Civil Aircraft as Weapons of Large-Scale Destruction: Countermeasures, Article 3BIS of the Chicago Convention, and the Newly Adopted German "Luftsicherheitsgesetz"

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CIVIL AIRCRAFT AS WEAPONS OF LARGE-SCALE DESTRUCTION: COUNTERMEASURES, ARTICLE 3BIS OF THE CHICAGO CONVENTION, AND THE NEWLY ADOPTED GERMAN "LUFTSICHERHEITSGESETZ"

Robin Geiß*

I. INTRODUCTION

In January 2005, the German legislature adopted a new law, entitled "Luftsicherheitsgesetz" (LuftSiG), that authorizes the shooting down of a civil airliner imminently intended to be used as a weapon of destruction against a ground target.1 Since the attacks of September 11, 2001,

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1. Gesetz zur Neuregelung von Luftsicherheitsaufgaben (German Aerial Security Law), v.11.1.2005 (BGBl. I. S. 78) [hereinafter LuftSiG].

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various states have contemplated similar scenarios; the consideration by U.S. authorities of shooting down a single-engine sports plane that had mistakenly entered Washington airspace adjacent to the White House in May 2005 is only one of the most recent examples.\footnote{For further details regarding the incident on May 11, 2005 see Intruding Pilots released Without Charges (May 12, 2005), at http://www.cnn.com/2005/US/05/11/evacuation. See also Christopher Bolkcom, Homeland Security: Defending U.S. Airspace, Congressional Research Service 3 (Feb. 11, 2005), available at http://www.mipt.org/pdf/CRS_RS21394.pdf (last visited 17 May 2005), according to which: “In dire situations, hijacked civil aircraft may also need to be shot down, likely be preferred.”}

It seems to have escaped close scrutiny, however, that a 1998 amendment to the Chicago Convention on International Civil Aviation, article 3bis, prohibits the use of weapons against civil aircraft.\footnote{See Protocol Relating to an Amendment to the Convention on International Civil Aviation, May 10, 1984, reprinted in 23 I.L.M. 705–07(1984) [hereinafter article 3bis]. The Protocol entered into force in May 1998 when 102 ratifications, i.e., by two thirds of the International Civil Aviation Organization’s [hereinafter ICAO] member states, had been reached. See also Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295 [hereinafter Chicago Convention], and its predecessor, the Convention Relating to the Regulation of Aerial Navigation, Oct. 13, 1919, 11 L.N.T.S. 173 (1922).} Germany has ratified the amendment without reservation.\footnote{A list of the states parties to the convention is available at http://www.icao.int/cgi/goto-m.pl?/icaonet/dcs/7300.html (last visited Sept. 23, 2005). During the drafting process Germany was among those delegations that stressed that priority should be accorded to the safety of worldwide civil aviation and the concomitant prohibition of the use of force. The German delegate emphasized that it “should be stated very clearly that, regardless of the importance of the question of national sovereignty, the greatest concern must be shown for the protection of human lives.” ICAO Assembly 25th Session (Extraordinary), Executive Committee: Report, Minutes and Documents, ICAO Doc. 9438, A25-EX/4, 29 (1984).} While the U.S. has not, its practices suggest that it nevertheless feels bound by the rules stipulated in article 3bis. Indeed, at the time of drafting, the U.S. delegate explicitly concurred with the prevailing opinion that article 3bis merely declares pre-existing customary international law instead of creating new rules.\footnote{ICAO Doc. 9438, supra note 4, at A25-Min. EX/5, 44. Furthermore, the U.S. had introduced one of the elementary draft texts regarding article 3bis; See id. at A25-WP/3, 165.} Moreover, in 1994 the U.S. Department of Defense suspended a variety of its assistance programs to Colombia and Peru because of the concern that these countries were using U.S. intelligence information to shoot down aircraft suspected of drug-trafficking. The United States feared U.S. authorities might become complicit in unlawful behavior under the Aircraft Sabotage Act of 1984, the relevant provisions of which are based on customary international law.\footnote{U.S. authorities perceived a substantial risk that providing flight tracking information or certain other forms of assistance to the aerial interdiction programs of foreign governments that destroyed civil aircraft, or that had announced an intention to do so, would constitute aiding and abetting conduct in violation of the Aircraft Sabotage Act of 1984. The relevant legal memorandum referred to article 3bis of the Chicago Convention; despite the fact that the United States had not ratified it, there was support for the view that the principle it}
Civil Aircraft as Weapons

Undoubtedly, the newly emerging security threat stemming from the misuse of civil aircraft as weapons of destruction requires adaptation of state policies. In light of the importance of the prohibition on the use of weapons set forth in article 3bis of the Chicago Convention, and given the gravity of potential repercussions ignorance of it may bring about, it is quite striking that the increasing contemplation of forcible countermeasures against civil aircraft has not considered internationally accepted rules regarding civil aviation. The drafting process and the preparatory works of the German LuftSiG, for example, are silent on the matter and do not take into account the legislation's potential international implications. This is surprising considering the imminent threat in light of which the law was adopted is the threat of international terrorism, which means the majority of scenarios are most likely to occur in an international context. Moreover, the relative proximity of Europe's major airports, as well as the fact that aircraft in flight are legally regarded as part of the territory of their state of registration, suggests a considerable likelihood that a future target plane may not be a German airliner, thus establishing an international nexus. Finally, as will be discussed below, even the downing of a German airliner over German territorial airspace may have international implications, as the prohibition to use weapons against civil aircraft entailed in article 3bis of the Chicago Convention extends to aircraft of a state's own registration.

It is thus the aim of this Article to map out the international legal framework relevant for designing countermeasures against nonstate actors who convert civil aircraft into weapons of destruction. As a first step, this Article sketches out the applicable rules relating to international civil aviation security and highlights the dichotomy between nonstate actor threats and interstate threats at the base of these rules. As will be seen below, nonstate actors abusing civil aircraft as weapons of destruction is a new challenge not only in terms of destructive quality

announces is declaratory of customary international law. The memorandum points out that article 3bis should be understood to preclude states from shooting down civil aircraft suspected of drug trafficking, and the only recognized exception to this rule is use of self-defense from attack. See Walter Dellinger, United States Assistance to Countries that Shoot Down Civil Aircraft Involved in Drug Trafficking, Memorandum for Jamie S. Gorelick, Deputy Attorney General (July 14, 1994), at http://www.usdoj.gov/olc/shootdow.htm (last visited May 23, 2005).


8. Aircraft in flight are legally regarded as part of the territory of the state of registration of the aircraft. Chicago Convention, supra, note 3, art. 17. Aircraft may not be validly registered in more than one state, but their registration may be changed from one state to another. Id. art. 18.
but also in a legal sense, in that the question of the lawfulness of adequate countermeasures is situated somewhere between the two skeins of a traditionally divided framework. The Article then turns to a terminological, historical, and teleological analysis of the first two sentences of article 3bis of the Chicago Convention, analyzing this provision's inter-relation with the right to self-defense and the contemporary debate surrounding Article 51 of the UN Charter.

II. SAFEGUARDING INTERNATIONAL CIVIL AVIATION—
THE DICHOTOMY OF THE LEGAL FRAMEWORK

Different forms of misuse have accompanied commercial civil aviation from the outset of its development. The Chicago Convention on International Civil Aviation of 1944, in its preamble paragraph, emphasizes that “the future development of international civil aviation can greatly help to create and preserve friendship and understanding among nations and peoples of the world, yet its abuse can become a threat to the general security.” The main concerns in this regard have been the threats posed to civil aviation by nonstate actors on the one hand and interstate incidents on the other. The international legal framework has been shaped accordingly.

A. Threats Stemming from Nonstate Actors

The relatively short history of civil aviation indicates that this particular system of transport has always been vulnerable to different forms of abuse by nonstate actors. It is thus hardly surprising that out of the now thirteen UN conventions addressing the phenomenon of international terrorism, four are dedicated to the relationship between terrorism and civil aviation. The first reported incident of hijacking of a commercial airliner took place as early as 1931, and many followed, especially in the late 1960s and throughout the 1970s.


Entebbe"; and the "Landshut" incident on October 13, 1977, after the so-called "Deutscher Herbst" are only the most prominent examples among many others. This dramatic increase in crimes of violence, which adversely affected the safety of civil aviation during the late 1960s, resulted in an Extraordinary Session of the International Civil Aviation Organization (ICAO) Assembly in June of 1970. The session subsequently led to the adoption of annex 17 on March 22, 1974, which sets out the basis for the ICAO civil aviation security program and seeks to safeguard civil aviation and its facilities against acts of unlawful interference.

When the number of global hijackings of civil aircraft gradually decreased during the 1980s and 1990s, attention shifted toward acts of sabotage, in-flight attack, or airport facility attack. From early on, the evolution of different threats to aerial security was mirrored in the development of the applicable legal framework. On September 14, 1963, states parties adopted the Convention on Offenses and Certain Other Acts Committed on Board Aircraft (Tokyo Convention), regulating the exercise of criminal jurisdiction. In 1970, states gathered at The Hague signed the Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Convention), which in article 2 stipulates that each contracting state undertakes to make the offense of unlawful seizure of aircraft in flight punishable by severe penalties. One year later in

11. The annex is under constant review to ensure that its specifications are current and effective. Because this document sets minimum standards for aviation security worldwide, it receives further scrutiny before undergoing any changes, additions, or deletions. The Chicago Convention designates international standards and recommended practices adopted by the ICAO Council as annexes to the Convention. Chicago Convention, supra note 3, arts. 37, 54 (1), 90.

12. The aviation security specifications in annex 17 and the other annexes are amplified by detailed guidance contained in the SECURITY MANUAL FOR SAFEGUARDING CIVIL AVIATION AGAINST ACTS OF UNLAWFUL INTERFERENCE (1st ed. 1971). This restricted document provides details of how states can comply with the various standards and recommended practices contained in annex 17. The Manual has further developed for the purpose of helping states to promote safety and security in civil aviation. It aids in the development of the legal framework, practices, procedures, and material, technical, and human resources needed to prevent and, where necessary, respond to acts of unlawful interference.


Montreal, states signed the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal Convention), which in article 3 again obliged every contracting state to make punishable by severe penalties the offenses mentioned in its article 1: the destruction of an aircraft in service (article 1(b)); the placing of a device or substance which is likely to destroy the aircraft or to cause damage to it (article 1(c)); and the destruction or damage of air navigation facilities (article 1(d)). Simultaneously, following the three-year cycle for annex amendments, changes to annex 17 in 1988 included requirements of further assistance in fighting sabotage against aircraft or facilities. In 1988, the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving Civil Aviation supplemented the Montreal Convention in an effort to more effectively deter such acts. Finally, in response to the Lockerbie incident in 1988, states signed the Convention on the Marking of Plastic Explosives for the Purpose of Detection in Montreal on March 1, 1991.

In essence, these legal measures focused on developing more appropriate measures and enhanced worldwide cooperation to prevent and discourage the misuse of civil aviation by private actors. They targeted these problems from either a preventive perspective or, assuming the violations have already occurred, from a criminal jurisdiction and law enforcement perspective intended to attain an equal security standard globally.

B. Interstate Incidents Compromising the Security of Civil Aviation

Apart from the diverse threats imposed by private actors, numerous interstate incidents since World War II involving the shooting down of civil aircraft in foreign territorial airspace have compromised the safety of international civil aviation and international peace and security. Even before World War II, the shooting down of a trespassing German balloon by Russia in 1904 and overflights of French territory by German balloons in 1908 instigated the 1910 Paris Conference on International Air Navigation. Prominent examples of post-World War II incidents include the destruction of an El Al airliner by Bulgaria in 1955, Israel's downing of a Libyan Arab Airlines aircraft in 1973, and the Soviet Union's destruction of Korean Airlines Flight 902 in 1978 and Korean Airlines 15.


Flight 007 in 1983. These aircraft were often attacked not because the state in whose territorial airspace they intruded feared an actual attack; rather, they were approaching or overflying a militarily important area, causing the state concerned to suspect espionage or surveillance of sensitive installations.

Aerial incidents of this kind often had far-ranging, disruptive implications for the peaceful relations between states. In direct response to the downing of KAL 007, which left 269 people dead, the assembly of the ICAO in its 25th extraordinary session at Montreal on May 10, 1984, reaffirmed the Preamble of the Chicago Convention. It also noted that while international civil aviation can greatly help to create and preserve friendship and understanding among nations and peoples of the world, its abuse can become a threat to general security. Consequently, the states at the Extraordinary Session set out to strike a more careful balance between the requirements of safety on the one hand and the requirements of national air sovereignty and national security on the other. In accordance with article 94(a) of the Chicago Convention, states agreed to insert a new article 3bis stipulating the non-use of weapons against civil aircraft in flight. On March 12, 1999, the Council of

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19. Article 3bis, supra note 3, preamble ¶ 2.

20. See ICAO, Report, Minutes, and Documents, supra note 4, at 24.

21. Given the gravity of such incidents, the ICAO has developed procedures for the interception of civil aircraft, such as standard maneuvers to gain the attention of civil aircraft, as well as standard radio and visual signals to be used in interceptions, and instructions for coordination between military authorities and Air Traffic Service (ATS) units. See ICAO, Manual concerning Interception of Civil Aircraft, ICAO Doc. 9433-AN/926 (2d ed. 1990). See generally G. F. Fitzgerald, The Use of Force against Civil Aircraft: The Aftermath of the KAL Flight 007 Incident, 1984 Can. Y.B. Int'l L. 291. Some delegations were of the opinion that the Chicago Convention of 1944 was an adequate and balanced contractual document as it stood and that it should not be changed. In their view, it would have been sufficient to amend
the ICAO reaffirmed the principles laid out in article 3bis(a), namely the obligation to refrain from the use of weapons against civil aircraft in flight, in relation to a civil aviation complaint involving the Democratic Republic of the Congo, Rwanda, and Uganda. The ICAO Council emphasized that use of weapons against civil aircraft in flight was incompatible with elementary considerations of humanity.22

C. The Newly Emerged Threat

There is thus a regime of international conventions dealing with different forms of abuse of civil aircraft and related facilities by nonstate actors on the one hand and article 3bis of the Chicago Convention, which aims to regulate the use of force against civil airliners primarily in an interstate context, on the other. For several reasons, the newly emerged threat of attacks akin to those of September 11 lies somewhere between the aforementioned legal frameworks. Firstly, law enforcement as envisaged in the group of conventions relating to nonstate actor threats neither deters suicide attackers nor provides a feasible response in light of the potential destruction their attacks may cause. Secondly, the interstate context of article 3bis differs significantly from the situation of nonstate actors who misuse civil aircraft as a means for attack. States predominantly adopted article 3bis with the intention of confining the "trigger-happiness" of states vis-à-vis aircraft that intrude into their territorial airspace without authorization. The new threat, however, potentially compromises a state's security interests and territorial sovereignty far more severely than unauthorized intrusion or surveillance activity by another state.

At present, only amendment 10 to annex 17, which was adopted by the ICAO Council on December 7, 2001, and became applicable on July 1, 2002, has addressed this particular threat on the international level.23 Amendment 10, designed in response to the September 11 attacks, includes various definitions and new provisions relating to the applicability of annex 17 to domestic operations; international cooperation on threat
information, national quality control, and aircraft access control; measures related to passengers, their cabin, and hold baggage; inflight security personnel and protection of the cockpit; code-sharing/collaborative arrangements; and response management with regard to acts of unlawful interference. All of these measures are of a preventative nature and do not adequately address the question of what to do, as a last resort, if all other safeguards have failed and there is an imminent threat that a civil airliner will crash into a ground target. Article 3bis therefore remains the only provision that addresses the use of force against civil aircraft in flight, and thus, despite its original interstate focus, it serves as the relevant yardstick in a nonstate actor attack scenario.

In Germany, officials briefly considered the threat of such civil aircraft attacks as early as the 1972 Olympic Games at Munich. At the time, Defense Minister Georg Leber hinted at the complicated legal matters surrounding an adequate response to civil aircraft attacks and the necessity to solve such questions beforehand so as to provide for a timely response. More recently, some have discussed the feasibility of producing artificial smoke screens as a means to obscure potential ground targets like atomic power plants.

In recognition that such safeguards could provide partial protection at best, article 14(3) of the newly adopted German LuftSiG, termed the "last resort clause" by German legislators, now authorizes the use of armed force against an aircraft if circumstances allow no other conclusion than that the aircraft will be used against people and that no other means are available to counter the threat. The provision has sparked intense domestic debate, but only regarding its consistency with German constitutional law. Given that members of the opposition party have
announced they will bring the law before the Constitutional Court, an avenue President Horst Köhler hinted at when signing the law and simultaneously expressing his severe doubts as to its lawfulness, it is not yet certain how long the provision will remain in force. Nevertheless, the terms of article 14(3) of the German LuftSiG describe a scenario numerous states have contemplated and may thus serve as an example for their future policies. Consequently, the lawfulness of forcible countermeasures merits closer scrutiny in light of international law, particularly article 3bis of the Chicago Convention.

III. THE USE OF FORCE AGAINST HIGHJACKED CIVIL AIRCRAFT INTENDED TO BE USED AS WEAPONS OF LARGE SCALE DESTRUCTION

A. Article 3bis of the Chicago Convention

The protocol relating to an amendment to article 3bis of the Convention on International Civil Aviation of December 7, 1944, entered into force in May 1998 when it received 102 ratifications (i.e., ratifications by two-thirds of ICAO's member states). In the preamble of this protocol, states expressed their desire to reaffirm the principle of non-use of weapons against civil aircraft in flight and to amend the Chicago Convention through a new article 3bis, according to which:

26. For the competency to address the federal constitutional court with regard to this matter, see Grundgesetz fur die Bundesrepublik Deutschland(GG)(federal constitution), art. 93, § 1, No. 2, in combination with Gesetz über das Bundesverfassungsgericht (BVerfGG) (Law on the Federal Constitutional Court), §§ 13(6)–(76).


28. Apart from procedural questions concerning the competencies of enacting such a law on the federal level while the area of law enforcement is a state right, the authorization of the military to act domestically with the task of law enforcement is highly problematic in light of the German constitutional framework. In addition, article 2 (2), which contains the right to life, and article 1 (1), which safeguards human dignity under all circumstances and without exception, are at the center of the controversy. Moreover, military actions not directly related to defense against military attacks are only admissible if they are explicitly provided for in the Constitution. Provisions for the use of the Federal Armed Forces inside the state are found in article 87, paragraphs 3 and 4, as well as article 35, paragraphs 2 and 3, of the Basic Law. All of which, however, do not concern the threat stemming from civil aviation. To the contrary, sovereign competencies of the Federal Armed Forces in the field of aviation only exist in relation to outside aggressors. See generally Knut Ipsen, Bonner Kommentar zum Grundgesetz, art. 87(a), § 37 (1969); Karl Heinz Böckstiegel, Competencies for Civil And Military Aviation in German Law, in Air Worthy, Libri Amicorum Honouring Prof. Diederiks Verschoor, supra note 17, at 28. With regard to the domestic legal situation in the United States, see the Posse Comitatus Act, 18 U.S.C. § 1385 (2000).
a) The contracting States recognize that every State must refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of aircraft must not be endangered. This provision shall not be interpreted as modifying in any way the rights and obligations of States set forth in the Charter of the United Nations.29

Many have debated the scope of article 3bis and criticized its sometimes ambiguous wording.30 Previously, in the absence of relevant cases, these questions were mainly argued in the abstract. Now, with the use of civil aircraft as weapons of potentially large-scale destruction and the corresponding countermeasures developed by states, the need for clearer answers has become more pressing. For example, according to the second sentence of article 3bis(a), the shooting down of a civil airliner is seemingly only permissible in cases of self-defense within the meaning of Article 51 of the UN Charter. This in turn raises the question of whether the scenario envisaged by article 14 of the LuftSiG, the employment of civil aircraft as weapons by nonstate actors, amounts to an "armed attack" as required for the right to self-defense. Before embarking on this discussion, different aspects of the first sentence of article 3bis(a) require consideration, particularly the issue of whether aircraft intended for use as air-to-ground weapons can still be regarded as "civil aircraft" within the meaning of the Chicago Convention.

1. The Scope of Article 3bis(a) of the Chicago Convention

Initially, an Austro-French proposal limited the scope of the obligation entailed in article 3bis to "aircraft of the other contracting States." Ultimately, however, these words were not included in the final text of article 3bis because the delegations wished to emphasize that the provision was declaratory of general customary international law and therefore extended to non-contracting states.31 As a consequence, and

29. Similarly, the Montreal Convention, supra note 9, art. 1, specifies certain substantive offenses against civil aircraft. It also states that "any person commits an offence if he unlawfully and intentionally destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight." Id. art. 1(b).

30. See Cheng, supra note 17, at 59.

31. See ICAO, Report, Minutes and Documents, supra note 4, at 27, 30, 36, stating:

[It is such] a fundamental principle that it should apply to every civil aircraft irrespective of whether or not the State of Registry of an aircraft was a party to the Chicago Convention. Under Article 36 paragraph I of the Vienna Convention on the Law of Treaties it was possible to extend the rights provided under a treaty to third States, and Australia believed that it was essential to do that in the context of the
presumably unintentionally, the wording now extends the scope of article 3bis not only to all foreign aircraft but also to aircraft of a state's own registration. Under this interpretation, states are now obliged to refrain from the use of force against any civil aircraft in flight irrespective of the aircraft's origin or location of registration. Some authors have claimed that the very peculiarity of an international agreement establishing state obligations vis-à-vis its own aircraft militates against such an interpretation. Whether this indeed constitutes an abnormality in international law seems questionable, however, and such a reading is hardly untenable in light of the wording of article 3bis, which explicitly includes any civil aircraft. Consequently, as referred to above, article 14 of the LuftSiG triggers international implications irrespective of whether the scenario it envisages involves a German civil airliner or a civil aircraft of another registration (the consequences of this result, especially the question of legitimate countermeasures, will be subjected to closer scrutiny later in this Article).

Two limiting criteria further reduce the rather broad scope of the application of article 3bis. Firstly, the article applies only to civil aircraft, and secondly, it requires these civil aircraft to be in flight. In light of cases such as the "Landshut" incident at Mogadishu airport or the Entebbe operation, states added this latter qualification of "in flight" so as to indicate that law enforcement actions on the ground, especially storming a hijacked aircraft before takeoff, remained permissible.

The article also entails no pronouncement with regard to a minimum size of the aircraft. Article 29 lit. f) and g) of the Chicago Convention evidences that the carrying of passengers or cargo is not necessary for an aircraft to fall within the scope of the Convention and its article 3bis. Nevertheless, one might argue that when states adopted the Chicago Convention in 1944 they had not fully anticipated the subsequent development of sporting aviation. In addition, article 44 of the Chicago Convention, which lays out the aims and objectives of the ICAO in conformity with preamble paragraph 1, refers to international aviation and international air transport, from which a certain minimum capacity of the aircraft in question might be deduced. Of course, given that even the smallest single-engine aircraft is capable of crossing territorial borders and potentially impeding regular air traffic, and that an accurate classification of small aircraft would be rather difficult, there seems to be little

32. Cheng, supra note 17, at 63.
33. Id.
leeway to argue for a more restrictive scope of the Chicago Convention that would exclude smaller aircraft.

With regard to the employment of civil aircraft as weapons against ground targets, the question arises whether such aircraft can still be considered as civil aircraft within the scope of article 3bis(a). At the time of drafting, some delegations considered the qualification "civil" unnecessary, given that article 3(a) makes the Chicago Convention applicable only to civil aircraft and the word "aircraft" had been used in a number of articles without further qualification. Article 3(a) of the Chicago Convention divides aircraft into two categories, civil aircraft and state aircraft, and the Convention goes on to define state aircraft in paragraph b) in a purely functional manner as aircraft "used in military, customs and police services." According to this functional test, which contains no reference to ownership or control, an aircraft is a state aircraft whenever it is functionally used in the services of the military, customs, or police, in which case it would fall outside the scope of article 3bis. Consequently, article 3bis is applicable to all aircraft in flight regardless of nationality, so long as they are not being used in military, customs, or police services.

The use of the word "services" in article 3(b) of the Chicago Convention instead of "purposes" implies that the drafters created article 3 predominantly with the intention to regulate state-to-state relations. Police and military services, it would seem, are something only a state provides, whereas military purposes could be pursued by any other actor. Similarly, the events which led to the adoption of article 3bis were largely interstate incidents in which civil aircraft had trespassed sovereign airspace, overflown military sensitive areas, and were suspected of being engaged in espionage on behalf of their state of registration. During the negotiation of article 3bis, states considered nonstate actor interference with civil aircraft to fall within the purview of other agreements, namely The Hague and Tokyo Conventions, as well as frameworks designed to regulate criminal law enforcement vis-à-vis civil aircraft authority.

Nevertheless, during the drafting process of article 3bis, the delegate of Peru drew attention to the problem that certain activities conducted onboard a civil aircraft which could adversely affect a state's security would not necessarily exclude such aircraft from the scope of protection ensured by article 3bis. The delegate stipulated: "[T]here are aircraft which were referred to as civil aircraft and identified as civil aircraft which in certain countries carried out activities . . . such as the spraying

34. See ICAO, Report, Minutes and Documents, supra note 4, at 8.
35. Cheng, supra note 17, at 64.
of areas with bacteriological contaminants, the transport of drugs, contraband, gun running, the illegal transport of persons . . . .”

In this context it is noteworthy that Jamaica proposed to qualify the expression “civil aircraft” in article 3bis(a) with the words “engaged in civil aviation,” thereby a priori excluding aircraft used for purposes incompatible with the aims of the Chicago Convention. Similarly, Korea emphasized that civil aircraft might be used for military or other aggressive purposes and to that extent should be disqualified from the description of a civil aircraft. Some parties argued that by introducing the term “engaged in civil aviation,” article 4 of the Chicago Convention would remain as a fundamental feature of the Convention, aircraft not precisely covered by the Convention would still be protected, and aircraft employed for aggressive purposes could be excluded from the protective umbrella of article 3bis.

Ultimately, states rejected the Jamaican proposal and favored the narrower concept entailed in article 3(a) because they feared the additional phrase “engaged in civil aviation” might open loopholes. With the Jamaican proposal, states could argue all too easily that an aircraft was being used for military purposes and therefore no longer qualified as a civil aircraft within the meaning of the Chicago Convention. In particular, it was argued, such qualification would enable states to attack a civil aircraft on the grounds, however slight or subjective, that the aircraft was not used wholly for civil aviation purposes, a serious departure from the international legal rules regulating the use of force in situations of self-defense. Consequently, the interpretation would have had the effect of imperiling international civil aviation. These concerns regarding potential abuse are evidence of the prevailing perception, in the after-

36. See ICAO, Report, Minutes and Documents, supra note 4, at 52, 85, 102. The Peruvian delegate then posed the question: “what should government do in case where a civil aircraft . . . was involved in any one of the activities referred to, which he could only describe as traffickers of death.” Developing countries were also concerned that they did not have the capacity to safeguard their sovereignty in the same manner as more powerful countries and that consequently interception could sometimes only be enforced by the use of weapons against such aircraft, namely ground-to-air weapons. Id. at 50. With regard to the practice of Peru and Colombia of shooting down of civil aircraft used in drug trafficking, see Walter Dellinger, Memo for the Deputy Attorney General, supra note 6.

37. Article 3 of the Chicago Convention entitled, “Civil and State Aircraft” provides: a) This Convention shall be applicable only to civil aircraft, and shall not be applicable to State aircraft; b) Aircraft used in military, customs and police services shall be deemed to be state aircraft. Chicago Convention, supra note 3, at 945.

38. ICAO, Report, Minutes and Documents, supra note 4, at 23.
39. Id. at 38.
40. Cheng, supra note 17, at 65.
41. ICAO, Report, Minutes and Documents, supra note 4, at 30.
42. Id. at 35.
43. Id. at 37.
of the Korean airliner incident, of a dangerous "trigger-happiness" amongst states to shoot down civil aircraft. The dilemma of how to identify the precise purpose of a civil aircraft in flight would likewise play out in the context of terrorist activity, as it would be rather difficult to pinpoint an aircraft's non-civil use with any degree of precision. If an aircraft's status is to be determined in light of its purpose, the question remains as to which kind of criminal activity qualifies as status-altering. A further question, with regard to the scenario at issue, is whether an aircraft falls outside the scope of article 3bis at the time of its hijacking or only when it subsequently becomes obvious the hijacked aircraft is intended for further illegal purposes.

Still, Robertson has argued that, viewing article 52(2) of Protocol I to the Geneva Conventions and article 3 of the Chicago Convention in juxtaposition, it is apparent the "use" of an aircraft in a role making an effective contribution to military action (article 52(2)) constitutes its use in military service and thus removes it from the category of "civil aircraft." It is very much along the lines of such argumentation, however, that the distinction between law enforcement and measures of war is blurred in the proclaimed global war on terrorism, in which all presumed terrorists are automatically described as combatants rather than criminals, thus waiving their immunity from direct military attack. In addition, the contrary argument—that while the circumstances of a conflict situation permit a somewhat more restrictive definition of civil aircraft, the legal regime applicable in peacetime does not—could be deduced from the juxtaposition of the Chicago Convention and Additional Protocol I just as easily.

Such an argument seems more convincing in light of the drafting history of article 3bis and its overriding telos to reaffirm the principle of non-use of force. A systematic reading of articles 3 and 4 of the Chicago Convention also backs this interpretation. While article 3 sets out the

44. Robertson, supra note 17, at 122. See also THE SAN REMO MANUAL, ¶¶ 62–63 (1994), at http://www.icrc.org/ihl.nsf/0/7694fe2016f347e1c125641f002d49ce?OpenDocument. In recognition of the fact that civil aircraft can readily be converted to military use, the Manual lists the following activities as converting civil aircraft to military purposes:

- engaging in belligerent acts on behalf of the enemy, e.g., laying mines, mine-sweeping, laying or monitoring acoustic sensors, engaging in electronic warfare or providing target information, acting as an auxiliary aircraft by, e.g., transporting troops or military cargo
- being incorporated into or assisting the enemy's intelligence-gathering system
- flying under the protection of accompanying enemy warships or military aircraft
- being armed with air-to-air or surface weapons, or
- otherwise making an effective contribution to military action.
criteria for distinguishing between civil and non-civil aircraft, article 4 addresses the use of civil aviation for purposes inconsistent with the aims of the Convention without any reference whatsoever to an aircraft's civil or non-civil status. Had the parties more leniently defined article 3bis so that all aircraft used for purposes incompatible with the aims of the Chicago Convention fell outside its scope of protection, they would have deprived the provision of its essence; it is precisely in such situations of doubt that states may be tempted to use force and in which article 3bis obliges them to resort to other non-forcible means at their disposal.45

Consequently, it is only in times of armed conflict, or more precisely in cases in which there exists a nexus to an armed conflict, that the criteria for determining the status of an aircraft are shifted towards a purpose-oriented approach.46 Even then, the San Remo Manual establishes a presumption in cases of doubt that an aircraft is not making an effective contribution to military action and that it may only be attacked if it clearly meets the definition of a military objective. In peacetime, however, a civil aircraft hijacked by a few individuals with the intention to use it against a ground target remains a civil aircraft and thus within the protective scope of article 3bis of the Chicago Convention.

2. Are the Obligations Imposed by Article 3bis(a) Absolute?

If it is accepted that a civil aircraft used in a manner envisaged by article 14 of the German LuftSiG is not deprived of its status as a civil aircraft, the next question is whether the obligations imposed by article 3bis are absolute or whether the obligation to refrain from the use of weapons and not endanger the lives of persons on board and the safety of the aircraft admits exceptions. In this regard, the wording of article 3bis, sentence 1 demands analysis, especially the use of the phrase "must refrain" and the implication that the obligation not to endanger the lives of persons is limited to cases of interception. Secondly, the reference to the rights and obligations under the Charter of the United Nations in the second sentence of article 3bis also requires consideration.

45. ICAO, Reports, Minutes and Documents, supra note 4, at 30.
46. For example, the U.S. Commander's Handbook provides that civil airliners in flight are exempt from destruction unless at the time of the encounter they are being utilized by the enemy for a military purpose or refuse to respond to the directions of the intercepting aircraft. The Commander's Handbook on the Law of Naval Operations, NWP 9 (Rev. A), FMFM 1-10, at 8-4 (1989). The German Manual exempts civilian passenger aircraft from attack. See DIETER FLECK et al., THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 435, 1034 (1995) (exempting passenger ships from attack).
3. Article 3bis Sentence 1

The phrase "must refrain" in article 3bis(a) entails a certain ambiguity as to what exactly it requires from states. Some have pointed out that the common understanding of the word "refrain" is less emphatic than, for example, "abstain" and that refraining from an action often means merely its voluntary non-performance.\(^4\) It is noteworthy that at the time of the adoption of article 3bis, annex 2 to the Chicago Convention, in its attachment A, paragraph 7, already provided: "intercepting aircraft should refrain from the use of weapons in all cases of interception of civil aircraft." By using the injunction, "must refrain," states did not simply follow the precedent of the annex but departed from the wording of annex 2, according to which intercepting aircraft "should refrain" from the use of weapons. Consequently, even though states did not agree upon the stronger wording proposed in the Korean draft (according to which states "must not use" weapons),\(^4\) article 3bis does not allow the parties the same discretion as annex 2 with regard to the use of weapons against civil aircraft.

Still, given the wording in the second half of the first sentence of article 3bis ("must not") and the wording, "must refrain," it could be argued there is a gradual difference between the two which implies that while "lives and the safety of the aircraft must not be endangered in case of interception," the use of weapons should merely be avoided if possible.\(^4\) Such a reading, however, would contradict the very aim of article 3bis, namely preventing recourse to force against civil aircraft and ensuring maximum protection of human lives.\(^5\) Given that states intended to reiterate the general prohibition on the use of force entailed in Article 2(4) of the UN Charter vis-à-vis civil aircraft, the obligation that states must refrain from the use of force is subject merely to the rights and obligations set forth in the Charter.

As drafted, the first sentence of article 3bis limits the obligation not to endanger the lives of persons aboard civil aircraft to situations where the aircraft is intercepted. Inasmuch as the use of force could exceptionally be permissible subject to the conditions of the second sentence of article 3bis, this obligation would be void. It is telling in this regard that whereas the majority of previous drafts of article 3bis referred to the use of force, states ultimately adopted the narrower wording of "use of weapons." The understanding was that the legal forms of interception

\(^{47}\) Cheng, supra note 17, at 61 (referring to definition supplied by Webster's International Dictionary).

\(^{48}\) ICAO, Reports, Minutes and Documents, supra note 4, at 182. The U.S. draft proposed the phrase, "Each contracting State agrees not to use . . . ." Id. at 165.

\(^{49}\) Cheng, supra note 17, at 62.

\(^{50}\) ICAO Reports, Minutes and Documents, supra note 4, at 29, 30, 46.
foreseen by article 3bis(b) would ipso facto involve the use of some degree of force against the aircraft without placing its passengers at risk. Heeding genuine security concerns, and in light of the overriding aim to ban uses of force which would endanger the life of the passengers, states agreed that such a threat would most likely arise in the case of the employment of weapons.\(^5\) Despite the fact that paragraph 7.1 of the attachment to annex 2 of the Chicago Convention already provided that an aircraft interception should exclude the use of weapons, states felt an essential need for an additional obligation ensuring forced landings of foreign aircraft do not endanger the safety and lives of persons on board and are carried out only at an airfield on which the aircraft can touch down without danger.\(^2\) This shows that the drafters had wider concerns for the safety of civil aircraft and their passengers than merely those associated with the use of weapons.

4. Article 3bis Sentence 2

Thus, the obligation that states must refrain from the use of force is subject merely to the exceptions referred to in the second sentence of article 3bis, according to which the “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.”

In this regard, discussion at the time of drafting centered first on the question of whether any reference to the rights and obligations under the UN Charter was useful, and if so, whether specific mention should be made of Article 51 of the UN Charter. The UN Charter, by virtue of its Article 103, has precedence over any international treaty or agreement in any case, and Article 51 provides for the inherent right of self-defense, which preceded the Charter itself.\(^3\) Reiterating the peremptory principle of the non-use of force in Article 2(4) of the Charter, the delegations to the Assembly stressed that the question of the use of force was solely to

\(^5\) Even though it could be argued that in extreme cases certain maneuvers of interception could also endanger the security of an aircraft’s passengers, the Soviet delegate, the 25th Assembly (Extraordinary) explained the preference for the expression “weapons”: Interception almost always involved the use of force . . . Obviously, it was out of humane consideration that force was used in interception to make an intruder leave the country whose sovereignty had been violated without having to resort to other measures which could pose a threat to human life . . . . Those delegates who called for an absolute non-use of force had expressed that desire with a view to preventing a threat to human life but that threat only arose with the use not of force but of weapons.

\(^51\) Id. at 65.
\(^52\) Id. at 37.
\(^53\) Id. at 8.
be answered within the Charter system. Moreover, states feared that any explicit reference to Article 51 could be misunderstood as a license to shoot. Therefore, the parties ultimately reached agreement on a general reference to the rights and obligations of states set forth in the Charter. Nevertheless, references were made throughout the Assembly delegations to Articles 2(4) and Article 51. Although the parties ultimately integrated neither provision into the text of sentence 2 verbatim, the discussions indicate they saw self-defense in accordance with Article 51 as the only legitimate exception justifying the use of force against civil aircraft.

Yet some parties argued that absolute exclusion of the use of force against civil aircraft was not justified, as the narrow scope of Article 51 would not always allow for adequate responses when civil aircraft violated another state's territorial integrity or independence. Similarly, the Soviet delegation argued that any reference to Article 51 substantially reduced the capabilities of states to protect their sovereignty, removing the right to stop the illegal use of civil aviation in any cases but aggression. In the extreme, some delegations feared, ensuring complete immunity of civil aircraft might even encourage violations.

The majority of delegations, however, agreed that modern international law totally rejected the use of force for the sole purpose of self-protection except in response to an armed attack, and then only to the extent and for the time required to eliminate the danger. This interpretation finds support in the argument that if cases of interception are already limited to certain grounds laid out in article 3bis, measures involving the use of force must be limited even further to the narrow concept of armed attacks in Article 51 of the Charter. Accordingly, departure from the balance between sovereignty and the non-use of force as foreseen in the Charter

54. Cheng, supra note 17, at 70.
55. ICAO, Report, Minutes and Documents, supra note 4, at 38.
57. ICAO, Report, Minutes and Documents, supra note 4, at 25.
58. Id. at 15.
59. The Polish delegate stated:

[...] Indeed, an aircraft registered as a civil aircraft, whether carrying passengers or not, could be safely used for any illegal purpose including criminal or military purposes, and would remain immune in a case where it was unwilling to correct the violation and to land in compliance with proper instructions received.

Id. at 25.

60. The Belgian delegate spoke of a “Humanization in Air Relations.” Id. at 46. See also Steven B. Stokdyk, Comment, Airborne Drug Trafficking Deterrence: Can A Shootdown Policy Fly?, 38 UCLA L. REV. 1287, 1306–10 (1991).
system (by virtue of its extending the right to resort to force to, e.g., the guarantee of a state's security) would indeed have been a retrogressive step. Consequently, a mere infringement of a state's sovereignty cannot legitimize the use of force against civil aircraft unless such infringement amounts to an armed attack.

B. Self-Defense in Accordance with Article 51 of the UN Charter

At first view, the use or intended use of a civil aircraft as a weapon of large-scale destruction could amount to an armed attack, triggering the right to self-defense in accordance with Article 51 of the Charter. There is little doubt that the abuse of civil aircraft as weapons against ground targets, potentially killing thousands of victims and targeting a country's focal points of economic, military, or political decisionmaking, amounts to an armed attack as far as the issue of intensity is concerned.

Far more controversial, however, is the question of whether attacks by nonstate actors could amount to armed attacks within the purview of Article 51. This issue lies at the heart of the current debate over how to adequately respond to acts of terrorism, and it is determinative, for example, for the issue of targeted killings of terrorist suspects living abroad after having hijacked aircraft.

In the 1990s, attempts to broaden the scope of Article 51 largely gave way to debates on the collective powers of states acting under the auspices of the Security Council. Before September 11, counterterrorist operations were almost exclusively treated as law enforcement issues. In the aftermath of the attacks, the disturbing level of violence that nonstate actors can inflict has caused significant uncertainty about the suitability of including criminal acts related to terrorism within the purview of law enforcement. This discussion has undergone quite a renaissance, and the scope of Article 51, especially with regard to the behavior of nonstate actors, is once again at the forefront of the discussion.

While it is accepted that Article 51 encompasses acts committed by nonstate actors inasmuch as they are imputable to a state, concerns with the phenomenon of international terrorism have led some authors to argue that

61. ICAO, Report, Minutes and Documents, supra note 4, at 31.
62. Id. at 37.
63. Another critical issue is whether self-defense may already be resorted to before the first attack has reached its aim (analysis of the issue, however, would exceed the scope of this Article). See Humphrey M. Waldock, The Regulation of the Use of Force by Individual States in International Law, 81 Recueil des Cours/ Académie de droit international 498 (1952); Bruno Simma & Alfred Verdross, Universelles Völkerrecht 288 (1976).
nonstate actor attacks constitute armed attacks in their own right, thus triggering the right to self-defense.

With the shift from the state-to-state perspective toward threats imposed by nonstate actors, consensus on gradually lowering the threshold for assigning blame to a state has grown. Acts committed by nonstate actors are imputable to a state if the state has encouraged the acts, given its direct support to them, planned or prepared them at least in part within its territory, or if it was knowingly reluctant to impede them. In light of this, some authors have agreed to the invocation of the right of self-defense vis-à-vis the attacks of September 11 on the basis of the connection between al Qaeda and the Taliban as the de facto rulers of Afghanistan. Still under discussion is the failed state scenario in which a state is unable to respond to threats of potentially global reach that are developing within its territory, as well as the issue of a government’s mere tolerance coupled with its unwillingness to target such activity in its territory in an adequate manner.

With regard to genuine nonstate actor attacks, the situation remains even more controversial. Arguably, this is the most probable scenario in the near future, given that the determined will of the international community to combat terrorism imposes a high risk on states supporting or even willingly hosting terrorists. The probability of exclusively nonstate actor attacks might also be enhanced by the fact that what remains of al Qaeda could be described as al Qaedaism, a certain ideology random terrorist groups adhere to inasmuch as it serves their purposes, rather than a centralized and hierarchically structured organization operating from a territorial base.

In its response to the events of September 11, the Security Council in Resolution 1368 of September 12 did not confine itself to condemning the threats to international peace and security posed by the terrorist attacks in New York, Washington, D.C., and Pennsylvania, but it also explicitly recognized the “inherent right of individual or collective self-defense in accordance with the Charter.” In Resolution 1373 of September 28,

2001, the Security Council once more reaffirmed the inherent right of individual and collective self-defense as recognized by the Charter in the context of antiterrorism measures.\textsuperscript{69} In this regard, it is also quite telling that on October 5, 2001, the ICAO Assembly issued its Declaration on Misuse of Civil Aircraft as Weapons of Destruction and Other Terrorist Acts Involving Civil Aviation. According to this declaration, "[S]uch terrorist acts are not only contrary to elementary considerations of humanity, but use of civil aircraft for an armed attack on civilized society and are incompatible with international law."\textsuperscript{70}

It has been argued that in neither of its resolutions did the Security Council limit its application to terrorist attacks by state actors, a reading supported by the lack of a limitation to state attacks within the text of Article 51.\textsuperscript{71} Moreover, in light of the fact that the Security Council in Resolution 1368 classified the actions taken against the United States on September 11 as "a threat to international peace and security," thus opening the way to adopt measures in accordance with Articles 41 and 42 of the Charter,\textsuperscript{72} it would be inconceivable if measures against the same actor would be impermissible under Article 51 in exercise of a state's inherent right of self-defense.\textsuperscript{73}

Such reasoning, however, potentially entails abuse inasmuch as it interlinks the relatively broad and ever-expanding concept of a threat to international peace and security in Article 39 of the Charter with the much more restrictive prerequisites of Article 51. In addition, a certain ambiguity remains in Resolution 1368; while generally recognizing the right to self-defense, the resolution did not explicitly set the exercise of

\textsuperscript{69} This should not distort the fact that the right to self-defense is "inherent" to the victim and thus not dependent upon any authorization by the Security Council. Thomas Franck, \textit{Terrorism and the Right of Self-Defense}, 95 \textit{A.M. J. INT'L L.} 839, 849 (2001).

\textsuperscript{70} ICAO, \textit{Declaration on Misuse of Civil Aircraft as Weapons of Destruction and Other Terrorist Acts Involving Civil Aviation}, supra note 7, preamble ¶ 3.

\textsuperscript{71} Such measures were adopted in S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

\textsuperscript{72} Franck, \textit{supra} note 69, at 840.
this right in the particular context of the armed attacks of September 11. Nevertheless, in light of prevalent nonstate actor threats, genuine security interests, and the wording of Article 51, there are indeed good reasons to argue that the scope of the provision extends to nonstate actor attacks. Even critics, however, accept that the limitation of Article 51 to genuine state attacks "is to be regarded as a Statement of the law as it now stands."75

The ICJ bolstered this position in an Advisory Opinion, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, which recently confirmed that Article 51 recognizes an inherent right of self-defense in the case of armed attack by one state against another state76 and thus limited its scope to state attacks only. The court further stated that Article 51 only becomes applicable if the respective threat originates outside the defending state's territory.77 The question of where an armed attack initially originated, of course, has a broader connotation than the question of from where a specific attack was ultimately launched. The court also indicated that the situation contemplated by Security Council Resolutions 1368 and 1373 fulfilled the "extraterritoriality" requirement.78 It follows that inasmuch as the criteria of accountability are met, an armed attack originates in the state to which the act is attributable irrespective of the actual location from which it is executed and regardless of the nationality of the perpetrator or the aircraft.79

Commentators have lamented the brevity of the Advisory Opinion's section on self-defense, particularly the absence of any consideration of more recent state practice (U.S. actions in Sudan in 1998, for example) and declining international disapproval of forcible action against terrorist organizations abroad.80 Whether for better or worse, the court chose to render a brief statement on the matter, implicitly limiting the scope of Article 51 to nonstate actor attacks which fulfill the accepted, and developing, requirements for attributing actions to a state. In light of the

74. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. (separate opinion of Judge Kooijmans), supra note 71, ¶ 35.
76. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J., supra note 71, ¶ 139.
77. Id.
78. Id.
Advisory Opinion, Article 51 only comes into play in cases in which the behavior of the perpetrators would be imputable to a state, whereas a genuine nonstate actor threat presently does not qualify as an armed attack triggering the right to self-defense. It follows that to the extent the German LuftSiG condones the use of force against civil aircraft without any distinction as to the perpetrators’ status as a state or nonstate actor, its article 14 is in violation of article 3bis of the Chicago Convention. Furthermore, the LuftSiG envisions a practice in violation of recent ICJ jurisprudence regarding Article 51 of the UN Charter.

C. The Domestic Perspective

The fact that article 3bis thus precludes the use of force against civil aircraft in all cases in which the attack is not imputable to a state could lead to a rather absurd conclusion vis-à-vis aircraft of a state’s own registration. Article 3bis, on its face, precludes the use of force against a state’s own civil aircraft hijacked by its own nationals under all circumstances and without exception, given that the requirements of Article 51 could not possibly be fulfilled in such a genuinely domestic context. While attention regarding the exceptions to article 3bis has centered primarily on Article 51, it is noteworthy that the second sentence of article 3bis subjects the stipulations of the article’s first sentence to the rights and obligations of the Charter as a whole.

The Charter, particularly the principle of sovereignty in Article 2(1), preserves the right to domestic use of force subject merely to a state’s international human rights and humanitarian law obligations. It can thus be argued that vis-à-vis aircraft of a state’s own registration, the Charter and article 3bis’s second sentence grant wider discretion in the choice of countermeasures, including forcible measures, so long as they are not barred by national laws or international human rights law. Only then can scenarios such as the Frankfurt Incident or the recent intrusion of a U.S. civil aircraft into Washington airspace be dealt with outside the purview of article 3bis and, in this regard, the rather incongruous Charter system relating to the use of force. In light of such a reading, the extension of the provisions’ scope to aircraft of a state’s own registration would be meaningless. Still, this may have to be accepted given article 3bis’s

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original purpose of reconfirming the Charter system and the historic inte-

terstate context in light of which it was adopted.

Viewed against the paradigm of the UN Charter system, the scope of
article 3bis appears to be overly broad inasmuch as it restrains a state
from acting in an exclusively domestic context. There is thus good rea-
son to argue that this editorial mistake—after all, nothing in the travaux
préparatoires indicates that the scope has been extended to national air-

craft intentionally—should be remedied by way of a teleological
reduction that a priori limits the scope of article 3bis’s first sentence to
civil aircraft registered in other states. The use of force against civil air-
craft of a state’s own registration, consequently, will be judged merely in
light of that state’s national laws, international human rights, and hu-
manitarian law obligations.

D. Article 89 of the Chicago Convention

Article 89 of the Chicago Convention provides that “in case of war,”
the provisions of the Chicago Convention do not “affect the freedom of
action of any of the contracting states affected, whether as belligerents or
neutrals.” The second sentence of article 89 stipulates that “the same
principle shall apply in the case of any contracting state which declares a
state of national emergency and notifies the fact to the Council.”

In light of the aim of the Chicago Convention to regulate trans-
border civil aviation, there is good reason to argue that the term “war” in
its article 89 refers to international armed conflict. The threat of civil
airliners being converted into air-to-ground weapons, however, is one
stemming from private actors. Under the hypothesis that such behavior,
unlike the September 11 attacks, is not imputable to a state, such action
could merely be considered to fall within the purview of non-
international armed conflict. Irrespective of whether non-international
armed conflict qualifies as a “war” within the meaning of article 89 of
the Chicago Convention, it could still be argued that the respective pro-
visions of international humanitarian law regarding non-international
armed conflict, as a lex specialis in times of armed conflict, derogate
from the provisions of the Convention.

Regardless, the humanitarian law rules relating to civil aircraft in
Additional Protocol I and the San Remo Manual do apply in interna-
tional armed conflict. Determining the applicability of these rules in
times of non-international armed conflict as a matter of customary law
demands analysis of whether the scenario under discussion meets the
threshold of non-international armed conflict. This seems rather doubt-
ful, however, in light of the established criteria regarding the intensity
and duration required to constitute a non-international conflict. Yet the
mere threat of a single attack might meet the threshold for a non-
international armed conflict under a genuine effects perspective, which
could overcome the required degree of "protracted violence."

Similarly, even though using an aircraft as a means for an armed at-
tack, thus endangering the lives of thousands of people, would in
substance qualify as an emergency situation within the meaning of arti-
cle 4 of the ICCPR, article 15 of the ECHR, and article 89 of the
Chicago Convention, this would only be of relevance if one accepts a de
facto state of emergency not requiring a formal declaration as foreseen in
these articles. More importantly, however, and irrespective of these intri-
cacies relating to the prerequisites of article 89 of the Chicago
Convention, there is good reason to argue that the prohibition on the use
of weapons against civil aircraft in flight enshrined in article 3bis of the
Chicago Convention is absolute.

Throughout the negotiations leading to article 3bis's promulgation,
the majority of delegations entertained the opinion that the article was
merely declaratory of previously existing customary law, that it only re-
lected a specific aspect of the general prohibition of the use of force,
and that it was needed solely to clarify remaining uncertainties. A few
delégations, however, were of the view that article 3bis added substanc-
tially new rules. The former reading derives support from the ultimately
adopted declaratory phraseology of article 3bis: "The contracting State
recognizes that . . . " On the other hand, the Austro-French proposal on
which article 3bis is largely based clearly stated: "At present time, there

83. For examples of unreserved recognition of the peremptory character of the prohibi-
tion of interstate force as expressed by the Charter, see Int'l L. Comm'n, Report of the
International Law Commission on the Work of its 18th Session, reprinted in [1966] 2 Y.B. Int'l
L. Comm'n 247, U.N. Doc. A/6309/Rev.1/1966. See also The Secretary-General, Further
Report of the Secretary-General on the Implementation of Security Council Resolution 598,
§ 7, U.N. Doc. S/RES/23273 (Dec. 9, 1991) (explaining that Iraq's aggression against Iran was
a violation of the prohibition of the use of force, which is regarded as one of the rules of jus
cogens); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102, comment k (1985); IAN
BROWNLIE, PRINCIPLES OF INTERNATIONAL LAW, 697-715 (6th ed. 2003); S.C. Res. 1067,
force against civil aircraft as being "incompatible with elementary considerations of human-
ity"). With regard to the declaratory character of article 3bis, see ICAO, Report, Minutes and
Documents, supra note 4, at 27, 30, 36; Michael Milde, Interception of Civil Aircraft vs. Mis-
use of Civil Aviation, 11 ANNALS AIR & SPACE L. 105, 125 (1986); Gilbert Guillaume, La
Destruction, le 1er September 1983 de l'Avion des Korean Airlines, (vol. KE 007), 37-38
REVUE FRANCAISE DE DROIT AERIEN 215, 225 (1984). See also Memorial submitted by the
Islamic Republic of Iran (Iran v. U.S.), 1990 L.C.J. Pleadings 141 (Jul. 24) (case concerning
the Aerial Incident of July 3, 1988). Even before article 3bis was adopted, ICAO had con-
demned the use of force against civil aircraft as a fundamental violation of the Chicago
Convention and international law in its Council Resolution Concerning Israeli Attack on Lib-
yan Civil Aircraft, 12 ILM 1180 (June 4, 1973). See also John T. Phelps II, Aerial Intrusions

84. Cheng, supra note 17, at 59.
is no specific provision in modern international law which unambiguously prohibits the use of armed force against civil aircraft." The wording of the actual draft article in the Austro-French text mirrors this understanding, commencing with the words, "Each contracting State undertakes," thus implying the assumption of new obligations.

Still, even if customary law at the time was ambiguous as to whether armed force could be employed against civil aircraft, states adopted article 3bis precisely with the aim to clarify the legal situation and to close potential loopholes. Security concerns some delegations voiced throughout the drafting process did not prevail, and ultimately the parties codified a rather strict prohibition of the use of force against civil aircraft. Subsequently, in response to a Cuban aerial incident, the Security Council in Resolution 1067 of July 26, 1996, condemned "the use of weapons against civil aircraft as being incompatible with elementary considerations of humanity [and] the rules of customary international law as codified in article 3bis of the Chicago Convention." Thus, without prejudice to the status of the existing law prior to the adoption of article 3bis, there is now little ground to argue against an all encompassing prohibition on the use of force against civil aircraft, subject to the exception of self-defense but otherwise absolute. Again, this conclusion finds support in the fact that it is precisely in emergency situations that a state might consider resorting to forcible and potentially deadly countermeasures, and it is the very gist of article 3bis of the Chicago Convention to rule out the use of force in these situations if they do not amount to an armed attack within the meaning of Article 51.

In addition, unlike article 3bis, which states subsequently introduced into the Chicago Convention by way of amendment, article 89 belongs to the set of original articles of the Convention. The rationale of article 89 was to grant states their freedom of action in times of war or emergency vis-à-vis restrictions stemming from the initial provisions of the Chicago Convention. In contrast, the negotiations leading to the adoption of article 3bis clearly evidence that states did not intend to subject this provision to any form of derogation other than those exceptions provided for by its own terms. Thus, irrespective of article 89 of the Chicago Convention, the legitimacy of forcible countermeasures against civil aircraft in flight must be determined solely within the purview of article 3bis of the Convention and Article 51 of the Charter.

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Even though airport security has increased considerably so as to prevent the recurrence of events akin to the attacks of September 11, it is beyond doubt that preventive measures alone cannot provide absolute security against this persistent threat. In addition, opportunities for interference are growing, as the process of globalization requires constant enhancement of cross-border transport, especially through aviation technology, to meet the ever-increasing desire to further overcome space and time as natural barriers to global interrelations. Soon the giant A-380 Airbus will open up yet another dimension of long distance air travel. Undoubtedly, this new technology, combined with events like the September 11 attacks and the Frankfurt incident of January 5, 2003, have only compounded the perception of a real and considerable threat.

Nevertheless, article 3bis of the Chicago Convention, read in conjunction with ICJ jurisprudence, precludes the use of force against civil aircraft in cases in which nonstate actors threaten to employ aircraft as destructive weapons against ground targets. With regard to threats to aircraft stemming from nonstate actors, existing law thus marks the upper limit of interference. Moreover, article 3bis of the Chicago Convention acuminates the contemporary debate surrounding the scope of Article 51 of the Charter vis-à-vis attacks by nonstate actors and the underlying question of how to meet the legitimate security demands of states. It proceeds that article 3bis excludes resort to any other grounds precluding wrongfulness, including a state of necessity, Judge Simma’s concept of full-scale armed attacks, and other hostile actions that fall outside the scope of Article 51 yet nevertheless justify proportionate defensive measures on the part of the victim.

Some have described article 3bis as intrinsically flawed, in that it subjects what in essence is a question of the treatment of aliens to the

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86. See, e.g., ICAO, Declaration on Misuse of Civil Aircraft as Weapons of Destruction and Other Terrorist Acts Involving Civil Aviation, supra note 7, ¶ 7 (directing the Council and the Secretary General to act urgently to address the new and emerging threats to civil aviation) (emphasis added).

87. In his separate opinion in the Case Concerning Oil Platforms, Judge Simma stated:

[T]here are two levels to be distinguished: there is, first, the level of ‘armed attacks’ in the substantial, massive sense of amounting to ‘une agression armée,’ to quote the French authentic text of Article 51 . . . . But we may encounter also a lower level of hostile military action, not reaching the threshold of an ‘armed attack’ within the meaning of Article 51 of the United Nations Charter. Against such hostile acts, a State may of course defend itself, but only within a more limited range and quality of responses . . . .

Case Concerning Oil Platforms (Iran v. United States of America), 42 I.L.M. 1334, 1433, ¶¶ 12–13 (Nov. 6, 2003) (separate opinion of Judge Simma).
purview of Articles 2(4) and 51 of the UN Charter, which were never intended to lay down specific rules on how states, especially within their own territory, should or should not treat either their own or foreign nationals. Indeed, article 3bis fosters such criticism because it subjects measures of interception to rather strict human rights standards, including the obligation not to endanger the lives of persons on board aircraft, whereas the Charter system allows more forcible measures.

On the assumption that the prohibition on the threat or use of force is limited to the international relations between states, various authors have opined that it does not encompass protective military acts within state territory against intruding persons or aircraft. This reading is in line with the fact that article 1 of the Chicago Convention accords a state "complete and exclusive sovereignty over the airspace above its territory." Article 3bis, in its ambiguity, has not entirely ruled out a renaissance of such an argument, since its provisions are subject to the rights and obligations of the UN Charter in its entirety, which include the principle of sovereignty. Of course, any invocation of the principle of sovereignty with the intention to argue for a greater scope of discretion within a state’s territorial airspace would render article 3bis altogether meaningless. Further, it would be in stark contradiction to the clear intentions of the drafting fathers; the remedial instrument of teleological reduction is feasible only vis-à-vis civil aircraft of a state’s own registration.

Law is a product of social reality, and this reality is subject to change. Undoubtedly, international security concerns have shifted since the adoption of article 3bis in 1984 from state-to-state confrontations toward more asymmetrical threats posed by nonstate actors. Thus, the question of how to adequately respond to palpable threats from such actors, who in the course of their criminal undertakings employ means and methods with the destructive potential of military attacks, seems ever

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88. See Plenary Meetings, Resolutions and Minutes, A25-Res, P-Min, ICAO Doc. 9437, at 60–62 (Apr. 24–May 10, 1984); see also ICAO, Report, Minutes and Documents, supra note 4, at 22, 92.


90. D.W. Bowett, Self-Defence In International Law 38 (1958); Oscar Schachter, The Right of States to Use Armed Force, 82 Mich. L. Rev. 1620, 1626 (1984); The Charter of the United Nations—A Commentary (Bruno Simma et al. eds., 1994), supra note 65, ¶ 34. See also the definition of aggression in G.A. Res. 3314, U.N. GAOR, 29th Sess., 2319th plen. mtg at art.3(d) (Dec. 14, 1974). Article 3(d) considers an “attack by the armed forces of a State on the land, sea or air forces, or marine and air fleets of another State” as armed force and prima facie evidence of an act of aggression in the sense of article 2 of the same resolution. Id.
more pressing. Irrespective of whether states perceive their discretion to respond to newly emerging threats as unacceptably restrained by the applicable legal framework, they are bound to respect such laws for the time being. Genuine security interests of states are at stake, but countering such threats through an all too monocentric approach that disregards accepted rules of international law may adversely affect international peace rather than foster it. Article 3bis, in light of all its flaws and ambiguities, is evidence of an overhasty response to a once imminently perceived threat. Lest the same mistake be repeated in the realm of civil aviation security, a profound discussion and reconsideration of existing laws is preferable to tacit ignorance of accepted legal standards justified by a perceived divergence of social reality and legal restrictions. Ultimately, heeding the rule of law will prove to be the optimum and potentially exclusive strategy for effectively countering international terrorism.