RBS:JG:dlh cc: OLSON
SHANKS
Goldklang
Simms
Tarr
Sudol
Retrieval
File

U.S. Department of Justice
Office of Legal Counsel

Office of the
Deputy Assistant Attorney General

Washington, D.C. 20530

SEP 6 1983

MEMORANDUM

TO: Elizabeth G. Verville
Deputy Legal Adviser
Department of State

FROM: Robert B. Shanks
Deputy Assistant Attorney General
Office of Legal Counsel

RE: Retaliation for Soviet Attack on Korean Airliner

The question has been raised whether states which have bilateral aviation treaties with the USSR may suspend or terminate such treaties immediately in retaliation for the Soviet attack on a Korean airliner. We believe that persuasive arguments exist that suspension or termination of such treaties would be justified under these circumstances. 1/ We have summarized these arguments in the numbered paragraphs below. They are set forth in more detail in the attached memorandum from Deputy Assistant Attorney General Larry Simms to Deputy Assistant Attorney General Ronald G. Carr, dated March 2, 1982, re: "CAB Suspension of Civil Aviation Privileges for Polish Airline." We have also attached for your information an excerpt from the 1980 proceedings of the American Law Institute containing a statement by former Deputy Legal Adviser Mark B. Feldman supporting this conclusion.

1/ We have examined some of the bilateral agreements, and some appear to be terminable by either party following a specified period of notice. We assume for the purposes of this analysis, however, that the bilateral treaties may not be unilaterally terminated or suspended at will.

1. We may assume that the Soviet Union has committed material breaches of international law, particularly the provisions of the United Nations Charter relating to the use of force and human rights.

a. The Charter requires parties to settle disputes by peaceful means and to avoid the use of force, except in response to armed attack. Arts. 1, 2, 33, 51.

b. The Charter also promotes and encourages respect for human rights. Arts. 1(3), 55 and 56. The Hostage Case, [1980] I.C.J. Rep. 3 at ¶ 91. The right to life is a fundamental human right. Universal Declaration of Human Rights, Art. 3; Statement of President Reagan on Poland, Dec. 23, 1981, 17 Weekly Comp. 1404 (1981); ALI, Restatement (Revised) Foreign Relations Law of the United States § 702 (Tent. draft No. 3 (1982)).

2. Some states, such as Korea and the United States, can demonstrate direct injury from the aerial incident. This is a matter, however, in which all states have an interest because the obligations created by the Charter against the use of force and against violations of human rights are obligations which are owed to all states. One of the basic premises underlying the Charter is that of collective responsibility for keeping the peace and promotion of human rights. Art. 2(4); Restatement, supra, §§ 702(k), 703(2).

3. The Vienna Convention on the Law of Treaties codifies one part of the law of reprisals. Article 60 states that a treaty may be suspended in whole or part in response to a material breach by the other party. When the International Law Commission drafted the Vienna Convention, however, it made clear that it did not intend to preclude other forms of non-forcible reprisals. The Convention does not expressly deal with other forms of reprisals. [1966] 2 Y.B. Int'l L. Comm'n 253-55.

4. It seems clear that when certain types of obligations, such as those under the UN Charter or human rights instruments, are violated, it may not be lawful or practical to act to suspend the Charter or the human rights instrument. Art. 60 of the Vienna convention on the Law of Treaties speaks of forbidding reprisals against persons protected by treaties of a humanitarian character.

5. Since termination or suspension of such treaties would be counterproductive, other reprisals should be available. These measures could consist of acts such as suspension of other treaties, even where such suspension could be unlawful under international law but for the prior violation. Thus, the United States froze Iranian assets when Iran violated the Vienna Convention on diplomatic Relations, rather than retaliate against Iranaian diplomats. Similarly, the United States suspended a cooperation agreement with Israel several years ago when Israel staged raids on some of its neighbors in alleged violation of the UN Charter. Indeed, the United States has already imposed economic sanctions, including the suspension of landing rights despite similar bilateral agreements, against both the Soviet Union and Poland in retaliation for human rights violations in Poland. 17 Weekly Comp. Pres. Doc. 1404, 1429 (1981); 76 Am. J. Int'l L. 379-84 (1982).

6. The most widely cited international law treatise states:

> "Reprisals are such injurious and otherwise internationally illegal acts of one State against another as are exceptionally permitted for the purpose of compelling the latter to consent to a satisfactory settlement of a difference created by its own international delinquency.
>
> * * *
>
> An act of reprisal may be performed against anything and everything that belongs to, or is due to, the delinquent State or its citizens . . . treaties concluded with it may be suspended [and] goods belonging to it or its citizens, may be seized, and the like."

2 H. Lauterpacht, Oppenheim's International Law 136, 139 (7th ed., 1952).

7. This issue was raised at the 1980 Annual Meeting of the ALI. The proposed Restatement does not make the scope of reprisals clear. Professor McDougal of Yale and Mark Feldman, Deputy Legal Adviser of the Department of State, among others, made clear their belief that reprisals could be applied beyond the particular treaty concerned. Professor Henkin of Columbia, the Chief Reporter, thought there was a question as to whether international law permitted such reprisals. The matter has not been finally resolved as far as the draft Restatement is concerned. See ALI, 57th Annual Meeting (1980) at 133-35, attached.