Managing Airspace in Civil and Military Aviation

Abstract

Functionally, civil and military aviation are different, although they may operate in the same airspace. This brings to bear the risk of air routes used by civil aircraft being endangered by military aviation including missile testing by States. This paper examines the military activities that could endanger civil aviation, the instances of use of civil and military aircraft and the distinction between the two as well as initiatives by International Civil Aviation Organization (ICAO). The paper also contains some suggestions and recommendations that could promote greater cooperation between the two activities.
About the Author

Dr. Ruwantissa Abeyratne is a Coordinator for Regional Affairs at ICAO. He has worked in the field of aviation law and management for over twenty-five years. He also teaches Aero Politics, Law and Policy at the John Molson School of Business, Concordia University, Montreal in the Global Aviation MBA Programme.

He has published 14 books and over 300 leading journal articles on international law and air law, in addition to many papers presented to conferences. Among his latest books are Aviation in Crisis, Air Law and Policy, Aeropolitics, Aviation and the Environment, Airport Business Law and Aviation Security Law. Dr. Abeyratne is a Fellow of both the Royal Aeronautical Society and the Chartered Institute of Logistics and Transport. He is also a member of the International Law Association, in which he serves as member of both the Association’s International Trade Law Committee and Space Law Committee. He is the founder member of the Montreal Branch of the Royal Aeronautical Society.
Managing Airspace in Civil and Military Aviation

Dr Ruwantissa Abeyratne
International Civil Aviation Organization

INTRODUCTION
Military aviation and civil aviation are intrinsically different from each other in their nature and functions. However, both operate in the same air traffic management (ATM) environment and therefore use common airspace which needs to be stringently managed for safety and efficiency. While military aviation is essential for national security and defence and is therefore a legitimate and indispensable activity, civil air transport is not only necessary for global interaction between nations but it also makes a significant contribution to the global economy. These two equally important activities call for uncompromising cooperation in the shared use of airspace and an enduring understanding of each other’s needs. Military aviation not only includes the operation of conventional aircraft for military purposes but also involves the use of Unmanned Aerial Systems (UAS) and missile testing, all of which call for a close look at the use of airspace in the modern context.

MISSILES LAUNCH BY DPRK
A grave concern confronting the civil aviation community is that, with the proliferation of military activity will inevitably come the issue of endangerment of air routes. The consequences of the nuclear missile firings of 5 July 2006 by the Democratic Peoples’ Republic of Korea (DPRK) brought to bear the hazards and grave dangers such activities pose to civil aviation. In this instance, missiles launched by DPRK crossed several international air routes over the high seas. It was revealed that, when extrapolating the projected paths of some of the missiles, it appeared that they could have interfered with many more air routes, both over Japan and the air space of the North Pacific Ocean.

A similar incident took place on 31 August 1998 in the same vicinity in which the North Korean missiles were fired in July 2006. An object propelled by rockets was launched by North Korea and a part of the object hit the sea in the Pacific Ocean off the coast of Sanriku in northeastern Japan. The impact area was in the vicinity of the international airway A590 which is known as composing North Pacific Composite Route System, a trunk route connecting Asia and North America where some 180 flights of various countries fly every day.

1 Ruwantissa Abeyratne, Air Law and Policy, PublishAmerica: Baltimore, 2007 at 25–47.
2 The potential explosion of Unmanned Aircraft Systems (commonly called UASs) in airspace also brings to bear the need to have a closer look at the civil-military aviation airspace demarcation. UASs are commonly associated with military operations in many parts of the world. The question that would arise in this context is how would a State feel about sharing airspace over contiguous States with a swarm of UASs operated by a mix of military/law enforcement and commercial enterprises? For more information see Ruwantissa Abeyratne, Regulating Unmanned Aerial Vehicles – Issues and Challenges, European Transport Law, Vol. XLIV, No. 5 – 2009, 503-520.
3 http://au.china-embassy.org/eng/xw/t261698.htm See infra text pertaining to notes 49 and 50.
ANNEX 11 TO THE CHICAGO CONVENTION

From an aeronautical perspective, Annex 11 (Air Traffic Services) to the Chicago Convention⁴, lays down requirements for coordination of activities that are potentially hazardous to civil aircraft. The International Standards and Recommended Practices in the Annex, Chapter 2, contain provisions for coordination between military authorities and ATS and coordination of activities potentially hazardous to civil aircraft. These provisions specify that ATS authorities shall establish and maintain close cooperation with military authorities responsible for activities that may affect flights of civil aircraft.

The provisions also prescribe that the arrangements for activities potentially hazardous to civil aircraft shall be coordinated with the appropriate ATS authorities and that the objective of this coordination shall be to achieve the best arrangements which will avoid hazards to civil aircraft and minimise interference with the normal operations of such aircraft.

Standard 2.17.1 stipulates that arrangements for activities potentially hazardous to civil aircraft, whether over the territory of a State or over the high seas, shall be coordinated with the appropriate ATS authorities, and for such coordination to be effected early enough to permit timely promulgation of information regarding the activities in accordance with the provisions of Annex 15 (Aeronautical Information Services) to the Chicago Convention.

Standard 2.17.2 of Annex 11 explains that the objective of the coordination referred to in the earlier provision shall be to achieve the best arrangements that are calculated to avoid hazards to civil aircraft and minimise interference with the normal operations of aircraft. One must of course hasten to add that Article 89 (War and Emergency Condition) of the Convention stipulates that in case of war, the provisions of the Convention (and, by implication its Annexes) shall not affect the freedom of action of any of the International Civil Aviation Organization (ICAO)'s member States affected, whether as belligerents or as neutrals⁵. The same principle would apply in the case of any member State which declares a state of national emergency and notifies the fact to the ICAO Council.

The above considerations of safety notwithstanding, it is incontrovertible that cooperation in the activities of military and civil aviation is not only about sharing airspace. It is also about the efficient allocation of airspace to both categories of activity in separating such flights, particularly in the context of military flights which operate in special use airspace and those proceeding to special use airspace across civilian air routes. This brings to bear the inevitable conclusion that there must essentially be coordination between military authorities and air navigation service authorities.

---

⁵ In October 1949, on the occasion of the adherence of Israel to the Chicago Convention, the Government of Egypt advised ICAO that, in view of considerations of fact and law which at that time affected Egypt’s special position with regard to Israel and in pursuance of Article 89, Israeli aircraft may not claim the privilege of flying over Egyptian territory. See letter dated 16 October 1949 reproduced in Annex A to Doc 6922-C/803 at p. 125. It was Egypt’s claim, as was later clarified by Egypt upon a query of the Secretary General of ICAO, that a state of war existed between the two countries. The Government of Iraq also advised ICAO along similar lines, that a state of emergency had been declared on 14 May 1848 and therefore Article 89 was applicable and all Israeli aircraft were denied the privilege of flying over the territory of Iraq. On 28 November 1962 the Government of India informed ICAO that as a result of external aggression into Indian Territory by the People’s Republic of China a state of grave emergency existed and the Government of India informed ICAO that as a result of external aggression into Indian Territory by the People’s Republic of China a state of grave emergency existed and the Government of India may not find it possible to comply with any or all of the provisions of the Chicago Convention. On 6 September 1965 the Government of Pakistan notified ICAO of the state of emergency under Article 89. In all instances, ICAO relayed the communications received to all its member States.
GLOBAL AIR TRAFFIC MANAGEMENT FORUM ON CIVIL AND MILITARY COOPERATION

At the Global Air Traffic Management Forum on Civil and Military Cooperation, convened by ICAO on 19 October 2009, the International Air Transport Association (IATA) noted that, given the equal importance of civil and military aviation, it was imperative that airspace be managed as a whole, as a continuum and one common source and not a collection of segregated areas. This called for minimal restrictions on the use of airspace by both users, which in turn called for a structured and systematic management of the scope and duration of the use of airspace.

At the Forum, the Civil Air Navigation Services Organisation (CANSO) underscored the fact that increasing growth in civil air transport and traffic was putting pressure on limited airspace resources and that civil-military cooperation was becoming imperative. CANSO, while calling for a global platform of cooperation, emphasised that the key to successful cooperation is the establishment of trust, respect, transparency and flexibility on all key players and that States could play a lead role in developing a framework of cooperation. It also stated that a regional approach (as opposed to a national approach) was essential, citing the European Organisation for the Safety of Air Navigation (EUROCONTROL) as a true civil-military agency which involved both civil and military offices at the policy-making level. In summing up, CANSO called for a fully integrated civil-military ATM, leading to the complete union of civil-military partners at the national, regional and global level.

SESAR AND NEXTGEN

A good example of the management system called for by IATA, and balanced cooperation as referred to by CANSO, is the establishment of a Single European Sky (SES) legislation. This legislation aims to ensure a harmonised regulatory framework for ATM and which uniformly and harmoniously applies in all 27 member States of the European Union (EU) and 28 other associated States surrounding the Union. This legislation is accompanied by a technology programme called Single European Sky Air Traffic Management Research (SESAR) which modernises and helps run the European air traffic control infrastructure modernisation programme, making SES and SESAR the essential components of the full air transport policy of Europe.

The outcome of this merger between policy and infrastructure technology has resulted in a robust civil-military aviation cooperation enabling all EU member States to be represented by a civilian and a military...
officer in the EU Single Sky Committee (which develops legislation) and military officers to be included in other bodies working on SES and SESAR.

The counterpart of SESAR in the US is the Next Generation Air Transport System (NextGen). NextGen, which is scheduled to be effective from 2012 to 2025, calls for a shift in airspace management to a trajectory-based system. It will have the following five attributes:

- **Automatic Dependent Surveillance Broadcast** which will use the Global Positioning System satellite signals to provide air traffic controllers and pilots with much more accurate information that will help to keep aircraft safely separated both in the air and on runways;

- **System-wide Information Management System** which will provide a single infrastructure and information management system to deliver high quality, timely data to many users and applications;

- **Next Generation Data Communications** which will provide an additional means of two-way communication for air traffic control clearances, instructions, advisories, flight crew requests and reports;

- **Next Generation Network Enabled Weather** which will reduce weather-related delays at least by half; and

- **National Airspace System Voice Switch** which will replace existing voice systems with a single air-to-ground and ground-to-ground voice communications system.

Both SESAR and NextGen, targeted for post-2020, would improve the performance of the ATM system by combining increased automation with new procedures that improve and achieve benefits related to safety, economic efficiency, capacity and environmental protection.

**LEGAL AND REGULATORY ISSUES**

**Distinction Between Civil and Military Aviation**

A simplistic but apt definition of civil aviation is “aviation activities carried out by civil aircraft”. A civil aircraft has been defined as any aircraft, excluding government and military aircraft, used for the carriage of passengers, baggage, cargo and mail. However, civil aviation comprises in general all aviation activities other than government and military air services which can be divided into three main categories:

- Commercial air transport provided to the public by scheduled or non-scheduled carriers;

- Private flying for business or pleasure;

- A wide range of specialised services commonly called aerial work, such as agriculture, construction, photography, surveying, observation and patrol, search and rescue, aerial advertisement et al.

By the same token, military aviation must be aviation activities carried out by military aircraft. Military aircraft have been defined as aircraft that are designed or modified for highly specialised use by the armed services of a nation.

---

12 Adrianus D. Groenewege, Compendium of International Civil Aviation, Second Edition, International Aviation Development Corporation: Canada 1999, at 437. It must also be noted that an aircraft has been defined in Annexes 6, 7, and 8 to the Chicago Convention as any machine which can derive support in the atmosphere from the reactions of air other than the reactions of air on the Earth's surface.

13 Ibid.

Military aviation therefore can be identified as the use of aircraft and other flying machines for the purposes of conducting or enabling warfare, which could include the carriage of military personnel and cargo used in military activities such as the logistical supply to forces stationed along a front. Usually these aircraft include bombers, fighters, fighter bombers and reconnaissance as well as unmanned attack aircraft such as drones. These varied types of aircraft allow for the completion of a wide variety of objectives.

Assembly Resolution A10-19

Arguably, the most fundamental difference between the operation of civil and military aircraft lies in the fact that, although they are expected to share the same skies, the procedures by which they do this vary greatly. Civil aircraft depend entirely on predetermined flight paths and code of commercial conduct which varies depending on aircraft type and types of traffic carried, whereas military aircraft operate in line with the exigency of a situation and are not necessarily always guided by predetermined flight paths. This dichotomy led to the adoption, at the 10th Session of the ICAO Assembly (Caracas, 19 June to 16 July 1956) of Resolution A10-19 which, while recognising that the skies (airspace) as well as many other facilities and services were commonly shared between civil and military aviation, focused on ICAO’s mandate to promote the safety of flight.

The preponderance of weight in prioritising civil and military aviation seems therefore to be in favour of civil aviation, particularly when taking into consideration this Resolution and the earlier discussion on Annex 11 to the Chicago Convention, thus attenuating the principle that military aviation should, out of necessity, consider the compelling need to protect civil aviation from the spontaneous risks that the former may carry with it.

At the Global Air Traffic Management Forum on Civil and Military Cooperation, ICAO subsumed its position by stating that airspace is a natural resource with finite capacity for which demand from all users is constantly expanding and that there has been an increased requirement on airspace use to meet a fast-growing aviation demand.

States were elected to be parties to the Chicago Convention so that international civil aviation may be developed in a safe and orderly manner and international air transport services may be established on the basis of equality of opportunity and operated soundly and economically. To achieve these objectives and to take due account of current and future needs in aviation, ICAO developed its vision of a seamless ATM system. ICAO further advised that, although the Chicago Convention governs international civil aviation and is not applicable to State aircraft (i.e. aircraft used in military, customs and police services), State aircraft as well as military CNS/ATM systems and services are an integral part of the aviation community. A much closer cooperation between civil and military organisations will contribute to the vision encapsulated in the preamble to the Chicago Convention, leading to the optimum use of the airspace and balancing State requirements for both civil and military aviation.

---

15 In a report released on 21 December 2009, Venezuelan President Hugo Chavez is reported to have announced that, on Sunday, 20 December, military drones had penetrated Venezuelan airspace along the North-western border with Colombia. He had warned that Venezuela was prepared to defend itself if any State were to violate its sovereignty. See http://www.venezuelanalysis.com/news/5022. On 4 January 2010, it was reported that a US drone had fired two missiles in Pakistan, flattening an extremist hideout in Pakistan’s lawless tribal belt on Sunday, 3 January 2010, killing five militants in a recent spike in drone attacks. See http://www.channelnewsasia.com/stories/afp_asia/pakistan/view/1028351/1.html

16 As per Article 44 of the Chicago Convention.

17 Supra, note 7.
Assembly Resolution A36-13

ICAO drew the attention of the Forum to Assembly Resolution A36-13\(^1\) adopted at the 36\(^{th}\) ICAO Assembly (Montreal, 18-28 September 2007), Appendix O, which recognises that the airspace as well as many facilities and services should be used in common by civil aviation and military aviation. The ICAO Global Operational Concept\(^2\) also states that all airspace should be a usable resource and that any restriction on the use of any particular volume of airspace should be considered transitory, and all airspace should be managed flexibly. It was noted by the Forum that, through A36-13, the Assembly resolved that the common use by civil and military aviation of airspace and of certain facilities and services shall be arranged so as to ensure safety, regularity and efficiency of international civil air traffic.

The regulations established by ICAO member States to govern the operation of their State aircraft over the high seas shall ensure that these operations did not compromise the safety, regularity and efficiency of international civil air traffic and to the extent possible such operations conformed to the Rules of the Air contained in Annex 2 to the Chicago Convention. The resolution also requested the Council of ICAO to provide guidance and advice to States that wished to establish civil-military agreements.

**Need for Cohesive Civil-Military Cooperation**

Against this backdrop, ICAO advised the Forum of the need for a strengthened civil-military cooperation and coordination which called upon ICAO member States to initiate as necessary or improve the coordination between their civil and military ATS. It was important that States, in view of the increasing need to cooperate with multiple airspace users, develop an integrated and cohesive civil-military coordination strategy with a roadmap indicating short, mid and long-term objectives. ICAO further advised that the benefits of enhancing civil-military cooperation should be considered at the global level with a view to identifying best practices through dialogue and exchange of information. Effective civil-military cooperation and coordination is required not only to meet future civil and military air traffic requirements for increased safety, security, capacity, efficiency and environmental sustainability, but also to achieve interoperability, seamlessness and harmonisation through sound policy, a structured framework, effective liaisons and management at the working level\(^3\).

**ICAO INITIATIVES**

One of the recent initiatives is the ICAO Global ATM Operational Concept\(^4\) which visualises an integrated, harmonised and global interoperable ATM\(^5\) system. The broad vision of this concept is to achieve an interoperable global ATM system for every user during all phases of flight that meets agreed levels of safety, provides for optimum economic operations, is environmentally sustainable and meets national security requirements\(^6\). The ATM system is based on the provision of services, through

---

\(^1\) Consolidated statement of continuing ICAO policies and associated practices related specifically to air navigation, Assembly Resolutions in Force (as of 28 September 2007), Doc 9902, II-2.

\(^2\) Infra, note 22.

\(^3\) In its briefing, ICAO emphasised that cooperation between civil and military authorities should be aimed at achieving optimal use of the airspace resulting in increased airspace capacity, operational flexibility, and savings in flying time, fuel and CO2 emissions. The Forum noted that safety, economical impact, efficiency and interoperability are objectives shared by both civil and military aviation communities.

\(^4\) An operational concept is a statement of what is envisioned.

\(^5\) Air traffic management is the dynamic, integrated management of air traffic and airspace – safely, economically and efficiently – through the provision of facilities in collaboration with all parties. See ICAO Doc 9854, supra note 19 at 1-1.

\(^6\) Ibid.
a framework which involves airspace, aerodromes, aircraft and persons which are part of the ATM system. The benefits accruing to all members of the ATM community are greater equity in airspace activity; greater access to timely and meaningful information for decision support and more autonomy in decision-making including conflict management, and the opportunity to better deliver business and individual outcomes within an appropriate safety framework.

ICAO has also issued guidelines on the coordination between military authorities and ATS authorities which recognise in limine that coordination between the responsible military authorities and appropriate ATS authorities is essential to the safety of civil aircraft operations whenever activities potentially hazardous to such operations are planned and conducted by any military units. These guidelines go on to state that in the event that a sudden outbreak of armed hostilities or any other factors preclude this normal coordination process, appropriate State and ATS authorities, civil aircraft operators and pilots-in-command of aircraft must assess the situation based on the information available and plan their actions so as not to jeopardise safety.

The Guidelines recommend that, in the event that a military unit observes that a civil aircraft is entering or is about to enter a designated prohibited, restricted or danger area, or any other area of activity which constitutes potential hazards, a warning to the aircraft should be issued through the responsible ATS unit. The warning should include advice on the change of heading required to leave or circumvent the area. If the military unit is unable to contact the responsible ATS unit immediately and the situation is deemed to be a genuine emergency, an appropriate warning to the aircraft may be transmitted on the VHF emergency channel 121.5 MHz. If the identity of the aircraft is not known, it is important that the warning include the secondary surveillance rader (SSR) code, if observed, and describe the position of the aircraft in a form meaningful to the pilot, for example by reference to an ATS route and/or the direction and distance from an airport or an aeronautical radio navigation aid, an established waypoint or reporting point.

In the case where an unauthorised aircraft is observed visually to be flying in, or about to enter a prohibited, restricted or danger area, the following visual signal is prescribed by the International Standards in Annex 2 (Rules of the Air) to the Chicago Convention Appendix 1 to indicate that the aircraft is to take such remedial action as is necessary. The Guidelines highlight the importance of coordinating with the responsible ATS unit(s), whenever possible. The issuance of any warnings and advice to civil aircraft regarding changes of flight path should be emphasised in any briefing or instruction given by military authorities to their units since uncoordinated warnings and associated navigational advice, when followed, may result in a potential risk of collision with other aircraft in the area.

---

25 Id. Paragraph 3.1.1. Examples of military activities which may pose a threat to civil aircraft and which should be coordinated with ATS authorities include practice firings or testing of any weapons air-to-air, air-to-surface or surface-to-air in an area or in a manner that could affect civil air traffic; certain military aircraft operations such as air displays, training exercises and the intentional dropping of objects and paratroopers; launch and recovery of space vehicles; and operations in areas of conflict, when such operations include a potential threat to civil air traffic. See Paragraph 3.2. of Doc 9554.
26 Id. Paragraph 8.1.
27 Id. Paragraph 8.2.
28 Id. Paragraph 8.3.
29 Id. Paragraph 8.4.
The objective of the coordination between the military authorities planning activities potentially hazardous to civil aircraft and the responsible ATS authorities is to reach an agreement on the best arrangements which would avoid hazards to civil aircraft and minimise interference with the normal operations of civil aircraft. Ideally, this means the selection of locations outside promulgated ATS routes and controlled airspace for the conduct of the potentially hazardous activities. If the selection of such locations is not possible due to the nature and scope of the planned activities, temporary restrictions imposed on civil air traffic should be kept to a minimum through close coordination between the military and ATS unit\(^30\).

The Guidelines are clear on the fact that although Article 89 of the Chicago Convention provides that in the event of armed conflict or the potential for armed conflict, the Convention does not affect the freedom of action of any Contracting State affected, whether as belligerents or as neutrals. Nonetheless, the need for close coordination between civil and military authorities and units is even more critical.

The responsibility for initiating the coordination process rests with the States whose military forces are engaged in the conflict. The responsibility for instituting special measures to ensure the safety of international civil aircraft operations remains with the States responsible for providing ATS in the airspace affected by the conflict, even in cases where coordination is not initiated or completed\(^31\). Based on information available, the State responsible for providing ATS should identify the geographical area of the conflict, assess the hazards or potential hazards to international civil aircraft operations, and determine whether such operations in or through the area of conflict should be avoided or may be continued under specified conditions.

An international Notice to Airmen (NOTAM) containing the necessary information, advice and safety measures to be taken should then be issued and subsequently updated in the light of developments. All those concerned with initiating and issuing of NOTAM should be aware of the provisions governing the duration of the published NOTAM. Annex 15, Standard 5.3.1.2 states that a NOTAM given Class I distribution shall be superseded by a NOTAM given Class II distribution when the duration of the circumstances notified is likely to exceed three months or the NOTAM has remained in force for three months. A copy of the NOTAM should be forwarded to the appropriate regional office of ICAO\(^32\).

If the necessary information is not forthcoming from the States whose military authorities are engaged in the armed conflict, the State responsible for providing air traffic services should ascertain the nature and scope of the hazards or potential hazards from other sources, such as aircraft operators, IATA and the International Federation of Air Line Pilots’ Associations, adjacent States or in some cases the relevant ICAO regional office\(^33\).

Separate guidelines\(^34\) issued by ICAO provide that aircraft shall not be flown in a prohibited, or restricted area, the particulars of which have been duly published, except in accordance with the conditions of the restrictions or by permission of the State over whose territory the areas are established\(^35\). The same

---

\(^{30}\) Id. Paragraphs 9.1 and 9.2.

\(^{31}\) Doc 9554, Paragraph 10.2.

\(^{32}\) Id. Paragraph 10.3.

\(^{33}\) Id. Paragraph 10.4.


\(^{35}\) Id. Paragraph 3.2.4.1.
guidelines also provide that special procedures shall be established with a view to ensure air traffic units are notified if a military unit observes that an aircraft which is, or might be a civil aircraft is approaching, or has entered any area in which interception might be necessary. In such an event all possible efforts should be made to confirm the identity of the aircraft and to provide it with the navigational guidance necessary to avoid the need for interception.

There is also a requirement to the effect that ATS authorities establish and maintain close cooperation with military authorities responsible for activities that may affect flights of civil aircraft. As soon as an ATS unit becomes aware of an unidentified aircraft in its area, it is required to establish the identity of the aircraft whenever this is necessary for the provision of ATS or required by the appropriate military authorities in accordance with locally agreed procedures.

CONCLUSION

As the foregoing discussion indicates, there is ample regulatory guidance from a civil aviation perspective to ensure a seamless and interoperable sharing of airspace between civil and military aviation activities. However, some weak spots remain, the first being the perceived inadequacy and lack of clarity of Article 89 of the Chicago Convention which renders the legal structure in this context destitute of certainty and effect. Another contentious area is missile testing involving airspace and air routes used by civil aircraft as was demonstrated by the DPRK issue of 2006. Many concerned parties voiced their perturbation over the incident, including ICAO. A letter was sent by the President of the Council to the DPRK authorities voicing the grave concern of the international aviation community that Standards 2.17 and 2.18 of Annex 11 to the Chicago Convention were not followed by the military authorities of DPRK. Countries across the world joined in the protest, and the United Nations Security Council met for an emergency meeting to discuss the missile tests.

The United Nations Security Council condemned the test firing by DPRK of missiles and adopted Resolution 1695 which requested all member States to prevent the transfer of missile and missile-related items, materials, goods and technology to the DPRK’s missile or weapons of mass destruction programmes, as well as procurement of such items and technology from that country. It also addressed the transfer of financial resources in relation to those programmes.

The resolution affirmed that such launches jeopardise peace, stability and security in the region and beyond, particularly in light of the country’s claim that it has developed nuclear weapons. The Council underlined that DPRK needed to show restraint and refrain from any action that might aggravate tension, and continue to work on the resolution of non-proliferation concerns, through political and diplomatic efforts.

In May 2009, DPRK test fired another short-range missile, apparently in clear violation of Resolution 1695 and, it is reported that it would take self-defence action if the United Nations Security Council

---

36 Id. Paragraph 3.2.6.1.
37 Id. Paragraph 3.1.7.1.
38 Id. Paragraph 3.1.9.1.
39 Supra, note 6.
40 An object propelled by rockets was launched by North Korea and a part of the object hit the sea in the Pacific Ocean off the coast of Sanriku in north-eastern Japan. The impact area of the object was in the vicinity of the international airway A590 which is known as composing NOPAC Composite Route System, a trunk route connecting Asia and North America where some 180 flights of various countries fly every day.
41 http://www.chinadaily.com.cn/cndy/2009-05/30/content_7953420.htm
were to impose tougher sanctions. This missile, which was fired from the Masudan-ni site on DPRK’s east coast, was the latest in the series of missiles the DPRK test fired since conducting a major nuclear test a few days before the firing.

If the response of State authorities firing missiles into the air without paying heed to applicable regulations and guidelines were to be that, since the State concerned has sovereignty over its airspace (as recognised by Article 1 of the Chicago Convention) and that it does over its airspace is its concern, it must be pointed out that air routes used by many airlines carrying passengers of various nationalities and that there must be recognition that the concept of sovereignty, in its pristine purity and simplistic interpretation, cannot be sustained in this instance. One commentator states very aptly:

The role of the State in the modern world is a complex one. According to legal theory, each State is sovereign and equal. In reality, with the phenomenal growth in communications and consciousness, and with the constant reminder of global rivalries, not even the most powerful of States can be entirely sovereign. Interdependence and the close-knit character of contemporary international commercial and political society ensures that virtually any action of a State could well have profound repercussions upon the system as a whole and the decisions under consideration by other States.

Therefore, in the ultimate analysis, cooperation between civil and military authorities, in accordance with the existing regulations and guidelines is essential, with the underlying consideration that civil aviation, with 15,000 aircraft airborne at any given time carrying 2.2 billion passengers annually, should not under any circumstances be compromised.

The views and opinions expressed in this paper reflected those of the author and not necessarily those of ICAO.

---