이 글은 앞에서 요약소개한 Michael Milde 교수가 "항공기 사고조사의 법률적 측면과 그 적용사례"에 대하여 주제발표한 내용을 생략없이 원문그대로 소개 하고자 게재한 것입니다.

AIRCRAFT ACCIDENT INVESTIGATION IN LAW AND PRACTICE

(KE 007-TEN YEARS LATER)

The tragedy of flight KE 007 of Korean Air Lines on 1 September 1983 remains, even after ten years, a black mark in the history of international civil aviation. It ranks among the worst man-made aviation catastrophes and is a painful reminder and illustration of the cruelty, callousness, lawlessness and inhumanity in the Cold War attitudes of the former USSR.

The 269 innocent victims of this tragedy and their families deserve to be remembered on the 10th anniversary of the shooting down of KE 007 and we must ask ourselves whether the full truth is known about the causes of the tragedy and whether all its consequences have been settled. The full truth and consequences include all legal evaluations, admission or apportionment of blame and responsibility and compensation of the victims. Unfortunately, in spite of almost 10 years of international efforts, the consequences remain unclear and there is now an apparent trend to consider the matter "closed" or "completed" and to reach an international appeasement. The interests of law and justice would not be served and the victims would be again victimized if the consequences of the tragedy remain unsettled.

In this brief contribution we will focus on the legal aspects of aircraft accident investigation, the legal nature of the "investigations" instituted by the Council of ICAO

in 1983–84 and again in 1992–93 and on the legal aftermath of the KE 007 tragedy in the form of the development and codification in the field of international air law; we want also to stress that the legal consequences remain unsettled and that the ICAO Council, in its resolution of 14 June 1993[1], failed to exercise its far-reaching competence and in fact backtracked from the principled position it took on 6 March 1984[2]. Are the victims to be victimized again for the dubious pragmatic and politically convenient aim "forget and forgive"? We believe that in the interests of respect for international law and morality it should not be so. The KE 007 "incident" is not closed, action has not been "completed" as suggested in the ICAO action and the world still owes too much to the innocent victims of the tragic event of 1 September 1983.

1983 - 1984 investigation

On 1 September 1983 at 6:27:04 hours UTC the Tokyo Air Traffic Control centre received on HF frequency a barely audible message from Korean Air Lines Flight KE 007 advising of rapid decompression and descend to 10,000 feet. This was the last message from a B747-200 aircraft with 269 persons on board on Anchorage-Seoul segment of a scheduled flight KE 007 from New York to Seoul. Massive search and rescue operations have been launched without delay by the Japanese, Korean and US authorities. The USSR authorities for an extended period of time denied any knowledge about the aircraft and only after nearly 48 hours admitted that their air defence units have "terminated" the flight of an "espionage" aircraft over Sakhalin Island; according to them the aircraft violated the sovereign airspace of the USSR, made evasive manoeuvres after it was intercepted by Soviet fighter aircraft and refused to comply with repeated warnings, signals and orders to land at a USSR airport given visually by the navigational lights of the intercepting aircraft, by a burst of tracer bullets and on the radio over the international emergency frequencies.

1) ICAO News Release PIO 8/93, 16 June 1993, Revised. The text of the resolution is attached to this contribution

2) Minutes of the ICAO Council, 6th Meeting, 111th Session, C-Min. 111/6

The deception and lies of the USSR authorities were exposed a few days later in the United Nations Security Council where the delegation of the United States presented transcripts of the Soviet interceptors' transmissions during the attack which clearly proved that KE 007 was treated by the Soviet military authorities from the very beginning as a "target" that its navigational lights and strobe light were on and that the Soviets did not make any effort whatsoever to communicate with the aircraft to identify it or to instruct it to land.[3] On 9 September 1983 a group of 17 States presented to the Security Council a draft resolution[4] which would have declared that **"use of armed force against civil aviation is incompatible with the norms governing international behaviour and elementary considerations of humanity"**. The Security Council was unable to adopt the resolution due to the "veto" of the USSR.[5]

Since the Security Council of the UN was paralysed and prevented from taking any action, the substantive discussion of the KE 007 tragedy was transferred to the International Civil Aviation Organization - a specialized agency governed by the majority of states and not granting a privileged position to the "great powers". At the request of the Republic of Korea and of Canada, the ICAO Council held a rare Extraordinary Session on 15 and 16 September 1983[6] just a few days before the regular session of the ICAO Assembly. Never before in the history of ICAO did the Council engage in an acrimonious discussion showing such a profound shock, revulsion and indignation caused by the conduct of a member State. The Resolution adopted by the ICAO Council went further than the draft which failed in the Security Council in **"deeply deploring the destruction of an aircraft in commercial international service resulting in the loss of 269 innocent lives" and further "recognizing that such use of armed force against international civil aviation is incompatible with the norms governing international behav-**

3) The text of the transcript is available in ICAO Doc C-WP/7764, Attachment, Appendix D.
4) UN Doc. S/15966/Rev. 1, 9 September 1983.
5) Article 27 of the UN Charter does not use the term "veto" but refers to "concurring votes of the permanent members" named in Article 23. Thus the "veto" is just the other side of the same coin - absence of unanimity of the permanent members of the Security Council.
6) ICAO Doc 9416-C/1007, C-Min. Extraordinary (1983).

iour and elementary considerations of humanity and with the rules, Standards and Recommended Practices enshrined in the Chicago Convention and its Annexes and invokes generally recognized legal consequences". This resolution had profound legal implications; it contained a strong legal censure of the USSR conduct, declared its act as being contrary to the general international law as well as the specific provisions of international air law and the elementary considerations of humanity; its reference to "generally recognized legal consequences" implies international responsibility for an unlawful act and liability to compensate the damage caused. The resolution was adopted by a convincing vote of 26 Council member States, with 2 votes opposed (USSR and Czechoslovakia) and 3 abstentions (Algeria, China and India - the USSR failed to marshal support from the other developing countries of the "non-aligned" group of States on the Council).

The resolution of 16 September 1983 further directed the ICAO Secretary General to institute an investigation to determine the facts and technical aspects relating to the flight and destruction of the aircraft and all States were urged to co-operate fully in the investigation. However, the Council did not make any effort to clarify the legal nature of the "investigation" to be carried out by the Secretary General. Under the Convention on International Civil Aviation[7] which is the basic constitutional document of the Organization the Secretary General is the "chief executive officer" of the Organization[8], the most senior international civil servant of the Organization who does not have any independent constitutional functions. What is the legal basis, under the Convention, of the "investigation" carried out by ICAO in 1983-84 and "completed" in 1992-93 under the authority ICAO Secretary general?

The Convention refers to the **"investigation of accidents"** in Article 26: it is the legal duty of the State in the territory of which an accident occurred to institute an inquiry into the circumstances of the accident; such inquiry must be in accordance with the ICAO Standards so far as the law of that State permits (i. e., if no difference with

7) ICAO Doc 7300/6.
8) Article 54 (h) of the Convention.

the relevant Standard has been filed by the State in accordance with Article 38 of the Convention). The state instituting the inquiry is obliged to give an opportunity to the State of registry of the aircraft to appoint observers to be present at the inquiry.

Detailed technical regulation of aircraft accident investigation is contained in Annex 13 to the Convention under which[9] the State of registry and the State of the operator are entitled to appoint accredited representatives to participate in the investigation; similarly, the State of the manufacture of the aircraft is entitled to appoint an accredited representative to participate in the investigation if it is believed that its participation in the investigation could be useful or result in greater safety[10] ; furthermore, any other State providing information, facilities or experts to the State conducting the investigation is entitled to appoint an accredited observer.[11] Finally, there is a Recommended Practice[12] that any State which was a special interest in the investigation by virtue of fatalities to its citizens should, upon making a request to do so, be permitted to appoint an expert to participate in some aspects of the investigation.[13] Under the Convention on International Civil Aviation and the related Annex 13 it was the legal duty of the USSR to institute an appropriate process of investigation with the participation of observers from all interested and concerned States. The USSR never complied with this legal duty [14] although it did not file any substantive difference to

9) Standard 5.19 of Annex 13.

10) STandard 5.22 of Annex 13.

11) Standard 5.24 of Annex 13.

12) Recommended Practice 5.27 of Annex 13.

13) In this context it should be noted that among the fatalities on board KE 007 were 105 citizens of the Republic of Korea, 62 of the United States, 28 of Japan, 23 of Taiwan, 16 of the Philippines, 12 of Hongkong, 8 of Canada, 5 of Thailand, 2 of Australia, 2 of the United Kingdom and one each from the Dominican Republic, India, Iran, Malaysia, Sweden and Vietnam.

14) The "Preliminary information" presented by the USSR in 1983 does not comply with Article 26 of the Convention or Annex 13 thereto ; it is devoid of any credible technical substance, contains patent distortion of facts and belongs to the class of tasteless political propaganda material. The text will be found in C-WP/7764, Attachment, Appendix F. Contrary to well established facts, this "information" asserts that KE 007 was flying with its navigation lights and strobe switched off and did not respond to interrogations on the international emergency frequency 121.5 MHz from both the ground and the air; it also states that KE007 has constantly changing its heading, speed and altitude to avoid interception and that "intrusion" into the Soviet air space was synchronized with the orbits of the US reconnaissance satellite Ferret-D.

Annex under Article 38 of the Convention. The successor of the USSR over the territory of Sakhalin Island - the Russian Federation - did not indicate any intention to complete the investigation. The ICAO Council resolution of 14 June 1993 does not refer to the outstanding legal duty of the Russian Federation to comply with the Convention and Annex 13 and the solution remains uncompleted and unfinished.

It is apparent that the "investigation" instituted under the authority of the ICAO Secretary General in 1983 - 84 and "completed" in 1993 did not have the legal nature of an investigation under Article 26 of the Convention and Annex 13. Only a sovereign State in whose territory the accident occurred has the right and duty to carry out such investigation in co-operation with other States entitled to appoint observers. The Council of ICAO, however, has a far-reaching scope of functions and responsibilities, both mandatory and permissive[15] and under Article 55 (e) of the Convention it is a permissive function of the Council "to investigate, at the request of any contracting State, any situation which may appear to present avoidable obstacles to the development of international air navigation"; furthermore, the Council has the power "to issue such reports as may appear to it desirable". This power is not restricted in any way and the ICAO Council may issue any report considered, in the sole judgement of the Council, "desirable". Article 55 (e) of the Convention is the true legal basis for the investigations undertaken by the ICAO Council in 1983 - 84 and 1992 - 93 with respect to the KE 007 tragedy. What is noteworthy is the fact that Article 55 (e) was never specifically invoked prior to or after the KE 007 "investigation" and the Council did not appear concerned with the express legal justification of its action.[16]

15) The mandatory functions of the ICAO Council are defined in Article 54 of the Convention; the permissive functions are dealt with in Article 55.

16) The Repertory Guide to the Convention on International Civil Aviation(ICAO Doc 7700/2)states that "There has been no occasion for the Council to take action under this clause". This statement may be open to further evaluation : in fact, there have been cases both prior to the KE 007 investigation(e. g., in 1969 investigation of the complaint by Nigeria against Portugal and in 1978 investigation of the shooting down of Libyan aircraft over Sinai) and thereafter the 1988~89 investigation of the shooting down of the Iran Air Airbus flight 655 over the Gulf). The is no doubt that action has been taken under this clause but no specific reference has been made to Article 55 (e)

The 1983 - 84 investigation was not carried out by the Council itself but under its authority by the Secretary General of ICAO who appointed a team of ICAO civil servants; in spite of the concept of independence and impartiality to which all international civil servants are sworn, the Secretary General made sure that the members of the team were of "neutral" nationalities and eliminated from consideration experts whose States were directly involved in the matter or vocally censored the USSR action. The USSR did not provide any assistance to the 1983 - 84 investigation and refused to accept a visit of the ICAO team in the territory of the USSR.[17]

The Report of the 1983 - 84 investigation[18] was based on limited information since the USSR did not provide any co-operation and the vital evidence - in particular the Cockpit Voice Recorder, the Digital Flight Data Recorder and the transcripts of the USSR air defence radio communications - were not available to the investigating team. However, the data available to the investigation from other sources made it possible to rule out categorically any "premeditated deviation from the flight plan route for intelligence gathering purposes". No evidence was found that the KE 007 crew was, at any time, aware of the flight's deviation from its planned route. There was also no indication that the crew was aware of the interception attempts over Kamchatka peninsula and over Sakhalin Island and its last radio transmission to Tokyo ATC indicates that the crew was not aware of the reason for a rapid decompression of the aircraft. The Report speculates that "the USSR authorities assumed that KE 007 was an intelligence aircraft and, therefore, did not make exhaustive efforts to identify the aircraft through in-flight visual observation". The cause of the disaster was clearly identified in the Report: "The aircraft was hit by ay least one of two air-to-air missiles fired from one of the USSR interceptor aircraft whose pilot had been directed by his ground command to terminate the filght of KE 007".

17) The then Secretary General Yves Lambert (France) and the head of the investigating team (citizen of Pakistan) were invited, in 1984, for a visit in the USSR during which they were generously entertained and offered sight-seeing tours but were given on substantive information or opportunity of access to any evidence.

18) Attachment to ICAO doc C-WP/7764 with Appendices A to H.

The Report could not reach firm conclusions on the cause for the deviation of KE 007 from its planned route lasting some 5 hours and 26 minutes and amounting at the final point to some 500 kilometres deviation. In the absence of firm evidence which would be availablel only from the Cockpit Voice Recorder and the Digital Flight Data Recorder the team considered several theories or hypotheses. The Report states that "it was possible to postulate that either the holding of a constant magnetic heading (246 degrees) or an undetected error of 10 degrees east in longitude made in the insertion of the present (ramp) position into one of the three INS [Inertial Navigation system] units, would have produced a track to the area of KE 007 's destruction that was also consistent with the radar track information provided by the USSR and by Japan. Each of those postulations assumed a considerable degree of lack of alertness and attentiveness on the part of the entire crew but not to a degree that was unknown in international civil aviation".

The Report of the investigation, initially kept as a restricted document, was made public by the Council on 13 December 1983[19] and the Council referred it to the Air Navigation Commission for a technical study and report; this step is to be understood as a review of the material prepared by the Secretariat by a technical body of the Organization prior to any specific action by the Council. The Air Navigation Commission reported[20] that it found it difficult to "validate and endorse" either of the two hypotheses postulated by team as the cause for the deviation of the flight in view of insufficient information.

While the technical investigation was completed, the Council faced the task of taking its own policy position with respect to the findings. During the 111th Session of the Council four meetings were dedicated to a thorough and frequently acrimonious discussion of the findings and to the lack of co-operation by the USSR authorities.[21] On

19) ICAO Doc C-Min. 110/17.
20) C-WP/7809.
21) C-Min. 111/3~6.

6 March 1984[22] the Council adopted a Resolution which stands out in the history of ICAO as a rare decision forcefully expressing principles of law and using a strong language of condemnation for a reprehensible conduct of a member State of the Organization. In this resolution ICAO achieved much for the future safety of international civil aviation, as well as for the principles of international law and morality - an action which the United Nations were prevented from taking; "technical" nature of a specialized agency in the United Nations family was no obstacle to voicing matters of law and policy indivisible from the ultimate purpose of the Organization - safety of international civil aviation. The Resolution admits that due to the lack of data the investigation was unable to determine conclusively the precise cause for the serious deviation of the KE 007 flight from the flight plan route into the territory of the USSR. However, the Resolution asserts that **"no evidence was found to indicate that the deviation was premeditated or that the crew was at any time aware of the flight's deviation"**. The resolution continues that **"whatever the circumstances··· which may have caused the aircraft to stray off its flight plan route, such use of armed force constitutes a violation of international law, and invokes generally recognized consequences"**. It also recognizes that such use of armed force is **"incompatible with the norms governing international behaviour and with the rules, Standards and Recommended Practices enshrined in the Chicago Convention and its Annexes and with elementary consideration of humanity"**. Although the ICAO decisions are commonly drafted with restraint and observe all diplomatic "niceties", the Resolution of 6 March 1984 **"CONDEMNS the use of armed force which resulted in the destruction of the Korean airliner and the tragic loss of 269 lives"**. Never before or after did the Council use such an explicitly condemnatory language to censor the conduct of a contracting State. The Resolution also **"Deeply deplores"** the Soviet failure to co-operate with the ICAO investigation by refusing to accept a visit of the investigation team appointed by the Secretary General

22) See Note 2 above.

and by failing to provide the Secretary General with information relevant to the investigation.

It may be concluded that in its Resolution of 6 March 1984 the ICAO Council did not shirk its international responsibility and discharged its function under Article 55 (e) of the Convention by issuing its own report as it considered desirable. The Resolution spelled out important legal conclusions : the USSR authorities violated international law and have to face international responsibility ; they violated the norms governing international behaviour, elementary consideration of humanity and the specific provisions of international air law enshrined in the Chicago Convention and its Annexes.

In the aftermath of the KE 007 disaster ICAO accomplished meaningful work for the development and codification of international legal regulation of air safety. The 25th Session (Extraordinary) of the ICAO Assembly adopted, on 10 May 1984, an amendment to the Chicago Convention inserting a new Article 3bis[23] in which the contracting States **recognize** that every State must refrain from resorting to the use of weapons against civil aircraft in flight and that, in the case of interception, the lives of persons on board and the safety of aircraft must not be endangered. The drafting history of this new provision clearly indicates that the term "recognize" was used in the same sense as it is used in Article 1 of the Convention - not as creating a new principle of international law and new obligation for States but as a recognition and formal codification of an existing principle of customary international law; hence, the use of weapons against a civil aircraft in flight has been and is unlawful under customary international law regardless of the entry into force of the new Article 3bis.[24] This law-making achievement of ICAO should be a permanent credit to the head of the delega-

23) ICAO Doc 9437, A25-Res., P-Min and Doc 9438, A25-EX; the Protocol for the amendment of the Convention is in ICAO Doc 9436.

24) The Protocol for the amendment of the Convention has been ratified so far by 69 States but 102 ratifications are required for its entry into force; the USSR ratified the Protocol on 24 August 1990.

tion of France to the 25th Session of the ICAO Assembly whose outstanding legal and diplomatic skills in the negotiation and drafting of the new provision enabled the Assembly to adopt the amendment by "consensus" without a formal vote.[25]

A less visible but equally important legal development in the wake of the KE 007 tragedy was Amendment 27 to Annex 2 which was adopted by the ICAO Council, after extensive studies in a special Working Group and in the Air Navigation Commission, on 10 March 1986 by 22 votes - just reaching the required two-thirds majority under Article 90 of the Chicago Convention.[26] This amendment for the first time in ICAO history sets forth a comprehensive set of Standards relating to interception of civil aircraft and also a set of "Special Recommendations" which are not legally binding but all States have been invited by the Council to notify any departures from such special recommendations. The adoption of Amendment 27 to Annex 2 faced considerable difficulties and initial opposition from several States in view of the conflicts in interpretation of Article 3 of the Convention which restricts the applicability of the Convention(and thereby the ICAO jurisdiction) to civil aircraft; it was not easy to find a common understanding that the aim of the new Standards was to advance the safety of civil aircraft and not to regulate the conduct of state aircraft; under Article 3 (d) of the Convention States have undertaken when issuing regulations for their state aircraft, that they will have due regard for the safety of navigation of civil aircraft and there should not be a legal obstacle for the ICAO Council to provide guidance to States in this respect to maintain international uniformity and safety.[27]

25) The delegate was H. E. Gilbert Guillaume, now Judge of the International Court of Justice, a former Chairman of the ICAO Legal Committee.

26) C-Min. 117/12.

27) See Milde, M., Interception of Civil Aircraft v. Misuse of Civil Aviation (Background of Amendment 27 to Annex 2), in (1986) Annals of Air and Space Law, Vol. XI., pp. 105 - 130. Further amendments relating to interception were also included in Annex 6 (Part I and II), 10 (Volume I) and 11, the PANS-RAC (Doc 4444) and PANS-OPS (Doc 8168) which all became applicable in November 1986. Further guidance material on interception of civil aircraft was published in 1984 in the "Manual concerning interception of civil aircraft" (Doc 9433).

1992~93 investigation

After more than nine years since the KE 007 tragedy steps were taken to find the final truth and to settle all outstanding problems. The political situation in the world appeared favourable for such an effort - the Cold War accompanied by super-power confrontation came to an end after 1989 marked by the dismantling of the Berlin Wall, an obscene illustration of the era. USSR policy of "glasnost" and "perestrolika" eventually outgrew its own creators and the Soviet Empire - the last true colonial empire - disappeared from the map. It will be for the historians to evaluate how the KE 007 tragedy and the revulsion it caused in the international public opinion influenced the final demise of the Soviet regime.

In late 1992 President Boris Yeltsin visited Seoul and in a gesture to foment futrue co-operation gave to the Korean authorities what was then believed to be the original Cockpit Voice Recorder and the Digital Flight Data Recorder retrieved from the wreckage of the KE 007.[28] A surprising "misunderstanding" was discovered later when it was found that only a copy of the Cockpit Voice Recorder and the empty armoured containers of the CVR and DFDR were handed over but not the complete and authentic evidentiary material.

Later in the year 1992 a meeting was convened in Moscow between the authorities of the Russian Federation, United States, Japan and Republic of Korea. The records of that meeting and the political reasoning of the debates were not made public but the parties agreed to jointly request ICAO to complete its 1983 - 84 investigation - this time with full support, co-operation and full evidence to be made available by all parties without any restrictions. The individual requests by the Russian Federation, United States, Japan and Republic of Korea were presented to the 137th Session of

28) These vital instruments have been in the hands of the USSR authorities all the time since September 1983 when they were recovered by divers from the wreckage of the plane at the depth or 174 metres some 17 nautical miles north of the Moneron Island in international waters. The existence and possession of these instruments were never admitted by the USSR to ICAO or to the international community. A surprising "misunderstanding" was discovered later

the ICAO Council.[29] The Council decided, on 18 December 1992[30], to complete the fact-finding investigation-ninitiated in 1983.

It is still too early to evaluate the political wisdom of the Council in accepting the task to resume the investigation. The new political situation in the world was conducive to an appropriate investigation under Article 26 of the Convention and under Annex 13 to be carried out by the Russian Federation in close co - operation with all States directly interested. When the Council accepted again in 1992 to exercise its "permissive" (i.e., discretionary) function, it was widely expected that it was ready to add its own voice in the evaluation of the KE 007 tragedy and endorse the final conclusions based on full evidence and draw its conclusions on the consequences of the tragedy-including on the legal consequences relating to State responsibility(e. g., some form of public apology or other "satisfaction") and liability to compensate the damage. The results of the 1992 - 93 ICAO action are most disappointing and are indicative of an undisguised effort to dispose of the problem, to close the chapter of history, to "complete" the matter with an absolute finality. It appears that the prestige and status of ICAO was used by the interested parties to dispose of the problem in a technical and administrative manner in the interests of their own pragmatic political "accommodation".

The 1993 "Report of the Completion of the Fact - Finding Investigation Regarding the Shooting Down of Korean Air Lines Boeing 747 (Flight KE 007) on 31 August 1983" is a very voluminous material.[31] It was prepared by a team of international civil servants from the ICAO Secretariat and by two Consultants (whose draft text was undoubtfully, as usual in ICAO practice, checked and corrected from the "policy"

29) C-WP/9684 and 9685 and Memorandum of the President of the Council AK/333 dated 14 December 1992.

30) C-Min. 137/15.

31) C-WP/9781, 28/5/93; Appendix thereto; Addendum No. 1 thereto 8/6/93; Information Paper No. 1 related to C-WP/9781; Secretary General's Memorandum SG 1352/93 (Revised) dated 14 June 1993 and attaching an information paper (Revised) related to C-WP/9781 received from the Russian Federation. The total volume is almost 300 pages.

point of view not only by the Secretary General but in particular by the President of the Council with a view to mitigate or eliminate any potentially "abrasive" elements). The Council itself did not add to the Report not only any substance or dimension but not a single word and in the haste to dispose of the matter even failed to formally endorse the findings of the Report by its authority. Throughout all the relevant documents there is a clear effort to stress the word "completion" as if to emphasize again and again that the ICAO action is final and nothing more is to be expected.

What new facts or perspectives did the 1993 Report reveal? Vast amount of additional data originally concealed from the world by the USSR authorities was made available to the team - in particular the original and properly authenticated Cockpit Voice Recorder and the Digital Flight Data Recorder which were handed over by the authorities of the Russian Federation to ICAO and decoded with the assistance of "neutral" facilities. Furthermore, voluminous transcripts of the transmissions among the USSR air defence centres and with the interceptors were also made available.

One of the stunning revelations (which, however, is only casually mentioned but not highlighted in the Report) is that the wreckage of the aircraft was found already in September 1983 by the Soviet divers in **international waters**; however, the investigating team found it impossible to determine the position of KE 007 at the time of the missile attack in relation to the USSR sovereign airspace. While the Rrport does not speculate on this point, it could be a valid hypothesis that the aircraft was effectively hit over the sovereign territory of the USSR and crashed in international waters; however, it would be an equally valid hypothesis to postulate that the aircraft was hit far in the international airspace and on its descending spiral veered somewhat closer to the USSR territory. The Report states that after the detonation the crew was able to retain limited control of the aircraft, respond to the loss of cabin pressure and then, according to the radar data,"the aircraft flew for at least nine minutes in a descending spiral after the attack and subsequently collided with the sea and sank".[32] The

32) Report, paragraph 1.4.1 on p.6.

hypothesis that the aircraft was in international airspace at the time of the attack would be supported by the transcript from the USSR Air Defence Command communications where, at 18:24 hours General Kornukov sounds very agitated and with an (omitted) expletive enquired: "··· how long [does it take him] to get into attack position, he is already getting out into neutral waters; engage afterburner immediately".[33] The attack took place some two minutes later and in that interval KE 007 flying at about 800km/h may have folwn at least additional 25km.

The decoding of the Digital Flight Data Recorder confirmed the first hypothesis formulated in the 1983 - 84 investigation for the deviation of the aircraft from the planned route : the deviation was due to the maintenance of a constant magnetic heading of about 245 degrees which the aircraft reached three minutes after lift-off from Anchorage and then maintained until the attack. The crew failed to note that the autopilot had either been left in the heading mode or had been switched to the Inertial Navigation System when the aircraft was beyond the range (7.5 nautical miles) for the INS to capture the desired track. Again like in 1983 - 84, there were no indications that the crew of KE 007 deliberately maintained a constant magnetic heading or was, at any time, aware of the deviation. The cockpit voice recordings prove that on the flight deck everything was routine and professional and in a relaxed atmosphere the crew is heard planning walks in the mountains to watch autumn leaves, they talk about currency exchange at Kimpo airport and there is no indication whatsoever that the crew was aware of the interception or any signals coming from the interceptors.[34] The reaction after the sound of an explosion was "What happened?", "retard the throttles", "check it out", "this is not working", "cannot do manually", "engines are normal, Sir", "is it power compression". About a minute after the apparent explosion the KE 007 contacts Tokyo HF with a message ; "··· Korean Air zero zero seven rapid ah··· we are ··· rapid compressions descend to one zero one thousand". On the public address system the crew is heard advising the passengers with full professionalism in Korean, Japanese and English of "emergency descent", "put out your ciga-

33) Information Paper No. 1 related to C-WP/9781, transcript of Track 2, reel No. 2, at p. 130.

rettes, this is an emergency descent", "put the mask over your nose and mouth and adjust the headband" and all recordings stopped 1 minute and 44 seconds after the missile impact; the Report does not speculate on the situation in the cabin for the agonizing 9 minutes in horror, darkness and frost in an uncontrollable aircraft prior to the collision with the sea.

The 1992 - 93 investigation obtained vast documentation with transcripts of the radio communications from the USSR Air Defence Command Centres on Sakhalin Island.[35] It is clearly evident that on its approach to Sakhalin Island KE 007 was designated as "target 60-65" provisionally identified as RC-135 military aircraft. Some doubt must have remained concerning the identity of the aircraft; General Kornukov reports to General Kamenski that the aircraft cannot be identified because it is still dark but orders were already given "to arm the weapons". General Kamenski responds : "We must find out, maybe it is some civilian craft or God knows who" to which General Kornukov impatiently responds : "What civilian, [it] has flown over Kamchatka. it [came] from the ocean without identification. I am giving the order to attack if it crosses the State border". The "one-track-mind" of the Soviet military officials (called "scenario fulfilment" by the psychiatrists) is further illustrated at 18: 08 hours when General Kornukov asks whether the interceptor 805 (SU-15 plane with pilot Osipovich) can see the target ; he asks: "how many jet trails are there, if there are four jet trails, then it's an RC-135". Pilot Osipovich, the only one who ever had KE 007 within his vision reported on three separate occasions that the target had its navigation lights and the strobe light on. At 18:18 hours General Kornukov gave a command "flash you lights briefly" and without waiting for any response Osipovich received a command "a burst from you cannons". Unfortunately, pilot Osipovich was not available in person to the investigating team (according to media he now lives in the country and grows strawberries - having been treated as a "hero" for

34) KE 007 CVR transcript, 17:54:10 to 18:27:46; Information Paper No.1 related to C-WP/9781, pp.2-16.

35) Information Paper No.1 related to C-WP/9781, pp. 48-208

some time and then discarded) but in press interviews in 1991 he stated that he fired more than 200 rounds from his cannon - not tracers but the armour - piercing variety since his aircraft did not carry tracers. This statement was contradicted by the spokesmam of the Ministry of Defence of the Russian Federation who claimed that at that time the cannons of interceptor aircraft were routinely loaded whth a mixture of rounds so that every fourth or fifth was a tracer. In any case, there is no confirmation of the relative position of KE 007 and of the interceptor at the time of the firing of the cannons and no evidence that the KE 007 crew was aware of any such attempted signals. Pilot Osipovich further expressly confirmed that he made no effort whatsoever to contact the "target" on the radio because he had no time to do so (there is no positive evidence that the Soviet interceptor was even equipped with the international distress frequency 121.5 MHz or the military distress frequency 243 MHz); he could not visually identify the aircraft since the Soviet pilots did not "study" foreign civilian aircraft. He saw clearly the flashing lights but had no idea that it was a passenger aircraft. The transcripts do not contain any trace of an effort by the Command Centres of the USSR Air Defence to communicate a warning or other signals to KE 007 over the radio and no such claim was made during the investigation in 1992 - 93 by the authorities of the Russian Federation.

At 18:21 the recordings indicate General Kornukov's unequivocal:"… cut the horseplay at the command post, what is the noise there. I repeat the combat task : fire missiles, fire on target 60-65, destroy target 60-65". This command was transmitted to pilot Osipovich in the words: "805, approach target and destroy target". Osipovich reported at 18:25:31 "Launch. Executed launch" and half a minute later "The target is destroyed". The missiles used against KE 007 were R-98 air-to-air missiles, one with a heat-seeking guidance and a contact fuse, the other with semi-active radar guidance and a proximity non-contact radio detonator: each missile carried 21 kilograms of high explosive and at least one of them hit KE 007.

The 1992 - 93 ICAO report concludes categorically that "the USSR military aircraft

did not comply with the ICAO Standards and Recommended Practices for interception of civil aircraft before attacking KE 007". This is the only explicitly "legal" statement in the entire report and the Council did not see fit to add to it in its resolution of 14 June 1993. It is rather irritating that the Report states that "information was freely available to flight crews that an aircraft penetrating prohibited areas of USSR sovereign airspace over Kamchatka Peninsula and Sakhalin Island might be fired upon without warning"; it would have been interesting to know whether this conclusion is a specific "finding" of the investigation and how ICAO views its "legality" or relevance for an aircraft crew which unknowingly strayed from its planned route.

The Report does not dare to comment on the United States possible part in the catastrophe; the US military radar installations in Alaska must have followed the KE 007 flight in this highly sensitive area and it is hardly imaginable that they would not express concern or issue a warning to an aircraft straying into a dangerous area. The ICAO Report tersely and without comment states: "According to the representatives of the United States, the military radar installations in Alaska were not aware in real time that the aircraft was proceeding west with an increasing northerly deviation from the recognized airway system". ICAO report does not endorse this statement as a fact in its cautious wording "according to the representatives of the United States"; compared with the overall style of the report this statement is clearly placed in the category of unconfirmed unilateral allegations. It is a pity that for the future the United States' role could not have been clarified beyond any doubt and that further speculations are not prevented ; nobody sane would try to put any blame for the KE 007 disaster on any action by the United States but speculations abound about the alleged "inaction" of the United States military who may have seen the deviation of KE 007 but refrained from any action to alert or warn it since its penetration of the USSR air space could have brought about an "intelligence bonanza" making the Soviet defence

system "light up like a Christmas tree"[36]. A more profound evidence in this field could have put all wild speculations to rest.

The text of the Council resolution of 14 June is attached to this note. It is not a satisfactory decision worthy of the ICAO Council and of ICAO as such. It does not specifically endorse the results of the investigation, does not add a single word to the work done by a team of international civil servants and does not draw any conclusions from the costly and laborious investigation. While the resolution timidly "recalls" the principled resolution of 6 March 1984, it does not repeat or endorse its legal conclusion. The question of inrernational responsibility for an unlawful act has not been addressed by the ICAO Council and no policy guidance has been formulated by the Council with respect to the consequences of the KE 007 incident. "Pusillanimity" or "lack of courage" may be the expressions best characterizing the Council's attitude.

The debates in th ICAO Council in June 1993 also unduly shifted the focus on the alleged inattention of the KE 007 crew in an unseemly effort to balance the fault. This was a dangerous course which was instantly used by the lawyers representing some of the families of the victims whose claims have not so far been finally settled; the lawyers in their talk with the media immediately after the adoption of the resolution of 14 June 1993 on the premises of the ICAO Headquarters in Montreal tried to divert the attention to the "fault" of the KE 007 crew which allegedly by their negligence directed the ill - fated aircraft and its occupants "into a minefield". The motivation of shrewd trial lawyers is understandable-they stand a better chance to win substantial compensation for their clients form the airline than from the successor State of the former USSR.

It would be futile to criticize the decision of the ICAO Council of 14 June 1993 in

36) Some of the sources of such speculations are quoted, e.g., by Cheng, B., "The Destruction of KAL flight KE 007 and Article 3bis of the Chicago Convention". in Air Worthy, Liber Amicorum honouring Professor Dr 1. Diederiks-Verschoor, KLUWER, Deventer, 1985.

legal terms. The Council is not composed of 33 lawyers sitting in judgement and its function in the investigation under Article 55 (e) of the Convention is not a legal adjudicatory function . The Council is composed of 33 **States** exercising their political functions and under Article 55 (e) it is free to adopt any report "as may appear to it desirable".

It is to be regretted that what appeared "desirable" to the Council was a political "appeasement" and closing of a bothersome chapter in the history. The Council may have unwittingly obliterated the true concept of **causation**; it was a missile intentionally fired against KE 007 with the aim of destroying it which is at the root of the tragedy, the true **"causa proxima"** or **"causa causans"**, not the error in the programming of the autopilot. Under Article 25 of the Chicago Convention, KE 007 departing from its flight plan should have been treated as an "aircraft in distress" and given all practicable "measures of assistance", not a death sentence for all 269 innocent persons on board.

The ICAO investigation may have been declared "completed" but issues of law and international ethics are still open ten years after the KE 007 tragedy.

〔Attachment : ICAO Council resolution of 14 June 1993〕

ATTACHMENT

RESOLUTION ADOPTED BY THE COUNCIL OF THE INTERNATIONAL CIVIL AVIATION ORGANIZATION AT THE SEVENTH MEETING OF ITS 139TH SESSION ON 14 JUNE 1993

Thd Council of the International Civil Aviation Organization

Recalling the Resolutions adopted and the decisions taken on 16 September 1983 at the Extraordinary Session of the ICAO Council and endorsed by the 24th Session of the ICAO Assembly in October 1983 as well as the Council Resolutions of 13 December 1983 and 6 March 1984, and the Council decision of 18 December 1992, concerning the shooting down of Korean Air Lines Boeing 747 (Flight KE 007) on 31 August 1983;

Having considered the Report of the completion of the fact-finding investigation instituted by the Secretary General pursuant to the decision of the Council of 18 December 1992;

Recalling that the 25th Session (Extraordinary) of the Assembly in 1984 unanimously recognized the duty of States to refrain from the use of weapons against civil aircraft in flight;

Recognizing with appreciation the contribution of the Governments of Canada, France, Japan, the Republic of Korea, the Russian Federation and the United States, including making available experts, material and technical installations which facilitated the completion of the fact-finding investigation;

1. Epresses again its profound sympathy and condolences to the families bereaved in this tragic incident;

2. *Expresses* appreciation for the full co-operation extended to the fact-finding mission by the authorities of all States concerned;

3. *Expresses* appreciation to the Secretary General for the professionalism of the ICAO team and to the experts from the parties concerned;

4. *Requests* the Air Navigation Commission, in its continuing review of the technical Annexes to the Chicago Convention, to take into account the new facts contained in the Report, Addendum No.1 and Information Papers Nos. 1 and 2 related to it;

5. *Appeals* again urgently to all Contracting States that have not yet done so to ratify, as soon as possible, th Protocol introducing Article 3 *bis* into the Convention on International Civil Aviation, which reaffirms the fundamental principle of general international law that States must refrain from resorting to the use of weapons against civil aircraft;

6. *Urges* States to take all necessary measures to safeguard the safety of air navigation of civil aircraft, in compliance with the relevant rules, Standards and Recommended Practices enshrined in the Chicago Coi7.nvention and its Annexes;

7. *Decides* that the fact-finding investigation has been completed and that the Report of the completion of the fact-finding investigation regarding the shooting down of Korean Air Lines Boeing 747 (Flight KE 007) on 31 August 1983 in C-WP/9781 no longer has a restricted character. ▒