and the Russian Federation (2022),' C-DEC 235/11 30 Jun. 2025, para. 2 citing the plain meaning of the text and the *travaux préparatoires* of the Article 3bis Protocol.

⁹⁷ Memorial of Australia and the Kingdom of the Netherlands, The Downing of Flight MH17 in Contravention of Article 3bis of the Convention on International Civil Aviation (*Australia and the Netherlands v. The Russian Federation*) 14 Mar. 2022, para. 1.19, found in Appeal from the ICAO Council decision dated 30 June 2025 (*Russian Federation v. Australia and Netherlands*), Application Instituting Proceedings, 18 Sept. 2025, Annex 11.

⁹⁸ ICAO Council, 'Decision of the Council of the International Civil Aviation Organization in the Matter: Australia and the Kingdom of the Netherlands and the Russian Federation (2022),' C-DEC 235/11 30 Jun. 2025, para. 7.

⁹⁹ JIT MH17, Report: Findings of the JIT MH17 Investigation into the Crew Members of the Buk TELAR and Those Responsible in the Chain of Command, Feb 2023 The four States were Australia, Belgium, the Netherlands and Ukraine.

Council found the evidence from these two investigations carried ‘substantial evidentiary weight and probative value.’¹⁰⁰ In addition, the Council noted the failure of the Russian Federation, despite repeated requests, not only to acknowledge the role of its forces in the incident but also to explain to the Council how its actions could be justified as self-defense or consistent with IHL.¹⁰¹ This conclusion suggests that should a State use weapons against a civil aircraft in flight it has to show the Council how its actions are in accordance with international law.

A final point regarding the decision in the downing of MH17. The vote finding the Russian Federation in non-conformance with Article 3bis was 22 States in favor, three States opposed and eight States abstaining. In addition, the Council unanimously decided that the Russian Federation should immediately enter negotiations with the Netherlands and Australia to resolve the matters of full reparation by the Russian Federation for its non-conformance and that the parties report regularly to the Council on progress in the matter.¹⁰² This suggests that although some members of the Council may not have agreed with the decision or abstained for various reasons, the Council as a whole thought that in order for the Russian Federation to come into conformance with Article 3bis, reparations were required.

3.2 The Dispute over PS752

In the dispute regarding the downing of PS752, the Ukrainian Boeing 737 was shot down shortly after take-off from Tehran’s Imam Khomeini International Airport in the early morning of 8 January 2020 killing 176 people on board.¹⁰³ Iranian forces were on alert during this period as the United States had killed the Iranian Republican Guard Corps Quds Force Commander General Qasem Soleimani in Bagdad on 2 January 2020.¹⁰⁴ Iran responded with missile attacks against U.S. forces stationed in Iraq the morning of 8 January and was anticipating additional strikes by U.S. forces.¹⁰⁵ Initially, Iran denied that it had shot down the Ukrainian aircraft, however, with mounting assertions by other States that it did, Iran stated that, PS752 was shot down in error. Iran’s accident investigation concluded that cause of the shootdown was the air defense unit’s misalignment of its radar and the failure to receive approval to engage the misidentified target from its command center.¹⁰⁶ In its jurisdictional objection to the Council, Iran inferred that because the downing was a human mistake Article 3bis does not apply suggesting an intentional requirement on the part of a State to trigger Article 3bis.¹⁰⁷ In addition, Iran has asserted that it conducted an investigation in accordance with Annex 13, offered compensation to the victim’s families and prosecuted individuals responsible for the incident. As such, it is the position of the Iranian government that while the destruction of PS 752 is regrettable, it was not intentional and it has fulfilled its responsibilities for such act.

¹⁰⁰ ICAO Council, ‘Decision of the Council of the International Civil Aviation Organization in the Matter: Australia and the Kingdom of the Netherlands and the Russian Federation (2022),’ C-DEC 235/11 30 Jun. 2025, para. 5.

¹⁰¹ ICAO Council, ‘Decision of the Council of the International Civil Aviation Organization in the Matter: Australia and the Kingdom of the Netherlands and the Russian Federation (2022),’ C-DEC 235/11 30 Jun. 2025, para. 6.

¹⁰² ICAO Council, ‘Decision of the Council of the International Civil Aviation Organization in the Matter: Australia and the Kingdom of the Netherlands and the Russian Federation (2022),’ C-DEC 235/11 30 Jun. 2025, Decisions 2 and 3.

¹⁰³ CAO-IRI, *Flight PS752 Accident Investigation: Final Report*, 15 Mar. 2021, 89.

¹⁰⁴ CAO-IRI, *Flight PS752 Accident Investigation: Final Report*, 15 Mar. 2021, 89. CRS, *U.S. Killing of Qasem Soleimani: Frequently Asked Questions*, CRS Report R46148, 13 Jan. 2020, 1.

¹⁰⁵ CRS, *U.S. Killing of Qasem Soleimani: Frequently Asked Questions*, CRS Report R46148, 13 Jan. 2020, 3.

¹⁰⁶ CAO-IRI, *Flight PS752 Accident Investigation: Final Report*, 15 Mar. 2021, 120-121.

¹⁰⁷ Iran, In the matter relating to the interpretation and application of the Convention on International Civil Aviation pursuant to Article 84: Rejoinder on Preliminary Objections of the Islamic Republic of Iran, 28 Aug. 2024, Para. 22(a).

The applicants to the dispute – Canada, Sweden, Ukraine and the United Kingdom have asserted that Iran is in violation of its obligations under Article 3bis in that Iran is required to:

- 1) Acknowledge its responsibility for the downing and apologize to the families of the victims, the Applicants, and the international civil aviation community;
- 2) Provide assurances and guarantees of non-repetition by providing a full account of the events that led to the downing, supported by evidence, and a list of specific safety measures designed to prevent a re-occurrence;
- 3) Pay compensation, in accordance with the relevant principles of international law, for the damage caused by the downing; and
- 4) Where possible, return all personal belongings recovered from the crash site.¹⁰⁸

Specifically, a Canadian forensic team investigation concluded that Iran's response and investigation did not conform to the requirements of Annex 13 on accident investigations and failed to account for the failure of other military and civilian authorities that could have prevented the errors of the air defense unit that shot down PS752.

The disputes regarding the use of weapons against civil aircraft in flight have yet to run their course and it may be a few more years before the ICJ makes a final judgment on the rights and obligations of States under Article 3bis of the Convention. However, the disputes regarding the downing of MH17 and PS752 provide insights into the obligations of States to prevent such incidents, as well as their response when found to be at fault for a violation of Article 3bis. The ICAO Council's decision on the merits regarding MH17 and the initial position of the parties relative to the downing of PS752 give some indication as to whether a response to the use of weapons against civil aircraft was adequate, something that the text of Article 3bis does not address and is only derived from the annex of the Convention and other sources of international law. Should the applicants in the PS752 dispute eventually prevail and the decision of the Council regarding MH17 be sustained by the Court, it would suggest that an interpretation of Article 3bis not only includes its textual requirements, but also triggers an obligation on States that would accompany the unintentional use of weapons against a civil aircraft in flight, including the following elements:

- 1) An objective and transparent investigation by competent authorities with the participation of parties specified in Annex 13
- 2) Cooperation by contracting States in the investigation
- 3) Admission by the responsible State
- 4) Full compensation to the victims and their families, and
- 5) Actions on the part of States to mitigate the risk of future incidents

More importantly, these disputes highlight the responsibility of States over their forces in conflict zones. The decision in the MH17 dispute indicates that States are not obliged to prevent the use of weapons against civil aircraft in flight by groups who are not under their direct authority and control. Therefore, instances of non-State actors shooting at civil aircraft in flight will continue to be a hazard for civil aviation. In addition, the Chicago Convention does not regulate state aircraft

¹⁰⁸ Government of Canada, 'Backgrounder – Convention on International Civil Aviation and its Annexes,' 8 Jan. 2024. [Backgrounder - Convention on International Civil Aviation and its annexes - Canada.ca](#)

much less the conduct of forces in possession of weapons that present a hazard to civil aircraft in flight. That responsibility lies with individual States. However, through Article 3bis, the Convention provides the ICAO Council with compulsory jurisdiction over disputes where weapons are used against civil aircraft in flight. As such, the Convention provides a forum where States, whose nationals are victims of violations of Article 3bis, can attempt to hold contracting States accountable for the actions of their military forces or surrogates.

4.0 Conclusion

NEED TO DRAFT A CONCLUSION

Potential Recommendations [need further reflection and development]:

Potential Means

- New treaty on use of weapons against civil aircraft in flight? Canadian proposal? Application to SAMs? Difficult politically.
- Amend the Convention? Difficult politically.
- Add additional procedures in the annexes – could regulate ATM or civil aircraft but not State aircraft and not military forces with SAMs

Emphasis on transparency and compliance with intercept procedures – video, radar and satellite information.

- Chicago Convention cannot regulate State aircraft
- Technological solutions to misidentification

Procedures to mitigate uncertainty in certain scenarios such as the hijacked aircraft.

Procedures to improve the identification of civil aircraft by air defense units

- Identify Friend or Foe technology
- Potential for perfidy

Improved coordination between civil aviation authorities and their military counterparts responsible for air defense. This should apply within the State as well as in international airspace.

- Procedures in the annexes could apply to ATM but not military units

Use of other treaties

- Montreal Convention on aircraft sabotage