Using the Air Force against Civil Aircraft

From Air Terrorism to Self-Defense

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Air terrorism, as witnessed by the world during the attacks of 11 September 2001 (9/11), raises the issue of the type of defense that a state can reasonably utilize against such strikes. That is, within which legal framework may the affected state respond? How can a country use its air arm to suppress the threat represented by a civil aircraft hijacked by terrorists? On 9/11 "air law suddenly entered the twenty-first century."[1] This new form of air terrorism represented a watershed in the history of aviation.[2] From this moment forward, a civil aircraft could become a weapon of mass destruction and serve international hyperterrorism, a development that raises new issues about how to respond—specifically, the use of armed force against a civil aircraft. Can a state order military personnel to shoot down an aircraft used for purposes obviously incompatible with civil aviation? This situation creates an impossible choice between the passengers' lives and the country's vital interests threatened by the hijacked aircraft. Rather than offer a discussion about resorting to armed force, which in itself constitutes a dilemma, this article seeks to consider its legitimization from a legal standpoint. Indeed, international law prohibits any use of armed force against a civil aircraft. This principle, which impedes the exercise of sovereignty in the airspace, protects passengers—but when the aircraft becomes a weapon used by terrorists, this change in status makes possible an armed response by the attacked state.

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Protecting Civil Aircraft against Unlawful Interventions That Target Civil Aviation

The international collective security system is based on the prohibition of resorting to force. This rule of contemporary international law applies first to interstate relations. Yet it affects the legal framework of the use of airpower, which cannot be deployed against civil aviation, whose safety and protection remain the responsibility of the state. However, when an aircraft jeopardizes a state's sovereignty over its airspace, that country can take a number of coercive measures to stop the security breach.

Protection Based on Considerations of Humanity

Protecting civil aircraft against armed force is a principle of international law intended to apply only in certain situations.

Protection guaranteed by international law. The prohibition of armed force against civil aircraft follows an international norm. Until 1928 the use of force was a natural component of the state's sovereignty. That year, the Kellogg-Briand Pact became the first convention to establish the nonuse of force as a principle regulating international relations, a rule taken up by the Charter of the United Nations (UN) and upheld by the International Court of Justice (ICJ).[3] Most of the legal theory thus considers the nonuse of weapons a peremptory norm of international law, also called *jus cogens*.[4] This principle has an impact on civil aviation to the extent that a state may not use armed force against a commercial aircraft. An addendum to Article 3 of the Chicago Convention of 7 December 1944 establishes this specific protection: "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."[5]

The UN General Assembly took up this precept by asking all states to take the necessary steps to avoid incidents involving attacks on civil aircraft that accidentally stray from their fixed route.[6] Similarly, the International Civil Aviation Organization (ICAO) on several occasions has upheld the principle of protecting civil aircraft: "The Assembly . . . condemns all acts of violence which may be directed against aircraft, aircraft crews and passengers engaged in international air transport."[7] The ICAO denounces any unlawful intervention against a civil aircraft on the following basis: "In keeping

with elementary considerations of humanity, the safety and the lives of persons on board civil aircraft must be assured."[8] Further, the UN Security Council's Resolution 1067 "condemns the use of weapons against civil aircraft in flight as being incompatible with elementary considerations of humanity, the rules of customary international law as codified in [the addendum to] article 3 of the Chicago Convention."[9] The ICJ thus holds that "elementary considerations of humanity, even more exacting in peace than in war," are not simple moral dictates but general principles of international law.[10] Additionally, in order to make the principle of nonuse of weapons more effective, the Chicago Convention provides for launching an investigation in case of the destruction of a civil aircraft.[11] The scope of the addendum to Article 3 of the Chicago Convention, however, is limited to a specific framework.

Scope of the addendum to Article 3 of the Chicago Convention. The Chicago Convention provides protection intended to apply not only to civil aircraft flying legally in a state's airspace but also to aircraft that contravene the rules of overflight.[12] Despite the infraction, the aircraft must enjoy the protection afforded by the ban on the use of weapons against it. Indeed, several types of dysfunctions can explain such a violation, irrespective of any malice. The hypothetical case considered by the addendum to Article 3 concerns the interception of an aircraft that intrudes upon a state's airspace because of a material error but shows no hostility. In practice, civil aviation deplores the destruction of rogue but not willfully aggressive aircraft. For example, on 27 July 1955, Bulgarian fighter aircraft shot down an El Al Israel Airlines aircraft flying from London to Israel that had gotten lost over Bulgaria; none of the passengers survived.[13] On 21 February 1973, a Libyan airliner operating on the Tripoli-to-Cairo route mistakenly entered the airspace over territories occupied by Israel and flew over military facilities; intercepted by Israeli fighters, it crashed on landing, killing 108.[14] On 20 April 1978, a South Korean aircraft operating on the Paris-Anchorage-Seoul route mistakenly flew over a strategic area off limits to civil air traffic; Soviet fighter aircraft intercepted the airliner and shot it down north of the USSR. The same scenario unfolded in 1983: a Boeing 747 of Korean Airlines carrying 269 passengers was shot down in the USSR's airspace over the Sea of Japan while flying over a military area of utmost importance to Soviet defense forces. Soviet fighters intercepted the aircraft, hitting it with

an air-to-air missile; there were no survivors. An investigation conducted by the ICAO concluded that the aircraft had in fact violated Soviet airspace but condemned the USSR's excessive use of force.[15]

Finally, the protection of civil aircraft applies in a state's airspace as well as in international airspace.[16] After Cuban fighters accidentally shot down two American Cessnas on 24 February 1996, the ICAO confirmed in its report that "[the addendum to] Article 3 . . . and the ICAO provisions concerning interception of civil aircraft apply irrespective of whether or not such aircraft is within the territorial airspace of that State."[17] The principle of nonuse of armed force against civil aircraft does not mean that the latter cannot be subjected to measures intended to preserve a state's sovereignty over its airspace.

Acting against Offending Civil Aircraft

A state that suffers a violation of its airspace by a civil aircraft need not remain helpless. The principle of sovereignty over airspace gives it the right to act in order to stop the intrusion. However, authorized measures are narrowly defined and do not allow actions that may endanger the lives of passengers.

The principle of sovereignty over airspace. The state's sovereignty over its territorial airspace and territorial waters represents an established principle of customary international law. The Chicago Convention confirmed the Paris Convention of 1919, the first multilateral agreement on airspace regulation to recognize the principle of sovereignty over airspace: "The contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory."[18] In the absence of conflicting contractual obligations, the state is free to regulate and even prohibit flying over its territory; any unauthorized flight represents an offense against the subjacent state's sovereignty, as confirmed by the ICJ: "The principle of respect for territorial sovereignty is also directly infringed by the unauthorized overflight of a State's territory by aircraft belonging to . . . the government of another State."[19]

In international law applicable to civil aviation, the principle involves the closing of the airspace: "In the airspaces above State territories, there are only capacities that actually are controlled liberties and are implemented within the framework of the subjacent State's sovereignty to which they must adjust."[20] The French Code of Civil Aviation stipulates that "foreign-

flag aircraft may only fly over French territory if that right is granted to them by a diplomatic convention or if they are given for that purpose an authorization which must be specific and temporary."[21] In accordance with the principle of sovereignty over airspace, the state may designate the flight paths and altitudes that aircraft must adhere to in their flight plan.[22] Similarly, even in time of war, each state is free to enact rules that govern the access, movements, or stay of aircraft. Thus, the French Air Force has the mission of enforcing the integrity and sovereignty of its airspace around the clock.[23] It does so by utilizing a system of *mesures actives de sûreté aérienne* (air-safety active measures), which allows reaction to an unlawful intrusion into French airspace.[24] To enhance air cover around its territory, France signed cross-border air-safety agreements with most of its European neighbors.[25] The acknowledged powers of public authorities within the state's airspace permit them to take the necessary steps to guarantee air and territorial safety.

Measures authorized in case of airspace violation. Several provisions of the Chicago Convention deal with violation of a state's sovereignty over its airspace:

> 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 an 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.[26]

A state may still use force against a civil aircraft acting illegally, provided that such action does not endanger the latter's integrity. Therefore, it cannot use weapons or open fire to destroy the aircraft, but it may lawfully employ any other measure aimed at stopping the security breach. Authorized coercive means include surrounding the civil aircraft with interceptors, using tracers as a warning, conducting visual or radio interrogation, restricting flight paths, boarding, and firing warning shots when the aircraft refuses to comply. The state must always execute these maneuvers without endangering the safety of the passengers and aircraft. According to the ICAO Council's special recommendations, interception of a civil aircraft, carried out as a last resort, should be limited to establishing the aircraft's identity and to providing the navigational guidance necessary to ensure the

flight's safety.[27] The ICAO thus encourages states to standardize their interception procedures regarding civil aircraft to improve safety.[28] Interception may also create a right of hot pursuit when the aircraft that violates overflight rules flees toward international airspace.[29] Only an aircraft of the state can carry out the pursuit, and the operation must not violate another state's sovereignty over its airspace unless the latter gives its express consent.[30] In such a case, the intercepting state may act in the cocontracting state's airspace until boarding the aircraft under pursuit. Finally, the state must initiate pursuit as soon as the violation occurs and must continue uninterrupted. The wording of the addendum to Article 3 indicates that protection of the civil aircraft applies as long as the latter operates in accordance with the purpose served by civil air transport.

From Civil Aircraft to Improvised Weapon: Limits of the Protection Guaranteed by the Addendum to Article 3

Since 9/11 "for the international community as a whole, it is now a matter . . . of preventing as much as suppressing attacks conducted using the most high-performance and sophisticated means of transportation: the civil aircraft which symbolizes the globalization of passenger and cargo traffic."[31] Now that states face this type of attack, the principle of protecting civil aircraft cannot remain absolute. However, a state can base an air attack only on two considerations included in the UN Charter: the principle of self-defense and the threat against international security and peace. Within the framework of the use of armed force against a commercial aircraft hijacked for terrorist purposes, can the state claim self-defense? With what intensity can a state react in self-defense?

Self-Defense against an Attack

The addendum to Article 3 of the Chicago Convention in fact includes an exception to the principle of nonuse of armed force since it refers to Article 51 of the UN Charter, which provides for a right of self-defense in case of armed attack.[32] The point has to do with preventing civil aircraft from asserting the ban on the use of force to violate with total impunity states' territorial sovereignty or to engage in activities contrary to the aims of the

Chicago Convention. Resorting to self-defense thus presupposes certain armed attack.

Armed attack. Considered a natural right of states, self-defense authorizes the use of armed force in response to an attack, but one must define the term *attack*.[33] According to the UN General Assembly, "Aggression is the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition."[34] More specifically, an attack is "the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein."[35]

Only a clearly hostile attitude authorizes resorting to self-defense; the problem involves assessing where aggressive behavior starts and where unlawful behavior ends.[36] On the one hand, in the Korean Airlines Boeing case of 1983, mentioned above, the Russians could not put forward this argument. Because the intruding aircraft had committed no act of blatant attack, the USSR should have resorted to conventional interception procedures. On the other hand, in the 9/11 case, the aircraft do indeed represent improvised weapons. However, Article 51 recognizes self-defense only if one state attacks another—not the case with 9/11. Nevertheless, the ICAO clearly denounced the terrorist attacks as contrary to aviation's goals:

> The Assembly . . . strongly condemns these terrorist acts as contrary to elementary considerations of humanity, norms of conduct of society and as violations of international law; declares that such acts of using civil aircraft as weapons of destruction are contrary to the letter and spirit of the Convention on International Civil Aviation . . . and that such acts and other terrorist acts involving civil aviation or civil aviation facilities constitute grave offenses in violation of international law.[37]

In practice, the Security Council embraces an empirical conception of the attack that allows it to extend that description to several hostile acts.[38] By describing terrorism as a threat to international peace and security in its Resolutions 1368 and 1373, the council formally recognized the right to resort to self-defense in response to terrorist acts.[39] If the aircraft is used for purposes contrary to those of civil aviation, such as terrorism, the platform thus exposes itself to the use of armed force.

Certain attack. Self-defense allows a military response to an attack, but it must remain exceptional. Only the realization of an attack can justify such action. Thus, international law does not recognize preemptive self-defense, which might indeed encourage states to acquire an arsenal sufficient to ensure an independent defense and prompt an arms race.[40] Nothing in the text of Article 51 of the UN Charter allows one to assert the legitimacy of a preventive action intended to eliminate a threat. However, faced with the dangers of the international environment, some states are trying to resort to the concept of preemptive self-defense to justify armed attacks.[41] The security strategy of the United States expresses well that country's adherence to the doctrine of preemptive self-defense. The latter distinguishes between a possible attack, which does not give the right to self-defense based on Article 51 (preemptive self-defense), and a future attack that authorizes self-defense (preventive self-defense). In the second instance, the risk of attack rests on an obvious will to do harm. In this approach, the determining criterion is the imminence of danger: "So long as the occurrence of the event that must be avoided appears inevitable, nothing justifies a need to delay the reaction at the risk to increase the difficulties and the cost of prevention."[42]

Consequently, after 9/11, President George W. Bush claimed the right to resort to force preemptively against any state or terrorist group threatening the security of the United States. Moreover, Israel attempted to justify in identical fashion two air operations: the 1975 raids on Palestinian camps in Lebanon and the 1981 bombing of the Tuwaitha nuclear center in Iraq. The international community, with the exception of the United States, condemned the legitimacy of those actions.[43] Mexico considered it "inadmissible to invoke the right of self-defense when no armed attack has taken place. The concept of preventive war, which for many years served as justification for the abuses of powerful States, since it left it to their discretion to define what constituted a threat to them, was definitively abolished by the Charter of the United Nations."[44] In 2003 the United States and the United Kingdom attempted to justify their intervention in Iraq by citing the principle of preemptive self-defense, giving as a reason the stockpiling of weapons of mass destruction in that country. The Security Council rejected that line of argument by calling the presence of American and British troops there an occupation.[45] Indeed, the UN secretary-general became alarmed about the drifts that the notion of preemptive self-defense might generate:

"My concern is that, if [this logic] were to be adopted, it would set precedents that [would result] in a proliferation of the unilateral and lawless use of force, with or without justification."[46]

The main risk involved in the concept of preemptive self-defense entails complete usurpation of the role of the Security Council, which would cause a genuine crisis of the collective security system. Preemptive self-defense rests on a much-too-subjective assessment (will to do harm and imminence of danger) to serve as the foundation of an armed action. To date, no rule of international law would likely validate the thesis of preemptive self-defense; an armed attack remains a precondition.[47] Hostile intrusion into a state's airspace with the intention of destroying some of that country's vulnerable points represents a known aggressive act. It is necessary here to dissociate the attack from the damage in order not to mistakenly talk about preemptive self-defense. The attack consists of the violation of the sovereignty over the airspace with intent to harm the state; the harm may not have occurred yet, but that does not condition the action of self-defense.

The Action of Self-Defense

States must inform the Security Council of actions conducted in accordance with self-defense, and the council will then take appropriate steps to restore peace and security.[48] The legality of the measures adopted within the framework of self-defense must be assessed with regard to their necessity and their proportionality to the attack suffered.

A reaction imposed by necessity. The action—rather, the reaction—of self-defense must respond to the need to stop an attack. That is, the firing of weapons must stop as soon as the threat disappears; otherwise, according to Article 2 of the UN Charter, we are dealing with unlawful armed reprisals.[49] The rule of necessity is also included in the project on the responsibility of states for internationally wrongful acts, adopted on 31 May 2001 by the International Law Commission.[50] Among the exclusionary clauses of responsibility, the commission makes provision for the state of necessity, which, according to the commission, excludes the illegality of a military action if it represents the only way to protect an essential interest of the state against a grave and imminent danger.[51] The state's essential interest may appear in several forms: a location with a heavy concentration of civilians, an industrial site that contains hazardous substances, or a site essential to

the population's survival, such as a dam. Reprisals based on the state of necessity are lawful only under certain conditions. Specifically, the state must have failed to obtain satisfaction by means other than force, and it must have issued several unheeded warnings. Finally, the state must not engage in reprisals disproportionate to the unlawful act to which it responds.[52] In the event of a terrorist hijacking of a civil aircraft for the purpose of destroying an industrial site that contains hazardous substances, if France orders its fighters to shoot down the aircraft, it does so because it must act in order to protect the people in its care. Here, necessity appears in the imminence and inevitability of the danger threatening the country. The use of armed force is authorized but conceivable only after other coercive means have run out. It must be the last resort to neutralize the terrorist threat.[53] The latter will demand a clear definition: as soon as the government deems the aircraft an improvised weapon used to cause death and property damage, it establishes the necessity to use armed force. This can apply to a commercial aircraft, a private plane, a fixed- or rotary-wing aircraft, or even a drone.

The limits of an armed reaction. Only some legal theorists consider that the state's forces should pursue the attacker until they destroy it. Most of them advocate adoption of a restrictive view of the use of armed force: self-defense measures should only stop the attack and restore order as it previously existed. Therefore the state must limit the response to what is necessary to repel the attack. It must also respect a certain proportionality. That is, the intensity of operations conducted as self-defense depends on that of the attack which prompted them. In several decisions, the ICJ confirmed the principle according to which self-defense is subjected to the dual conditions of necessity and proportionality.[54] Finally, the defensive reaction must occur immediately.[55]

In the event of the hijacking of an aircraft by terrorists, the government may order its destruction only from the time when the decision makers conclude with certainty that the aircraft is about to commit a hostile act. If, after the firing of warning shots, the civil aircraft remains deaf to injunctions, the French prime minister, who is responsible for air defense, may order its destruction.[56] The applicable instructions in France are as follows: destruction of an aircraft that constitutes a grave threat lies within the legal framework of self-defense. However, all European countries do not view the intensity of reaction in self-defense the same way. Germany distanced

itself from other nations in this matter by rejecting any possible destruction of a civil aircraft. On 15 February 2006, the Constitutional Court of Karlsruhe held that

> shooting down aircraft when persons who are not involved in the commission of a crime are on board would amount to treating the passengers and crew taken hostages as mere objects and denying to those victims the worth owed to man. . . . Ordering their death as a way to save other lives would represent a deprivation of their rights. Article 1.1 of the Constitutional Law, which guarantees human dignity, makes it inconceivable to intentionally kill people in a desperate situation on the basis of a statutory authorization.[57]

To properly capture Germany's position, one must add a constitutional motive to humanitarian considerations. German constitutional law rules out any intervention by the military on German territory other than offering assistance in case of a natural disaster or major accident and forbids the use of weapons. It does not consider challenging an aggressive civil aircraft an act of territorial defense but an act of internal security in which the military cannot become involved.

The French and German examples illustrate the dilemma confronting governments. Because the aircraft involved is both a means of transportation and an improvised weapon, its destruction becomes an impossible choice. Should protecting the basic interests of a state threatened by a hijacked aircraft take precedence over saving the lives of the passengers? This question cannot be answered in a systematic way: it all depends on the assessment made of the conflicting goals and on the magnitude of the threat.

Conclusion

The safety of civil aviation remains a priority strongly asserted by the international community, but today's threats linked to air terrorism force a reconsideration of the protection of civil aircraft. The point is not to reassess such protection but to establish its legal framework. Indeed, the lives of passengers taken hostage must always have priority; however, when an array of clues allows the state to determine with certainty that use of the aircraft will cause devastating damage, the protection noted in the addendum to Article 3 no longer applies. At this point, the aircraft's legal status changes from means of transportation to weapon of mass destruction—a shift that serves as the basis for resorting to armed force.

Notes

1. L. Grard, "Le droit et l'exercice de la souveraineté dans l'espace aérien" [The law and the exercise of sovereignty in the airspace], *PLAF*, no. 10 (June 2006): 26.

2. On the evolution of air terrorism, see P. Dupont-Elleray, "Le terrorisme aérien: De l'évolution de la menace à la riposte du droit à la piraterie aérienne" [Air terrorism: From the evolving threat to the legal response to air piracy], *Revue Française de Droit aérien et spatial* [*RFDAS*] 220, no. 4 (October–December 2001): 392–400.

3. Art. 2, sec. 4. "The Charter and the customary international law flow from a common fundamental principle outlawing the use of force in international relations." ICJ decision, 27 June 1986, Nicaragua v. United States, case concerning military and paramilitary activities in and against Nicaragua, Reports 1986, General Cause Book no. 70.

4. In its work on the codification of the Law of Treaties, the International Law Commission stated that "the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of jus cogens." Par. 1 of the International Law Commission's Commentaries on Art. 50 of its draft "Articles on the Law of Treaties," *International Law Commission Yearbook*, 1966-II, 270.

5. Chicago Convention on International Civil Aviation, 7 December 1944, addendum to Art. 3, Doc. 7300/9.

6. General Assembly Resolution 927, 10th sess., 14 December 1955.

7. A17-1, Assembly Resolution, *ICAO Assembly Resolutions*, Doc. 9848, VII-2. See also the Convention on International Civil Aviation, Appendix 17: "Security: Safeguarding International Civil Aviation against Acts of Unlawful Interference."

8. A25-1, Amendment to the Convention on International Civil Aviation (addendum to Art. 3), *ICAO Assembly Resolutions*, Doc. 9848, I-6.

9. Security Council Resolution 1067, 26 July 1996, S/RES/1067 (1996).

10. ICJ decision, 9 April, United Kingdom v. Albania, Corfou Channel Case, Reports 1949, 22. On aviation cases taken to the ICJ, see G. Guillaume, *La Cour Internationale de Justice à l'aube du XXIeme siècle, Le regard d'un juge* [The International Court of Justice at the dawn of the twenty-first century as seen by a judge] (Paris: Pédone, 2003), 273–85.

11. Chicago Convention, Art. 26.

12. "This convention shall be applicable only to civil aircraft, and shall not be applicable to State aircraft." Chicago Convention, Art. 3.

13. See the proceedings introduced by Israel before the ICJ against the government of the Popular Republic of Bulgaria. ICJ decision, 26 May 1959, Reports 1959, 127ff.

14. The ICAO condemned Israel for this act. A19-1, Libyan civil aircraft shot down on 21 February 1973 by Israeli fighters. *ICAO Assembly Resolutions*, Doc. 9848, I-24.

15. J. Dutheil de La Rochere, "L'affaire de l'accident du Boeing 747 de Korean Airlines" [The case of the Korean Airlines Boeing 747 accident], *Annuaire Français de Droit international* 29 (1983): 749–72.

16. On the international airspace, see L. Monari, "Utilisations et abus de l'espace aérien international" [Uses and misuses of the international airspace] (doctoral dissertation, McGill University, Montréal, 1996).

17. ICAO Investigation Report forwarded to the Security Council/S/1996/509.

18. Chicago Convention, Art. 1.

19. ICJ decision, 27 June 1986, sec. 251.

20. P. Dupont, "L'espace aérien entre souveraineté et liberté au seuil du XXIème siècle" [The airspace between sovereignty and freedom at the dawn of the twenty-first century], *RFDAS* 229, no. 1 (January–March 2004): 18.

21. Civil Aviation Code, Art. L. 131-1.

22. Chicago Convention, Art. 11.

23. Decree no. 75-930, 10 October 1975, concerning air defense and conventional air operations conducted above and from the home territory, Official Journal, 14 October 1975 (consolidated text of 5 February 2004).

24. The methods of interception are specified in Ministerial Instruction no. 3226/DEF/C34/CD, 12 October 1990, concerning air safety. (Confidential: Defense). Commissioner Maj C. Munsch, *Le cadre juridique des opérations aériennes dans les conflits armés et les situations de crise* [The legal framework of air operations in armed conflicts and crises], 2001, 15.

25. On cross-border air safety cooperation, see Gen S. Abrial, "Place et missions de l'armée de l'Air dans l'exercice de la souveraineté" [The air force's role and missions in the exercise of sovereignty], *Penser les ailes françaises*, no. 10 (June 2006): 43.

26. Chicago Convention, addendum to Art. 3.

27. Convention on International Civil Aviation, Addendum A, Appendix 2.

28. A25-3, Cooperation among Contracting States for Ensuring the Safety of International Civil Aviation and Advancing the Aims of the Chicago Convention, *ICAO Assembly Resolutions*, Doc. 9848, I-7.

29. On hot pursuit in the international airspace, see Monari, "Utilisations et abus," 40–44.

30. Actual practice shows that this condition is not always met. Air incident of 31 July 1976, *Revue générale de droit international public*, 1977, 194.

31. Dupont, "L'espace aérien entre souveraineté et liberté," 12.

32. Art. 51, Charter of the United Nations. See A. Cassese, "Article 51," *La Charte des Nations Unies* [Charter of the United Nations], vol. 1, ed. J. P. Cot, A. Pellet, and M. Forteau (Paris: Economica, 2005), 1329–60.

33. P. Rambaud, "La définition de l'attaque par l'organisation des Nations Unies" [Attack as defined by the United Nations], *Revue générale de droit international public* 80, no. 3 (1976): 835–81.

34. General Assembly Resolution 3314, 29th sess., 14 December 1974, Art. 1.

35. Ibid., Art. 3.

36. L. Grard, "Le droit de l'aviation civile après le 11 septembre 2001, Quelles mesures face à l'hyper terrorisme?" [The law of civil aviation after 9/11: Which steps to take in the face of hyper-terrorism?], in *Études à la mémoire de Christian Lapoyade-Deschamps* [Studies in memory of Christian Lapoyade-Deschamps] (Pessac: Presses universitaires de Bordeaux, 2003), 606.

37. A33-1, Declaration on Misuse of Civil Aircraft as Weapons of Destruction and Other Terrorist Acts Involving Civil Aviation, *ICAO Assembly Resolutions*, Doc. 9848, VII-1.

38. Resolution 3314, Art. 4.

39. Security Council Resolution 1368, 12 September 2001, S/RES/1368 (2001); Resolution 1373, 28 September 2001 (Afghanistan), S/RES/1373 (2001); and A. S. Firion, "Le fondement juridique de l'intervention armée en Afghanistan" [The legal basis of the armed intervention in Afghanistan], *Droit et Défense*, no. 4 (October–December 2001): 31–41.

40. ICJ, Advisory Opinion, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 9 July 2004, Reports 2004, General Cause Book no. 131, sec. 140.

41. T. Garcia, "Recours à la force et droit international" [Resort to force and international law], *Perspectives Internationales et Européennes*, no. 1 (July 2005); and F. Kampa, "Interdiction du recours à la force: Une norme internationale sous haute tension" [Prohibition of the resort to force: An international norm under high pressure], *Le débat stratégique*, no. 65 (November 2002).

42. Philippe Wekel, "Nouvelles pratiques américaines en matière de légitime défense?" [New American self-defense practices?], *Annuaire Français de Relations Internationales* 6 (2005): 312.

43. Minutes, Security Council, S/PV/1862, 8 December 1975; and minutes, S/PV/2288, 19 June 1981.

44. Minutes, Security Council, S/PV/2288, 19 June 1981, sec. 115.

45. Security Council Resolution 1483, 23 May 2003, S/RES/1483 (2003).

46. A/58/PV.7, 23 September 2003 (UN secretary-general's statement about preemptive self-defense).

47. Conceivably, an evolution of international law on this point will occur. United Nations, *Report of the High-Level Panel on Threats, Challenges and Change*, 1 December 2004, A/59/565.

48. Charter of the United Nations, Art. 51.

49. L. Condorelli, "A propos de l'attaque américaine contre l'Irak du 26 juin 1993" [On the subject of the American attack against Iraq on June 26, 1993], *Journal Européen de Droit International* 5, no. 1 (1994–95): 134–44.

50. See the project in General Assembly Resolution A/RES/56/83. See also J. Crawford, *Les articles de la Commission internationale sur la responsabilité de l'état* [Articles of the International Commission on the State's Responsibility] (Paris: Pedone, 2003), *introduction, textes, et commentaires* [introduction, texts, and commentaries].

51. These conditions were taken up again by the ICJ. Advisory Opinion, Legal Consequences of the Construction of a Wall.

52. Special German-Portuguese Arbitral TribunaL verdict, Naulilaa case, 31 July 1928, RSA, vol. 2, sec. 43.

53. It is necessary to exhaust all air-safety active measures before resorting to destruction of the aircraft. Those measures are taken in the following order: long-range reconnaissance, long-range surveillance, escort, coercive actions, and warning shot.

54. ICJ decision, 27 June 1986, sec. 194; and ICJ decision, 6 November 2003, Oil Platforms (Islamic Republic of Iran v. United States of America), Reports 2003, General Cause Book no. 90.

55. Minutes, Security Council, S/PV/1644, sec. 25, 27–28 February 1972.

56. Decree no. 75-930, 10 October 1975.

57. Anne S. Millet-Devalle, "Lois sur la sécurité aérienne et terrorisme: Chroniques des faits internationaux" [Laws on air safety and terrorism: Chronicles of international facts], *Revue générale de droit international public* 110, no. 3 (2006): 689.