GRENADA and the LAW

By

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Introduction

On 23 October 1983 a "Collective Security Force," consisting of contingents from the United States of America and various West Indian islands, landed on the island of Grenada and, after some bloody encounters with Grenadian militias assisted by some Cubans, assumed control of Grenada. This action has been described by those who support it as a "rescue mission" or as an act of "collective self-defence," and by those who oppose it as an invasion or as an illegal act of "aggression." As is usual with an operation of this kind, it is not easy to obtain access to all the facts. However, an attempt will be made, within the limits of this short article, to set out the facts as objectively as possible and at least to discuss, if not to clarify definitively, some of the legal issues.

This article is divided into sections as follows:- Section A - The Facts; Section B - The International Reaction; Section C - The Australian Reaction; Section D - The Law (Commonwealth); and Section E - The Law (International).

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Section A: The Facts

Grenada, which has a population of 110,000, has an area of 133 square miles, being about 21 miles long from north to south and being 12 miles wide at the point of its greatest breadth. It is the most southerly of the Windward Islands of the West Indies, being only 85 miles north of Port of Spain, Trinidad. It is situated about 1,550 miles from Havana, Cuba, which is in turn only about 100 miles from Key West, the nearest point in Florida. So, from the point of view of American security, Grenada hardly represents a direct danger which is not already present in Cuba. However, Grenada under Cuban control could assist that country in whatever designs it may have on Latin America: it could also provide a useful staging post for Cuban operations in Africa. Further, Grenada, under hostile control, could represent a threat to United States interests in the Panama Canal zone and to the oil supplies which the United States obtains from Venezuela.

Grenada was discovered by Columbus in 1498. In the seventeenth century it came under French control, but in 1763 it was formally ceded to Great Britain. The French re-took it in 1779, but it was restored to Great Britain in 1783. In 1967 Grenada acquired "a status of association with the United Kingdom" under the West Indies Act of that year, and in 1974 in became fully independent, with Sir Eric Gairy as its first Prime Minister It then joined the United Nations, though not the Organization of American States. In 1979 Maurice Bishop, leader of the New Jewel Movement (N.J.M.), overthrew Gairy in a bloodless coup and took over as Prime Minister. Bishop established close ties with Cuba and the Soviet Union, and in January 1980 Grenada was the only Latin American country other than Cuba to vote in the United Nations against a resolution condemning the Soviet invasion of Afghanistan. On 19 October 1983 in circumstances which are not entirely clear Bishop and many of his colleagues were murdered. It seems that the killers, who called themselves the Revolutionary Military Council, considered that Bishop was not moving fast enough to socialize the economy and was even showing signs of wanting to establish better relations with Washington

This violent action was quickly followed by further violent action A "Collective Security Force," consisting of contingents from the United States, and also from Jamaica, Barbados, Antigua, Dominica, St. Lucia and St. Vincent, landed on the island and, after overcoming some resistance, established control. The last four of the countries named above are members of the Organization of Eastern Caribbean States (OECS), as is also Grenada. OECS was established in 1981 and had as one of its major purposes "to promote unity and solidarity among the Member States and to defend their sovereignty, territorial integrity and independence."[1)]

Speaking to the American people on 27 October, President Reagan referred to the murder of Bishop and his colleagues and went on: "Grenada was without a Government, its only authority exercised by a self-proclaimed band of military men. There were then about 1,000 of our citizens on Grenada, 800 of them students in St. George's Medical School. Concerned that they be harmed or held as hostages, I ordered a flotilla of ships, then on its way to Lebanon with Marines - part of our regular rotation program - to circle south on a course that would put them somewhere in the vicinity of Grenada in case there should be a need to evacuate our people." The President next referred to a request he had received from six OECS States, and also Jamaica and Barbados, "to join them in a military operation to restore order and democracy to Grenada," and he concluded that "the legitimacy of their request, plus my own concern for our citizens, dictated my decision." Elaborating further, the President said that 600 Cubans had been taken prisoner, and that United States forces had "discovered a complete base with weapons and communications equipment which makes it clear a Cuban occupation of the island had been planned." He also referred to warehouses containing weapons and ammunition, "stacked almost to the ceiling, enough to supply thousands of terrorists."

Some further information, beyond that contained in President Reagan's broadcast of 27 October, has since emanated from Washington On 10 November, at the Andrews Air Force Base near Washington, there was a display of Soviet bloc weapons claimed to have been discovered in Grenada. These included 9,000 rifles (of which 1,600 were Soviet-made AK-47s), 5,500,000 rounds of ammunition; ten 82 mm mortars and 9,000 mortar rounds, 12 ZU-23 anti-aircraft guns and 86,000 rounds

of anti-aircraft ammunition. The sergeant in charge of the display said that this haul was enough for two infantry battalions. As if these weapons were not enough, Washington claims to have found secret papers from the files of the N J M These are said to have disclosed acknowledgment by the N J.M. that its rule in Grenada was unpopular as well as evidence of secret military agreements between the N.J.M. on the one hand and the Soviet Union, Cuba and North Korea on the other hand.

Section B - The International Reaction

Mrs Thatcher, Prime Minister of the United Kingdom, did not exactly enthuse over this American incursion into a Commonwealth country. She said she was utterly against communism, but, she continued, "if you are going to pronounce a new law that wherever communism reigns against the will of the people, even though it has happened internally there, the United States shall enter, then we are going to have really terrible wars in the world." She thought that what had swayed the President was the "cri de coeur from the other Caribbean States" and that he had decided "from his perspective, which was one of regional security, that that justified him in crossing into Grenada." Mrs Thatcher did not disguise her pleasure at the yoke of communism and oppression being lifted, wherever that took place, but she concluded, "that does not mean you are entitled to go into any country either in Central America or Eastern Europe because they live under the communist yoke."[2)]

Some surprise has been caused by the failure of Mrs Thatcher to give more support to President Reagan's initiative, especially having regard to the generally favourable attitude of the United States to Britain's successful effort to recapture the Falkland Islands in 1982. The explanation is probably twofold, being political rather than legal. First, it cannot be easy for a British Prime Minister to accept the intrusion of foreign forces into a Commonwealth country of which Queen Elizabeth II is still Head of State. Secondly, for internal political reasons not unconnected with the simultaneous arrival of American cruise missiles in Britain, Mrs Thatcher seems to have been anxious to play down the image of being an "iron lady" and a bellicose one at that.

The Grenada crisis came before the Security Council of the United Nations at 5.15 p.m. on 27 October. The debate was suspended between 5.20 p.m. and 6.47 p.m., but then continued until 3 30 a.m. on 28 October. Guyana submitted a draft resolution which condemned the joint United States-Caribbean action as a violation of international law and also of the independence, sovereignty and territorial integrity of Grenada. The draft resolution also called for the immediate withdrawal of the invading troops and for the

Secretary-General to report on the situation within 48 hours of the adoption of the resolution. Thirty five delegations (not including Australia) and a representative of the League of Arab States took part in the debate. The voting on the resolution was 11 in favour, one (the United States) against, and three abstentions (Togo, United Kingdom and Zaire). The resolution was therefore not adopted.[3)]

The matter was then transferred to the General Assembly of the United Nations under the "Uniting for Peace" resolution[4)], where a similar resolution promoted by Nicaragua and Zimbabwe and deploring the joint United States-Caribbean action was adopted by 108 votes in favour, nine against and twenty-seven abstentions.[5)]

Section C - The Australian Reaction

The Australian reaction to these events has been confused. It has been said that, when the crisis broke, the Prime Minister, Mr Hawke, in a telephone conversation with President Reagan on 27 October, "carefully avoided any criticism of the United States" but that later "the Foreign Minister, Mr Hayden, carried the Cabinet with him in adopting a more critical position after deepening concern in the Labor Party over the Government's apparently soft line."[6] It has further been said that Mr Hawke was persuaded to go along with this tougher stance when a statement was issued by the Cabinet on 31 October saying the following:-

"While acknowledging the concern of the United States and the regional countries regarding the developments in Grenada and elsewhere in the Caribbean and the possible risks to foreign citizens on the island, the Government finds it hard to justify the use of force, certainly before all other possible courses of action had been exhausted. The Australian Government was not consulted or advised in advance of the intervention, but in their discussion today ministers agreed unanimously that, had the Government been consulted, it would have counselled against intervention."

The Cabinet statement went on to refer to "possible involvement of Commonwealth peace-keeping forces in Grenada" and continued by saying that the Government "does not contemplate Australian participation in such a force should it eventuate."[7]

Answering a question in Parliament from the Leader of the Opposition on 1 November, Mr Hawke was at pains to play down any suggestion of disunity in the Cabinet on the matter and for his part he accused the Opposition of playing "domestic politics" over it. Be that as it may, the Cabinet statement was obviously politically motivated from both the external and internal points of view. According to Mr Peter Hastings, foreign editor of the Sydney Morning Herald, it "struck the right note," being "firm, without being offensive to a close ally." The Cabinet statement

did not address the legal issues directly, but seems to have been drafted with those issues in mind and was almost certainly not made public without advice having been obtained from legal experts in the Department of Foreign Affairs. The Cabinet statement suggests that "rescue missions" and acts of "collective self-defence" may be justified legally, but not in the circumstances which had arisen in the Caribbean. The weakest part of the statement lies in the suggestion that before interventions of this kind can be justified, "all other possible courses of action" must first be exhausted. It is difficult to see, in the circumstances which had arisen in the Caribbean, what such other "courses of action" could be, and how they could be effective. Whatever the rights and wrongs of President Reagan's action, he can hardly be blamed for having taken notice of the fact that the other "courses of action" taken by President Carter in the Iranian hostage crisis (e.g. appeal to the United Nations; application to the International Court of Justice; and various economic sanctions) produced no result.

The leading article in the Sydney Morning Herald for 1 November was even more critical of the American action than the Australian Government had been. It referred to the fact that "The United States is no more prepared to accept the spread of communism in the Caribbean and Central America than the Soviet Union is willing to allow the spread of liberalism in Eastern Europe," but then said that "respect for national sovereignty is about the only relevant feature distinguishing West from East." Consequently, in the view of the leader writer, "no distinction can be made between the policy pursued within a sphere of influence and policy pursued outside it." In other words, "a plague on both your houses," or to put it another way, the emerging "Reagan doctrine" is considered by the leader writer to be no more acceptable than the so-called "Brezhnev doctrine." This question will be discussed in Section E of this article.

The Grenada question has continued to be discussed in Parliament. Mr Peacock, the Leader of the Opposition, endeavoured to raise on 1 November, as a matter of public importance, what he

referred to as "the disturbing trend in Australian foreign policy, and particularly the failure to support peace initiatives in Grenada " A debate of poor quality followed, during which, however the Foreign Minister, Mr Hayden, made the interesting point that 5,000 trained troops of the Grenadian armed forces had doffed their uniforms, melted into the jungle and also into the main course of civilian population. This statement reveals that the Collective Security Force had had no easy task, although the purpose for which Mr Hayden made it was to accuse the Opposition of wanting to send an Australian peace-keeping contingent into an extremely risky operation. Mr Hayden also claimed that governmental leaders in the Federal Republic of Germany, the Netherlands and Italy, as well as Mrs Thatcher, had been critical of the American operation.

On 3 November it was Mr Hayden's turn to be embarrassed because of a muddle over the stance of the Australian delegation when the Nicaraguan/Zimbabwe resolution, "deeply deploring" the American action in Grenada, was put to the vote in the General Assembly of the United Nations. This resolution was declared carrie by 108 votes in favour, nine against (the United States, Israel and various Caribbean nations) and twenty seven abstentions. The Australian delegation voted in favour of the resolution, but subsequently Mr Hayden, speaking in Parliament, said he had instruct the delegation to notify the Secretary-General that "the Australian vote on the resolution should have been recorded as an abstention." He claimed that the delegation's positive vote "had not adequately reflected the Government's attitude to the resolution, particularly as expressed in my press statement of 31 October 1983."

This is not the first time that a delegation has attempted to change its vote after the vote has been taken. This course tends to be followed by a government which is unsure of its stance and may wish to be seen in a favourable light by two separate audiences, perhaps one domestic and the other foreign. Probably, however, too much should not be made of this incident. It has to be remembered that, in a General Assembly debate, the situation can change rapidly, and on this occasion the vote was taken earlier than expected, making it impossible for the Australian delegation to consult Canberra. Also, the voting often takes place on separate

paragraphs of a resolution, before the resolution is put to the vote as a whole, and on this occasion the Australian delegation had already indicated its abstention on one of the main operative paragraphs. The confusion seems to have arisen because Mr Hayden's guidelines to the delegation - absolutely precise instructions can hardly be given in such a fluid situation - said the following:-

> "We would want you, at the end of the day, to maintain your abstention unless a substantial majority of western countries move to support the resolution."

In the event, of the 22 delegations normally considered "western," 15 voted in favour of the resolution and 7 abstained. So, depending on what is meant by the word "substantial," Mr Richard Woolcott, Australia's ambassador at the United Nations, can hardly be said to have erred. What seems to have led him into changing Australia's stance was a last-minute amendment by Belgium calling for free elections as soon as possible, which would allow Grenadians to "democratically choose their own Government." Such an amendment, however, would not affect the main thrust of the resolution which was to censure strongly the action of the United States and, even if Mr Woolcott technically had the numbers on his side, he overlooked the fact that some of the most "substantial" of the western delegations, namely the United Kingdom, Canada, the Federal Republic of Germany and Japan, all decided to abstain.

Unfortunately, debate on Grenadian affairs in the Parliament has continued to be on a very low level, with mere abuse prevailing over rational discussion and with nothing useful emerging except possibly a suggestion that, although the Government has remained opposed to participating in a "peacekeeping" force, it might consider participating in some other kind of operation. It was also disclosed by Mr Hayden that he intended in future to "give firm and unequivocal instructions in relation to votes." For reasons already indicated, it will be easier to give this assurance than to carry it out in practice. Supporters of an "independent" Australian foreign policy will, however, welcome his intention "to change the procedure which was established when the Leader of the Opposition (Mr Peacock) was Minister for Foreign Affairs, when the

tendency was to follow substantial blocks of votes amongst the Western European nations and other groups of countries."

It is a pity that Australia's leading politicians have chosen to indulge in petty politics rather than to discuss seriously the problem which the Grenada crisis discloses. In retrospect, it was probably a mistake for the Government to indicate in its statement of 31 October that it did not contemplate Australian participation in a Commonwealth peacekeeping force. This paragraph may have been inserted for two reasons; first to reassure the Government's own anti-American left wing; and secondly because of a belief that, to indicate support for a peacekeeping force would in some way be to condone or even to justify the American action. If so, such a belief was clearly mistaken because, when the United Nations decided to send a peacekeeping force to Suez in 1956, it could not be seriously argued that the sending of the force in any way detracted from international criticism of the Anglo-French-Israeli action. It has been proved on many occasions that peacekeeping forces can help to ease tension, and it is vital to maintain the principle that the sending of such forces is entirely without prejudice to the legal aspects of the crisis which has brought about the tension.

For its part, the Opposition seems to have concentrated on the Government's peremptory, and possibly premature, decision not to contemplate participating in a Commonwealth peacekeeping force to the exclusion of other factors in the Grenada crisis, and to have regarded that decision as indicative of disloyalty to, and even contempt for, the Commonwealth, an institution which the Opposition leaders, when themselves in government, had done much to promote. Unfortunately, neither party put forward worthwhile views on the question of "rescue missions" or of acts of collective self-defence conducted on a regional basis, which go to the heart of the Grenada crisis.

Section D - The Law (Commonwealth)

The Grenada crisis raises issues of Commonwealth law, such as it is, as well as of international law. In view of the developments on 11 November 1975, when the Governor-General of Australia dismissed the Prime Minister, it is possible that Australian opinion will be more concerned with the Commonwealth constitutional issues than with the issues of international law, important as the latter are.

On the question of Commonwealth law, it is important to make one matter clear at the outset, as it is liable to be misunderstood. The fact that the Queen, who is ex officio Head of the Commonwealth, and who normally resides in the United Kingdom, is therefore normally more easily in touch with the Prime Minister of the United Kingdom than with other Commonwealth Prime Ministers, in no way alters the constitutional position that, in an affair such as the Grenada crisis, the United Kingdom neither possesses any responsibility nor enjoys any right other than those possessed or enjoyed by other Commonwealth countries.

In the case of the Grenada affair, it is unfortunately still not clear precisely what role the Governor-General, Sir Paul Scoon, G C M.G., O.B.E., who is himself a Grenadian and who was appointed as Governor-General in 1978, played. Certain it is that he welcomed the intervention after it had occurred. Speaking on Grenada radio on 28 October, he referred to "the tragic and un-Grenadian events which led to the death of Prime Minister Maurice Bishop and three of his Cabinet colleagues." These events, he continued, "so horrified not only Grenadians but the entire Caribbean, the Commonwealth and beyond, that certain Caribbean States with the support of the United States of America decided to come to our aid in the restoration of peace and order." He then said that "of course intervention by foreign troops is the last thing one would want for one's country," but in the circumstances he wished "to thank the countries involved for coming to our assistance so readily." He referred to "the incredible amount of foreign sophisticated weapons" which the People's Revolutionary Army (PRA) had in its possession, but now that they had been defeated he called upon the PRA and other militiamen to lay down their arms. Finally he

announced his intention of setting up an interim administration pending "an early return to full constitutional government by way of general elections," but warned the population for their own protection to stay in their homes between 8 p.m. and 5 a.m. Nowhere in this address did he say that he had actually invited the foreign forces to intervene. However, he is reported as having said on BBC television on 1 November that he had invited the smaller Caribbean nations, and then the United States, to "help from outside." Asked why he had asked the United States rather than Britain to intervene, he is reported as having said: "Well, I thought the Americans could do it much faster and more decisively."[8)]

Obviously the question whether the Governor-General did ask the United States and certain Caribbean countries to "help from outside," and whether, if he did, he had legal authority under Grenadian and Commonwealth law so to do, has some bearing upon the position under international law. For present purposes, it is assumed that he did ask for "help from outside," and this article will now briefly discuss the question whether he had legal authority to do so.[9)]

Sir Paul Scoon's role in the crisis was discussed in an article in The Times (29 October 1983, p. 22). The article was prepared by the "foreign staff" of that newspaper, but appears to rely heavily on an opinion rendered by Professor L.H. Leigh, who is described as "a specialist in Commonwealth constitutional law at the London School of Economics." The article says that "the notion that the Governor-General of Grenada could request foreign troops to intervene in its affairs is a novel one, but may not be unfounded." The argument is of course that the Governor-General might have such a right "to restore law and order in a situation of complete governmental breakdown, and perhaps, one of unlawful usurpation of power." Normally, a Governor-General would be "obliged to act on the advice of responsible ministers, and thus could not request intervention save with their advice," but in the case of Grenada "it could well be argued that the basic conditions of parliamentary government no longer existed and that the Governor-General could thus wield residual powers " This interpretation of the law seems unexceptionable, but the factual

situation is less clear. It seems for instance to be uncertain whether there was in Grenada such a total breakdown of law and order as to warrant such use of residual power by the Governor-General. Also, if this view of the Governor-General's residual powers is correct, why did Sir Paul Scoon not call for "help from outside" when Bishop overthrew Gairy in 1979? Also it is not clear whether the American medical students really were in danger, although as indicated above, President Reagan might have good reasons for thinking that they were.

Be that as it may, the State Department's legal advisers had evidently done their homework on Commonwealth constitutional law. In a statement issued on 15 November, the Department declared that Sir Paul Scoon had appealed for OECS assistance and that his appeal had been notified to the United States by the Prime Minister of Barbados. The statement does not say that Sir Paul appealed directly to the United States, but rather that he had appealed to OECS; and that "in taking this lawful collective action, the OECS countries were entitled to call upon friendly States for appropriate assistance, and the United States, Jamaica and Barbados were entitled to respond to that request."

Modestly disclaiming any capacity to be "expert on Grenadian or British Commonwealth constitutional law," the Department's statement said: "It is our understanding that in many Commonwealth nations, the Governor-General not only embodies the executive authority of the State, but, in practical terms, retains a necessary residuum of discretionary power." There then followed a detailed analysis of the constitution of Grenada which, in the Department's view, was "consistent with this general principle "

To sum up. It seems that Sir Paul Scoon had authority in extreme circumstances to call for "help from outside." As the facts are uncertain, it is not proposed to examine any further the question whether such circumstances existed in Grenada in October 1983 Instead the international legal aspects of the crisis will next be considered.

Section E - The Law (International)

In this Section it is proposed, first, to consider in general the relevant rules of international law concerning the use of force by States; and secondly to apply those rules to the particular facts, to the extent that it has been possible to elucidate them, of the Grenada case. As regards the facts, the following separate scenarios may be envisaged: (a) the Governor-General of Grenada had legal authority to request "help from outside" and did so request; (b) the Governor-General had no legal authority to request "help from outside" but nevertheless did so request; and (c) whether or not the Governor-General had legal authority to request "help from outside," he made no such request or, if he did, it was not a genuine request but one he was prompted "from outside" to make. So as to prevent this article from becoming unavoidably long, it will proceed on the basis of scenario (a). As for scenario (c) it is not suggested that that scenario applies in the present case. But it is a possible scenario because cases are not unknown in which intervening powers have justified their intervention on the basis of requests for "assistance" which they themselves engineered

The relevant rules of international law are contained in Articles 2(4)[10], 39[11] and 51[12] of the Charter of the United Nations. Needless to say they have been discussed ad nauseam in the literature that has developed since 1945. Unfortunately they have not been well observed in practice, and the superpowers, or smaller powers acting under the protection, or with the support, of the superpowers, have been able to use armed force to safeguard their interests without much restraint. Apart from the Corfu Channel (Merits)[13] case in 1949, little judicial light has been thrown upon the problem.

Generally speaking, the early literature tended to interpret Articles 2(4) and 51 strictly[14]. It was soon realised, however, that because of the veto enjoyed by the permanent members of the Security Council, those permanent members, or other countries enjoying their protection, would be able in practice to make extensive use of the right of self-defence, whether individual or collective, referred to in Article 51. As for Article 39, this

does little to help clarify the law relating to the use of force, because it was obvious - and has proved to be the case - that the Security Council would take its decisions on purely political grounds, without seriously investigating whether or not one or other country had violated the rules of law. Opinions differ as to whether the Security Council, as a political organ, is entitled so to act.[15)]

In the Corfu Channel case, the International Court of Justice, which in contrast to the Security Council is a "judicial organ," had an opportunity to apply the law. The Royal Navy had entered Albanian territorial waters where three weeks previously two British destroyers had been seriously damaged by mines. The Court found Albania responsible under international law for the explosions which had caused the damage. Even so the Court went on to hold that the subsequent entry of British warships into Albanian waters constituted a violation of Albanian sovereignty. The excuse that the purpose of the subsequent entry was to secure the corpora delicti, with a view to bringing proceedings before an international tribunal, was not accepted. Rather the Court regarded "the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law."[16)]

The "defects in international organization," to which the Court referred, are more manifest to-day than they were in 1949, and responsible literature concerning the use of force by States has taken this into account. Writing in 1970[17)], Professor Thomas M Franck of New York University, argued that Article 2(4) of the Charter had been undermined by a number of factors, including lack of unanimity among the permanent members of the Security Council and changes in the nature of warfare. Article 2(4), he thought, had been predicated upon the assumption that wars took the form of "organized incursions of large military formations of one State onto the territory of another, incursions usually preceded by mobilization and massing of troops and underscored by formal declarations of war." By contrast, the situations with which present-day international law

has mainly to deal are either "rural and urban hit-and-run operations by small bands of fighters, sometimes not in uniform and often lightly armed"[18] but assisted from outside the territory of the victim State, or the threat of nuclear war rendering it unlikely that any State which feels threatened will await patiently the "armed attack" envisaged in Article 51 before striking back. On top of this the central authority of the United Nations has been undermined by the growth of regional organizations which claim the right to control the exercise of force in their particular regions. Professor Franck's conclusion was that Article 2(4) had been "killed" - a strong word - by "the wide disparity between the norms it sought to establish and the practical goals the nations are pursuing in defence of their national interest." He added the following sober thought: "So long as there are nations - which is likely to be for a very long time - their pursuit of the national interest will continue; and where that interest habitually runs counter to a stated international legal norm, it is the latter which will bend and break."[19] Professor Franck's reference to the undermining of the central authority of the United Nations by the growth of regional organizations is particularly relevant in the present case.

As examples of pursuit of national interest, if necessary outside the framework of legal norms, Professor Franck cited the Brezhnev Doctrine, which had been used to justify the invasion of Czechoslovakia in 1968 by Soviet and other Warsaw Pact forces According to this Doctrine, other members of the Socialist "family" or "commonwealth" have the right, indeed the duty, to use force to prevent any member of the "family" or "commonwealth" changing its social system. Professor Franck also referred to the Johnson Doctrine, as formulated by the then President of the United States on 2 May 1965 when, in justification of American intervention in the Dominican Republic, he said: "American nations cannot, must not, and will not permit the establishment of another Communist government in the Western Hemisphere."[20]

It has become customary for recent American presidents to formulate "doctrines" of this kind; e.g. Truman (Greece and Turkey); Eisenhower and Carter (Middle East), Nixon (Asia and Pacific). It remains to be seen whether President Reagan will formulate a "doctrine" with which his name will for every be associated. In his speech of 27 October he came near to doing so. Referring to the need to keep American forces in Lebanon, he said: "Can the United States or the free world, for that matter, stand by and see the Middle East incorporated into the Soviet bloc?" He continued: "The events in Lebanon and Grenada, though oceans apart, are closely related. Not only has Moscow assisted and encouraged the violence in both countries, but it provides direct support through a network of surrogates and terrorists." As for Grenada, it was not the tourist paradise that some advertisements said it was; rather it was "a Soviet-Cuban colony, being readied as a major military bastion to export terror and undermine democracy."

All these American presidential doctrines take their cue from the famous doctrine pronounced by President James Monroe in his message to Congress on 2 December 1823. This included five principles, namely (i) the American Continents were "not to be considered as subjects for future colonization by any European powers"; (ii) the United States would consider any attempt on the part of European powers "to extend their system to any portion of this hemisphere, as dangerous to our peace and safety"; (iii) "with the existing colonies or dependencies of any European power we have not interfered and shall not interfere"; (iv) in relation to any governments on the American continents which had declared their independence, "we could not view any interposition for the purpose of oppressing them, or controlling in any other manner their destiny, by any European power, in any other light than as the manifestation of an unfriendly disposition towards the United States"; and (v) "our policy in regard to Europe...remains the same, which is, not to interfere in the internal concerns of any of its powers."[21)]

Returning to President Reagan's speech of 27 October, it seems clear that he has generalised the Monroe Doctrine to the extent of holding that, if American national interests are threatened anywhere in the world, the United States considers itself entitled to use

force to protect those interests, and that, insofar as that is so, there is, as the leader writer of the Sydney Morning Herald perceived, little to choose between the Reagan Doctrine and the Brezhnev Doctrine:[22] Also President Reagan's use of the term "Soviet-Cuban colony" in relation to Grenada may have been deliberately chosen as an indication that the Grenada crisis was considered to come within the terms of the Monroe Doctrine, even though that Doctrine was not expressly invoked.

Two aspects of the Monroe Doctrine need to be considered here: first, is the Doctrine a rule of law or purely an expression of American policy?: secondly, is the Doctrine purely an expression of United States policy or is it in some sense a "pan-American" doctrine, shared by all the countries of the Western hemisphere?

Some writers[23] have expressed the view that the Monroe Doctrine constitutes a rule of "'American' international law," and some support for that view can be found in Article 21 of the Covenant of the League of Nations, which referred to the Monroe Doctrine as a "regional understanding." However, a whole succession of American Presidents and Secretaries of State have asserted that the Monroe Doctrine is a declaration of policy rather than part of international law. The position was never more clearly stated than by Mr Elihu Root when, addressing the American Society of International Law on 22 April 1914 he said: "The doctrine is not international law but it rests upon the right of self-protection and that right is recognized by international law." He continued by saying that the principle underlying the Monroe Doctrine was "the right of every sovereign State to protect itself by preventing a condition of affairs in which it will be too late to protect itself." He added: "Since the Monroe Doctrine is a declaration based upon this nation's right to self-protection, it cannot be transmuted into a joint or common declaration by American States or any number of them "

Notwithstanding Root's words, which it is believed accurately represent the underlying political reality of the Monroe Doctrine, the United States has been at pains, whenever

it has been necessary to employ force in the Western hemisphere since 1945, to "regionalise" the Doctrine in the sense of maintaining that the force has been used not purely for unilateral motives but as part of an action in "collective self-defence." Considerable reliance has been placed upon the Inter-American Treaty of Reciprocal Assistance, concluded at Rio de Janeiro on 2 September 1947[24] and on the Charter of the Organization of American States (OAS), concluded at Bogota on 30 April, 1948.[25] In the Cuban missile crisis of 1962 the State Department went out of its way to insist upon the collective nature of the American response.[26] This course was not available in the recent Grenada crisis, as Grenada was not a party to those instruments. However, the State Department did its best to insist that the American action was consistent with the OAS Charter. It was maintained that "the appeal of the Governor-General of Grenada for OECS assistance provided a legitimate basis for immediate collective action under the framework of the regional treaty"; that "the OECS treaty functions as the regional security arrangement of the OECS countries, none of which is a party to the Rio treaty"; and that "both the OAS Charter, in Articles 22 and 28, and the UN Charter, Article 52, recognize the competence of regional security bodies in ensuring regional peace and stability." In particular, it was asserted that "Article 22 of the OAS Charter...makes clear that action pursuant to a special security threat does not constitute intervention or use of force otherwise prohibited by Articles 18 or 20 of that Charter."

Space does not permit an examination here of these arguments which seem to the present writer to be absurdly weak. It might have been better frankly to say that the security of the United States was at stake and that the Monroe Doctrine was being invoked

The other justification put forward by the State Department for the American action was that of the "rescue mission," i.e the desire to evacuate the American medical students in Grenada before they could be seized as hostages by the People's Revolutionary Army Opinions may differ as to how great the risk was, but in view of what had happened in Teheran in 1979-81, and the failure of the international community to take any firm steps against Iran

in that crisis, the United States can hardly be blamed for assessing the danger as considerable From the legal point of view, such a situation involves discussion of the right of protection of nationals and the right of humanitarian intervention.

Since 1945 the view has tended to be taken that the right of protection of nationals does not justify a breach of Article 2(4) of the Charter and that this right, such as it is, does not come within the scope of "self-defence," as referred to in Article 51. In 1951, during the Anglo-Iranian crisis, there was a suggestion that it would be legitimate for the British Government to send troops to Abadan to protect and rescue its nationals stranded at the oil refinery there but not to protect the refinery as such. This suggestion, which has a dubious legal basis, was never put to the test. Insofar as it has any basis, the suggestion would seem more relevant to the right of humanitarian intervention, which is about to be discussed, than to the right of protection of nationals. It is important to stress this point because, if it be assumed that the employees in the Abadan oil refinery were in real danger of having their human rights violated, it would be a monstrous absurdity to suggest that a British "rescue mission," if one had been mounted, could have rescued British employees only and would have been obliged to leave employees of other nationalities to their fate.

It is submitted, that, in the light of "the present defects in international organization," this question of "rescue missions" should be reconsidered. It may also be noted that, when the United States made an abortive attempt on 24 April 1980 to rescue its hostages in Iran, the International Court of Justice contented itself with observing that "an operation undertaken in these circumstances, from whatever motive, is of a kind calculated to undermine respect for the judicial process in international relations," and did not allow this American action to prevent it holding that Iran had violated in several respects, and was still violating, obligations owed by it to the United States both under international conventions in force between the two countries and under long-established rules of general international law.[27] The

contrast with the stern language used by the Court in the Corfu Channel case in 1949 could hardly be more marked.

The so-called right of humanitarian intervention rests on a different basis from the right of protection of nationals, because it includes a claim to intervene "in the interests of humanity" as a whole and not merely to protect persons who happen to be nationals of the intervening State. This right greatly exercised the minds of nineteenth century writers. Many of them felt logically bound to oppose it because of their belief, as Hall put it, that "International law professes to be concerned only with the relations of States to each other. Tyrannical conduct of a government towards its subjects, massacres and brutalities in a civil war, or religious persecution are acts which have nothing to do directly or indirectly with such relations." Nevertheless interventions of this kind were not infrequent and were widely supported as proper, although the same writer commented that they had been justified "by the popular mind upon considerations of sentiment to the exclusion of law" and that "sentiment has been allowed to influence the more deliberately formed opinions of jurists "[28)]

Oppenheim, writing in 1905, expressed a more balanced view. He referred to frequent interventions to stop the persecution of Christians in Turkey, and continued: "But whether there is really a rule of the Law of Nations which justifies such interventions may well be doubted. Yet, on the other hand, it cannot be denied that public opinion and the attitude of the Powers are in favour of such interventions, and it may perhaps be said that in time the Law of Nations will recognise the rule that interventions in the interests of humanity are admissible provided they are exercised in the form of a collective intervention of the Powers."[29)]

As if to emphasis continuity in international law, Professor (later Sir Hersch) Lauterpacht, editing the eighth edition of Oppenheim's treatise, saw no reason to alter the basic approach to this question which his predecessor had expressed fifty years earlier. Lauterpacht said that "when a State renders itself guilty of cruelties against and persecution of its nationals in such a way as to deny their fundamental human rights and to shock the

conscience of mankind, intervention in the interest of humanity is legally permissible " He admitted that the right of humanitarian intervention had been abused, especially when employed by individual States, but he maintained that that objection "does not apply to collective intervention," and that "the Charter of the United Nations, in recognising the promotion of respect for fundamental human rights and freedoms as one of the principal objects of the Organization, marks a further step in the direction of elevating the principle of humanitarian intervention to a basic rule of organised international society."[30]

CONCLUSIONS

An attempt will now be made to formulate some conclusions:-

(i) It is quite obvious that any attempt to apply the terms of Articles 2(4) and 51 of the United Nations Charter with literal strictness is not viable and is doomed to failure. Several commentators realised this early on [31] Their warnings have more recently been brought up to date by Professor Franck.[32]

(ii) This being so, the attempt to apply a strict interpretation to Articles 2(4) and 51 for the purpose of maintaining that international law has effectively outlawed the use of force by its subjects, and is thus to be considered "law" in the same sense that municipal systems are considered "law," is fraudulent and should be abandoned. As Professor Franck has said, where national interest and international legal norm conflict, "it is the latter which will bend and break."[33] This is not to say, however, that international law should not be regarded as "law," but rather that it should be regarded as "law" in a different sense from advanced municipal systems.

(iii) One service which international law can perform, weak though it is from the point of view of prohibiting the use of force, and of enforcing such prohibitions as it can enjoin, is to introduce a certain element of predictability into the conduct of international relations. This being so, it behoves academic international lawyers to pay more attention, than they have tended to do in the post-1945 period, to the quasi-legal rules and practices which had been developed in the nineteenth century. One of the lessons of such study is, as Professor Schwarzenberger puts it, that "in form and substance, both super-Powers and world camps must treat each other on a footing of absolute equality and reciprocity."[34] Regrettable though it may seem, both Brezhnev and Reagan doctrines have to be accepted, if not as rules of law, as statements of national policy which cannot be ignored by international lawyers. Most pre-1945 treatises on international law devoted considerable attention to the

Monroe Doctrine, and if in 1945 the Charter of the United Nations itself could accept the proposition that, despite the provision of Article 2(1) that "the Organization is based on the principle of the sovereign equality of all its Members," some Members (i.e. the permanent members of the Security Council through their enjoyment of the "veto" power) were "more equal" than others, it is only realistic to accept now that, as a result of technological and other developments since 1945, "the overriding characteristic of present-day international society is the bipolarisation of the world in two gigantic power blocs or world camps."[35] This has given rise to policies of "hegemonial intervention" on the part of the leaders of the respective camps Moreover, although the hegemonial powers may sometimes agree to consult their camp followers on the application of such policies, the hegemonial powers will in the last resort "demand the decisive voice."[36]

(iv) If, in matters of "hegemonial intervention," political considerations are likely to count for more than legal considerations, nevertheless there remains room for clarifying the law in regard to cases of humanitarian intervention, or "rescue missions" as these have come to be called. Technically these cases are almost bound to involve a violation of "the territorial integrity or political independence" of the States which have to submit to such "missions." Nevertheless, such missions will not necessarily involve a violation of Article 2(4) of the Charter provided they are conducted in a manner that is not "inconsistent with the Purposes of the United Nations." This requires a delicate balancing of interests and, in the closing stages of this article, it is submitted that that is an area which requires to be further studied by international lawyers. But, in general, it seems not unreasonable to suggest that provided such rescue missions

(a) involve minimal and temporary interference with territorial integrity and political independence; (b) are conducted for the purpose of preventing violations of human rights; and (c) are not abused for the purpose of pursuing purely national interests, they should "find a place in international law," at any rate so long as "the present defects in international organization" referred to in the Corfu Channel case persist.

FOOTNOTES

1) Treaty establishing the Organization of Eastern Caribbean States, done at Basseterre, St. Kitts/Nevis, 18 June 1981 (20 ILM 1166).

2) Sydney Morning Herald, 1 November 1983.

3) Because of the requirement of Article 27(3) of the U.N. Charter that decisions of the Security Council on non-procedural matters "shall be made by an affirmative vote of nine members including the concurring votes of the permanent members" (italics added). The United States is a permanent member.

4) G.A. Res. 377(V) adopted on 3 November 1950.

5) See, however, Section C where it is explained that the Australian delegation changed its original vote in support of the resolution to an abstention.

6) Sydney Morning Herald, 1 November 1983.

7) Ibid.

8) Sydney Morning Herald, 2 November 1983.

9) For reasons of space this article will not discuss the question whether those Caribbean countries, which are fellow members with Grenada of the Organization of Eastern Caribbean States, had a right to intervene. It seems unlikely that they would have been able or willing to do so without assistance from the United States. Nor will this article discuss the question whether those Caribbean countries, which are not members of OECS, had a right to intervene.

10) "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

11) "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security."

12) "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security."

13) I.C.J. Reports 1949, p. 4.

14) The leading monographs are: D.W. Bowett, Self-Defence in International Law (Manchester University Press, 1958), and I. Brownlie, International Law and the Use of Force by States (Oxford University Press, 1963). Drs Bowett and Brownlie are now Professors of International Law in Cambridge and Oxford respectively. See also H. Kelsen, The Law of the United Nations (Stevens, 1951); G. Schwarzenberger, Power Politics (4th ed. Stevens, 1964) and "Hegemonial Intervention," an especially relevant article in 12 Year Book of World Affairs, 236-265 (1959); and J. Stone, Legal Controls of International Conflict (Stevens, 1954) and Aggression and World Order (Stevens, 1958).

15) In the Advisory Opinion concerning Conditions of Admission of a State to Membership in the United Nations (I.C J. Reports 1948, p. 57), the majority of the Court held (at p. 64) that "The political character of an organ cannot release it from the observance of the treaty provisions established by the Charter when they constitute limitations on its powers or criteria for its judgment." But an exceptionally strong group of minority judges took a different view. They held (at p. 85) that "The main functior of a political organ is to examine questions in their political aspect, which means examining them from every point of view. It follows that the Members of such an organ who are responsible for forming its decisions must consider questions from every aspect, and, in consequence, are legally entitled to base their arguments and their vote upon political considerations."

16) I.C.J. Reports 1949, pp. 34-35.

17) "Who Killed Article 2(4)"?, 64 A.J.I.L. 809. The alternative title of this article was "Changing Norms governing the Use of Force by States."

18) Op. cit., p. 812.

19) Op. cit., p. 837.

20) Op. cit., pp. 832, 835.

21) 5 Hackworth, Digest of International Law, section 518

22) P. 8, supra.

23) Particularly the leading Chilean jurist, Alejandro Alvarez, in 20 Revue Générale de Droit International Public 50 (1913). Alvarez also published a book entitled The Monroe Doctrine (1924). In this book he collected the opinions on the Doctrine of several leading authorities both from the United States and from Latin American countries.

24) 43 A.J.I.L. Suppl. 53 (1949).

25) 46 A.J.I.L. Suppl. 47 (1952).

26) See, in particular, Leonard C Meeker, Deputy Legal Adviser, Department of State, in 57 A J I L 515 (1973)

27) Case Concerning United States Diplomatic and Consular Staff in Teheran (I.C J Reports 1980, p. 3, 43).

28) W.E. Hall, International Law (1st ed. Oxford University Press, 1880, pp. 245-246).

29) L. Oppenheim, International Law (Vol. I, 1st ed., Longmans Green and Co., 1905, pp. 186-187). Italics in the original.

30) L. Oppenheim. International Law (Vol. I, 8th ed. by Lauterpacht. Longman, Green and Co., 1955, pp. 312-313)

31) e.g. Schwarzenberger, with his repeated early references to the post-1945 situation as being one of "power politics in disguise," and confirmed by his later statement that "basic relations between the world camps, governed in the last resort by the rule of force in the shape of the balance of thermo-nuclear terror, differ in form rather than substance from those under traditional international law." This is an extract from The Misery and Grandeur of International Law, an Inaugural Lecture delivered at University College London on 24 October 1963 (United Nations Day) and published for the College by Stevens and Sons, 1963, pp. 3-27, at 26. This Lecture, which is also published in 17 Current Legal Problems, 184-210 (1964), is cited below as Inaugural Lecture.

32) P. 16, supra.

33) P. 17, supra.

34) Inaugural Lecture, p. 26 or 17 Current Legal Problems 209 (1964).

35) G. Schwarzenberger, "Hegemonial Intervention," 12 Year Book of World Affairs, 236-265, at 244.

36) Ibid.

AERIAL INCIDENT - THE DESTRUCTION OF KAL FLIGHT 007

In September 1983, a Korean Air Lines plane penetrated Soviet airspace and was brought down by an armed Soviet plane with a loss of 269 lives, including some Australia citizens. (In the section below, "Australian Practice", we publish the text of the Australian letter of protest. In our "Publications" section, we also publish the contents page of (1983) 22 No.5 ILM which was received just as we went to press, and contains a large amount of material on this incident).

Other incidents involving the use of force against allegedly intruding civil aeroplanes include:

- an Air France plane was forced down by Soviet fighters in 1952 with six persons injured and no loss of life;

- a Cathay Pacific plane was shot down by Chinese fighters with several lives lost. The Chinese stated that they thought it was a Nationalist plane about to attack, they apologized and stated they were willing to pay compensation;

- an El Al plane was shot down by Bulgarian fighters in 1955 with a loss of all fifty eight persons on board. This was the subject of an unsuccessful application to the International Court of Justice in 1955 (Aerial Incident of July, 1955, Israel v. Bulgaria; U.S. v. Bulgaria, U.K. v. Bulgaria, I.C.J. Pleadings). The Bulgarians subsequently admitted fault, offering to pay compensation and promising to take all measures to prevent any repetition;

- a Libyan Airlines plane was brought down by Israeli fighters over occupied Sinai in 1973 with a loss of 108 lives. This was the subject of a formal condemnation by the ICAO, the International Civil Aviation Organisation on 5 March 1973. There was a dispute as to whether Israel had warned the plane;

- a Korean Air Lines plane was fired on and forced to land in 1978 by Soviet fighters after deeply penetrating the USSR. Two passengers were killed and eleven injured. It was intercepted in a high secruity zone. The USSR claimed that the crew had failed to abide by international rules of flight, and had refused to obey the demands of the Soviet fighters. Korea did not protest, but thanked the USSR for speedily releasing the passengers: see W.J. Hughes, Aerial Intrusions by Civil Airliners and the Use of Force, 45 Journal of Air Law and Commerce 595 (1980).

The resolution, the pleadings before the I.C.J. and diplomatic correspondence show two principles generally accepted by all the affected states, including the attacking states the USSR, China, Bulgaria and Israel:

1. A state has sovereignty over the airspace over its territory, including its territorial sea.

2. Such a state does not have an unqualified right to use force against an intruding civil plane. However the state would be entitled to take action against a military plane. (Note the U.S. position when the USSR shot down the U-2 high altitude reconnaissance plane on 1 May 1962 - see Lissitzyn, Some Legal Implications of the U-2 and RB-47 Incidents, 56 AJIL 135 (1962)).

The reasons why a state does not have an unqualified right to shoot down an intruding civil airliner are based on "elementary considerations of humanity even more exacting in peace than in war". These considerations enter international law as general and well recognized principles, and were most notably relied upon by the International Court of Justice in the Corfu Channel

Case in 1949. In that decision, Albania was held to have had a duty to warn vessels of the presence of a mine field in the Corfu Channel. Her failure to do so led to her being found liable to the U.K. when two British vessels struck mines, with consequent loss of life.

Beyond that general statement there is a variation in practice. The UK argued that there is no justification in ever shooting down a civil airliner identifiable as such on a scheduled flight. She says that rules of international law in respect of intrusions are exclusively declared in the Paris Convention of 1919 and the Chicago Convention of 1944. The Chicago Convention applies only to civil, not "state" (i.e. military) aircraft. Article 9 permits a state to establish prohibited areas, and authorises that state to require any aircraft entering such an area "... to effect a landing as soon as practicable thereafter at some designated airport within its territory". She points out that the use of force is limited to cases of self defence under Article 51 of the U.N. Charter. The USSR is incidentally a party to the Chicago Convention, and of course a party to the U.N. Charter. It could be argued that the Chicago Convention declares customary international law applicable to all states. The U.K. position is particularly relevant because of her important role in air travel and air defence.

The U.S.A., at least in the past, has admitted there may be a right to use force against intruding civil aircraft where the intrusion raises security questions, and where there is refusal of an offer of a "safe alternative", for example, by radio on an international radio frequency used by planes in flight. A "safe alternative" would mean landing where indicated. The force used must be reasonably proportional to the security damages to the state. This paradoxically would appear to be close to the position adopted by Israel, Bulgaria, and most importantly, the Soviet Union. Although the ICAO condemned Israel in 1973, it did not adopt the British position - it found there was "... no justification for the shooting down of the Libyan civil aircraft". Therefore, it seems to indicate, at least implicitly, that there would be cases where there might be justification for such an act.

It seems that the KAL plane in the latest incident was shot down over Soviet airspace and that it had penetrated a high security area. The questions which have to be answered are whether the Soviet Union was justified on security grounds in seeking to verify by inspection that the plane was performing no military function and whether a "safe alternative" was made available by a properly communicated warning. It is on the answer to these questions that the culpubility or not, in law, of the USSR hangs.

Of course there are other questions. For example, if a warning were given, why did the KAL pilot, after the previous experience ignore the warning to land? Why did he risk the life of his passengers? If a warning justified on security grounds were given, and he ignored it, then presumably the airline would have some legal responsibility towards the estates of the passengers.

The question also arises whether the USSR may have mistaken the KAL plane for a US reconnaissance plane. Presumably in a case such as this, the USSR would only be liable if intent to injure were present, although such intent would be presumed from the fact that Soviet arms brought down the plane. Let us recall that from the U2 incident, it seems agreed that an intruding military plane may be brought down without warning. As a defence, the USSR might argue, and try to bring forward facts to show there was a genuine mistake reasonably made, and that the USSR had not been in our terms "recklessly indifferent" to the potential loss of human life. The question whether mistake is available is not absolutely clear; for example, there is strict liability when a warship mistakenly boards and inspects a ship suspected of an offence on the high seas. The British, in their pleadings to the International Court in 1955 submitted that there could be no justification for the destruction of a "foreign civil aircraft, clearly identifiable as such" in these circumstances. This seems to suggest that mistake might be a defence where the plane was not clearly

identifiable as civil. If a mistake is made, compensation must be paid.

At a press conference in September in Moscow, where Marshal of the Soviet Union Nicolai Orgakov officially explained the Soviet position, it was said that the KAL flight co-incided with a U.S. reconnaissance flight to the extent that the two images merged for some minutes on the radar monitor. This however, does not seem to constitute a plea of mistake, but rather justification on the grounds of some connection between U.S. reconnaissance and the KAL flight. Subsequent unofficial statements suggest the Soviet authorities may have in fact mistaken the identity of the plane; however this has not been put officially.

On the basis of Marshall Orgakov's account, the question of U.S. liability should be examined.

First, surely she would have to be shown to have been engaged in an illegal act. That is, that the U.S. reconnaissance plane had violated Soviet airspace. If she were over Soviet airspace because of a SALT 2 "arrangement" or "understanding", this would not be an illegal act, even though SALT 2 is not a formally ratified treaty. Further, there would have to be the necessary causal connection between any illegal act by the U.S. and the loss of life. It is difficult to legally trace liability here. If a person, as a spy for country X were to illegaly enter a base in my country, would X be liable for the death of a trespasser whom the police shot thinking the trespasser was X's spy? It would be unlikely, at least in the common law system, to find X liable for the death of the trespasser.

The incident can only be brought before an international tribunal with the consent of the Soviet Union. The USSR, and her allies have not exercised the facility under the so called "optional clause" to accept in advance the jurisdiction of the International Court of Justice. Among the great powers the U.S. has only indicated a very narrow acceptance of that jurisdiction, and France has revoked her's after failing to appear when Australia and New Zealand challenged the nuclear testing in Tahiti.

The ICAO is however conducting an inquiry, and its report should be available shortly. At the World Peace Through Law Conference in Cairo in September, New York attorney Paul S. Edelman suggested a back door approach to the International Court of Justice: an advisory opinion could be sought by ICAO under Article 96 of the U.N. charter.

On the question of civil litigation, actions have been commenced in the U.S. against KAL and the USSR. It is difficult to see how the action against the USSR could come within any of the exceptions to sovereign immunity provided in the Foreign Sovereign Immunities Act, 1976, 28 USC 1602 et seq: note especially section 1605(2) and (5)A; see Persinger v. Iran, Casenote section below. In relation to the actions against KAL, the dispute centres around the limit of liability to US$75,000 under the Montreal Agreement, made in the context of the Warsaw Convention. Recent decisions question the applicability of these limits to liability (see Franklin Mint v. Trans World Airlines: 52F F.Supp.1288 (S.D.N.Y.1981), affd.690 F.2d 303 (2d.Cir.1982), cert granted (see Casenote section for note, and conflicting decision); In re Air Crash at Kimpo International Airport Korea on November 18, 1980: 558 F.Supp.72 (D.C.Cal.1983). Under the Convention, the US$70,000 limit is not available in the event of "wilful misconduct": American Airlines v. Ulen 186 F.2d 529 (1949). "Ticket delivery" defences are available under Article 3 - for example in relation to undersized tickets. A jurisdictional defence is also available under Article 28. These provisions would not apply to actions against the manufacturers or air traffic controllers. Of interest to foreign plaintiffs in a class action in the U.S. with U.S. plaintiffs is whether the court might refuse jurisdiction as regards the foreign plaintiffs under the forum non conveniens principle. The following comment on the rights of claimants in the U.S. has been prepared by Paus S. Edelman a leading New York attorney in the field of aviation and maritime accidents.

D.F.

RIGHTS OF CLAIMANTS ON THE KAL-007 FLIGHT

Paul S. Edelman, Kreindler and Kreindler, New York.

1. Rights Against the Airline

The U.S.A. is a signatory to the Warsaw Convention of 1929, which limits recoveries to 125,000 Poincare (gold) French francs, originally about US$8,300, later raised to US$10,000. The Warsaw Convention creates a presumption of liability, unless the air carrier proves it took all necessary measures to avoid an accident. Wilful misconduct will deny any limitation of damages, and there is a two (2) year period within which suit must be brought. The limitation of liability is unenforceable unless the ticket notice is printed in at least 10 point: In re Air Crash at Warsaw, Poland 705 F.2d 85 (2nd circuit, 1983 cert. denied US Supreme Court 1983). The ticket stock used by KAL is in smaller type than this, and presumably the limitation of liability may not be enforcable at least in the second circuit comprising New York, Connecticut and Vernon. "International travel" is defined as travel between two countries which signed the Treaty. Suit can be brought at the place of domicile, or principal place of business of the carrier, where the contract was made, or in the country of destination (Article 28).

Korea is not a signatory to the Warsaw Convention, but apparently signed the Hague Protocol of 1955. The Hague Protocol doubled the limitation amount and redefined wilful misconduct as an act of omission "done with intent to cause damage or recklessly and with knowledge that damage would probably result". Article 18 of the Protocol makes it applicable to voyages between signatories of the Protocol. U.S. courts have refused to apply the Hague Protocol, since the U.S. is not a signatory, and is not applicable to suits in U.S. courts. The Montreal Agreement of 1966 is an agreement by airlines serving the U.S., to raise limits of liability to $75,000 where there is a stopping place in the U.S. The defense of due care was waived.

Warsaw plus Montreal applies on a New York-Korea-New York ticket. Hague plus Montreal applies on a Korea-New York-Korea ticket. Probably only Montreal applies to a one way ticket from New York to Korea. Some tickets were to Taiwan and Thailand which are neither parties to Warsaw nor Hague. Hence on the Proof of negligence, liability would be unlimited. The Montreal Agreement may not apply to the latter. However, at the present time, the federal courts in the New York area have refused to apply any limitation, since the gold requirement of Warsaw is now so vague: Franklin Mint Corp. v. T.W.A., 690 F.2d 303 (1982). The case is now before the U.S. Supreme Court for a final determination. In accord with the Franklin Mint case is a federal district court decision in California: In Re Air Crash at Kimpo Int'l. Airport, Korea, 558 F.Supp.72 (D.C.Cal.1983). Thus, for suits brought in New York, there is, at present, no limitation on a recovery.

II. Suits Against Manufacturers

Assuming that the deaths occurred over the high seas, or on impact on the high seas, and not over the Soviet Union, a U.S. statute applies, the Death on the High Seas Act. Section 1 of the Act provides for recoveries by survivors of their pecuniary losses, inlcuding loss of support, loss of services by decedent, and the loss to a decedent's children of nurture and guidance. Conscious pain and suffering prior to death is recoverable; Mobil Oil v. Higginbotham, 436 U.S.618 (1978). Section 4 of the Act allows additional recoveries under any applicable foreign law. Korean law could apply as the law of the flag. Damages under s1 and s4 have been held cumulative where s4 provides for mental anguish or grief of survivors or other damages not allowed under s1: Noel v. Linea Aeropostal Venezolana, 260 F.Supp.1002, 1003-1004 (S.D.N.Y.1966).

An unusual case, involving the death of Indian nationals in an Air India crash, where suit was brought against the manufacturers, held that Indian liability law would be applied. Rights were allowed under s4. In Re Air Crash Near

Bombay, India, 531 F.Supp.1175 (W.D.Wash.1982). Suit was allowed in the United States, and was recently tried before a judge only. Most federal courts would not allow a jury trial under the Death On the High Seas Act, but the New York state courts do allow a jury trial! Ledet v. United Aircraft Corp., 10 N.Y.2d 258, 219 N.Y.S.2d 245 (1961).

Under American products law, there is strict liability, which is usually applied under the Death on the High Seas Act: Renner v. Rockwell Int'l. Corp. 403 F.Supp.849 (D.C.Cal.1975), vacated and remanded on other grounds, 587 F.2d 1030 (9th Cir.1978), Lindsay v. McDonnell Douglas Aircraft Corp., 460 F.2d 63 (8th Cir.1972).

111. If the case comes under the Death on the High Seas Act, damages are calculated according to the decision on June 15, 1983 of the U.S. Supreme Court in Jones & Laughlin Steel Corp. v. Pfeifer, 76 L.Ed.2d 768, a maritime case.

The basic wage rate is to be figured, plus fringe benefits, such as employer-provided insurance, pensions and retirement monies, non-monetary employer services, profit-sharing, etc. Future wage increases, based on non-inflation increases, are to be figured, such as promotions, merit raises, seniority raises, raises due to increased productivity and merit. Income taxes are deducted. A discount rate is to be fixed, based on an expert's calculation, which can be zero if the trier of fact believes it to be so, based on future expectations as to inflation. Generally speaking, a discount rate of one to three percent is acceptable, as this is the "real rate of interest", absent an inflation factor, which determines the market rate of interest.

American law, thus, has one big advantage over Korean damage law, in that under the Hoffmann formula used in Korea and Japan, there is apparently a five percent discount rate. Also, wage increases are apparently only allowed for the three years projected after the death.

There is much greater flexibility in figuring awards under U.S. law.

INTERNATIONAL BANKING CENTRES - AUSTRALIA AND THE U.S. EXPERIENCE

The floating of the dollar and the substantial relaxation of exchange control were decisions of considerable courage.

We should of course remember that what has happened is really a suspension, not an abolition, of exchange control. The law - the Act and the Regulations - will remain in the government's armoury. Indeed, even Sir Keith Campbell saw the need to keep the Variable Deposit Requirement, the VDR, in the governments' armoury during the dismantling of foreign exchange control. He, of course, envisaged a longer transition for dismantling than has in fact occurred.

The situation is the same in the U.K. Exchange control can easily be restored. That is why the doyen of international financial lawyers, Dr. F. Mann, in the fourth edition of his magisterial work, The Law of Money, sets out previous U.K. exchange control policy.

One of the results of the decision to float has been increased interest in the prospect of developing an international banking centre in Australia. The Premiers of New South Wales and Victoria have insisted on the importance of their capitals as such centres; other comment suggests that with modern communications, both these cities and others, such as Brisbane, would collectively constitute such a centre. The prospect of increased work in the financial field is of course of interest to the legal profession.

Notwithstanding the decision of 9 December, the development of an international banking centre in Australia will be inhibited by certain existing laws. Both state and federal legislation will be necessary to overcome these. These are, first, the effective prohibition of new foreign banks. This is presently under