

ARTICLES

THE SUKHOI SU-24 INCIDENT BETWEEN RUSSIA AND TURKEY

ETIENNE HENRY,
University of Neuchâtel
(Neuchâtel, Switzerland)

DOI:10.17589/2309-8678-2016-4-1-8-25

This note presents an analysis from the viewpoint of public international law of the event that occurred on November 24, 2015, when a Russian Sukhoi Su-24 bomber jet was downed by the Turkish Air Force over the border region between Syria and Turkey. While some of the basic circumstances of the case remain controversial, enough elements have emerged from media coverage to permit for the identification of the main legal issues, if not also to assess the legality of the Russian behavior and of the Turkish reaction in all its details. The known facts warrant the conclusion that the attack and the downing of the Russian jet can be seen as a disproportionate reaction on the part of the Turkish Government and, therefore, as a violation of the prohibition of the use of military force under Art. 2(4) of the UN Charter and under the corresponding customary rule of international law.

Keywords: jus ad bellum; aerial intrusion; aerial sovereignty; use of force; necessity; proportionality.

Recommended citation: Etienne Henry, *The Sukhoi Su-24 Incident between Russia and Turkey*, 4(1) RLJ (2016).

Table of Contents

1. Introduction

2. The Facts: An Attempt at Reconstitution

3. Legal Issues

3.1. *Does an Overflight by a Military Aircraft Amount to a 'Use of (Military) Force' under Art. 2(4) of the UN Charter?*

3.2. Was the Turkish Reaction Lawful?

3.2.1. *Was Turkey's Reaction Confined to Its Territory?*

3.2.2. *Did Turkey Issue Warnings?*

3.2.3. *Was Turkey's Reaction Necessary and Proportionate to the Objective of Restoring Its Aerial Sovereignty?*

3.3. Did the Downing of the Russian Aircraft Trigger the Right to Adopt Measures in Self-Defence?

3.4. Was the Killing of the Aircraft's Crew a Violation of International Humanitarian Law?

3.5. Did Russia Violate Its Obligations under the Law of Diplomatic Relations?

4. Concluding Remarks

1. Introduction

It is an understatement to say that the downing of a Russian Sukhoi Su-24 military jet by the Turkish Air Force on Tuesday, November 24, 2015, has increased the tensions between the states involved in the Syrian crisis.¹ The precise circumstances of the incident remain disputed and are likely to remain unclear for some time. Ideally the facts should be unveiled through a thorough and independent investigation – as asserted by, among others, UNSG Ban Ki-Moon² and US President Barack Obama.³ While certain elements seem accepted as established facts according to public declarations and media coverage, some crucial factual elements remain disputed. The present analysis thus attempts to identify the main legal issues raised by these events by examining the differing accounts available in public media. It proceeds by trying to reconstitute the general circumstances of the incidents (Ch. 2.), before assessing them in the light of the relevant rules and principles of international law (Ch. 3.).

¹ See, for the historical background and the more recent context of Russian-Turkish relationships (from a Turkish standpoint), Akin Unver, *Clash of Empires: Why Russia and Turkey Fight*, Foreign Affairs (Nov. 29, 2015), <<https://www.foreignaffairs.com/articles/turkey/2015-11-29/clash-empires>> (accessed Mar. 5, 2016). See, for a political analysis (from a Russian perspective), Пастухов В. Не дарите спички пиromanам. Два сценария выхода из кризиса в российско-турецких отношениях [Pastukhov V. *Ne darite spichki piromanam. Dva stsenariya vykhoda iz krizisa v rossiisko-turetskikh otnosheniyakh* [Vladimir Pastukhov, *Don't Give Matches to a Pyromaniac. Two Exit Scenarios for the Crisis in Russian-Turkish Relationships*]], *Rossiia v global'noi politike* (Dec. 7, 2015), <<http://www.globalaffairs.ru/global-processes/Ne-darite-spichki-piromanam-Dva-stsenariya-vykhoda-iz-krizisa-v-rossiisko-turetskikh-otnosheniyakh-->>> (accessed Mar. 5, 2016).

² *Ban Concerned over Downing of Russian Plane by Turkish Air Force, Urges Measures to Lower Tensions*, UN News Center (Nov. 24, 2015), <<http://www.un.org/apps/news/story.asp?NewsID=52641#.VqtEeln4NPZ>> (accessed Mar. 6, 2016).

³ See *supra* n. 1.

2. The Facts: An Attempt at Reconstitution

On November 24, 2015, a Russian bomber was undertaking an operation in the northwest of Syria, in a region controlled by opposition forces, near the Turkish border region of Yayladağı. The bomber was intercepted and downed by an air-to-air missile fired from a Turkish F-16 jet and crashed on Syrian territory. It is disputed whether the Russian plane entered Turkish airspace. The pilot and the co-pilot managed to activate their ejection seats and escape the destroyed aircraft. It appears that at least the co-pilot, Lieutenant Colonel Oleg Peshkov, was shot and killed by ethnic Turkmen rebel forces in Syria.⁴ Some early media coverage reported that both crew members were shot and killed.⁵ According to the Syrian newspaper *al-Watan*, the pilot, Captain Konstantin Murakhtin, was allegedly rescued by Syrian special forces.⁶ Other sources, including the Russian Ministry of Defence, mention a joint Russian and Syrian operation resulting in the death of soldier Aleksandr Pozynich, one of the Russian soldiers involved in the rescue.⁷ A video – purportedly filmed by members of the US trained Free Syrian Army's First Coastal Division – emerged in which a militant is seen while he attacks and destroy a Russian-made helicopter with a BGM-71 TOW anti-tank missile.⁸ This event took place in the proximity of the crash site – about six kilometres away. Soon after, on November 25, violent demonstrations took place in front of the Turkish Embassy in Moscow, with stones thrown at the building causing

⁴ See, e.g., Meg Warner & Jason Silverstein, *Russian Pilot Rescued from Downed Warplane Says Turkey Gave No Warning before Firing Despite Cockpit Audio: 'Change Your Heading South Immediately'*, New York Daily News (Nov. 25, 2015), <<http://www.nydailynews.com/news/world/pilot-downed-russian-warplane-alive-article-1.2446187>> (accessed Mar. 6, 2016). Other sources identified the dead co-pilot as Major Sergei Aleksandrovich Rummyantsev. See, e.g., *Syrian Rebels Reveal Identity of Dead Russian Su-24 Pilot*, UNIAN Information Agency (Nov. 24, 2015), <<http://www.unian.info/world/1193193-syrian-rebels-reveal-identity-of-dead-russian-su-24-pilot.html>> (accessed Mar. 6, 2016).

⁵ See, e.g., *Turkmen Forces in Syria Shot Dead Pilots of Downed Russian Jet: Deputy Commander*, Reuters (Nov. 24, 2015), <<http://www.reuters.com/article/us-mideast-crisis-syria-turkey-shooting-idUSKBN0TD1T620151124>> (accessed Mar. 6, 2016); Sara Malm et al., *Helpless Russian Pilots 'Were Shot Dead as They Parachuted to the Ground': Furious Putin Accuses Turkey of 'Treachery' after It Downs Jet over Syrian Rebel Territory*, The Daily Mail (Nov. 24, updated Nov. 30, 2015), <<http://www.dailymail.co.uk/news/article-3331558/Turkey-shoots-fighter-jet-Syrian-border-Local-media-footage-flaming-plane-crashing-trees.html>> (accessed Mar. 6, 2016).

⁶ *Syrian Paper Recounts Rescue of Downed Russian Pilot*, NDTV (Nov. 26, 2015), <<http://www.ndtv.com/world-news/syrian-paper-recounts-rescue-of-downed-russian-pilot-1247966>> (accessed Mar. 6, 2016); *Sukhoi'abattu: une opération commando de 12 heures pour sauver le pilote russe*, L'Orient – Le Jour (Nov. 26, 2015), <<http://www.lorientlejour.com/article/957179/sukhoi-abattu-une-operation-commando-de-12-heures-pour-sauver-le-pilote-russe.html>> (accessed Mar. 6, 2016).

⁷ *Missing Russian Jet Pilot 'Alive and Well' in Syria*, BBC (Nov. 25, 2015), <<http://www.bbc.com/news/world-middle-east-34917485>> (accessed Mar. 6, 2016) [hereinafter *Missing Russian Jet Pilot*].

⁸ *FSA Video Claims Russian-Made Helicopter Hit with US-Made TOW Missile near Su-24 Crash Site*, RT (Nov. 24, 2015), <<https://www.rt.com/news/323306-video-russia-helicopter-syria/>> (accessed Mar. 6, 2016).

material damage. According to some media, the Moscow police did not intervene to restore order and to ensure the Embassy's security.⁹

The parties differ on the precise circumstances leading to the attack. Russian President Vladimir Putin – who qualified the act as 'a stab in the back' committed by accomplices of the Islamic State – asserts that the aircraft neither crossed the Turkish border nor threatened Turkey's security.¹⁰ He states that, when hit by the missile, the aircraft was flying at an altitude of roughly 6,000 meters in Syrian airspace at a distance of one kilometre from the Turkish border. According to a leaked letter from the Permanent Mission of Turkey to the UN to the British President of the United Nations Security Council, Mr. Matthew Rycroft, and statements by Turkish Prime Minister Ahmet Davutoğlu and Turkish President Recep Tayyip Erdoğan, Turkey asserts that the attack occurred in response to a violation of Turkish sovereignty and in conformity with its rules of engagement.¹¹ The letter to the UN states:

This morning (24 November), 2 SU-24 planes, the nationality of which are unknown have approached Turkish national airspace in Yayladağı/Hatay region. The planes in question have been warned 10 times during a period of 5 minutes via 'Emergency' channel and asked to change their headings south immediately.

Disregarding this warning, both planes, at an altitude of 19,000 feet, violated Turkish national airspace to a depth of 1.36 miles and 1.15 miles in length for 17 seconds from 9.24:05" local time.

Following the violation, plane 1 left Turkish national airspace. Plane 2 was fired at while in Turkish national airspace by Turkish F-16s performing air combat patrolling in that area in accordance with the rules of engagement. Plane 2 crashed onto the Syrian side of the Turkish-Syrian border.¹²

While this specific event's important repercussions in international affairs commands particular attention – not the least because it represents the first direct military clash between Russia and a NATO country – it has to be placed in the broader

⁹ *La Russie 'ne fera pas la guerre à la Turquie, malgré une provocation'*, Radio Télévision Suisse (Nov. 25, 2015), <<http://www.rts.ch/info/monde/7283415-la-russie-ne-fera-pas-la-guerre-a-la-turquie-malgre-une-provocation.html>> (accessed Mar. 6, 2016); *Missing Russian Jet Pilot*, *supra* n. 7.

¹⁰ *Turkey Downing of Russia Jet 'Stab in the Back' – Putin*, BBC (Nov. 24, 2015), <<http://www.bbc.com/news/world-middle-east-34913173>> (accessed Mar. 6, 2016).

¹¹ Tulay Karadeniz & Maria Kiselyova, *Turkey Downs Russian Warplane near Syria Border, Putin Warns of 'Serious Consequences'*, Reuters (Nov. 25, 2016), <<http://www.reuters.com/article/us-mideast-crisis-syria-turkey-idUSKBN0TD0IR20151125>> (accessed Mar. 6, 2016).

¹² *Turkey's Statement: Claims Russia Violated Airspace for Just '17 Seconds' with Very Slow 243 Miles/Hour Jet*, Wikileaks (Nov. 24, 2015), <<https://twitter.com/wikileaks/status/669204928984915968>> (accessed Mar. 6, 2016).

framework of the ongoing armed conflict in Syria and the tensions it has caused between Turkey and the Syrian government. Since the outbreak of the conflict in 2011, several border clashes have occurred between Syria and Turkey—including the shooting down of a Turkish F-4 Phantom jet by the Syrian Air Force in June 2012 and a Syrian helicopter by a Turkish fighter jet in September 2013.¹³

3. Legal Issues

From an international legal perspective, these facts raise several important questions relating to general international law on the use of force¹⁴ and the laws of armed conflict. Assuming that a violation of the Turkish airspace did occur, was the Turkish action in accordance with international law? Could a Russian incursion in Turkish airspace lasting 17 seconds be qualified as an armed attack triggering the right of self-defence by Turkey? Was the Turkish reaction necessary and proportionate to the threat posed by such an – arguably minor – infringement of Turkish sovereignty? Conversely, assuming that the Russian aircraft did not enter Turkish airspace, does the Turkish attack amount to an armed attack under Art. 51 of the UN Charter? From the perspective of *jus in bello*, one can also wonder whether the targeting of the aircraft's crew members by a rebel Syrian armed group during their descent violated international humanitarian law. And, finally, one can also wonder whether the Russian authorities complied with their obligations arising from diplomatic law in their treatment of the demonstrations occurred in front of the Turkish Embassy in Moscow.

3.1. Does an Overflight by a Military Aircraft Amount to a 'Use of (Military) Force' under Art. 2(4) of the UN Charter?

The first issue regarding the *jus contra bellum* is whether the alleged infringement of Turkish territory by the Russian aircraft amounts to a use of military force in violation of Art. 2(4) of the UN Charter. If this is the case, it remains to be determined if such a use of force amounts to an 'armed attack' or if it is an instance of a 'less grave form.' It is thus generally understood that not all uses of force amount to 'armed

¹³ See *Syria-Turkey Tension: Assad 'Regrets' F-4 Jet's Downing*, BBC (Jul. 3, 2012), <<http://www.bbc.com/news/world-middle-east-18685250>> (accessed Mar. 6, 2016); Kareem Fahim & Sebnem Arsu, *Turkey Says It Shot Down Syrian Military Helicopter Flying in Its Airspace*, N.Y. Times (Sep. 16, 2013), <<http://www.nytimes.com/2013/09/17/world/europe/turkey-syria.html>> (accessed Mar. 6, 2016).

¹⁴ See also Kubo Mačák, *Was the Downing of the Russian Jet by Turkey Illegal?*, EJIL: Talk!, (Nov. 26, 2015), <<http://www.ejiltalk.org/was-the-downing-of-the-russian-jet-by-turkey-illegal/>> (accessed Mar. 6, 2016); Nicolás Carrillo Santarelli, *¿Derecho de Turquía a defender su espacio aéreo... a sangre y fuego? Por supuesto que no (actualizado)*, Jus Orbi (Nov. 26, 2015), <<https://jusorbi.wordpress.com/2015/11/26/derecho-de-turquia-a-defender-su-espacio-aereo-a-sangre-y-fuego-por-supuesto-que-no/>> (accessed Mar. 6, 2016).

attack' in the meaning of Art. 51 UN Charter.¹⁵ Of course, if Russia's actions do not reach the threshold for the use of military force – as we will argue – their qualification as 'armed attacks' is *ipso jure* excluded.

Aerial incidents of this kind are not uncommon in international practice. Some famous precedents involving civilian aircrafts include the downing of Korean Air Lines flight KAL-007 by Soviet planes on September 1, 1983,¹⁶ and the downing of Iran Air flight 655 by the *USS Vincennes* on July 3, 1988.¹⁷ Indeed, the first of these incidents catalyzed the development of a set of standards applying to air intercept of civilian aircrafts with the adoption of the Montreal Protocol of May 10, 1984, relating to an amendment to the Convention on International Civil Aviation (Art. 3 *bis*).¹⁸

But international law seems more indeterminate – and to a certain extent even confusing – as regards cases involving military aircraft. The downing of a US Lockheed U-2 reconnaissance aircraft over Soviet territory, on May 1, 1960,¹⁹ and the downing

¹⁵ See, e.g., *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, ¶ 101 (June 27); *Oil Platforms (Islamic Republic of Iran v. U.S.)*, 2003 I.C.J. 161, ¶¶ 186–87 (November 6); *Eritrea-Ethiopia Claims Commission – Partial Award: Jus Ad Bellum – Ethiopia's Claims 1–8*, 26 R.I.A.A. 457, ¶ 12 (U.N. 2005). See, for a critical analysis of this case-law, Yoram Dinstein, *War, Aggression and Self-Defence* 207–13 (5th ed., Cambridge University Press 2012).

¹⁶ See, for this event leading to the adoption of the 1984 Protocol, Gilbert Guillaume, *Les grandes crises internationales et le droit* 61–78 (Seuil 1994); Jacqueline de la Rochère, *L'affaire de l'accident du Boeing 747 de Korean Airlines*, 29 *Annuaire français de droit international (AFDI)* 749 (1983). doi:10.3406/afdi.1983.2579; Gerald F. Fitzgerald, *The Use of Force against Civil Aircraft: The Aftermath of the KAL Flight 007 Incident*, 22 *Can. Y.B. Int'l L.* 291 (1984); Farooq Hassan, *The Shooting down of Korean Airlines Flight 007 by the USSR and the Future of Air Safety for Passengers*, 33 *Int'l & Comp. L.Q.* 712 (1984); Ingrid L. Jahn, *Applying International Law to the Downing of Korean Air Lines Flight 007 on September 1, 1983*, 27 *German Y.B. Int'l L.* 444 (1984); Masahiko Kido, *The Korean Airlines Incident on September 1, 1983, and Some Measures Following It*, 62 *J. Air L. & Com.* 1049 (1997); Jeffrey D. Laveson, *Korean Airline Flight 007: Stalemate in International Aviation Law – A Proposal for Enforcement*, 22 *San Diego L. Rev.* 859 (1985); Nicholas J. Mullany, *The Legal Implications of the Soviet Union's Assertions Concerning the Downing of Kal Flight 007*, 19 *U. W. Austl. L. Rev.* 419 (1989), available at <<http://www.austlii.edu.au/au/journals/UWALawRw/1989/21.html>> (accessed Mar. 6, 2016); Eugene Sochor, *ICAO and Armed Attacks against Civil Aviation*, 44 *International Journal: Quarterly of the Canadian Institute of International Affairs* 134 (1988–89); *Legal Argumentation in International Crises: The Downing of the Korean Air Lines Flight 007*, 97 *Harv. L. Rev.* 1198 (1983); *KAL007 – The Sequel – ICAO Assembly Resolution*, 1984 *Austl. Int'l L. News* 344.

¹⁷ See David K. Linnan, *Iran Air Flight 655 and Beyond: Free Passage, Mistaken Self-Defense, and State Responsibility*, 16 *Yale J. Int'l L.* 245 (1991); *Excerpts from Report of ICAO Fact-Finding Investigation Pursuant to Decision of ICAO Council of July 14, 1988*, 83 *Am. J. Int'l L.* 332 (1989); Harold G. Maier, *Ex Gratia Payments and the Iranian Airline Tragedy*, 83 *Am. J. Int'l L.* 325 (1989).

¹⁸ See Protocol Relating to an Amendment to the Convention on International Civil Aviation (Article 3 *bis*), May 10, 1984, 2122 U.N.T.S. 337, 346–47. See, e.g., Ruwantissa Abeyratne, *Convention on International Civil Aviation: A Commentary* 67–73 (Springer 2014); Kimberley N. Trapp, *Uses of Force against Civil Aircraft*, *EJIL: Talk!* (Jun. 28, 2011), <<http://www.ejiltalk.org/uses-of-force-against-civil-aircraft/>> (accessed Mar. 6, 2016); Jean-Claude Piris, *L'interdiction du recours à la force contre les aéronefs civils, l'aménagement de 1984 à la Convention de Chicago*, 30 *Annuaire français de droit international (AFDI)* 711 (1984). doi:10.3406/afdi.1984.2630; William J. Hughes, *Aerial Intrusions by Civil Airlines and the Use of Force*, 45 *J. Air L. & Com.* 595 (1980).

¹⁹ See in particular Quincy Wright, *Legal Aspects of the U-2 Incident*, 54 *Am. J. Int'l L.* 836 (1960); Oliver J. Lissitzyn, *The Treatment of Aerial Intruders in Recent Practice and International Law*, 47 *Am. J. Int'l L.* 559 (1953); Rupchand C. Hingorani, *Aerial Intrusions and International Law*, 8 *Neth. Int'l L. Rev.* 165 (1961). doi:10.1017/S0165070X0003196X

of a Breguet Atlantic of the Pakistani Air Force by Indian jets in the Rann of Kutch on August 10, 1999,²⁰ count among the most famous and well-documented incidents. Moreover, accusations of violation of air sovereignty frequently occur in cases of territorial dispute. Indeed, in this context, the overflight of disputed territory or adjacent maritime zone often represent a means for a state to signify the rejection of exorbitant territorial claims by another state – thus precluding the possibility that its inaction may be interpreted as acquiescence. This is attested to in, for instance, Greek-Turkish relations in the Aegean Sea, in the context of the territorial and maritime disputes in the South China Sea,²¹ and in the Gulf of Sidra incident of August 19, 1981, when a US F-14 aircraft downed two Libyan Sukhoi Su-22 over international waters.²² In any case, as reaffirmed in Art. 3(c) of the 1944 Chicago Convention,²³ flights of state aircrafts over the territory of another state without its consent constitute a breach of the latter's territorial integrity.²⁴ Depending on the circumstances, aerial intrusion by military aircrafts can be considered as instances of threats of military force in contradistinction with Art. 2(4) of the UN Charter.²⁵ But do they automatically qualify in themselves as uses of military force which are prohibited by Art. 2(4) of the UN Charter?

This raises the question of the existence of a *minimal threshold* of coercion for acts to fall under the aegis of Art. 2(4) of the UN Charter. According to Olivier Corten, state practice shows that cases that do not imply explicit hostile intent fall below the threshold and are generally not dealt with by reference to Art. 2(4).²⁶ The

²⁰ See J.G. Merrills, *The Aerial Incident of 10 August 1999 (Pakistan v. India), Judgment on Jurisdiction*, 50 Int'l & Comp. L.Q. 657 (2001); Rajiv Nanda, *International Law and the Aerial Incident Case: Pakistan vs. India* (Universal Law Pub. 2002); *Shootdown! The Atlantique Incident and the Phantom of the Syria*, Bill the Butcher (Jun. 27, 2012), <<http://bill-purkayastha.blogspot.ch/2012/06/shootdown-atlantique-incident-and.html>> (accessed Mar. 6, 2016).

²¹ See Vivek Kapur, *Chinese Aerial Patrols over Senkaku Islands*, Institute for Defence Studies and Analyses (Dec. 24, 2012), <http://www.idsa.in/issuebrief/ChineseAerialPatrolsOverSenkakulands_VivekKapur_241212> (accessed Feb. 9, 2016).

²² See, e.g., Steven R. Ratner, *Gulf of Sidra Incident of 1981: A Study of the Lawfulness of Peacetime Aerial Engagements*, 10 Yale J. Int'l L. 59 (1984). See, for the broader context of Libyan claims over the Gulf of Sidra, Yehuda Z. Blum, *The Gulf of Sidra Incident*, 80 Am. J. Int'l L. 668 (1986); John M. Spinnato, *Historic and Vital Bays: An Analysis of Libya's Claim to the Gulf of Sidra*, 13 Ocean Dev. & Int'l L. 65 (1983). doi: 10.1080/00908328309545720

²³ Convention on International Civil Aviation, Dec. 7, 1944, 15 U.N.T.S. 295.

²⁴ Article 3(c) Chicago Convention: 'No state aircraft of a contracting State shall fly over the territory of another State or land thereon without authorization by special agreement or otherwise, and in accordance with the terms thereof.' See also Art. 2(1) UN Charter; Military and Paramilitary Activities in and against Nicaragua, *supra* n. 15, ¶ 251; Ki-Gab Park, *La protection de la souveraineté aérienne* 51–62 (A. Pedone 1991); Marcus Schladebach, *Lufthoheit: Kontinuität und Wandel (= 236 Jus Publicum)* 216, 253–61 (Mohr Siebeck 2014).

²⁵ See Park, *supra* n. 24, at 190–92.

²⁶ See Olivier Corten, *Le droit contre la guerre: L'interdiction du recours à la force en droit international contemporain* 67–118 (A. Pedone 2014) [hereinafter Corten, *Le droit*]; Park, *supra* n. 24, at 74 (noting

Independent Fact Finding Mission's Report on the 2008 War between Georgia and Russia thus stated – quoting Robert Kolb – that the 'the interception of a single aircraft' lies below the threshold of Art. 2(4) of the UN Charter.²⁷ The main difficulty with this approach is to draw the line between such instances of *de minimis* recourse to coercion, calling for 'strictly necessary police measures' as a matter of maintenance of public order, and cases of use of military force falling under the scope of Art. 2(4) of the UN Charter. According to Corten, this has to be done by assessing the criteria of gravity and intent of the 'attacking' state.²⁸

Obviously, the political context – as well as other circumstances – will weigh heavily in the subjective appreciation of the states involved. In the present case, although tension are palpable in public declarations, it seems that both Russia and Turkey have been willing – at least in a first stage – to de-escalate the situation and lower the tone. NATO's Secretary General Jens Stoltenberg stated: 'Diplomacy and de-escalation are important to resolve this situation.'²⁹ This stance is also reflected in United Nations Security Council President Matthew Rycroft's declaration.³⁰ At the outset of the crisis, both countries consciously avoided using *jus contra bellum* terms in their declarations; Turkey referring to the notion of 'national security' rather than 'self-defence'. This tends to confirm the fact that the actors involved do not envisage the initial alleged violation of Turkish airspace through the lens of Art. 2(4) of the UN Charter.

3.2. Was the Turkish Reaction Lawful?

This is not to say that a state experiencing a violation of its airspace by military airplanes may in no situation use force when the incursion fails to amount to an 'armed attack'.³¹ But air intercept in these cases are governed by another set of rules

that state practice tends to distinguish between 'simple' aerial incidents and more serious acts involving for instance the bombardment of the territory). *But see*, on the question of a 'minimal threshold' for the application of Art. 2(4) of the UN Charter (and rejecting this approach), the critical remarks of Tom Ruys, *The Meaning of 'Force' and the Boundaries of the Jus ad bellum: Are 'Minimal' Uses of Force Excluded from UN Charter Article 2(4)?*, 108 Am. J. Int'l L. 159 (2014).

²⁷ 2 Independent International Fact-Finding Mission on the Conflict in Georgia: Report (Sep. 2009) 242, <http://web.archive.org/web/20110706223037/http://www.ceiig.ch/pdf/IIFFCG_Volume_II.pdf> (accessed Mar. 6, 2016).

²⁸ Corten, *Le droit*, *supra* n. 26, at 88–118. *See also* the comments by Benedetto Conforti (Institute of International Law, Belgium) in 72 *Annuaire de l'Institut de droit international* 150–51 (2007), available at <<http://www.justitiaetpace.org/IdIF/annuaireF/2007/Roucounas.pdf>> (accessed Mar. 6, 2016).

²⁹ *Statement by the NATO Secretary General after the Extraordinary NAC Meeting*, NATO (Nov. 24, 2015), <http://www.nato.int/cps/en/natohq/news_125052.htm> (accessed Mar. 6, 2016).

³⁰ *UNSC Calls for 'Measured Response' over Russian Su-24 Incident*, Sputnik (Nov. 24, 2015), <<http://sputniknews.com/world/20151124/1030677162/su24-turkey-uns-russia.html>> (accessed Mar. 6, 2016).

³¹ *See*, for the view that any, even minor, intrusion in airspace amounts to an armed attack, Stefan Hobe, *Airspace* in 1 *The Max Planck Encyclopedia of Public International Law* 263, 266 (Rüdiger Wolfrum, ed.) (Oxford University Press 2012).

and principles pertaining to police operations in time of peace rather than by more general rules of *jus contra bellum*.³² This approach is reflected in the Resolution adopted by the *Institut de droit international* in 2007 at the session in Santiago.³³ Paragraph 5 of the Resolution states in its relevant part:

Acts involving the use of force of lesser intensity [than armed attacks] may give rise to counter-measures in conformity with international law. In case of an attack of lesser intensity the target State may also take strictly necessary police measures to repel the attack.³⁴

These so-called 'measures of police,' which – in the case of aerial intrusions – imply the intercept of the foreign aircraft, if necessary by force, are grounded on what Benedetto Conforti calls 'the "internal force" of the State, i.e. the coercive measures which a State can take against individuals or communities within its territory.'³⁵ They can thus be adopted in certain circumstances even in the absence of a prior 'armed attack' in the meaning of Art. 51 of the UN Charter. Although it is sometimes delicate to assess an incident in maintaining a strict analytical distinction, recourse to coercive means in this context should only occur when several cumulative conditions are respected.

3.2.1. Was Turkey's Reaction Confined to Its Territory?

Although recourse to coercive means may be allowed both if we were to consider these cases through the lens of Art. 51 of the UN Charter self-defence and 'police enforcement actions,' this last point could make a big difference in the present case. Since it flows in the last instance from the principle of state sovereignty, the right to adopt coercive 'police enforcement actions' of such magnitude is necessarily limited to individual action – as opposed to collective self-defence – on the national territory – as opposed to the territory of a third state and without touching upon the question of enforcement actions in international spaces.³⁶

In this case, it seems plausible that the attack might have taken place – at least partly – when the Russian aircraft was (already) outside of Turkish airspace. According

³² See, e.g., Park, *supra* n. 24, at 291–98.

³³ *Present Problems of the Use of Armed Force in International Law – A Self-Defence*, <http://www.justitietpace.org/idiE/resolutionsE/2007_san_02_en.pdf> (accessed Mar. 6, 2016).

³⁴ *Id.* See also the discussion in Olivier Corten, *Les résolutions de l'Institut de droit international sur la légitime défense et sur les actions humanitaires*, 2007(2) *Revue belge de droit international* (R.B.D.I.) 608–13.

³⁵ 72 *Annuaire de l'Institut de droit international* 150 (2007).

³⁶ See Albrecht Randelzhofer & Oliver Dörr, *Article 2(4)*, in 1 *The Charter of the United Nations: A Commentary* 200, 215 (Bruno Simma et al., eds) (3rd ed., Oxford University Press 2012). See also the discussion in Raphaël van Steenberghe, *La légitime défense en droit international public* 253 (Larcier 2012).

to a declaration by President Vladimir Putin, 'the plane had been attacked when it was 1 km (0.62 mile) inside Syria.'³⁷ This is obviously a point that would call for further investigation.

3.2.2. *Did Turkey Issue Warnings?*

Except in circumstances where the intention of the trespassing aircraft are manifestly hostile, repeated warnings must have been issued and proven ineffective.³⁸ This condition should be seen as an aspect of the condition of necessity according to which recourse to forceful means must be the only available means of ending the unlawful aerial intrusion.³⁹ In this case, Turkey maintains that 10 warnings were issued in the five minutes preceding the intercept⁴⁰ while the Russian side – basing itself on the testimony of the pilot, Captain Konstantin Murakhtin – deny that any warning were given.⁴¹ To assess the respect of this condition, an inquiry on the exact circumstances of the incident should not only aim to establish whether the warnings were effectively issued but whether they were given in a manner that could be effectively received and understood by the Russian aircraft's crew. It is symptomatic in this regard that the most recent press release of the Turkish Ministry of Foreign Affairs issued on January 30, 2016, the day following a new alleged Russian aerial incursion in Turkish airspace insists on the fact that warnings have been issued both in English and Russian languages.⁴²

3.2.3. *Was Turkey's Reaction Necessary and Proportionate to the Objective of Restoring Its Aerial Sovereignty?*

The condition of absolute necessity and proportionality of the measures undertaken with the aim of ensuring aerial security must be respected.⁴³ Necessity

³⁷ *Supra* n. 11.

³⁸ See, e.g., Wright, *supra* n. 19, at 850; Lissitzyn, *supra* n. 19, at 587; Hingorani, *supra* n. 19, at 167; Schladebach, *supra* n. 24, at 257.

³⁹ See *infra* n. 44 and accompanying text.

⁴⁰ See, e.g., Shaun Walker & Kareem Shaheen, *Turkish Military Releases Audio of Apparent Warning to Downed Russian Jet*, *The Guardian* (Nov. 25, 2015), <<http://www.theguardian.com/world/2015/nov/25/second-russian-pilot-shot-down-turkey-alive-ambassador>> (accessed Mar. 6, 2016).

⁴¹ See 'Turkish Jets Gave Us No Warning before Shooting' – Rescued Pilot of Downed Russian Su-24, RT (Nov. 25, 2015), <<https://www.rt.com/news/323431-saved-pilot-turkish-su24/>> (accessed Mar. 6, 2016). The authenticity of the testimony as well as the identity of the interviewee have been questioned by some. See, e.g., Gregory Feifer, *Putin's Game of Chicken*, *Foreign Affairs* (Nov. 30, 2015), <<https://www.foreignaffairs.com/articles/turkey/2015-11-30/putins-game-chicken>> (accessed Mar. 6, 2016).

⁴² No: 33, 30 January 2016, *Press Release Regarding the Violation of Turkish Airspace on 29 January 2016 by a RF Aircraft*, Republic of Turkey, Ministry of Foreign Affairs (Jan. 30, 2016), <http://www.mfa.gov.tr/no_-33_-30-january-2016_-press-release-regarding-the-violation-of-turkish-airspace-on-29-january-2016-by-a-rf-aircraft.en.mfa> (accessed Mar. 6, 2016) [hereinafter *Press Release*].

⁴³ See Park, *supra* n. 24, at 191.

means that force must be the *ultima ratio* to restore security on the territory.⁴⁴ The requirement of proportionality means the proportion that has to be observed between the action taken and its purpose, namely the reestablishment of territorial sovereignty and the maintenance of public order.⁴⁵

As regards airspace violations, the (very) short duration of an incursion is not necessarily an indication that measures of coercive intercept were out of proportion with the perceived threat. The speed of aircrafts and the potentially devastating consequences of inaction have to be taken into account, as illustrated by the attacks on Pearl Harbour on December 7, 1941, and particularly on September 11, 2001. In some cases, an incursion by several aircraft might constitute the first stage of an impending aggression. States have a legitimate need to be able to react quickly and effectively to such an upcoming attack.⁴⁶ This might involve an intercept through forcible means if warnings remained ineffective.

But given the surrounding circumstances of the present case, it is difficult to infer a hostile intent of the Russian Government towards Turkey. In this regard, one has to admit though that the Russian Air Force's practice of flying with the transponder turned off – if the accounts are true – do not speak in its favor.⁴⁷ Although similar violations of Turkish sovereignty by Russian aircrafts occurred in the previous months, communications were regular on the issue, and Russia had been willing to admit an infringement of Turkish airspace in October 2015.⁴⁸ In this context, it would have

⁴⁴ See *Addendum to the Eighth Report on State Responsibility*, by Mr. Roberto Ago 'The Internationally Wrongful Act of the State, Source of International Responsibility' (part 1), ¶ 120, U.N. Doc. A/CN.4/318/Add.5-7 (1980), in 2(1) Y.B. Int'l L. Comm'n 13, 69 (1982), U.N. Doc. A/CN.4/SER.A/1980/Add.1 (Part 1), U.N. Sales No. E.81.V.4 (Part I), at <http://legal.un.org/ilc/documentation/english/a_cn4_318_add5_7.pdf> (accessed Mar. 6, 2016) [hereinafter *Addendum*]: 'The reason for stressing that action taken in self-defence must be *necessary* is that the State attacked (or threatened with imminent attack, if one admits preventive self-defence) must not, in the particular circumstances, have had any means of halting the attack other than recourse to armed force.' See also Military and Paramilitary Activities in and against Nicaragua, *supra* n. 15, ¶ 222 (dissenting opinion of Judge Schwebel); Giovanni Distefano, *Use of Force*, in The Oxford Handbook of International Law in Armed Conflict, 545, 554-55 (Andrew Clapham & Paola Gaeta, eds) (Oxford University Press 2014). doi: 10.1093/law/9780199559695.003.0022; Judith Gardam, *Necessity and Proportionality in Jus ad Bellum and Jus in Bello*, 87 Am. J. Int'l L. 391 (1993).

⁴⁵ See *Addendum*, *supra* n. 44, at 69.

⁴⁶ See Jonathan G. Odom, *A 'Rules-Based Approach' to Airspace Defense: A U.S. Perspective on the International Law of the Sea and Airspace, Air Defense Measures, and the Freedom of Navigation*, 47 Belg. Rev. Int'l L. 65, 67 (2014), available at <http://papers.ssrn.com/abstract_id=2673927> (accessed Mar. 6, 2016).

⁴⁷ See, e.g., Simon Johnson, *Sweden Intercepts Russian Military Planes Flying with Their Transponders Off over Baltic Region*, Business Insider UK (Mar. 24, 2015), <<http://uk.businessinsider.com/r-sweden-intercepts-russian-planes-over-baltic-amid-regional-tensions-2015-3?r=US&IR=T>> (accessed Mar. 6, 2016); Carol Matlack, *Russia's 'Dark' Warplanes Are Spooking Europe*, Bloomberg (Mar. 9, 2015), <<http://www.bloomberg.com/news/articles/2015-03-09/russia-s-dark-warplanes-are-spooking-europe>> (accessed Mar. 6, 2016).

⁴⁸ See, e.g., *Turkey 'Cannot Endure' Russian Violation of Airspace, President Says*, The Guardian (Oct. 6, 2015), <<http://www.theguardian.com/world/2015/oct/06/nato-chief-jens-stoltenberg-russia-turkish-airspace-violations-syria>> (accessed Mar. 6, 2016).

been scarcely plausible to infer an aggressive intent of the Russian side. Furthermore, the very short duration of this particular case over a relatively peripheral part of its territory did not seem to call for such a forceful response.⁴⁹ The circumscribed and publically stated goal of Russia's military presence in the region tends to indicate that its intention was not to attack Turkey.

These troubled circumstances led Russian Foreign Minister Sergei Lavrov to state that the intervention had been pre-planned and that the downing of the Sukhoi Su-24 was the result of a Turkish 'ambush'.⁵⁰ In any case, the downing of a plane causing – though indirectly – the death of a crew member appears to constitute a disproportionate response to the nominal violation of Turkey's territory. To sum up the analysis of the law relating to the use of force, the legality of the downing of the Russian plane is dubious, to say the least. According to Art. 31(1) of the International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts [hereinafter Draft Articles], Turkey is thus 'under an obligation to make full reparation for the injury caused by the internationally wrongful act'.⁵¹

3.3. Did the Downing of the Russian Aircraft Trigger the Right to Adopt Measures in Self-Defence?

In a first stage, President Vladimir Putin – arguably addressing mainly the Russian internal audience – used strong words to qualify Turkey's action – even calling them a 'crime' – but did not use terms such as 'aggression' or 'armed attacks'.⁵² Russian Prime Minister Dmitry Medvedev later qualified Turkish actions as an 'act of aggression against our country'.⁵³ It is nevertheless debatable if the downing of one single aircraft amounts to an act of armed attack triggering the right of self-defence or if it is confined to the notion of a border incident.⁵⁴ Even if the downing of the Sukhoi Su-24 were to be considered as an act that passes the threshold of 'armed

⁴⁹ See also Fyodor Lukyanov, *After Sukhoi Crash: A Bloc or a Coalition Dilemma*, Russia in Global Affairs (Nov. 25, 2015), <<http://eng.globalaffairs.ru/redcol/After-Sukhoi-crash-a-bloc-or-a-coalition-dilemma-17836>> (accessed Mar. 6, 2016).

⁵⁰ *Downing of Russian Su-24 Looks Like a Planned Provocation – Lavrov*, RT (Nov. 25, 2015), <<https://www.rt.com/news/323404-lavrov-syria-s24-turkey/>> (accessed Mar. 6, 2016).

⁵¹ *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, in Report of the International Law Commission, U.N. GAOR, 53rd Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001), reprinted in 2(2) Y.B. Int'l L. Comm'n 1, 91 (2007), U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2), U.N. Sales No. E.04.V.17 (Part 2), at <http://legal.un.org/ilc/publications/yearbooks/english/ilc_2001_v2_p2.pdf> (accessed Mar. 6, 2016).

⁵² *Supra* n. 11.

⁵³ Chris Enloe, *In Response to Turkey's Aggression, Russia Plans to Retaliate with a Number of Economic Sanctions*, The Blaze (Nov. 26, 2015), <<http://www.theblaze.com/stories/2015/11/26/in-response-to-turkeys-aggression-russia-plans-to-retaliate-with-a-number-of-economic-sanctions/>> (accessed Mar. 6, 2016).

⁵⁴ See the references *supra* n. 15.

attack,' it is nevertheless doubtful that it could be deemed as triggering Russia's right of self-defence. Since the attack ceased immediately after the downing of the plane and both parties expressed willingness to settle the incident through peaceful means, there appears to be no necessity for Russia to act in self-defence. The Russian Government confirmed this when it opted for the adoption of peaceful countermeasures against Turkey in the days following the event.

3.4. Was the Killing of the Aircraft's Crew a Violation of International Humanitarian Law?

As regards *jus in bello*, the targeting of the aircraft's crew members by the Syrian rebels is a violation of international humanitarian law. According to Art. 42(1) of the Protocol Additional to the Geneva Conventions of August 12, 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of June 8, 1977 [hereinafter AP I], '[n]o person parachuting from an aircraft in distress shall be made the object of attack during his descent.'⁵⁵ This provision is nevertheless not applicable to this case since the armed conflict opposing Syrian governmental forces, assisted by Russia, should be qualified as non-international.⁵⁶ Moreover, Syria is not a party to AP I.

But this rule is deemed to be a reflection of international humanitarian customary law applicable to non-international armed conflicts by the ICRC⁵⁷ as well as by the Manual on International Law Applicable to Air and Missile Warfare.⁵⁸ The violation

⁵⁵ 1125 U.N.T.S. 3, 22. See Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, at 494–97 (Yves Sandoz et al., eds) (ICRC; Martinus Nijhoff 1987), available at <http://www.loc.gov/rr/frd/Military_Law/pdf/Commentary_GC_Protocols.pdf> (accessed Mar. 6, 2016); Frits Kalshoven, Reflections on the Law of War: Collected Essays (= 17 International Humanitarian Law Series) 69–70, 268–71 (Martinus Nijhoff 2007); Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* 144–45 (Cambridge University Press 2004); Stefan Oeter, *4. Methods and Means of Combat*, in *The Handbook of International Humanitarian Law* 119, 178 (Dieter Fleck, ed.) (2nd ed., Oxford University Press 2008).

⁵⁶ See, e.g., *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic* ¶ 165, U.N. GAOR, Human Rights Council, 30th Sess., Agenda Item 4: Human Rights Situations That Require the Council's Attention, U.N. Doc A/HRC/30/48, at <http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session30/Documents/A.HRC.30.48_AEV.pdf> (accessed Mar. 6, 2016).

⁵⁷ See *Rule 48. Attacks against Persons Parachuting from an Aircraft in Distress*, in 1 Customary International Humanitarian Law 170, 170 (Jean-Marie Henckaerts & Louise Doswald-Beck, eds.) (ICRC; Cambridge University Press 2005), available at <<https://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf>> (accessed Mar. 6, 2016): 'Making persons parachuting from an aircraft in distress the object of attack during their descent is prohibited.' See also William J. Fenrick, *9. Specific Methods of Warfare*, in *Perspectives on the ICRC Study on Customary International Humanitarian Law*, 238, 242–43 (Elizabeth Wilmshurst & Susan Breau, eds) (British Institute of International and Comparative Law; Chatham House; Cambridge University Press 2007).

⁵⁸ See *Rule 132(a)*, in *Manual on International Law Applicable to Air and Missile Warfare: Program on Humanitarian Policy and Conflict Research at Harvard University* (Bern, 15 May 2009) 44 (Harvard College 2009), available at <<http://ihlresearch.org/amw/HPCR%20Manual.pdf>> (accessed Mar. 6, 2016): 'No person descending by parachute from an aircraft in distress may be made the object of

of the rule is nevertheless not recognized as a war crime in international treaties. As is well known, the Geneva Conventions and the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts of June 8, 1977 (AP II), do not contain any provision relating to international criminal responsibility. The Rome Statute of July 17, 1998, of the International Criminal Court does not make it a specific war crime to target these individuals neither in international armed conflict nor in non-international armed conflicts.

3.5. Did Russia Violate Its Obligations under the Law of Diplomatic Relations?

Finally, the alleged passivity of the police in reaction to the material damages caused to the Turkish Embassy in Moscow appears to constitute a breach of Russia's 'special duty' as a receiving state 'to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.'⁵⁹ In application of this 'special duty,' receiving states have the obligation to prevent public demonstrations – whatever the political motives of the demonstrators – from disturbing the peace or dignity of the diplomatic mission or from causing damage to its buildings.⁶⁰ This 'special duty' may be accomplished through the criminal prosecution of trespassers or of persons that have committed acts of depredation on the diplomatic premises.

The omission of the Moscow police authorities may easily be understood as a covert form of 'retaliation' – although such behaviour does not contribute to de-escalating tensions – and it is in no way justified under international law. According to Art. 50(2) of the Draft Articles, countermeasure can in no case justify a breach of the inviolability of diplomatic premises.⁶¹ As the International Court of Justice [hereinafter ICJ] affirmed in the classic *Tehran Embassy Hostages case*,

attack during his descent.' See also Commentary on the HPCR Manual on International Law Applicable to Air and Missile Warfare: Program on Humanitarian Policy and Conflict Research at Harvard University 270 (Harvard College 2010), available at <<http://ihlresearch.org/amw/Commentary%20on%20the%20HPCR%20Manual.pdf>> (accessed Mar. 6, 2016): 'Rule 132(a) applies also in non-international armed conflict.'

⁵⁹ Vienna Convention on Diplomatic Relations, Apr. 18, 1961, Art. 22(2), 23 U.S.T. 3227, 3237, 500 U.N.T.S. 95, 108: 'The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.'

⁶⁰ See, e.g., Stanisław E. Nahlik, Development of Diplomatic Law: Selected Problems (= 222 (1990-III) *Recueil des Cours* / Collected Courses of the Hague Academy of International Law) 310–19 and especially 323 (Martinus Nijhoff 1991); Jean d'Aspremont, *Premises of Diplomatic Missions*, in 8 *Max Planck Encyclopedia of Public International Law* 413, 418 (Rüdiger Wolfrum, ed) (2nd ed., Oxford University Press 2012); *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* 140–145 (Eileen Denza, ed.) (4th ed., Oxford University Press 2016).

⁶¹ *Supra* n. 51, at 131: 'A State taking countermeasures is not relieved from fulfilling its obligations . . . (b) to respect the inviolability of diplomatic or consular agents, premises, archives and documents.'

[e]ven in the case of armed conflict or in the case of a breach in diplomatic relations those provisions require that both the inviolability of the members of a diplomatic mission and of the premises, property and archives of the mission must be respected by the receiving State.⁶²

Indeed – as is illustrated by the use, by the ICJ, of the term ‘self-contained regime’ – the rules on diplomatic privileges and immunities are generally excluded from the scope of ordinary rules on countermeasures.⁶³ If the alleged passivity of the authorities could be confirmed, Russia would incur responsibility for all the damages caused to the Turkish diplomatic premises.

4. Concluding Remarks

Since the beginning of the Russian intervention in Syria, Russia and Turkey have been accusing each other of adopting provocative behavior. In this kind of context, the ‘(over-)reactions’ of one side to the perceived ‘provocations’ of the other side might well be seen as new ‘provocative actions,’ thus launching an infernal sequence of reciprocal provocations. This vicious cycle threatens to go on and further heighten political tensions among the involved actors. When such a crisis implicates, on the one side, one of the biggest military and nuclear power of the planet and, on the other side, a middle power integrated in a military alliance such as NATO, there are good reasons to worry about the consequences and to try and prevent the escalation by all available means. Despite the worrying rhetoric by some akin to war-mongering,⁶⁴ the Russian Government wisely decided not to react militarily to the unlawful downing of its aircraft and opted for the adoption of peaceful countermeasures. But the magnitude of the measures adopted leaves little room

⁶² United States Diplomatic and Consular Staff in Tehran (*Islamic Republic of Iran v. U.S.*), 1980 I.C.J. 3, ¶ 86 (May 24). See also Eritrea-Ethiopia Claims Commission – Partial Award: Diplomatic Claim – Ethiopia’s Claim 8, 26 R.I.A.A. 407, ¶ 24 (U.N. 2005): ‘[T]he Commission does not accept that the Parties could derogate from their fundamental obligations under the Vienna Convention on Diplomatic Relations, notably those relating to the inviolability of diplomatic agents and premises, because of the exigencies of war.’ See also Eritrea-Ethiopia Claims Commission – Partial Award: Diplomatic Claim – Eritrea’s Claim 20, 26 R.I.A.A. 381, ¶ 20 (U.N. 2005).

⁶³ United States Diplomatic and Consular Staff in Tehran, *supra* n. 62, ¶ 86: ‘The rules of diplomatic law, in short, constitute a self-contained régime which, on the one hand, lays down the receiving State’s obligations regarding the facilities, privileges and immunities to be accorded to diplomatic missions and, on the other, foresees their possible abuse by members of the mission and specifies the means at the disposal of the receiving State to counter any such abuse.’ See also, on the sometimes misunderstood notion of ‘self-contained regime,’ Bruno Simma & Dirk Pulkowski, *Of Planets and the Universe: Self-contained Regimes in International Law*, 17 Eur. J. Int’l L. 483 (2006), available at <<http://www.ejil.org/pdfs/17/3/202.pdf>> (accessed Mar. 6, 2016). doi:10.1093/ejil/chl015

⁶⁴ Polina Tikhonova, *Nuclear War over Turkey Shooting Down Russian Jet ‘Likely’ – Russia’s Top Defense Analyst*, ValueWalk (Nov. 25, 2015), <<http://www.valuwalk.com/2015/11/russia-vs-turkey-nuclear-war-likely/>> (accessed Mar. 6, 2016).

for further escalation in the realms of peaceful means in the hypothetical case of a new incident. This is particularly worrying in the light of the recent accusations of the Turkish Ministry of Foreign Affairs, according to which, a Russian Sukhoi Su-34 bomber has violated Turkish airspace on January 29, 2016.⁶⁵

On NATO's side, decision-makers would do well to take Turkish assertions with a grain of salt. While understandably willing to reaffirm the political unity of the alliance, NATO and its member states should endeavour to take a breath before expressing unconditional support for the Turkish side.⁶⁶ By ignoring this advice of prudence, the alliance risks precipitating itself and the rest of the world in a potentially cataclysmic storm before even realizing it. Hopefully the parties will strive to reach a solution through peaceful means in accordance with their international obligations.

References

Blum, Yehuda Z. *The Gulf of Sidra Incident*, 80 Am. J. Int'l L. 668 (1986).

Corten, Olivier. *Les résolutions de l'Institut de droit international sur la légitime défense et sur les actions humanitaires*, 2007(2) Revue belge de droit international (R.B.D.I.) 608–13.

D'Aspremont, Jean. *Premises of Diplomatic Missions*, in 8 Max Planck Encyclopedia of Public International Law 413, 418 (Rüdiger Wolfrum, ed.) (2nd ed., Oxford University Press 2012).

Dinstein, Yoram. *The Conduct of Hostilities under the Law of International Armed Conflict* 144–45 (Cambridge University Press 2004).

Dinstein, Yoram. *War, Aggression and Self-Defence* 207–13 (5th ed., Cambridge University Press 2012).

Distefano, Giovanni. *Use of Force*, in *The Oxford Handbook of International Law in Armed Conflict*, 545, 554–55 (Andrew Clapham & Paola Gaeta, eds) (Oxford University Press 2014). doi: 10.1093/law/9780199559695.003.0022

Fenrick, William J. 9. *Specific Methods of Warfare*, in *Perspectives on the ICRC Study on Customary International Humanitarian Law*, 238, 242–43 (Elizabeth Wilmshurst & Susan Breau, eds.) (British Institute of International and Comparative Law; Chatham House; Cambridge University Press 2007).

Fitzgerald, Gerald F. *The Use of Force against Civil Aircraft: The Aftermath of the KAL Flight 007 Incident*, 22 Can. Y.B. Int'l L. 291 (1984).

Gardam, Judith. *Necessity and Proportionality in Jus ad Bellum and Jus in Bello*, 87 Am. J. Int'l L. 391 (1993).

Guillaume, Gilbert. *Les grandes crises internationales et le droit* 61–78 (Seuil 1994).

⁶⁵ See Republic of Turkey, Ministry of Foreign Affairs, *supra* n. 42.

⁶⁶ See also the harsh critics of US policy expressed by Santarelli, *supra* n. 14.

Hassan, Farooq. *The Shooting down of Korean Airlines Flight 007 by the USSR and the Future of Air Safety for Passengers*, 33 Int'l & Comp. L.Q. 712 (1984).

Hingorani, Rupchand C. *Aerial Intrusions and International Law*, 8 Neth. Int'l L. Rev. 165, 167 (1961). doi:10.1017/S0165070X0003196X

Hobe, Stefan. *Airspace* in 1 The Max Planck Encyclopedia of Public International Law 263, 266 (Rüdiger Wolfrum, ed.) (Oxford University Press 2012).

Hughes, William J. *Aerial Intrusions by Civil Airliners and the Use of Force*, 45 J. Air L. & Com. 595 (1980).

Jahn, Ingrid L. *Applying International Law to the Downing of Korean Air Lines Flight 007 on September 1, 1983*, 27 German Y.B. Int'l L. 444 (1984).

Kalshoven, Frits. *Reflections on the Law of War: Collected Essays* (= 17 International Humanitarian Law Series) 69–70, 268–71 (Martinus Nijhoff 2007).

Kido, Masahiko. *The Korean Airlines Incident on September 1, 1983, and Some Measures Following It*, 62 J. Air L. & Com. 1049 (1997).

Laveson, Jeffrey D. *Korean Airline Flight 007: Stalemate in International Aviation law – A Proposal for Enforcement*, 22 San Diego L. Rev. 859 (1985).

Legal Argumentation in International Crises: The Downing of the Korean Air Lines Flight 007, 97 Harv. L. Rev. 1198 (1983).

Linnan, David K. *Iran Air Flight 655 and Beyond: Free Passage, Mistaken Self-Defense, and State Responsibility*, 16 Yale J. Int'l L. 245 (1991).

Lissitzyn, Oliver J. *The Treatment of Aerial Intruders in Recent Practice and International Law*, 47 Am. J. Int'l L. 559, 587 (1953).

Maier, Harold G. *Ex Gratia Payments and the Iranian Airline Tragedy*, 83 Am. J. Int'l L. 325 (1989).

Merrills, J.G. *The Aerial Incident of 10 August 1999 (Pakistan v. India), Judgment on Jurisdiction*, 50 Int'l & Comp. L.Q. 657–662 (2001).

Mullany, Nicholas J. *The Legal Implications of the Soviet Union's Assertions Concerning the Downing of Kal Flight 007*, 19 U. W. Austl. L. Rev. 419 (1989), available at <<http://www.austlii.edu.au/au/journals/UWALawRw/1989/21.html>> (accessed Mar. 6, 2016).

Nahlik, Stanisław E. *Development of Diplomatic Law: Selected Problems* (= 222 (1990-III) Recueil des Cours / Collected Courses of the Hague Academy of International Law) 310–19, 323 (Martinus Nijhoff 1991).

Nanda, Rajiv. *International Law and the Aerial Incident Case: Pakistan vs. India* (Universal Law Pub. 2002).

Odom, Jonathan G. *A 'Rules-Based Approach' to Airspace Defense: A U.S. Perspective on the International Law of the Sea and Airspace, Air Defense Measures, and the Freedom of Navigation*, 47 Belg. Rev. Int'l L. 65, 67 (2014), available at <http://papers.ssrn.com/abstract_id=2673927> (accessed Mar. 6, 2016).

Oeter, Stefan. *4. Methods and Means of Combat*, in The Handbook of International Humanitarian Law 119, 178 (Dieter Fleck, ed.) (2nd ed., Oxford University Press 2008).

Park, Ki-Gab. La protection de la souveraineté aérienne 51–62, 74, 190–92, 291–98 (A. Pedone 1991).

Piris, Jean-Claude. *L'interdiction du recours à la force contre les aéronefs civils, l'aménagement de 1984 à la Convention de Chicago*, 30 *Annuaire français de droit international* (AFDI) 711 (1984). doi:10.3406/afdi.1984.2630.

Ratner, Steven R. *Gulf of Sidra Incident of 1981: A Study of the Lawfulness of Peacetime Aerial Engagements*, 10 *Yale J. Int'l L.* 59 (1984).

Rochère, Jacqueline de la. *L'affaire de l'accident du Boeing 747 de Korean Airlines*, 29 *Annuaire français de droit international* (AFDI) 749 (1983). doi:10.3406/afdi.1983.2579

Ruys, Tom. *The Meaning of 'Force' and the Boundaries of the Jus ad bellum: Are 'Minimal' Uses of Force Excluded from UN Charter Article 2(4)?*, 108 *Am. J. Int'l L.* 159 (2014).

Schladebach, Marcus. *Lufthoheit: Kontinuität und Wandel (= 236 Jus Publicum)* 216, 253–61 (Mohr Siebeck 2014).

Wright, Quincy. *Legal Aspects of the U-2 Incident*, 54 *Am. J. Int'l L.* 836, 850 (1960).

Acknowledgments

The author would like to thank Neil I. Teller for reviewing his text.

Information about the author

Etienne Henry (Neuchâtel, Switzerland) – Visiting Researcher at Geneva Academy of International Humanitarian Law and Human Rights, Lecturer, Researcher and Ph.D. Candidate at University of Neuchâtel (Avenue du 1^{er}-Mars 26, Neuchâtel, CH-2000, Switzerland; e-mail: etienne.henry@unine.ch).