PEACETIME RECONNAISSANCE FROM AIR SPACE AND OUTER SPACE: A STUDY OF DEFENSIVE RIGHTS IN CONTEMPORARY INTERNATIONAL LAW

by

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A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfilment of the requirements for the degree of Master of Laws.

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April 1965.

Short Title

PEACETIME AERIAL AND SPACE RECONNAISSANCE

- by -

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FOREWORD

The author is a Judge Advocate on duty with the Office of The Judge Advocate General, United States Air Force.

The views expressed herein are those of the author and do not necessarily represent or reflect the official views, opinion or policy of the Office of The Judge Advocate General, United States Air Force, the Department of the Air Force, the Department of Defense, or any other Department or Agency of the United States Government.

LIST OF ABBREVIATIONS

Aviation Week: Aviation Week & Space Technology.

Brierly: The Law of Nations (6th ed. Waldock 1963).

Brownlie: The Use of Force in Self-Defence, 37 Brit. Yb. Int'l L. 183-268 (1961).

Cuban Crisis: The Inter-American Security System And The Cuban Crisis (Hammarskjold Forum No. 3, Tondel ed. 1964).

Fifth Colloquium: Proceedings of the Fifth Colloquium on the Law of Outer Space (1963).

Fourth Colloquium: Proceedings of the Fourth Colloquium on the Law of Outer Space (1961).

Fusca: Space Surveillance, 41 Space/Aeronautics 92-103 (June 1964).

Hearings on H.R. 10939: Hearings on H.R. 10939 Before the Subcommittee on Department of Defense of the Senate Committee on Appropriations and the Senate Committee on Armed Services, 88th Cong., 2d Sess. pt. 1 (1964).

Lipson and Katzenbach: Report To The National Aeronautics And Space Administration On The Law of Outer Space (1961).

Lissitzyn: The Treatment of Aerial Intruders in Recent Practice and International Law, 47 Am. J. Int'l L. 559-589 (1953).

McDougal and Burke: The Public Order of the Oceans: A Contemporary International Law of the Sea (1962).

McDougal and Feliciano: Law and Minimum World Public Order: The Legal Regulation of International Coercion (1961).

McDougal, Lasswell, and Vlasic: Law and Public Order in Space (1963).

Proc. A.S.I.L. (all years): Proceedings of the American Society of International Law.

Situation In Cuba: Hearings Before the Senate Comm. on Foreign Relations And The Committee on Armed Services, Situation In Cuba, 87th Cong., 2d Sess. (1962).

Soviet Space Programs: Staff of Senate Comm. on Aeronautical and Space Sciences, 87th Cong., 2d Sess., Soviet Space Programs: Organization, Plans, Goals, and International Implications (Comm. Print 1962).

Space Digest: Air Force and Space Digest.

Space Documents: Senate Comm. on Aeronautical and Space Sciences, Documents On International Aspects Of The Exploration And Use of Outer Space, 1954-1962, S. Doc. No. 18, 88th Cong., 1st Sess. (1963).

Space Handbook: Select Comm. on Astronautics and Space Exploration, Space Handbook: Astronautics And Its Implications, H.R. Doc. No. 86, 86th Cong., 1st Sess. (1959).

Survey of Space Law: House Select Comm. on Astronautics and Space Sciences, Survey of Space Law, 85th Cong., 2d Sess. (Comm. Print 1958).

Thomas and Thomas: The Organization of American States (1963).

U.S. Space Policy: House Comm. on Science and Astronautics, U.S. Policy on the Control and Use of Outer Space, H.R. Rep. No. 353, 86th Cong., 1st Sess. (1959).

Univ. Okla. Space Conf.: Proceedings of the Conference on Space Science and Space Law, University of Oklahoma, June 18-20, 1963 (1964).

1961 Symposium: Senate Comm. on Aeronautical and Space Sciences, Legal Problems of Space Exploration: A Symposium, S. Doc. No. 26, 87th Cong., 1st Sess. (1961).

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INTRODUCTION

> The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, . . . have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become. We must alternately consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage. The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past.[1]

Such was the expression of Oliver Wendell Holmes, Jr., in 1881 concerning the philosophy of the Common Law. Its fundamental premise is equally valid today in all branches of the law, particularly international law. A recent living example thereof was the Cuban Crisis of 1962.

The Cuban Crisis of October 22-28, 1962, pitted against each other the two world giants who have weapons that can destroy each other and at the same time all of human society. The suspenseful events of that week brought the world to the brink of World War III. As the crisis receded upon agreement of the Soviet Union to remove the offensive missiles from Cuba and by the United States to refrain, under certain conditions, from invading Cuba, so did the memory of that week.

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1. Holmes, The Common Law 5 (Howe ed. 1963).

The Cuban Crisis presented an unprecedented situation in international law which in turn was skillfully handled by the application of an unprecedented, "new" limited coercive measure - the "quarantine-interdiction." The case of the Cuban quarantine has created, in the retrospect, a series of juridical problems for international lawyers with respect to a wide variety of opinions voiced principally by various scholars. One criticism is that the United States violated the territorial sovereignty of Cuba by surveillance flights over its national air space during the quarantine, and that it still persists in such international violations by continuing such overflights after the removal of the quarantine.

This study has two inter-related purposes. The specific purpose is to examine the aerial aspects of the Cuban quarantine and to assess the legal justification, if any, for the surveillance overflights of Cuba. As a predicate therefor and in the interest of ascertaining what the applicable law is, what it has been, and what it tends to become, it is necessary to examine the legal status of reconnaissance and the circumstances under which peacetime reconnaissance may be permissible from air space and outer space under contemporary rules of international law. This is the more general purpose. Accordingly, three variables are considered. First, the legal status of air space and outer space as flight media. Second, the legal status of civil aircraft, military aircraft, and spacecraft as flight instrumentalities. Finally, the legal status of peacetime military reconnaissance or surveillance as activities conducted from air space and outer space.

Toward the accomplishment of these ends, the following areas will be considered ad seriatim:

1. A survey of the legal regime of sovereignty in air space and the transit rights therein of civil aircraft, with particular emphasis on the evolution of the adjacent area concept and its consequential erosive effect on the so-called doctrine of the "freedom of the seas."

2. A survey of the nascent legal regime in outer space, including the legal status of outer space, the legal status of spacecraft, the boundary question between air space and outer space, peaceful v. military uses of outer space, and self-defense in outer space.

3. An examination of what is a military aircraft, the legal status of military aircraft within the legal regime of air space in time of peace, and the conditions under which military aircraft may properly overfly foreign territorial air space in time of peace.

4. An examination of the evolution of and need for military reconnaissance, its jural status, and the legality of peacetime reconnaissance from air space and outer space, including self-defense as a permissible measure against reconnaissance satellites.

5. An analysis of the factual background and legal basis for the Cuban quarantine in order to ascertain the law applicable to the case, to assay the legality of the new concept of the "quarantine-interdiction," and to assess the juridical impact, if any, of the quarantine as a measure of self-defense on the ever-present "erosion" of the so-called freedom of the seas.

6. An appraisal of the aerial surveillance of Cuba with the objective of determining whether circumstances may exist in time of "peace" justifying a State's penetration via its military aircraft of foreign territorial air space.

Finally, it is recognized that political considerations inextricably inter-related to the legal issues raised are of great pragmatic importance. However, in the preparation of this study, no consideration has been given to the political practicalities of the law. Political problems are for the statesmen;

the student should confine himself to the understanding and development of the philosophy underlying juridically viable concepts which can meet the challenge of and keep abreast with our rapidly changing times.

CHAPTER I

SOVEREIGNTY IN AIR SPACE

A. Territorial Sovereignty

"Sovereignty" is a term that has been much abused, misused, and misunderstood in international law with the result that it is now considered a controversial concept.[2] Without intending to enter this contentious arena,[3] national sovereignty, in its internal as distinguished from its external sense, may be said to connote the supreme, but not necessarily absolute, power of an independent State to perform governmental acts. Such power is inherent in the people of any State, or is vested in its rulers by constitutional or fundamental laws.

International law is primarily concerned with the rights and duties of independent States, which are possessed of full legal international personality. One of the essential elements of statehood is the occupation of a defined territory within which the State law operates. The geographical area in which a State is entitled to exercise its national sovereignty constitutes its territory. Herein lies the basis for the concept of territorial sovereignty, which signifies that within this territorial

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2. For a historical background of the various meanings attributed to "sovereignty," see 1 Oppenheim, International Law 120-123 (8th ed. Lauterpacht 1955); Brierly 7-16.

3. For an exhaustive study of the changing concept of sovereignty, see Korowicz, Introduction To International Law 23-217 (1959).

domain jurisdiction is exercised by the State over persons and property to the exclusion of other States, subject to limitations imposed by international law or by international agreement. In this sense, territorial sovereignty bears an obvious resemblance to the patrimonial notions of ownership under private laws, and in fact many of the Roman law principles of property have influenced the development of the international law dealing with the acquisition of territory.[4]

Territorial sovereignty was described by the distinguished jurist, Max Huber, arbitrator in The Island of Palmas (or Mingas) Arbitration, as follows:

> Sovereignty in the relation between States signifies independence. Independence in regard to a portion of the globe is the right to exercise therein, to the exclusion of any other State, the functions of a State. The development of the national organisation of States during the last few centuries and, as a corollary, the development of international law, have established this principle of the exclusive competence of the State in regard to its own territory in such a way as to make it the point of departure in settling most questions that concern international relations.[5]

In a legal sense, therefore, territorial sovereignty may be defined for our purposes as the exclusive, although not absolute, right or freedom recognized by international law of a State to control all persons and things within its territory to the exclusion of all other States. The territory of a State, geographically considered, is a three-dimensional region. It includes an area on the surface of the earth, a sector of the earth below,

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4. Starke, An Introduction To International Law 150 (5th ed. 1963).

5. 22 Am. J. Int'l L. 867, 875 (1928). See also The Schooner Exchange v. McFadden, 11 U.S. (7 Cranch) 136 (1812).

and a sector of the space above.[6] Our primary concern herein is the exclusive competence of States in air space.

B. Territorial Air Space

It is often said that the law of the air is a product of the twentieth century. Some legal scholars have traced the legal concept that a State has territorial rights above the surface of the earth to as far back as the classical Roman law.[7] However, the first international convention on air navigation did not materialize until 1919. In the sense of international law, air law is truly an infant and unlike the law of the sea which derives its principles from precedents developed through the ages.

The principal source of international air law is the Paris Convention of 1919,[8] a law-making multilateral treaty which settled the so-called "Second Battle of the Books" which had been raging since 1901 among legal scholars as to whether the superincumbent air space over the territory of a State should be free

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6. "The territory of a State...is not a plane, but a space of three dimensions...an inverted cone. The vertex of this cone is in the center of the earth.... What traditional theory defines as 'territory of the State,' that portion of the earth's surface delimited by the boundaries of the State, is only a visible plane formed by a transverse section of the State's conic space. The space above and below this plane belongs legally to the State as far as its coercive power...extends." Kelson, General Theory of Law and State 217 (1945). See also Cooper, High Altitude Flight and National Sovereignty, 4 Int'l L. Q. 411-418 (1951); II Hackworth, Digest of International Law 1 (1941).

7. Cooper, Roman Law and the Maxim "Cuius est solum" in International Law (McGill 1952); Jacobini, International Aviation Law-A Theoretical and Historical Survey, 2 J. Pub. L. 314 (1953).

8. 11 League of Nations Series 173. The Paris Conference of 1910 failed to produce a convention on the regulation of air navigation. According to Cooper, the 1910 Conference evidenced general international agreement in the national sovereignty principle of air space. From 1911 various States asserted a unilateral right by statute or otherwise to regulate flight and to admit or deny aircraft entry above their surface territory. Cooper, The International Air Navigation Conference in Paris 1910, 19 J. Air L.&Com. 127-143 (1952).

like the high seas or subject to the full sovereignty of the subjacent State.[9] World War I had impressed upon the States the paramount importance of asserting sovereignty over its territorial air space for security and military reasons.[10] Thus, the Paris Convention of 1919 repudiated all previous theories of freedom of the air by adopting the principle of national air sovereignty. Article 1 thereof provided accordingly:

> The High Contracting Parties recognize that every Power has complete and exclusive sovereignty over the air space above its territory.[11]

Since 1919 this principle of national air sovereignty became a generally accepted standard in international law.

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9. The conflicting theories on territorial air space have been classified as: (a) the "complete sovereignty" theory, (b) the "free air" theory, (c) the "territorial air space" theory, and (d) the "innocent passage" theory. Shawcross and Beaumont, Air Law 173-174 (2d ed. 1951).

10. Latchford, The Bearing of International Air Navigation Conventions on the Use of Outer Space, 53 Am. J. Int'l L. 405-411 (1959); Cooper, The Right To Fly 17-36 (1947). For a scholarly statement in support of the sovereign air theory necessitated by the need of the "droit of conservation," see Hazeltine, The Law Of The Air 1-53 (1911).

11. The origin of this Article is explained by the report submitted by the Legal, Commercial and Financial Sub-Commission to the Aeronautical Commission of the Peace Conference. It reads, in part:

"...But whereas the opinion held in the majority of countries before the war favoured the principle of the freedom of the air, the present proposal of the Legal Sub-Commission would make the airspace subject to the complete and exclusive sovereignty of the subjacent territory. It is only where the column of air lies over a res nullius or res communis, like the sea, that the air becomes free.

"Accordingly, the airspace is subject to the same regime as the subjacent territory. Where such territory is that of a particular State, the airspace is subject to the sovereignty of that State. In the case of the high seas, which are subject to no State's sovereignty, the airspace above the sea is as free as the sea itself."

Although the United States did not ratify the Paris Convention,[12] it did in 1926 incorporate into the Air Commerce Act the principle of complete and exclusive national sovereignty in its territorial air space.[13] In 1928, the United States entered its first international aviation agreement, the Pan-American (Havana) Convention,[14] in which the doctrine of air sovereignty was firmly recognized in identical terms used in Article 1 of the Paris Convention.[15] Finally, the principle of national sovereignty over air space found in Article 1 of the Paris Convention of 1919 was embodied in Article 1 of the Chicago Convention on International Civil Aviation of 1944,[16] the latest international effort toward working out rights in air space, in the following terms:

> The contracting States recognize that every State has complete and exclusive sovereignty over the air space above its territory.

The Chicago Convention came into force on April 4, 1947, and by Article 80 thereof superseded both the Paris Convention of 1919 and the Havana Convention of 1928.

The Soviet Union did not participate in either the 1919

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12. Probably because it was tied to the rejected League of Nations. IV Hackworth, Digest of International Law 363 (1942). See Colgrove, International Aviation Policy of the United States, 2 J. Air L.&Com. 447-473 (1931).

13. 44 Stat. 572 (1926), 49 U.S.C. Sec. 176 (1952), reaffirmed in the Civil Aeronautics Act of 1938 and the Federal Aviation Act of 1958.

14. 47 Stat. 1901 (1931), T.S. No. 840; 22 Am. J. Int'l L. Supp. 124 (1928).

15. The Ibero-American (Madrid) Convention of 1926 also accepted the principle of national air sovereignty. See Sand, Pratt, and Lyon, An Historical Survey of the Law of Flight 15 (I.A.S.L. Pub. No. 7, 1961).

16. 61 Stat. 1180 (1944), T.I.A.S. No. 1951. U.S.S.R., Red China, and other major communist countries are not parties to the Chicago Convention of 1944.

Paris Conference or the 1944 Chicago Conference, nor has it adhered to either of the resultant conventions. Notwithstanding, the Soviet Government has claimed national sovereignty in air space since 1912, and the Soviet Union adopted the universally accepted principle of "complete and exclusive sovereignty" over its air space in its Air Codes of 1932, 1935, and 1962.[17]

While the Paris Convention and the Chicago Convention have firmly established the principle that each State has complete and exclusive sovereignty in the air space over its territory, neither of these conventions defines what "air space" is or how far it extends. With the advent of the man-made satellites and space age, problems concerning the limits of a State's vertical territorial sovereignty have arisen. Does a State's sovereignty extend upward indefinitely? If not, where does air space (and therefore sovereignty) end and what is the status of the space beyond? These are some of the problems presently plaguing the legal writers and others who are engaged in what may be termed "the Third Battle of the Books."[18] It is certain beyond peradventure that neither the finite limits of air space nor the sovereignty above the earth present justiciable issues, but are matters that can be settled only by international agreement.

C. Air Space Over The Territorial Sea

Having considered the problems of vertical air sovereignty, we now turn to the extent of horizontal air sovereignty.

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17. Soviet Space Programs 194-195.
18. See Lipson and Katzenbach.

The Paris Convention of 1919 defines the horizontal limits of sovereignty in Article 1 as follows:

> For the purpose of the present Convention the territory of a State shall be understood as including the national territory, both that of the mother country and of the colonies, and the territorial waters adjacent thereto. (Underscoring supplied)

The same concept is expressed in Article 2 of the Chicago Convention of 1944:

> For the purpose of this Convention the territory of a State shall be deemed to be the land areas and territorial waters adjacent thereto under the sovereignty, suzerainty, protection or mandate of such State. (Underscoring supplied)

In this manner, both Conventions have included the air space over a State's territorial sea within its national air sovereignty. This principle was also incorporated in the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone.[19] Article 2 thereof provides:

> The sovereignty of a coastal State extends to the air space over the territorial sea as well as to its bed and subsoil. (Underscoring supplied)

Unfortunately, the Geneva Conference failed to reach agreement as to the breadth of the territorial sea.[20]

While it is clear that every littoral State is entitled to a strip of water adjacent to its territory, the exact limit of this maritime belt differs from State to State. The three-mile rule is universally accepted as a minimum and twelve miles as the

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19. 15 U.S.T.&O.I.A.1601, T.I.A.S. No. 5639.

20. Article 1(1) of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone provides: "The sovereignty of a State extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea."

maximun.[21] Pending international agreement in the premises, it may be concluded that the sovereignty of a State extends to the air space above its territorial sea to an extent of at least three miles.[22]

Sovereignty of the littoral State over the territorial sea is subject to the limitation recognized in customary international law[23] and by Article 14 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone that vessels in time of peace have the right of innocent passage through the territorial sea of a foreign State without obtaining the permission of that sovereign.[24] This right of innocent passage naturally flows

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21. Starke, op. cit. supra note 4, at 181. The United States adheres to the three-mile limit. The Soviet Union historically claims twelve miles. See Boggs, National Claims In Adjacent Seas, 41 The Geographical Review 185-209 (1951). The claims of Chile, Ecuador, and Peru of 200 nautical miles were generally rejected by the International Law Commission. See Menter, Astronautical Law (Thesis No. 98, Industrial College of the Armed Forces, 1959).

22. "...with the increased speed of aircraft, the widening of an individual coastal State's territorial sea would increase the possibilities of international disputes caused by the unintentional violation of a nation's territory by unauthorized aerial overflight." Dean, The Geneva Conference On The Law Of The Sea: What Was Accomplished, 52 Am. J. Int'l L. 607, 613 (1958).

23. Starke, op. cit. supra note 4, at 179, 184-185.

24. Such right of passage does not generally extend to foreign warships, although as a matter of usage in time of peace they are permitted to navigate freely through territorial seas. Ibid.

In addition, warships are entitled in time of peace to a right of innocent passage through such parts of the territorial sea as form an international highway, and cannot be prohibited from exercising this right. Corfu Channel Case (Merits), I.C.J. Reports 4 (1949).

from the concept of the freedom of the open seas. It is significant to note, however, that neither the Chicago Convention nor the Geneva Convention on the Territorial Sea and the Contiguous Zone contain any comparable right of innocent passage through the air space over the territorial sea of another State. The doctrine of freedom of innocent passage, applicable to the passage of foreign vessels through territorial seas, has never been accepted as part of the law of international flight.[25]

Thus, it may be stated without equivocation that no aircraft, whether flying in the air or taxying on the surface of the water, has a right of innocent passage under customary international law over or through foreign territorial seas in time of peace.[26] It is noteworthy, however, that "an aircraft while on

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25. In the Paris Convention of 1919 each of the parties undertook in time of peace to accord "freedom of innocent passage" in the air above its territory to the aircraft of other contracting parties, subject to the conditions laid down in the Convention (Arts. 2, 15). In practice this undefined "freedom" was compromised and rendered virtually useless. See Cooper, op. cit. supra note 10, at 133-145; Latchford, The Right of Innocent Passage in International Civil Aviation Agreements, 11 Dep't. State Bull. 19-24 (1944).

The Chicago Convention of 1944 makes no mention of "freedom of innocent passage." Article 5 appears to exchange operating rights for non-scheduled flights, commercial and non-commercial. But in practice this too has been frustrated by State's relying heavily on its escape clauses. See Cheng, The Law of International Air Transport 195 (1962). Article 6 is explicit that scheduled flights are prohibited in the territory of a contracting State, without special permission or authorization.

26. The International Air Services Transit Agreement, a companion agreement to the Chicago Convention of 1944, constitutes a multilateral permit under Article 6 of the Chicago Convention. It provides by mutual agreement a sort of modified right of innocent passage by granting to civil airplanes of a contracting State the so-called "two freedoms" of flying over the territory of another contracting State without stopping, and of landing and taking off within such a State for non-traffic purposes only. The United States is a party to this agreement. 59 Stat. 1693 (1945), E.A.S. No. 487.

board a belligerent warship, including an aircraft carrier, shall be regarded as part of such warship," so long as it does not attempt to take to the air.[27]

Special problems of interest to horizontal air sovereignty are encountered in the case of large bays and archipelagoes. Usually the width of the territorial sea is measured from the low-water mark along the sinuosities of the coast. Historically, bays with a width of six miles or less from headland to headland are considered internal waters of a State and the territorial sea is measured from the headland line. States have made claims to greater widths on historic and other grounds.[28] Article 7 of the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone adopts a twenty-four mile headland to headland rule.

In addition, a number of States which possess island fringes along their coasts have made claims to the waters lying between the islands and the mainland as being internal waters. Such a claim by Norway was upheld by the International Court of Justice in the Anglo-Norwegian Fisheries case,[29] wherein the base lines along large sections of the Norwegian coast, which were

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26. (cont.) The International Air Transport Agreement, a broader companion agreement, granting more commercially important multilateral rights under Article 6 of the Chicago Convention, referred to as the "five freedoms," was never widely accepted. Although vigorously sponsored by the United States, the United States withdrew from the International Air Transport Agreement in 1947 when it became obvious that multilateralism could not be the basis for world-wide exchange of air transit rights. See Cooper, op. cit. supra note 10, at 174-177.

27. See text at note 201 infra.

28. Brierly 194-198.

29. I.C.J. Reports 116 (1951).

heavily indented and bestrewn with innumerable islands, consisted of imaginary straight lines as much as forty-five miles out to sea. The Philippines and Indonesia have likewise made claim to the waters surrounding and connecting their archipelago island systems. If such claims are allowed, the whole of the South Eastern Pacific Ocean would be removed from the high seas. The 1958 Geneva Convention on the Territorial Sea and Contiguous Zone does not solve the problem of ocean archipelagoes.[30]

The status of air space over international waterways requires brief mention. Since rights in air law are acquired by treaty and not by custom, the status of air space over international waterways must be determined from the international conventions regulating their international character.[31] Accordingly, it may be stated as a general rule that international agreements regulating navigation on international waterways are not construed to confer any right in the air space above it, unless expressly so stipulated therein.[32]

The extent of horizontal air space sovereignty is further complicated by the new Soviet Air Code of 1962. Section 1 thereof provides a new definition of "airspace" as follows:

> The airspace of the U.S.S.R. shall be deemed to be the airspace above the land and water territory of the U.S.S.R. and the territorial waters as determined by the laws of the U.S.S.R. and international agreements adhered to by the U.S.S.R. (Underscoring supplied)

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30. Brierly 198-202.

31. For a discussion of air rights over the Suez Canal, the Panama Canal, the Dardanelles, Bosphorus and the Sea of Marmora, see Hughes, Airspace Sovereignty Over Certain International Waterways, 19 J. Air L.&Com. 144-151 (1952).

32. Verplaetse, International Law In Vertical Space 86-88 (1960).

According to the Soviet view, part or all of the Caspian Sea, the Black Sea, and the Baltic Sea are embraced within the "territorial waters" of the Soviet Union. The principle of freedom of the seas is not applicable to these waters; nor is the principle of freedom of the air applicable to the air space above these waters.[33]

D. Air Space Over The High Seas And Stateless Territories

Neither the Paris Convention of 1919, the Madrid Convention of 1926, nor the Havana Convention of 1928 contains any provision relating to the status of the air space over the high seas. However, we have seen that the drafters of the Paris Convention had intended to give to the air space above the high seas the same legal status as the sea itself, namely that of res communis.[34]

Although the Chicago Convention of 1944 contains no clear statement expressing the freedom of flight over the high seas, the drafters must have proceeded on this premise when they undertook to vest in the International Civil Air Organization (ICAO) the power to make rules relating to the flight and maneuvers of civil aircraft over the high seas. Article 12 provides in pertinent part:

> Over the high seas, the rules in force shall be those established under this Convention. Each Contracting State undertakes to insure the prosecution of all persons violating the regulations applicable.

Annex 2 (Rules of the Air) to the Chicago Convention contains

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33. Soviet Space Programs 195.

34. See note 11 supra. Also Cooper, Space Above the Sea, JAG J. 8-9 (Feb. 1959).

the rules which civil aircraft must observe over the high seas.[35] These technical rules, which relate to the safety of aircraft over the high seas, are legislative in nature and thus obligatory without exception upon the Contracting States.[36]

However, the freedom to fly over the high seas was expressly confirmed in the 1958 Geneva Convention on the High Seas.[37] In Article 2 thereof, it is stated:

> Freedom of the high seas...comprises...
> Freedom to fly over the high seas.

Article 1 defines "high seas" as:

> all parts of the sea that are not included in the territorial sea or in the internal waters of a State.

It also follows that those unoccupied and unattached regions of the earth which are outside the sovereignty of any State (res nullius or Stateless territories) are as free as the sea and that the air space above these regions is just as free. This is so until such stateless areas are effectively brought within national sovereignty in accordance with principles established and recognized by international law.

Particular reference is made to the fact that sovereignty over the Polar Regions[38] is subject to many conflicting claims.

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35. By Assembly Resolution, ICAO requested member States to consider the application of the rules of Annex 2 to their State aircraft flying over the high seas. A14-WP/173, P/19, 28/9/62. See AFR 60-28, Operating Procedures For United States Military Aircraft Over The High Seas, 23 Oct. 1962.

36. See Carroz, International Legislation on Air Navigation Over The High Seas, 26 J. Air L.&Com. 158-172 (1959).

37. 13 U.S.T.&O.I.A. 2312, T.I.A.S. No. 5200.

38. Here one must distinguish between the mainland areas covered with ice and snow, and those regions which are part of the sea but permanently frozen over. The air space above such areas takes on the legal status of the subjacent area. See generally, II Whiteman, Digest of International Law 1232-1270 (1963).

As for the Antarctica, many States have made territorial claims in that region but none of them have been recognized by the United States.[39] These problems have been brought under control temporarily at least by the Antarctic Treaty of 1959,[40] which pledges the Antarctica to peaceful purposes only. While Article IV thereof provides that nothing in the treaty shall be interpreted as a renunciation or diminution by a Contracting Party to previously asserted rights of or claims to territorial sovereignty in Antarctica, it freezes any further claims to territorial sovereignty therein for the duration of the treaty. Article VII sets up an inspection system, with each observer having complete freedom of access at any time to all areas of Antarctica. In particular, it provides:

> Aerial observations may be carried out at any time over any or all areas of Antarctica by any of the Contracting Parties having the right to designate observers.[41]

In the Arctic, the problem of air space sovereignty has become complicated by the "sector theory" first advanced by Canada and later by the Soviet Union but rejected by other States.

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39. See Britton and Watson, International Law for Seagoing Officers 43-47 (1960); Toma, Soviet Attitude Towards the Acquisition of Territorial Sovereignty in the Antarctic, 50 Am. J. Int'l L. 611-626 (1956); Hayton, The American Antarctic, 50 Am. J. Int'l L. 583-610 (1956); Carl, International Law--Claims to Sovereignty: Antarctica, 28 So. Cal. L. Rev. 386-400 (1955).

40. 12 U.S.T.&O.I.A. 794, T.I.A.S. No. 4780. See Hayton, The Antarctic Settlement of 1959, 54 Am. J. Int'l L. 349-371 (1960).

41. As to the United States inspection in the Antarctica during the 1963-1964 austral summer season, see 49 Dep't State Bull. 513, 932-933 (1963). The United States inspection consisted of ground installation visits and aerial overflights. See Report of United States Observers on Inspection of Antarctic Stations, 3 Int'l Legal Materials 650-661 (1964).

Under the "sector theory,"[42] air space over the land masses, waters, and ice packs within the sector would become territorial air space.[43] Canada's sector claims are limited to the land masses only and exist de facto.[44] On the other hand, the Soviet Union's sector claims are de jure (by national decrees) as to the land masses and de facto as to the open sea and ice packs.[45] The legal status of the air space above these sectors is not definitive. In no other area in the world is there still such a lack of certainty as to the rights of a nation to fly.[46] It is submitted that the conflicting claims in the Artic require an international convention for resolution. Pending an international agreement to the contrary, it is reasonable to assume that the air space over the Polar Regions follows the legal status of the subjacent land, territorial sea, or high seas.

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42. Under the "sector theory" the States closest to the North Pole claim national sovereignty in the Polar Zone falling between the easternmost and the westernmost longitudes of their territories. See Svarlien, The Legal Status of the Arctic, Conflicting National Policies and Some Current International Legal Problems, Proc. A.S.I.L. 136-145 (1958); Hayton, Polar Problems and International Law, 52 Am. J. Int'l L. 746-765 (1958); Cooper, Airspace Rights over the Arctic, 3 Air Affairs 517-540 (1950).

43. Head, Canadian Claims To Territorial Sovereignty In The Arctic Regions, 9 McGill L. J. 200, 223 (1963), a recent penetrating analysis of the sector claims of Canada and the Soviet Union. See also Smedal, Acquisition of Sovereignty Over Polar Areas (1931).

44. Head, id. at 204, 206-210.

45. Id. at 206.

46. On the extension of the sector theory to the Antartic, see Jessup and Taubenfeld, Controls for Outer Space 137-159 (1959).

E. Air Space Over Adjacent Areas

The concept of "adjacent areas"[47] is a necessary by-product of the continuing "crisis in the law of the sea."[48] In the historically long and controversial development of the law of the sea, the principle of sovereignty over the territorial sea of littoral States developed contemporaneously and coextensively with the doctrine of the freedom of the seas.[49] Since ancient times powerful maritime nations claimed sovereignty over part or all of certain seas. A year after the discovery of America, the Republic of Venice claimed the Adriatic Sea, Genova and Pisa claimed the Ligurian Sea, Denmark and Sweden claimed the Baltic Sea, Spain claimed the Pacific Ocean and the Gulf of Mexico, Portugal claimed the Indian Ocean and the Southern Atlantic, and Great Britain claimed the Narrow Seas and the North Sea.[50]

In 1609, a Dutch jurist, Huig von Groot, better known as Grotius, published anonymously his Mare Liberum, contending that the open sea could not be appropriated by any State, which to this day has remained fundamental for the concept of freedom of

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47. Under the Geneva Convention on the Territorial Sea and the Contiguous Zone of 1958, the term "contiguous zone" is limited to an area not exceeding twelve miles from the coastal base-line (Art. 24). By way of contra-distinction, the term "adjacent area" is used herein to denote no fixed limitation on distance in the assertions to limited competence on the high seas as reflected by the practice of States.

48. See McDougal and Associates, Studies in World Public Order 844-912 (1960); McDougal and Burke, Crisis in the Law of the Sea: Community Perspectives Versus National Egoism, 67 Yale L. J. 539, 553-554, 563-564, 581-588 (1958). For a comprehensive tabulation of the numerous, varied, and inconsistent national claims in adjacent seas, see Boggs, National Claims In Adjacent Seas, 41 The Geographical Review 185-209 (1951).

49. Starke, An Introduction To International Law 180 (5th ed. 1963).

50. Id. at 232.

the seas. Along with the development of the doctrine of the freedom of the seas, there emerged the universally recognized concept that a littoral State exercises jurisdiction over a narrow belt of territorial sea. Some of the reasons advanced in support of this extension of a State's sovereignty beyond the limits of its land territory are security, promotion of the fiscal, political and commercial interests, and the enjoyment and exploitation of the products of the sea.[51] We have seen earlier that this belt of territorial sea is universally recognized as a minimum to a width of three miles.

It was Bynkershoek, another Dutch jurist, who first advocated that the littoral State could dominate only such width of the maritime belt as lay within the range of cannon shot from shore batteries: "Terrae potestas finitur ubi finitur armorum vis" (territorial sovereignty extends as far as the power of arms carries). This is the origin of the famous "cannon shot rule," which at later stages in the eighteenth century was expressed as a definite figure in miles by two Italian writers. They adopted the figure of three miles from shore as "the greatest distance to which the force of gunpowder can carry a ball or bomb" out to sea. In the nineteenth century, the three-mile limit was widely adopted by the jurists, the courts, and in the practice of States. Today, customary international law recognizes the three-mile rule

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51. Colombos, International Law of the Sea 8, 78 (5th ed. rev. 1962).

"The three-mile rule is but the recognition of the necessity that a government next to the sea must be able to protect itself from dangers incident to its location. It must have powers of dominion and regulation in the interest of its revenue, its health, and the security of its people from wars waged on or too near its coasts." United States v. California, 332 U.S. 19, 34 (1947).

as the minimum breadth of the territorial sea.[52]

It was the non-acceptance by the international community of the extension of the modest limits of the territorial sea that has given rise to the concept of "adjacent areas" whereby States have asserted and exercised rights of reasonable competence beyond their territorial seas for special and limited purposes -- less than "sovereignty." At this juncture, it is important to note the distinction between the comprehensive, continuous, and plenary rights of territorial "sovereignty" exercised within "territorial seas" by the littoral State, and the limited, non-sovereign, rights of control or jurisdiction claimed under various labels upon the high seas.

Before examining the evolution of the doctrine of adjacent areas as applied to the high seas and the superjacent air space, we should first review the nature and various components of the "freedom of the high seas" in order to get a proper perspective of the contemporary law of the sea.

1. Freedom of the High Seas

The principle of the freedom of the high seas in time of peace -- the freeing of the high seas from the exclusive sovereignty of individual States -- became firmly established by the beginning of the nineteenth century. It consists of two cardinal rules, one negative and one positive. The negative rule is that no State may exercise authority over any vessels on the high seas except those flying its own flag. The Permanent Court of Inter-

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52. See Kent, The Historical Origin Of The Three Mile Limit, 48 Am. J. Int'l L. 537-553 (1954); Starke, op. cit. supra note 49, at 180-182.

national Justice in the famous Lotus case expressed this general rule as follows:

> It is certainly true that -- apart from certain special cases which are defined by international law -- vessels on the high seas are subject to no authority except that of the State whose flag they fly. In virtue of the principle of the freedom of the seas, that is to say, the absence of any territorial sovereignty upon the high seas, no State may exercise any kind of jurisdiction over foreign vessels upon them.[53]

The positive rule is that every State has the right to the free use of the high seas for navigation, fishing, laying of submarine cables, and flying above it. This was expressed by Judge Moore in his dissent in the Lotus case:

> In conformity with the principle of the equality of independent States, all nations have an equal right to the uninterrupted use of the unappropriated parts of the ocean for their navigation, and no State is authorized to interfere with the navigation of other States on the high seas in time of peace except in the case of piracy by the law of nations or in extraordinary cases of self-defence.[54]

Recognized exceptions to these twin principles, apart from the controversial doctrine of "contiguous zone," include cases of piracy, hot pursuit, and the admitted right to approach foreign vessels for the purpose of verifying their identity.[55]

The basic principles of the freedom of the seas, including the various component elements, as developed by customary international law, have been codified in the Geneva Convention on the High Seas of 1958. The negative rule is stated in Article 6(1):

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53. The Lotus case, P.C.I.J., Ser. A, No. 10, 25 (1927).
54. Id. at 69.
55. Brierly 307.

> Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in these articles, shall be subject to its exclusive jurisdiction on the high seas....56

The positive rule is expressed in Article 2:

> The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas is exercised under the conditions laid down by these articles and by the other rules of international law. It comprises, inter alia, both for coastal and non-coastal States:
>
> (1) Freedom of navigation;
> (2) Freedom of fishing;
> (3) Freedom to lay submarine cables and pipelines;
> (4) Freedom to fly over the high seas.
>
> These freedoms, and others which are recognized by the general principles of international law, shall be exercised by all States with reasonable regard to the interests of other States in their exercise of the freedom of the high seas. (Underscoring added)

These freedoms of the high seas are neither absolute nor exclusive. They are subject to exceptions embraced within the adjacent area concept, and in addition to those contained in other international agreements, such as the Continental Shelf Convention, the Convention on the Territorial Sea and Contiguous Zone, and the Convention on Fishing and the Conservation of the Living Resources of the High Seas, all of which confer on coastal States substantial rights of jurisdiction over adjacent areas of the high seas. The point is that the law of the sea is not a simple matter of freedom of the high seas with a right of innocent passage through territorial seas. It recognizes a diversity of areas and regions of the high seas for different conditions and purposes. Freedom of the seas is a qualified right.

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56. Article 11 negatives the decision in the Lotus case and expressly provides that no penal or disciplinary proceedings may be instituted in respect of an incident upon the high seas except before the appropriate authorities either of the flag State or of the State whose national is the object of the proceedings.

a. Test of Reasonableness and Reciprocity.--The exercise of limited competence on the high seas has been tested by the reasonableness of the action taken with respect to the interest sought to be protected. One of the first enunciations of this fundamental legal philosophy underlying such claims is contained in the leading case of Church v. Hubbart, which recognized the validity of Portugal's claim to seize a foreign vessel on the high seas four or five marine leagues off the coast of Brazil in order to protect commercial intercourse with its colony of Brazil. After asserting that the power of a State "to secure itself from injury may certainly be exercised beyond the limits of its territory," Chief Justice Marshall continued:

> Any attempt to violate the laws made to protect this right [to monopolize colonial trade], is an injury to itself, which it may prevent, and it has a right to use the means necessary for its prevention. These means do not appear to be limited within any certain marked boundaries, which remain the same, at all times and in all situations. If they are such as unnecessarily to vex and harass foreign lawful commerce, foreign nations will resist their exercise. If they are such as are reasonable and necessary to secure their laws from violation, they will be submitted to.
>
> In different seas, and on different coasts, a wider or more contracted range, in which to exercise the vigilance of the government, will be assented to. Thus, in the channel, where a very great part of the commerce to and from all the north of Europe, passes through a very narrow sea, the seizure of vessels...must necessarily be restricted to very narrow limits; but on the coast of South America, seldom frequented by vessels, ...the vigilance of the government may be extended somewhat farther; ...foreign nations submit to such regulations as are reasonable in themselves....[57]

Speaking about this pronouncement in the Church v. Hubbart case, McDougal and Schlei significantly observed:

> It is this concept of a reasonable competence beyond territorial seas which most clearly reveals that enduring

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57. Church v. Hubbart, 6 U.S. (2 Cranch) 187, 234 (1804).

> flexibility which permits the regime of the high seas to meet the changing needs of contemporary life.[58]

It is noteworthy that this test of reasonableness was incorporated in the last paragraph of Article 2 of the 1958 Geneva Convention on the High Seas. Indeed, the basic philosophy underlying the success of all international law has consisted of the essential ingredients of reasonableness and reciprocity.[59] The success of the legal regime on the high seas has been due to the universal acceptance of these two factors by the community of nations.

We now proceed to examine the limited claims and practices of States in areas of the high seas, including the air space thereof. For our purposes, we have placed them into two categories according to the interest sought to be protected:

1. Economic and fiscal interests.
2. Defense and security interests.

2. Economic and Fiscal Interests

a. Customs and Anti-Smuggling.--According to Masterson, States began to exercise rights of jurisdiction and control upon the high seas in order to enforce their customs laws at least 250 years ago, in areas ranging from six to three hundred miles from shore.[60] A recent report to the International Law Commission that

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58. McDougal and Schlei, The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security, 64 Yale L.J. 648, 668 (1955).

59. The strength of international law is due in part to the working of the principle of reciprocity. See Schwarzenberger, Power Politics: A Study of International Society 202-217 (2d rev. ed. 1951). And the most comprehensive and fundamental test of all is reasonableness in a particular context. McDougal and Feliciano 218.

60. Masterson, Jurisdiction in Marginal Seas 1-120, 175-247 (1929).

at least twenty-six States claim adjacent areas outside their territorial waters for customs enforcement purposes, concludes that "it would be impossible to dispute the rights of States to institute a contiguous zone for customs purposes."[61]

In 1876 Great Britain claimed an adjacent area of one hundred leagues (300 marine miles) from shore.[62] Today it asserts customs jurisdiction of up to twelve marine miles which is also made applicable to aircraft.[63]

Since 1790, the United States has asserted the right to board and otherwise exercise jurisdiction over foreign vessels bound for the United States within twelve nautical miles off the coast in order to enforce customs regulations.[64] In the Tariff Act of 1922,[65] it was provided that any vessel, whether bound for the United States or not, might be boarded for examination within twelve nautical miles of the coast. By Liquor Treaties foreign countries have consented to the exercise by United States authorities over such foreign State flag vessels for customs purposes within a liquor treaty zone of one hour's sailing distance from

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61. Francois, Report on the Regime of the Territorial Sea 11-15, 49, U.N. Doc. No. A/CN.4/53 (1952).

62. Masterson, The Hemisphere Zone of Security and the Law, 26 A.B.A.J. 860, 861 (1940).

63. Murchison, The Contiguous Air Space Zone in International Law 33 (1956).

64. 1 Stst. 156 (1790). See also The Grace and Ruby, 283 F. 475 (D.C. Mass. 1922).

65. 42 Stat. 979 (1922). See Jessup, The Law of Territorial Waters and Maritime Jurisdiction 241-276 (1927).

the United States coast.[66] Finally, by the Anti-Smuggling Act of 1935,[67] the President was authorized to create "customs enforcement areas" extending sixty-two miles from shore for a distance of two hundred miles along the coast, whenever he finds that an area on the high seas outside customs waters is frequented by hovering vessels.[68]

b. Fisheries.--It was the adamant position of States to protect their alleged vital interests in coastal fisheries that prevented any agreement being reached at the 1958 Geneva Conference on the width of the territorial sea.[69] The adjacent areas doctrine has been particularly pressed by States desiring to protect their coastal fisheries by exercising control over fishing vessels outside their territorial sea. Unlike the adjacent area for enforcement of customs regulations, the establishment of an adjacent area for the enforcement of monopolistic national fisheries regulations against foreign vessels on the high seas aroused

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66. See Cook v. United States, 288 U.S. 102 (1933); Dickinson, Are the Liquor Treaties Self-Executing?, 20 Am. J. Int'l L. 444-452 (1926); 46 Stat. 747 (1930); 49 Stat. 521, 19 U.S.C. Sec. 1581 (1935).

67. 49 Stat. 517, 19 U.S.C. Sec. 1701 (1952). See also Jessup, The Anti-Smuggling Act of 1935, 31 Am. J. Int'l L. 101-106 (1937).

68. Article 24 of the 1958 Geneva Convention on the Territorial Sea and the Contiguous Zone provides that in a zone of the high seas contiguous to its territorial sea the coastal State may exercise the control necessary to prevent and punish any infringement of its customs, fiscal, immigration, or sanitary regulations within its territory or territorial sea. The contiguous zone "may not extend beyond twelve miles from the base-line from which the territorial sea is measured." See text at note 124 infra.

69. Brierly 208. See also Franklin, The Law of the Sea: Some Recent Developments 116 (1961).

general hostility and opposition.[70] On the other hand, scholars have been urging for years an adjacent area for fishery conservation.[71]

In the interest of protecting and conserving national fishery resources, President Truman in his Coastal Fisheries Proclamation of 1945,[72] declared a new policy of establishing conservation zones in areas of the high seas adjacent to the American coasts. The Proclamation expressly announced that the character of the high sea and unimpeded navigation are in no way affected by the establishment of such conservation zones. This historic proclamation was never protested by any State. In fact the Geneva Convention of 1958 on Fishing and Conservation derives much of its inspiration from President Truman's Proclamation.[73]

On the other hand, monopolistic claims to sedentary fisheries of oysters, chanks, sponges and corals on the bed of the high seas, have been recognized by customary international law as a legitimate exception to the principle of the freedom of the high

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70. The Hague Codification Conference of 1930 opposed the idea of a contiguous zone either for the conservation of fisheries or for a national fishing monopoly. III Gidel, Le Droit International Public de la Mer 468-473 (1932-1934). However, in his Memorandum on the Regime of the High Seas, Gidel suggested "that there are increasingly strong arguments for the recognition by international law of the establishment of a contiguous zone for fisheries," provided the purpose is conservation and not monopoly. U.N. Doc. No. A/CN.4/32, 36-48 (1950).

71. Riesenfeld, Protection of Coastal Fisheries in International Law 282 (1942).

72. Presidential Proclamation No. 2668, 59 Stat. 885, 10 Fed. Reg. 12304 (1945). See Chapman, United States Policy on High Seas Fisheries, 20 Dep't State Bull. 67-71, 80 (1949).

73. Brierly 309, 314-316.

seas.[74] Ceylon, Australia, Tunis, Ireland, Venezuela, Panama and States bordering the Persian Gulf assert such claims over a total of thousands of square miles of the high seas.[75]

c. Continental Shelf.--The continental shelf[76] has become of increasing economic importance to States because technological progress has made it possible to extract from the subsoil of the sea bed valuable minerals, particularly oil, by machinery installed in the open sea outside territorial waters. In 1945 President Truman by proclamation[77] declared that the United States regarded "the natural resources of the subsoil and sea bed of the continental shelf beneath the high seas but contiguous to the coasts of the United States as appertaining to the United States, subject to its jurisdiction and control" which was "reasonable and just." At the same time the proclamation emphasized that the "character as high seas of the waters above the continental shelf and the right to their free and unimpeded navigation" were in no way to be affected by the United States claim. Since then, many States

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74. See Hurst, Whose is the Bed of the Sea? Sedentary Fisheries Outside the Three-Mile Limit, 24 Brit. Yb. Int'l L. 34-43 (1923).

75. Francois, Second Report on the High Seas 51-62, U.N. Doc. No. A/CN.4/42 (1951).

76. The continental shelf may be described geologically as the gently sloping submerged land contiguous to the coast and extending outward under the high seas over varying distances to a depth where the slope of the sea-bottom increases noticeably in steepness. This occurs at an average depth of 100 fathoms. See generally, Mouton, The Continental Shelf (1952).

77. Presidential Proclamation No. 2667, 59 Stat. 884, 10 Fed. Reg. 12304 (1945). The United States is not the first State to make a claim to the continental shelf. In 1942 the United Kingdom and Venezuela each annexed one half of the sea bed of the Gulf of Paria by treaty. See Laws and Regulations on the Regime of the High Seas 44-47, U.N. Doc. No. ST/LEG/SER.B/1 (1951).

have issued comparable proclamations. However, the Latin American States, unlike the United States, have claimed sovereignty over the sea bed and subsoil of the continental shelf as well as over the high seas above the continental shelf.[78] Such claims to sovereignty have been vigorously protested by other States.[79]

The concept of the continental shelf, as expressed by President Truman's proclamation, was indorsed by the international community in 1958 when it was incorporated in the Geneva Convention on the Continental Shelf.[80]

3. Defense and Security Interests

The so-called "freedom of the high seas" is a doctrine applicable in time of peace. In time of war, the exceptions thereto are so numerous and substantial as virtually to overwhelm the principle itself.[81] We will confine ourselves here to the primacy of the claims for defense and security, variously termed as "self-help," "self-defense," "self-protection," "self-preservation," "right of necessity," "necessity in self-preservation," "protective police powers," "special police measures," "general security," etc., on the high seas in time of "peace."

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78. See Young, The Legal Status of Submarine Areas Beneath the High Seas, 45 Am. J. Int'l L. 225-239 (1951); Francois, Report on the High Seas to International Law Commission 31-41, U.N. Doc. No. A/CN.4/17 (1950).

79. See Mouton, op. cit. supra note 76, at 89-96.

80. 15 U.S.T.&O.I.A. 471, T.I.A.S. No. 5578. See Whiteman, Conference On The Law Of The Sea: Convention On The Continental Shelf, 52 Am. J. Int'l L. 629-659 (1958).

81. McDougal and Schlei, op. cit. supra note 58, at 681.

a. Piracy and the Right to Approach.--Customary international law has since antiquity conceded universal jurisdiction for the unilateral suppression of "piracy by the law of nations" -- criminal acts committed beyond all territorial jurisdiction, under which piratical ships and their crews may be tried and punished by any nation into whose jurisdiction they may come. In this regard Judge Moore observed in his dissenting opinion in the Lotus case:

> Piracy by the law of nations, in its jurisdictional aspects is sui generis. Though statutes may provide its punishment, it is an offense against the law of nations; and as the scene of the pirate's operations is the high seas, which is not the right or duty of any nation to police, he is denied the protection of the flag which he may carry, and is treated as an outlaw, as an enemy of all mankind - hostis humani generis - whom any nation may in the interest of all capture and punish.[82]

Cases of piracy are an exception to the general rule that no State may exercise any kind of jurisdiction over foreign vessels on the high seas. By an act of piracy the pirate and his vessel lose the protection of their flag State and their national character. Every State has the right under customary international law to punish pirates. And the warships of any State and any person authorized by a State can on the high seas chase, attack, capture, and bring the pirate to their own country for trial and punishment. When there is a reasonable suspicion that a ship is piratical, any interference with her by a foreign warship is lawful.[83] The 1958 Geneva Convention on the High Seas, which codifies

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82. The Lotus case, P.C.I.J., Ser. A, No. 10, 70 (1927). See also Harvard Research in International Law, Piracy, 26 Am. J. Int'l L. Supp. 739-747 (1932); Harvard Research Draft on Crime, Article 9 (1935); Brierly 307, 311-313.

83. Colombos, The International Law Of The Sea 405 (5th ed. rev. 1962).

these rules of customary international law, extends the definition of piracy to include aircraft.[84]

Additionally, the right to interfere with the freedom of navigation on the high seas is conferred by customary international law on the warships of all States to approach, in cases of suspicion, a merchant vessel on the high seas in order to assure themselves of her nationality. This is called the "right to approach" and is codified in Article 22 of the 1958 Geneva Convention on the High Seas.[85] Gidel prefers to call it "reconnaissance." It includes the right to visit and search. A clear example would be the right to visit and search a merchant vessel misusing a National flag or not flying a flag at all.[86] This exceptional right to visit and search merchant vessels on the high seas in time of peace has been extended by the 1958 Geneva Convention on the High Seas to ships engaged in the slave trade. Article 22 grants to warships the right, based on reasonable grounds, of boarding ships suspected of being engaged in the slave trade.[87]

b. Hot Pursuit.--Another exception to the general rule

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84. Articles 14-21. The Santa Maria incident is a good example of the concept of piracy in modern international law; see Zwanenberg, Interference With Ships On The High Seas, 10 Int'l & Comp. L.Q. 785, 798-817 (1961).

85. Although Article 22 mentions warships only as having the right to approach, it does not necessarily preclude such right to military aircraft under the rules of international law. See Zwanenberg, id. at 787-791.

86. Colombos, op. cit. supra note 83, at 286-287, 421.

87. Id. at 286-288, 415-421.

that ships on the high seas are subject to the exclusive jurisdiction of the flag State only has been long and universally recognized by customary international law in the case of "hot pursuit." For the protection of the interests of maritime States, international law concedes to such States a right of "hot pursuit." This right means that foreign vessels which break local laws while sailing within internal waters or the territorial sea, may, if they are immediately pursued while still in these waters, be arrested or seized on the high seas by the authorities of the coastal State, provided the pursuit is continuous[88] and reasonable and necessary force is used.[89]

Article 23 of the 1958 Geneva Convention on the High Seas recognizes that hot pursuit may also be exercised by aircraft against a foreign ship. In addition, it extends the classical doctrine to a pursuit begun in the "contiguous zone" of the pursuing State, as that term is defined in Article 24 of the Geneva Convention on the Territorial Sea and the Contiguous Zone.

It is noteworthy that the 1958 Geneva Convention on the High Seas does not extend to aircraft the right of hot pursuit against foreign offending aircraft. On 16 February 1963, the United States Air Force announced that two Soviet aircraft had been intercepted over Japanese territory and pursued over the high seas until reaching the Soviet held Kurile Islands, at which

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88. See II Hackworth, Digest of International Law 700-709 (1941); Williams, The Juridical Basis Of Hot Pursuit, 20 Brit. Yb. Int'l L. 83-97 (1939).

89. The intentional sinking of a pursued vessel was found not to be justified as excessive force was used. The I'm Alone case, U.S. Dep't of State Arbitration Series, No. 2, 1-7 (1931-1935).

time the pursuit was halted.[90] The claim to the right of hot pursuit in the air space over the high seas may be reasonably inferred from this incident. In instances of wilful aerial intrusion, the exercise of such a right might in some situations be the only effective means of forcing a landing of the intruding aircraft.

Since hot pursuit is so closely connected with self-defense, it may be said that the classical doctrine of hot pursuit exists in the air space over the high seas as a rule of customary international law on the basis of analogy, reasonableness, and reciprocity, and thus may be affected by aircraft against foreign aircraft.[91]

c. Pacific Blockade.--Under traditional international law, the "pacific blockade" is one of the measures of reprisals recognized within the legal powers of a State by way of retaliation for a wrong previously done to that State. This measure of self-help short of war was most widely used during the nineteenth century by powerful European States against weak States.[92] The pacific blockade, first employed in 1827 by Great Britain, France, and Russia during the Greek insurrection, has been used about twenty times; never by a non-European State. There was doubt whether this kind of blockade was only enforceable against ships of the State which was the object of the reprisals. Third States

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90. N.Y. Times, Feb. 17, 1953.

91. See Lissitzyn 586, note 102.

92. Measures short of war were generally utilized only by participants with a decided substantial power differential over their opponent. See McDougal and Feliciano 137-138.

were not duty bound to respect such a blockade.[93] Nevertheless, the numerous cases of pacific blockade which occurred since the nineteenth century have established the admissibility of the pacific blockade as a recognized collective procedure for facilitating the settlement of differences between States.[94]

d. Neutrality.--A protective zone wider than three miles is claimed by some States for purposes of enforcing their neutrality laws and regulations.[95] Neutral States desiring protection from combatant activities were forced to claim extended rights of jurisdiction over the high seas. The classic case occurred during the American Civil War when French authorities prevented an engagement between the Alabama and the Kearsarge just outside the French territorial waters. The Alabama was escorted some distance out to sea where the battle eventually took place. Although the United States first protested this action, its correctness was later conceded.[96]

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93. The belligerent blockade, by contrast, is an act of war and its principal object is to bar access of the enemy coast or port for the purpose of preventing ingress or egress of vessels or aircraft of all nations. It is a universal blockade. Ships which break the blockade are liable to seizure by the belligerent operating the blockade in the same manner as contraband cargoes, and after capture are sent to a port for adjudication by a prize court. Colombos, op. cit. supra note 83, at 672-783; II Oppenheim, International Law 767-797 (7th ed. Lauterpacht 1952).

94. VI Hackworth, Digest of International Law 152-153, 156-159 (1943); Id. Vol. VII, at 170; Starke, An Introduction To International Law 390-392 (5th ed. 1963); Brierly 399-402; Briggs, The Law Of Nations 959 (2nd ed. 1952); Oppenheim, id. at 146-147.

95. Hackworth, id. Vol. I at 660-663 (1940).

96. 1 Moore, A Digest of International Law 723-724 (1906).

The United States maintained neutrality zones outside territorial seas during World War I.[97] The most prominent example of claims to establish an adjacent area for the security of neutrality of coastal States is still the Declaration of Panama of October 3, 1939. At that time, twenty-one American Republics constituting the Inter-American Regional Security System asserted "as a measure of continental self-protection" an "inherent right" to have the waters "to a reasonable distance from their coasts" remain "free from the commission of any hostile act" from "land, sea or air" by nations engaged in war. This "security zone" encircled the United States and Central and South America, including the waters of the Atlantic and Pacific for distances ranging from 1200 miles off the coast of Florida to 300 miles off the tip of South America.[98] Although the legality of the Panama declaration was challenged by the belligerents, the soundness of the principle has been supported by influential jurists.[99]

During World War I and II there was substantial uniform practice of neutral States to prohibit the entry of belligerent military aircraft into neutral air space. Such neutral rights were protected by resisting such entry even by firing upon the

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97. 39 Stat. 1194 (1917); 99 U.S. Off. Bull. 8 (1917).

98. 1 Dep't State Bull. 331-333, 334, 336-337, 360, 463-464, 662 (1939); 2 Dep't State Bull. 7-8, 61-62, 199-204, 568-569 (1940). See also Wild, Contiguous Zones, Airplanes, and Neutrality, International Law Studies, 1939, 60-98 (1940).

99. Brown, Protective Jurisdiction, 34 Am. J. Int'l L. 112-116 (1940); Fenwick, The Declaration of Panama, 34 Am. J. Int'l L. 116-119 (1940). Cf. Wright, Rights and Duties under International Law as Affected by the United States Neutrality Act and the Resolutions of Panama, 34 Am. J. Int'l L. 238-248 (1940).

intruding aircraft where necessary, by compelling the aircraft to land when entry was nonetheless effected, and by interning both the plane and its crew.[100]

More recently and during the Algerian rebellion, France declared a 32-mile wide maritime security zone off the coast of Algeria in order to prevent supplies reaching the insurgents by sea. The protests which were directed against France by States whose ships were apprehended in that zone did not challenge the right of France to exercise such authority over the high seas but were confined to alleged specific abuses of French implementation of this declaration.[101]

e. Self-Protection.--As a measure of self-protection, coastal States have been justified in international law to exercise jurisdiction over foreign vessels on the high seas where there is grave suspicion that such vessels are a source of imminent danger to the sovereignty or security of that State. The classic case is the Virginius. In 1873 Spanish forces seized an American vessel on the high seas on its way to assist insurgents in Cuba. Some American citizens and British subjects aboard were summarily executed on their arrival in Cuba. The British Government protested against the executions which could not be justified on the grounds of self-defense, but conceded the legality of the seizure of the ship and the detention of those aboard under the circumstances of the case. The United States withdrew its initial

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100. See McDougal and Feliciano 471-472.

101. McDougal, Lasswell, and Vlasic 249, 297, 301-302.

protest, and adopted the British view on the right of self-defense.[102]

The principle of self-protection is likewise considered to justify actual invasion of foreign territory. This was the situation in the case of the Caroline.[103] During the Canadian rebellion in 1837, the Caroline was used to transport men and materials from the rebels from American territory into Canada across the Niagara river. Canadian forces crossed the Niagara, and, after a scuffle in which some American citizens were killed, sent the Caroline adrift over the Falls. Other historic acts of self-preservation include the sinking of the Danish fleet in 1807 by the British to avoid its use by Russia,[104] the sending of expeditionary forces by the United States into Mexico in 1916 to 1919 to protect American citizens and their property,[105] and the sinking of the French fleet at Oran in 1940 to prevent its falling into the hands of German forces.[106]

f. Naval Maneuvers and Defense Areas.--Since the earliest

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102. 2 Moore, A Digest of International Law 980-983 (1906). See Colombos, International Law of the Sea 289-290 (5th ed. rev. 1962).

"The authority of a State over the high seas is not exclusive but must be exercised with due regard to the rights of other nations therein. For the purpose of self-protection...it may exercise an authority beyond the three mile limit."
II Hackworth, Digest of International Law 656 (1941).

103. See Jennings, The Caroline and McLeod Cases, 32 Am. J. Int'l L. 82-99 (1938); Moore, id. Vol. II, at 409-414.

104. Kurlsrud, The Seizure of the Danish Fleet, 1807, 32 Am. J. Int'l L. 280-311 (1938); I Oppenheim, International Law 299 (8th ed. Lauterpacht 1955).

105. Oppenheim, id. at 301.

106. Oppenheim, id. at 303. For other comprehensive claims of similar type, see McDougal and Feliciano 211-212.

times, all major States have asserted claims to the exclusive use of limited areas of the high seas for peaceful naval and military exercises, maneuvers and gunnery practice. This is considered the most common form of exclusive use in accordance with international law. The practice has been for naval powers to isolate certain remote portions of the high seas with a view to creating the least possible interference with navigation and fishing. Notice that such "restricted," "closed," or "prohibited" areas would be unsafe for navigation for a stated time is given to mariners through proper channels. These naval and military exercises are not limited to the sea but also include the international air space above it.[107]

The United States has established over 400 such areas, varying in size from less than a square mile to the vast area surrounding Bikini and Eniwetok Atolls and varying in duration of from a few hours to many years. The Soviet Union, United Kingdom, Canada and Australia have engaged in the same practice for similar purposes. The legality of this limited exclusive use of the high seas has seldom been questioned or even discussed.[108]

g. Nuclear Weapons Test Area.--Based upon the precedents of reasonable use of the high seas as peacetime defensive sea areas, the United States and the Soviet Union have since the end of World War II declared closed extensive areas of the high seas

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107. McDougal and Burke 592, 754-755, 768-773, 786-787, 788. See AFR 60-28, Operating Procedures For United States Military Aircraft Over The High Seas, which provides guidance regarding ICAO flight procedures and the conduct of surface gunnery exercises as they relate to international air space.

108. McDougal and Schlei, The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security, 64 Yale L.J. 648, 677-680 (1955).

for the purpose of conducting atomic and nuclear tests deemed essential to their security. These temporary bans were not limited to surface vessels, but also barred non-national aircraft from the air space in the prohibited zones.[109]

Although several States and writers have declared such use to be impermissible,[110] the Geneva Conference on the High Seas of 1958, expressly noting the applicability of the standard of reasonableness, failed to label such tests as being a violation of the freedom of the seas and merely adopted a resolution expressing "serious and genuine apprehension on the part of many States that nuclear explosions constitute an infringement of the freedom of the seas" and referred the matter to the General Assembly "for appropriate action."[111] The necessity and reasonableness of measures taken in conducting such tests by the United States have been well taken.[112]

It took an international agreement to ban partially nuclear weapon tests. On August 5, 1963, representatives of the United States, the United Kingdom, and the Soviet Union, as the three original parties, signed the Nuclear Test Ban Treaty in

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109. McDougal and Burke 756-763, 787, 791. The U.S. set up a danger area of some 400,000 square miles around the islands of the Marshalls, the Carolines, and the Marianas in the Pacific Ocean.

110. See Margolis, The Hydrogen Bomb Experiments and International Law, 64 Yale L.J. 629-647 (1955); Schwarzenberger, The Legality of Nuclear Weapons, 11 Current Legal Problems, 258, 287 (1958).

111. Resolution of the United Nations Conference on the Law of the Seas on Nuclear Tests on the High Seas, U.N. Doc. No. A/CONF.13/L.56 (1958); 52 Am. J. Int'l L. 864 (1958).

112. McDougal and Burke 771-773; McDougal and Schlei, op. cit. supra note 108. See also Taubenfeld, Nuclear Testing and International Law, 16 Sw. L.J. 365-408 (1962).

Moscow. Article I thereof reads:

> 1. Each of the Parties to this Treaty undertakes to prevent, and not to carry out any nuclear weapon test explosion, or any other nuclear explosion, at any place under its jurisdiction and control:
>
> (a) in the atmosphere; beyond its limits, including outer space; or underwater, including territorial waters or the high seas; ....

In providing for a complete ban on nuclear explosions in the three environments mentioned, the phrase "any other nuclear explosion" includes explosions for peaceful purposes. It is noteworthy, however, that this Article does not prohibit the use of nuclear weapons in the event of war, nor restrict the exercise of the right of self-defense recognized in Article 51 of the United Nations Charter.[113]

h. Rockets and Missile Test Areas.--The advent of rockets saw an extension of the practice of temporarily isolating certain remote portions of the high seas. In 1960, the Soviet Union asserted occasional competence over areas in the Central Pacific up to 40,000 square miles for purposes of testing rockets, missiles and space vehicles. These remote areas included the superjacent air space, and ships and aircraft of other States were invited to

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113. 14 U.S.T.&O.I.A. 1313, T.I.A.S. No. 5433; Senate Comm. on Foreign Relations, The Nuclear Test Ban Treaty, S. Exec. Rep. No. 3, 88th Cong., 1st Sess. (1963); Schwelb, The Nuclear Test Ban Treaty and International Law, 58 Am. J. Int'l L. 642, 643-646 (1964). See Cooper, Must We Give Up Self-Defense Rights to Attain General Disarmament?, 47 Space Digest 71, 75-76 (July 1964).

Although over 100 States are parties to the Nuclear Test Ban Treaty, France and Red China are not. France continues its nuclear test program in the Algerian Sahara. N.Y. Times, March 16, 1964. Red China exploded its first atomic bomb in the western region of China on Oct. 16, 1964. The Washington Evening Star, Oct. 16, 1964, p.A-1, cols. 7,8.

avoid entering such zones. The United States expressly regarded such Soviet use of the Pacific area as permissible under international law, as it likewise claims the right to do the same.[114]

By agreement between the United States and the United Kingdom in 1950 an area of about 50,000 square miles, extending from the eastern coast of Florida out into the Atlantic Ocean and across the Bahamas, has been designated as a "Flight Testing Range" for joint use of the United States and Great Britain in testing long-range guided missiles.[115]

i. Texas Towers.--Back in the 1920's when non-stop flights across the Atlantic Ocean were still impossible, legal scholars were debating the legality of "seadromes" or "airdrome islands" - artificial structures to be built on the high seas as auxiliary stations to insure safety of trans-oceanic air traffic. Although there was a split opinion, the more enlightened view maintained that the construction of seadromes was permitted and not prohibited by the "freedom of the seas" doctrine. For the "freedom of the seas" does not contradict actual occupation of part of the sea as a means of asserting a right of use permitted to everyone. Certainly ships make exclusive use of the space they cover while sailing, and no one has ever questioned this right. For this reason, fixed installations such as anchored buoys and light ships, have been permitted in the open sea as being indispensable to the

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114. McDougal and Burke 771, 786-787, 788, 791; McDougal, Lasswell, and Vlasic 298-299, 303.

115. 1 U.S.T.&O.I.A. 429, T.I.A.S. No. 2099.

safety of navigation.[116]

By the same token, the construction by the United States of the so-called "Texas Towers" - a string of radar warning platforms extending to a distance of about 100 miles from its borders - is considered as a reasonable use of the high seas for security purposes.[117]

j. Air Defense Identification Zones.--The rapid advances in modern airflight technology resulting in further shrinking of the size of the globe, have graphically demonstrated the inadequacy of the three-mile rule for military security purposes in the air space over the high seas. This condition caused the United States in 1950 to establish regulations unilaterally exercising jurisdiction for security purposes in the air space over the high seas in order to ascertain the identity or intentions of aircraft approaching its national air space.[118] For this reason, coastal "Air Defense Identification Zones" (ADIZ's) and "Distant Early Warning Identification Zones" (DEWIZ's) have been established in adjacent air space and waters beyond the limits of the territorial sea.[119] Domestic and foreign aircraft must file

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116. See Meyer, Legal Problems of Flight into the Outer Space, 1961 Symposium 8, 16-17; Heinrich, Air Law and Space, id. at 271, 311-316; Verplaetse, International Law In Vertical Space 89-91 (1960).

117. See Note, Legal Aspects of Reconnaissance in Air Space and Outer Space, 61 Col. L. Rev. 1074, 1094, note 111 (1961).

118. Executive Order 10197 (1950).

119. FAA Reg. 99.1, 9 Dec. 1963, defines Air Defense Identification Zones (ADIZ) as: "...areas of airspace over land or water in which the ready identification, location, and control of civil aircraft is required in the interest of national security." They are classified as (1) Coastal ADIZ's, (2) Domestic ADIZ's, and (3) DEWIZ's.

flight plans before entering any ADIZ.[120] Foreign aircraft bound for the United States are required to file position reports upon entering a coastal ADIZ "when the aircraft is not less than one hour and not more than two hours average cruising distance from the United States".[121]

In 1951, Canada promulgated similar regulations providing for the creation of "Canadian Air Defence Identification Zones" (CADIZ), in which a similar type of jurisdiction is asserted over foreign aircraft with two major distinctions. The CADIZ extend seaward over the Atlantic and Pacific up to 180 miles (with an exception for aircraft flying at less than 4,000 feet), whereas the Atlantic ADIZ extend seaward for more than 250 miles and the Pacific ADIZ for more than 300 miles. CADIZ is stricter in the sense that position reports are required of all foreign aircraft within the defense zones whether or not they are bound for Canada.

Neither ADIZ nor CADIZ has elicited any protest, and their legal justification based on the principle of self-protection or self-preservation has been sustained under international law.[122]

France exercised a similar right in a slightly different setting. As the result of actual hostilities during the Algerian rebellion, France declared as its Air Defense Identification Zone

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120. Id. Secs. 99.11 and 99.13.

121. Id. Sec. 99.23. Similar stringent position-reporting regulations are applicable to domestic aircraft. Id. Sec. 99.21. The one-hour standard is similar to the jurisdiction claimed in the adjacent areas under the authority of the maritime law, where the twelve mile limit, equivalent to one hour sailing distance from the coast, is accepted for the purposes of customs and immigration.

122. See Martial, State Control of the Air Space Over Territorial Sea and the Contiguous Zone, 30 Can. B. Rev. 245-263 (1952); Murchison, The Contiguous Air Space Zone in International Law (1956); Pender, Jurisdictional Approaches to Maritime Environments: A Space Age Perspective, XV JAG J. 155-160 (1961).

the air space off the coast of Algeria, extending about 80 miles over the high seas and demanded compliance with its regulations by all aircraft within such zone. This action was prompted when it appeared probable that the Algerian nationalists might use the air routes over the adjacent high seas for the transportation of supplies and manpower. Unlike ADIZ and CADIZ, a number of complaints were registered against the French Government on the ground that the manner in which the French enforced such security regulations over the high seas "unnecessarily vex and harass foreign lawful commerce."[123]

4. Conclusions

In the preceding sections we traced the evolutionary development of increased exceptions to the so-called doctrine of "the freedom of the seas," necessitated by the inadequacy of the territorial sea to protect legitimate interests of littoral States. We saw that contemporary law of the sea seeks to accommodate conflicting interests not so much by fixed boundaries between territorial seas and the high seas, but rather by the highly flexible protection of varying concentrations of interests. As long as such claims to "jurisdiction" or "control" for special purposes are limited in time, distance, and degree reasonably necessary to protect a pressing interest -- as distinguished from a claim to "sovereignty" -- no significant protest is raised by the international community.

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123. McDougal, Lasswell, and Vlasic 307-308, 309-310, 310-311. See Debbasch, La Zone Contique En Droit Aerien, 24 Rev. Gen. de l'Air 249-266 (1961). See also text at note 101 supra.

With reference to the Geneva Convention on the Territorial Sea and the Contiguous Zone, it is submitted that Article 24 thereof restricting the "contiguous zone" to twelve miles and to certain specified economic and fiscal interests is unrealistic. Clearly, it fails to reflect the full range of the unique interests - particularly security interests - that States have traditionally protected in practice by the application of occasional exclusive competence on the high seas. One commentator predicted that "Article 24 is an article that...may well remain more honoured in its breach than its observance."[124]

Concerning the legal regime of the air space over adjacent areas, it may be stated that just as States have extended their effective control over the high seas beyond their territorial seas for security reasons, so will States extend their control over the superjacent air space over the high seas, and their unilateral claims will be recognized just as they have been for the sea.

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124. Green, The Geneva Conventions and the Freedom of the Seas, 12 Current Legal Problems, 224, 225 (1959). See also McDougal, Lasswell, and Vlasic 296, 349-350; McDougal and Burke 81, 545-546, 605-607, 618-630.

CHAPTER II

LEGAL REGIME IN OUTER SPACE

With the advent of the first space flight in 1957 and the ensuing increased rapidity of technological progress, there has literally been a flood of legal literature dealing with the problems of law in outer space. The quantitative outpouring of legal writing in what may be called "The Third Battle of the Books" far exceeds that produced during the legal controversy over the status of air space at the turn of the century.

The legal problems in this new arena of activity are as countless as the imagination. Much has been written but little has been achieved in the way of binding international agreement. Our purpose here is not to consider all the possible legal space problems involved or the various theories advanced with respect thereto, but rather is limited to the present state of the development of a legal regime in outer space, with particular emphasis on the legal status of outer space and celestial bodies, the legal status of spacecraft and satellites, the boundary question between air space and outer space, peaceful v. military uses of outer space, and self-defense in outer space.

A. The Process of Space Law Development

International law suffers from the nonexistence of an international legislature in the sense of a body having power to enact new international law binding on all States of the world community.

As a substitute therefor, international law has had to rely for the development of its law principally on the slow growth of custom and in more recent times on law-making treaties.[125] Whereas the law of the sea developed over the course of several hundred years through the process of customary international law primarily, the law of the air has developed over a relatively short period of about 50 years by the principal means of international conventions. Undoubtedly, the emerging law of space will be partly customary and partly conventional. The rapidity of the technological changes in the space age illustrates the need for a more rapid process than customary international law to develop workable norms of space law. However, since States have not yet resorted to the medium of international conventions in creating space law, customary international law--longer, more indefinite, less certain, and more difficult of proof--must be relied upon.[126]

The interest and role of the United Nations in space activities may have a revolutionary, if not catalystic, action upon the development of the emerging regime of space law.[127]

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125. Article 38, Statutes of the International Court of Justice, lists the two principal sources of international law as:

"(1) International conventions, whether general or particular, establishing rules expressly recognized by the contesting States;

"(2) International custom, as evidence of a general practice accepted as law."

126. See Jaffee, Reliance Upon International Custom And General Principles in The Growth of Space Law, 7 St. Louis U.L.J. 140 (1962).

127. See generally Cheng, The United Nations and Outer Space, 14 Current Legal Problems 247-279 (1961). On the intergovernmental and nongovernmental organizations in space activities generally, see Haley, Space Law and Government 298-393 (1963); Schwartz, International Organizations and Space Cooperation (1963).

In 1958, the U. N. General Assembly created an Ad Hoc Committee on the Peaceful Uses of Outer Space[128] and requested it to report on the nature of the legal problems which may arise in the exploration of outer space. On July 14, 1959, the Ad Hoc committee submitted its report[129] in which it identified legal problems into two categories of varying priorities of consideration. The legal problems susceptible of priority treatment were:

1. Question of freedom of outer space for exploration and use.
2. Liability for injury or damage caused by space vehicles.
3. Allocation of radio frequencies.
4. Avoidance of interference between space vehicles and aircraft.
5. Identification and registration of space vehicles and coordination of launchings.
6. Re-entry and landing of space vehicles.

The legal problems of secondary importance not considered ripe for early solution were:

1. The question of determining where airspace ends and outer space begins.
2. Protection of public health and safety: safeguards against a contamination of or from outer space.
3. Questions relating to exploration of celestial bodies.
4. Avoidance of interference among space vehicles.

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128. U.N. Gen. Ass. Res. 1348 (XIII), adopted unanimously Dec 13, 1958; Space Documents 88-89.

129. U.N. Doc. No. A4141 (1959); Space Documents 101-152.

The Ad Hoc committee concluded that a comprehensive code was not practicable at the present stage of knowledge and development.[130] It further decided "that it would not be appropriate at the present time to establish any autonomous inter-governmental organization for international cooperation in the field of outer space," or "to ask any existing autonomous inter-governmental organization to undertake over-all responsibility in the outer-space field."[131]

The Ad Hoc committee did not attempt to identify all the juridical problems which might arise. Other problems not identified by the committee but germane to our consideration include:

1. The legality of observation satellites.
2. Peaceful v. military uses of outer space.
3. Self-defense in outer space.
4. Jurisdiction over space craft.[132]

In December 1959, the U. N. General Assembly created a permanent Committee on the Peaceful Uses of Outer Space[133] and requested it to study the nature of the legal problems which may arise from the exploration of outer space.

The first concerted action in the beginning of the formulation of a positive law of space took place in 1961 when by General Assembly Resolution 1721 (XVI)[134] the United Nations:

130. U.S. Space Policy 8-9. This subject represents a major area of disagreement. See Lipson and Katzenbach 27-28, 57-59.

131. See further Lipson and Katzenbach 32-36.

132. For expressions of other legal problems, see Survey of Space Law 22-29; Lipson and Katzenbach 3-36; McDougal, Lasswell, and Vlasic 91-93.

133. U.N. Gen. Ass. Res. 1472 (XIV), adopted unanimously Dec. 12, 1959; Space Documents 161-162.

134. Adopted unanimously Dec. 20, 1961; Space Documents 225-228.

1. Commends to States for their guidance in the exploration and use of outer space the following principles:

(a) International law, including the United Nations Charter, applies to outer space and celestial bodies;

(b) Outer space and celestial bodies are free for exploration and use by all States in conformity with international law, and are not subject to national appropriation; . . .

In the same Resolution, States were called upon to furnish information of launchings for purposes of registration and requested the Secretary-General to maintain a public registry of such information.

In October 1963, after the United States and the Soviet Union had expressed their intentions not to station any objects carrying nuclear weapons or other kinds of weapons of mass destruction in outer space, the United Nations, by General Assembly Resolution 1884 (XVIII),[135] solemnly called upon all States:

(A) To refrain from placing in orbit around the earth any objects carrying nuclear weapons or any other kinds of weapons of mass destruction, installing such weapons on celestial bodies, or stationing such weapons in outer space in any other manner;

(B) To refrain from causing, encouraging, or in any way participating in the conduct of the foregoing activities.

The General Assembly in December 1963, by Resolution 1962 (XVIII),[136] approved a "Declaration of Legal Principles Governing the Activities of States in the Exploration and Uses of Outer

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135. U.N. Doc. No. A/C.1/L.324, adopted by acclamation on Oct. 17, 1963; 49 Dep't State Bull. 754 (1963).

In August 1963, the U.S. and the U.S.S.R. signed the Nuclear Test Ban Treaty banning nuclear tests in the atmosphere, in outer space, and underwater. See text at note 113 supra.

136. U.N. Doc. No. A/C.1/L.331 and Corr. 1, adopted unanimously Dec. 13, 1963; 49 Dep't State Bull. 1012-1013 (1963).

For a juridico-political review of this Declaration, see Schick, Problems of a Space Law in the United Nations, 13 Int'l & Comp. L.Q. 969-986 (1964).

Space," prepared by the Committee on the Peaceful Uses of Outer Space. The Declaration states, inter alia, that the General Assembly:

> "Solemnly declares that in the exploration and use of outer space States should be guided by the following principles:
>
> 1. The exploration and use of outer space shall be carried on for the benefit and in the interests of all mankind.
>
> 2. Outer space and celestial bodies are free for exploration and use by all States on a basis of equality and in accordance with international law.
>
> 3. Outer space and celestial bodies are not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means.
>
> 4. The activities of States in the exploration and use of outer space shall be carried on in accordance with international law including the Charter of the United Nations, in the interest of maintaining international peace and security and promoting international cooperation."

The Declaration additionally deals with responsibility of States for national activities in outer space and states that such activities should be conducted with due regard for the interests of other States, that the State on whose registry an object launched into outer space is carried shall retain jurisdiction and control while such object is in outer space, that each State that launches or procures the launching of an object into outer space and each State from whose territory or facility an object is launched is internationally liable for damages caused, and that astronauts landing on territory of a foreign State or on the high seas in the event of accident, distress, or emergency shall be assisted and returned to the State of registry of their space vehicle.

On the same day that the Declaration was approved, the General Assembly adopted Resolution 1963 (XVIII)[137] recommending:

> "that consideration be given to incorporating in international agreement form, in the future as appropriate, legal principles governing the activities of States in the exploration and use of outer space."

In addition, it requested the Committee on the Peaceful Uses of Outer Space to continue study and report:

> "on legal problems which may arise in the exploration and use of outer space, and in particular to arrange for the prompt preparation of draft international agreements on liability for damage caused by objects launched into outer space and on assistance to and return of astronauts and space vehicles."[138]

The critical question presented is the legal effect of United Nations Resolutions and Declarations. The Director, General Legal Division, United Nations, favors the view that such resolutions and declarations can be regarded as having the effect of law. He maintains:

> I do not think that the only alternative to customary law is treaty law, even though in a formal sense these are the two sources of international law. It seems to me that declarations adopted with general approval by the United Nations General Assembly which purport to set in terms of legal authority standards of conduct for States, can be regarded as an expression of "law" which is regarded as authoritative by governments and peoples throughout the world.[139]

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137. U.N. Doc. No. A/C.1/L.332/Rev.1; adopted unanimously Dec. 13, 1963; 49 Dep't State Bull. 1013-1014 (1963).

138. See Report Of The Legal Sub-Committee To The Committee On The Peaceful Uses Of Outer Space, U.N. Doc. No. A/AC.105/19 (1964); 3 Int'l Legal Materials 528-544 (1964).

139. Schacter, The Prospects for a Regime in Outer Space and International Organization, Law and Politics in Space 95, 98 (1964). See also I Whiteman, Digest of International Law 71 (1963); Menter, Formulation of Space Law, Univ. Okla. Space Conf. 127, 131-132.

The 1963 U.N. Declaration has been characterized as "soft international law." Christol, What's Going on in Outer Space: A Developing New Field of Law, 50 A.B.A.J. 527, 529 (1964).

The prevailing view to the contrary is that such resolutions and declarations are mere statements of intentions and have no binding legal force on States which voted in favor of them.[140] During the General Assembly debates, the French representative expressed this view when discussing the technical legal effect of the 1963 U.N. Declaration. He said:

> I will add, however, that, while supporting and subscribing to the principles contained in the Declaration to which I have just referred, my delegation could not for the moment give this Declaration more value than that of a declaration of intention. We do not, in fact, consider that a resolution of the General Assembly, even though adopted unanimously, can in this case create, stricto sensu, juridical obligations incumbent upon Member States. Such obligations can flow only from international agreements.[141]

This view was also expressed by the representatives of the United Kingdom and the Soviet Union.

It thus appears that United Nations Resolutions have not yet achieved the level of replacing custom as a source of international law. They cannot by themselves be creative of legal obligations and thus have no legally obligatory force.[142]

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140. U.N. Resolutions are not binding and a violation of them could not necessarily be considered an international delict. To be definitely binding under international law, a resolution would have to be confirmed either by agreement or the continued practice of States or the principles and customs incorporated into the municipal legal systems of different States. They constitute tangible evidence of what the law is or should be, and as such may be considered a subsidiary source of international law like the writings of eminent jurists and the decisions of courts, according to Article 38 of the Statute of the International Court of Justice. For a discussion of the quasi-legal effects of U.S. Resolutions, see Woetzel, The Nuremberg Trials in International Law 51-57 (1960); Schick, op. cit. supra note 136, at 971-974.

141. Cooper, Aerospace Law: Progress in the UN, Astronautics & Aerospace 42, 44 (March 1964); Schick, op. cit. supra note 136, at 973-974.

142. See Skubiszewski, The General Assembly of the United Nations and its Power to Influence National Action, Proc. A.S.I.L. 153-162 (1964); Lande, The Changing Effectiveness of General Assembly Resolutions, id. at 162-170.

However, it is submitted that a United Nations resolution or declaration, if unanimous and accepted in practice, may be evidence of the beginning of a customary rule of international law and thus constitutes an important step toward the development of law. Equally important, such overwhelming expression of unanimity removes the element of doubt so often present in evolutionary customary law so as to operate to reduce considerably the requisite time element necessary for a general practice to ripen into an accepted rule of customary law.

Significantly, the U.S. representative stated:

> We believe these legal principles reflect international law as it is accepted by the Members of the United Nations. The United States, for its part, intends to respect these principles. We hope that the conduct which the resolution commends to nations in the exploration of outer space will become the practice of all nations.[143]

Cooper sums up the legal effect of the 1963 U.N. Declaration as follows:

> While this Declaration was not a legislative enactment, its unanimous acceptance goes far towards proving the existence of an agreed rule of customary international law. It will, in my judgment, eventually become part of a new convention. But even before that occurs, world public opinion would hardly now countenance any national claim of sovereignty in outer space or on celestial bodies.[144]

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143. Statement by Ambassador Stevenson on Dec. 2, 1963, 49 Dep't State Bull. 1007 (1963). But see Schick, op. cit. supra note 136, at 972-973, that a Declaration is rather a medium for providing a political framework of general principles and specific issues.

Immediately following Ambassador Stevenson, the representative of the Soviet Union stated:

> "The Soviet Union, for its part, will also respect the principles contained in this Declaration if it is unanimously adopted." See Gardner, International Space Law and Free World Security, 47 Space Digest 58, 59 (July 1964).

144. Cooper, op. cit. supra note 141, at 46.

B. Legal Status of Outer Space and Celestial Bodies

We have seen that according to customary and conventional international law the space above the high seas and unclaimed areas of the world are free from State sovereignty. This reduces the problem of the legal status of outer space only to the relatively small percentage of the earth's surface where States exercise territorial sovereignty.

The initial question of whether outer space should be free like the high seas or subject to exclusive sovereignty of the subjacent State like territorial airspace has been answered by customary international law. Since the launching of Sputnik I on October 4, 1957, the United States and the Soviet Union, primarily, have engaged in extensive satellite launchings, lunar probes, and space probes. Most significantly, no State has as yet requested permission from another to fly satellites and space vehicles at very high altitudes "over" the other's territory and no State has as yet protested such overflights as a violation of its sovereignty.[145] A solid basis of State practice, supported by worldwide acquiescence[146] and fortified by the unanimous 1963 U.S. Declaration of 113 States, established beyond cavil the customary principle of freedom of outer space in 1963--"Year Seven of the Age of Space".

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145. The "free flight principle for earth satellites" is founded upon tacit consent springing from agreement in 1955 for the International Geophysical Year 1957-1958 (IGY) under the sponsorship of the International Council of Scientific Unions (ICSU). See Haley, op. cit. supra note 127, at 62-74.

146. For an impressive brief in support of this conclusion, see McDougal, Lasswell, and Vlasic 116-120, 194-227. See also Note, National Sovereignty of Outer Space, 74 Harv. L. Rev. 1154-1175 (1961).

The 1963 U.N. Declaration goes one step further by declaring that States have free access and inclusive competence in celestial bodies, too.[147] Its clarity, exactness, and simplicity defy equivocation.

Outer space and celestial bodies being free from sovereignty, the next question is: What law governs activities in outer space and celestial bodies? Obviously recognizing that space law is in its embryonic state and that the development of law depends upon facts, the 1963 U.N. Declaration supplies at this time a broad framework only to be filled in like a mosaic as experience and knowledge in this new area of human activity increase.[148] This standard is equally explicit in the 1963 U.N. Declaration:

> 4. The activities of States in the exploration and use of outer space shall be carried on in accordance with international law including the Charter of the United Nations, in the interest of maintaining international peace and security and promoting international cooperation.

Thus is established the cardinal rule governing the new regime in outer space that outer space and celestial bodies are free to all States but only for peaceful purposes in accordance with international law.[149]

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147. The Soviet Union never officially claimed sovereignty of the moon by reason of landing its national insignia upon the moon. See II Whiteman, Digest of International Law 1312-1314 (1963).

148. For a comprehensive analysis of the probable claims to authority in space activities, see McDougal, Lasswell, and Vlasic, 193-973.

149. That the indiscriminate extension of international law into the yet undefined reaches of outer space is likely to cause serious conflicts, see Schick, op. cit. supra note 136, at 976-978. Cooper postulates that the use of outer space may be agreed to be subject to certain limitations not now applicable to flight through the air space over the high seas. Cooper, Aerospace Law Over the High Seas, a paper delivered at the Fifth International Symposium on Space Technology and Science in Tokyo, Sep. 1963.

C. Legal Status of Spacecraft

Spacecraft is used herein as a generic term to include space rockets, ballistic missiles, artificial satellites, space stations, space probes, and any other object launched into outer space. The fact that spacecraft must traverse air space on their way to and from outer space presents a host of legal problems revolving about the legal status of spacecraft.

The initial problem is one of determining whether spacecraft come within the meaning of "aircraft" as used in the Chicago Convention. The failure of the Chicago Convention to contain a definition of aircraft does not aid the problem. The definition of aircraft contained in Annex 7 thereto is not binding on Contracting States. On the other hand, the United States definition of aircraft is broad enough to include spacecraft.[150] A further sophisticated question is whether spacecraft are pilotless aircraft within the meaning of Article 8 of the Chicago Convention. Additional problems are created concerning the status of the X-15, a "rocket plane" which operates in the atmosphere as an aircraft while aerodynamic lift is available and also in outer space as a rocket under a different system of controls when aerodynamic lift fails.[151]

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150. See note 188 infra.

151. The X-15 has attained the speed of 4,104 miles per hour and an altitude of 66.3 miles. Fleming, New Thrust Toward The Stars, The Airman 18-20 (March 1964). For an argument that the X-15 is not an aircraft, no matter how it is considered, see Haley, op. cit. supra note 127, at 102-105.

It would seem that as long as States are the only operators of spacecraft, the Chicago Convention would not apply to spacecraft while in the atmosphere, since the Chicago Convention is not applicable to State craft (Article 3(c)).[152]

Notwithstanding and in order to prevent chaos and conflict, there is the need for a body of law to be applicable to spacecraft not only in the outer space[153] but also while traversing the atmosphere. What is the legal status of spacecraft? The 1963 U.N. Declaration marks an historic advance toward a partial answer of this question. On the question of jurisdiction and ownership of spacecraft, it provides:

> 7. The State on whose registry an object launched into outer space is carried shall retain jurisdiction and control over such object, and any personnel thereon, while in outer space. Ownership of objects launched into outer space, and of their component parts, is not affected by their passage through outer space or by their return to the earth. Such objects or component parts found beyond the limits of the State of registry shall be returned to that State, which shall furnish identifying data upon request prior to return.

On the vitally important subject of liability for damage caused by spacecraft, it provides:

> 8. Each State which launches or procures the launching of an object into outer space, and each State from whose territory or facility an object is launched, is internationally liable for damage to a foreign State or to its natural or juridical persons by such object or its component parts on the earth, in air space, or in outer space.

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152. Verplaetse, On The Definition And Legal Status Of Spacecraft, 29 J. Air L.&Com. 131-140 (1963).

153. Cooper, Fundamental Questions of Outer Space Law, 1961 Symposium 764-776.

On the humanitarian question of assistance to and repatriation of astronauts, it provides:

> 9. States shall regard astronauts as envoys of mankind in outer space, and shall render to them all possible assistance in the event of accident, distress, or emergency landing on the territory of a foreign State or on the high seas. Astronauts who make such a landing shall be safely and promptly returned to the State of registry of their space vehicle.

A host of other legal issues dependent upon the status of spacecraft, such as nationality, registration, identification, extraterritoriality, privileges, and immunities, must wait for future development.[154] There is doubt whether an early definition of the legal status of spacecraft will be reached. The legal status of an aircraft, after sixty years of flight, still remains to be fully defined.[155]

D. The Boundary Between Territorial Air Space And International Outer Space

The great bulk of legal writings on space law has centered on the perplexing question of locating and prescribing the vertical limits of national air sovereignty. Proposed locations range from five miles[156] to infinity.[157] The numerous proposals are based upon different criteria, including the prescriptions in

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154. These matters and more are fully treated in McDougal, Lasswell, and Vlasic 513-748; Haley, op. cit. supra note 127, at 136-158. See also Cheng, From Air Law To Space Law, 13 Current Legal Problems, 228-254 (1960).

155. Sand, Pratt, and Lyon, An Historical Survey Of The Law Of Flight 70 (I.A.S.L. Pub. No. 7, 1961).

156, Moon, A Look At Airspace Sovereignty, 29 J. Air L.&Com. 328, 344 (1963).

157. Hingorani, An Attempt To Determine Sovereignty In Upper Space, 26 U. Kan. City L. Rev. 5, 11-12 (1957).

Air Law Conventions, physical characteristics of space, nature of flight instrumentalities, facts of effective control, upon the earth's gravitational effects, arbitrarily fixed boundaries, and functional basis of activity.[158] The following is a sampling of the wide range of proposals as to where sovereign air space should end:

1. Height to which an aircraft, depending upon aerodynamic lift, can ascend (about 25 miles).

2. Height at which atmospheric lift ceases (about 52 miles).

3. Height at which flight loses its aerodynamic lift and centrifugal force takes over (about 53 miles).

4. Height at which gravitational field ends (about 60 miles).

5. Height at which atmosphere is no longer present (can vary from 10 to 650 miles).

6. Minimum height at which a satellite can be put into orbit (about 70 miles).

7. Height at which no molecules of gaseous air are found (between 1,000 and 100,000 miles).

8. Arbitrarily fixed boundaries (5 to 50,000 miles).

9. Height at which the subjacent State can no longer effectively exercise actual control.

10. A contiguous zone between sovereign air space and free outer space.

11. No fixed boundary, but a boundary varying with the functional basis of the activity concerned.

While it is agreed that the legal regime in outer space is different from that pertaining in air space, there is a wide

158. For a detailed account, see McDougal, Lasswell, and Vlasic 33-35, 323-359,

disagreement as to the need of a boundary.[159] It will be recalled that the Ad Hoc committee did not consider this to be a priority problem.

Lawyers generally would favor the early establishment of a boundary; for they would like to see a definite standard which determines when one legal regime (sovereignty in air space) is inapplicable and when the other (freedom in outer space) is. For example, a State might be justified according to international law in using force in its air space, while this might not be the case in outer space, except in self-defense. More important, whether satellite overflight of a State's territory constitutes penetration or peripheral reconnaissance can only be answered if we know what is the precise limit of that State's territorial air space.

However, from a political point of view, it appears that establishing a fixed boundary would operate against a State's primary concern of protecting its interest in national security. From the history of air law we saw that sovereignty of air space prevailed because of the uncompromising desire of States to protect their security and economic interests in air space. The establishment of a vertical limit on air sovereignty might mean that a State cannot effectively protect its national interests against offensive or undesirable space activities.

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159. The arguments for and against are summarized in Lipson and Katzenbach 16-18, 104-107; McDougal, Lasswell, and Vlasic 114-115, 350-539.

General Kuhfeld, The Judge Advocate General of the USAF, speaking in support of the functional criterion, observed:

> It seems to me that the particular activity in space rather than distance from the earth, is what primarily concerns a subjacent state. Protection of the state was what led to firm claims of sovereignty over the territorial sea and to a nation's airspace above it. Protection of the subjacent state will argue against agreement to any fixed distance as long as equal danger may exist from above such point. It is the activity in space that will determine the subjacent state's tolerance of the particular satellite.[160]

Soviet writers likewise subordinate the question of boundary determination to that of national security.[161] Zhukov, stressing the need for an agreement on demilitarization of outer space as a solution to the boundary and peaceful use problems, stated:

> ...But from the standpoint of security of States the altitude limit to the extension of sovereignty in the space above the Earth is of no decisive significance. A State will not feel any safer if military preparations against it are conducted at a higher altitude.
>
> Moreover, even if State sovereignty is extended to an unlimited altitude the security of States will not be adequately protected. Within the bounds of its own space above the Earth, each State would receive the right to carry out any military measures (for example, to put into orbit stationary space platforms with nuclear bombs), which would be a grave threat to the vital interests of other States....
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> * * *
>
> Prohibition of the military use of space within the framework of general and complete disarmament will remove the difficulties and apprehensions which now prevent a solution of the problem of fixing an altitude limit to

160. Kuhfeld, The Space Age Legal Dilemma, 1961 Symposium 773, 775.

161. For an excellent account of variations of the Soviet views on sovereignty in outer space before and after Sputnik and the resulting increased emphasis on the right of a State to take measures to protect the security of its territory, see Soviet Space Programs 194-203; Crane, Soviet Attitude Toward International Space Law, 56 Am. J. Int'l L. 685, 686-692 (1962).

> sovereignty. In conditions of general and complete disarmament, States could easily reach understanding on this question with a view to facilitating to the utmost the exploration of demilitarized outer space.[162]

The boundary question is reminiscent of the struggle, conflict, and failure of States to agree to fix a limit to the territorial sea. Scientifically, it is hopeless to fix a boundary between air space and outer space which would be precise and valid for all purposes. Politically, a fixed boundary would not adequately protect the security of subjacent States. Therefore, States might be more inclined to favor the functional approach which stresses not so much the location of a particular activity as the effect of that activity upon the safety of the subjacent State. Operationally, air space and outer space constitute one continuum - "aerospace".[163] This continuum could be legalized by the functional approach. The resulting wide divergence of scholarly opinion indicates that the difficulties of fixing a stationary vertical boundary are insuperable. This complex and delicate mixed question of science and politics can be resolved only by multilateral international agreement. Pending such international convention, it has been urged that the United States should not delay longer in exercising its unilateral right to fix its own upper boundary of its national air space territory.[164] As yet,

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162. Zhukov, Problems of Space Law at the Present Stage, Fifth Colloquium 12-13. See also Machowski, Selected Problems of National Sovereignty with Reference to the Law of Outer Space, Proc. A.S.I.L. 169, 173 (1961).

163. See White, Air and Space Are Indivisible, Air Force 40-41 (March 1958); Cooper, Aerospace Law - Subject Matter and Terminology, 29 J. Air L.&Com. 89-94 (1963).

164. Cooper, The Boundary Between Territorial Aerospace And International Outer Space, Paper delivered at the International Symposium on Space Law, Federal Bar Association National Convention, Washington, D. C., Sep. 11, 1964.

the boundary question is not a practical subject for international agreement. The boundary question, having survived eight formative years of space activity, may in due time, like the law of the sea, give way to a variety of doctrines adjusting special claims of States and thus be assigned to oblivion.

E. Military v. Peaceful Uses of Outer Space

With the advent of the missile and space age, mankind extended its endeavors from the earth arena to the space arena. It naturally follows therefrom that States will seek to utilize in the new extra-terrestrial arena the same base values they previously employed in the terrestrial arena. Just like the land, the sea, and the air all in turn played a major role in the power and security of States, it is unrealistic to expect States to neglect their security in space. The military component of national power constitutes an all-important element of the sum total of base values employed by States. Space represents both at the same time a threat to and a high potential in military power.[165]

Chairman Krushchev did not waste time in acknowledging the military usefulness of outer space. Soon after Sputnik, he stated:

> The fact the Soviet Union was the first to launch an artificial earth satellite, which within a month was followed by another one, speaks a lot. If necessary, tomorrow we can launch 10 to 20 satellites. All that is required for this is to replace the warhead of an intercontinental ballistic rocket with the necessary instruments and launch the whole thing with the instruments. There's a satellite for you.[166]

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165. McDougal, Lasswell, and Vlasic 48-51, 64-66, 67-69; Forman, Why A Military Space Program?, Univ. Okla. Space Conf. 68.

166. Krushchev, N.S., Interview with William Randolph Hearst, Jr., November 22, 1957; Pravda, November 29, 1957.

> The launching of an artificial earth satellite is, above all, of the very greatest scientific importance, but it cannot be denied that it is also of great importance for our country's defense, for the satellites could only be launched with the help of the intercontinental ballistic missile.[167]

1. Military Uses of Outer Space

There are two broad military objectives in space:

1. To augment the existing military capabilities of the land, sea, and air forces.

2. To develop a military patrol capability to guard against threats from outer space.[168]

The possibilities within each of these objectives include:

1. Augmentation:

   a. Communications systems.
   b. Reconnaissance systems.
   c. Military meteorological survey system.
   d. Ballistic missile defense.
   e. Early warning system.

2. Military Patrol and Operations:

   a. Space detection and tracking system.
   b. Interception systems.
   c. Inspection systems.
   d. Space environment monitoring system.

Both the United States and the Soviet Union have been using outer space for military programs.[169]

2. Peaceful Uses of Outer Space

While the United Nations recognizes and all the existing literature is unanimous that outer space should be used only for

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167. Krushchev, N.S., Interview with Brazilian journalists Victorio Maitorelli and Tito Fleuri, November 21, 1957; TASS, December 5, 1957.

168. Schultz, Weapons and Space, Univ. Okla. Space Conf. 60-67. See also Gardner, Outer Space: Problems of Law and Power, 49 Dep't State Bull. 367, 370 (1963); Fundamentals of Aerospace Weapon Systems, Air Force ROTC, Air University (1961). For a general discussion of actual space projects and the reasons behind them, see Ley, Our Work In Space 75-123 (1964).

169. See generally Hearings on H.R. 10939 99, 101, 103-109, 172-186, 675, 795.

"peaceful" purposes, there exists no international accord as to what constitutes peaceful use of outer space. One of the most important legal questions of major proportion confronting the international community at present is whether States have the right to use outer space for military purposes. More particularly, does "peaceful use" mean non-aggressive or non-military use? There are three aspects to this problem.

The first aspect stems from the extraordinary inter-dependence of scientific, commercial, military, and other objectives that may be advanced by the same activities in space. Virtually every activity in space has a possible military connotation; military and non-military are factually inter-dependent. For example, a reconnaissance satellite may be made to yield to important economic benefits from service to meteorology. A navigational satellite can guide a submarine as well as a merchant ship. In effect, generally there is no workable dividing line between military and non-military uses of space.[170]

The second aspect concerns the definition of "peaceful use" and is in part a semantic one. It may be interpreted as meaning either non-aggressive or non-military. In context of the United Nations Charter and international law in general, "peaceful" is used in contradistinction to "aggressive".[171] Thus, non-aggressive military use would be peaceful, whereas aggressive

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170. See Staff of Senate Comm. on Aeronautical and Space Sciences, 87th Cong., 2d Sess, Meteorological Satellites 131 (Comm. Print 1962); McDougal and Lipson, Perspectives for a Law of Outer Space, 52 Am. J. Int'l L. 407, 409-411 (1958); Lipson and Katzenbach 24, 27; Lipson, An Argument on the Legality of Reconnaissance Satellites, Proc. A.S.I.L.174-176 (1961); Gardner, op. cit. supra note 168, at 370; Berg, Weapons and Space, Univ. Okla. Space Conf. 54-58.

171. For difficulties in defining "aggression", see text at notes 337-340 infra.

military use would not be peaceful. For example, the use of the high seas for the passage of naval vessels and for military maneuvers and testing of weapons in time of peace is "peaceful use" not in violation of international law. Similarly is transit in air space over the high seas by military aircraft. Under this view, any military use of space which did not itself constitute an attack upon, or threat against, the territorial integrity and independence of another State would be peaceful non-aggressive military use and permissible. Military is not synonymous with aggression. Military actions in self-defense would be legal.

The contrary interpretation, based upon the Antarctica Treaty and the treaty establishing the International Atomic Energy Agency, construes "peaceful use" to mean non-military use and thus would exclude all non-aggressive military uses. Such meaning is exceptional and arises as a result of explicit agreement of the parties.[172] To prohibit all forms of military use will ascribe a meaning to freedom of use of outer space that is different from the meaning of freedom of use of the high seas and the air space above it.

The third aspect deals with the inextricability of space problems from the problems prevailing on earth. Space is not a

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172. Lipson and Katzenbach 22-26. The Soviets apply a subjective test under which all actions by the Soviet Union are peaceful and all actions by the U.S. contrary to Soviet interests are "military" or warlike. See Crane, op. cit. supra note 161, at 700-704.

new subject--only a new place to which all of the problems prevailing on earth have been extended. The military problems on earth become part of the military problems in space. In the interest of national security, States will not refrain from all military activities in space until military problems on earth have been solved.[173]

A positive definition of "peaceful use" is urgently needed. Strong views were expressed in the legal subcommittee of the Committee on Peaceful Uses of Outer Space, both at its 1962 and 1963 meetings, that the question of military uses of outer space could be resolved only as part of a general disarmament agreement.[174] In the meantime two significant steps have been taken toward a regime of peace in outer space. The first was the Test Ban Treaty of 1963 signed by over one hundred States and banning the testing of nuclear weapons in outer space, in the atmosphere, and under water.[175] The other was U.N. General Assembly Resolution 1884 (XVIII)[176] of October 1963, which welcomed the expressions by the United States and the Soviet Union of their intention not to station in outer space any objects carrying

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173. Gardner, International Space Law And Free-World Security, 47 Space Digest 58-63 (1964). Gardner, op. cit. supra note 168, at 370-371.

174. Krushchev admitted that he was tying together the issues of dismantling foreign bases and the peaceful use of outer space. See Soviet Space Programs 159-163, 170. See also II Whiteman, op. cit. supra note 158, at 1314-1321; Cooper, Aerospace Law: Progress in the U.N, Astronautics Aerospace 41, 44 (March 1964). On disarmament generally, see Disarmament (Hammarskjold Forum No. 4, Tondel ed. 1964).

175. See text at note 113 supra.

176. See text at note 135 supra.

nuclear weapons or other kinds of weapons of mass destruction and solemnly called upon all States to refrain from stationing such weapons in outer space.

The 1963 U.N. Declaration does not remove the present uncertainty and disagreement as to whether "peaceful use" of outer space means non-aggressive or non-military use. Pending any limitation of military uses of outer space by way of international agreement, the only uses of outer space that are prohibited are those that fall within the prohibitions of the United Nations Charter. In the meantime, the United States is justified in using outer space for non-aggressive military uses consistent with the United Nations Charter.[177]

F. Self-Defense in Outer Space

A question of vital legal significance is whether or not the traditional right of States to act in self-defense is limited or prevented in outer space by any principle of international law or any provision in the United Nations Charter. Specifically, does the right of self-defense have geographical limitations? For example, is a State justified to intercept in outer space a foreign spacecraft known to be armed with a nuclear warhead and thereby constituting a potential threat to its national survival?[178]

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177. Lipson and Katzenbach 26; Meeker, Avoiding Conflict In and Over Space, Univ. Okla. Space Conf. 78; McMahon, Legal Aspects of Outer Space, 38 Brit. Yb. Int'l L. 339, 360 (1964).

178. The U.S. is developing an anti-satellite missile, the Nike X from the Nike-Zeus, and the Soviet Union has demonstrated the feasibility of the anti-satellite satellite by accurately placing Vostok-3 and Vostok-4 in orbit within a few miles of each other. A Survey of Aerial Reconnaissance, 19 Interavia 180, 182 (1964).

We have seen that the inherent right of self-defense or self-preservation is a long recognized principle of customary international law. In connection with the law of the seas, we noted that there is a difference between sovereign rights and the assertion of limited rights as to jurisdiction and control which are reasonable under all the circumstances. We have also seen many examples of such asserted rights on the high seas and in the air over the high seas, which are considered free from State sovereignty. These have been tolerated as reasonable in the interests of national security and self-defense.

States have traditionally claimed the right to act in self-defense and self-protection outside their national territory. The Virginius case is the classic case of self-defense exercised upon the high seas. The famous Caroline case is the classic case of self-defense exercised on foreign territory. Other noteworthy examples include the sinking of the Danish fleet in 1807 and the sinking of the French fleet at Orlan in 1940.[179] There is no cogent reason why the rule in the Caroline case is not applicable today in non-territorial outer space.

States may assert rights of self-defense with regard to space activities without actually claiming sovereignty in space. Such rights could be exercised under Article 51 of the United Nations Charter. In 1958 the legal adviser to the State Department stated in this connection:

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179. See text at notes 102, 103, 104, 105, and 106 supra.

> The United States is prepared at all times to react to protect itself against an armed attack, whether that attack originates in outer space or passes through outer space in order to reach the United States..
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> If and when the United States takes such action, it will be exercising a right which it has under international law, because that law in the last analysis is what nations will agree to. And the inherent right to individual and collective self-defense has been recognized as a fundamental principle of international law in the United Nations Charter.[180]

In October 1960, the Executive Secretary of the Space Law Commission of the U.S.S.R. Academy of Sciences declared that:

> In case of need the Soviet Union will be able to protect its security against any encroachments from outer space just as successfully as it is done with respect to air space.... Such action will be fully justified under the existing rules of international law and the United Nations Charter.[181]

Although Article 51 of the U.N. Charter has been construed by some to restrict the traditional right of self-defense to situations only where an armed attack occurs, the more enlightened view--founded upon the legislative history of the Article--is that Article 51 was not intended to abridge the traditional right of preventive self-defense, but on the contrary was intended to reserve and maintain it.[182] It is thus maintained that the customary right of self-defense is recognized by the U.N. Charter.

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180. Becker, Major Aspects of the Problem of Outer Space, 38 Dep't State Bull. 962, 965 (1958). See also Becker, The Control of Space, 39 Dep't State Bull. 416, 417 (1958).

181. Zhukov, Space Espionage Plans and International Law, 1961 Symposium 1095, 1101.

182. For fuller discussion of both sides of this controversy, see text at notes 488-502, infra.

We have noted that the 1963 U.N. Declaration does not define "outer space" or "peaceful use". However, the Declaration clearly expresses the existing consensus among member States that outer space and celestial bodies have an international status analogous to that of the freedom of the high seas from territorial sovereignty. As Mr. Justice Storey said in the case of the Mariana Flora:

> Upon the ocean, then, in time of peace, all possess an entire equality. It is the common highway of all, appropriated to use of all; and no one can vindicate to himself a superior or exclusive prerogative there.[183]

While the 1963 U.N. Declaration opposes claims of sovereignty, it does not expressly forbid claims of national rights to use and explore outer space in conformity with international law. Furthermore, the right to self-defense is not restricted by the U.N. Declaration. Therefore, nations can properly claim certain rights in outer space provided they do not attempt to establish sovereign control.

We have also seen that peaceful use of outer space includes defense uses. Lipson and Katzenbach ably sum up this point:

> In this connection an important point may be made. Nothing in the Charter prevents the maintenance of an efficient and modern military establishment or declares the mere ability to defend one's self inconsistent with positive obligations toward peaceful settlement of disputes. Article 51 is not an exhautive [sic] statement of the rights of self-defense and does not preclude the lawfulness of such devices as contiguous zones for security. There is, thus, no need to rely exclusively upon Article 51 to justify the capacity of the United States, and of its allies, to defend themselves against attack or even the threat of attack by maintaining a sufficient force in being.[184]

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183. 24 U.S. (11 Wheat) 1, 19 (1826).
184. Lipson and Katzenbach 25.

Significantly, the policy on the control and use of outer space recommended for the United States by the House Committee on Science and Astronautics in 1959 included the following:

> The committee recommends:
> * * *
> (7) That U.S. policy toward the control and use of space, aside from its existing commitment to peaceful purposes, be limited for the present to seeking agreements only on the civil uses of space.
> (8) That the United States serve notice that it does not intend, by implication, to limit its national sovereignty or its right of self-defense in space, through any agreement which is not specifically directed to such objectives.[185]

Finally, the right of self-defense extends to outer space regardless of whether or not a boundary on air sovereignty is established. The General Counsel of NASA stated the point as follows:

> It should be noted that the upward delimitation of territorial sovereignty does not imply that activities which threaten peace and security are to be permitted in outer space, nor does it mean that a state would not be free to take legitimate self-defense measures in outer space. The extent of territorial sovereignty is not the criterion for such matters.[186]

In conclusion, there is nothing in international law, the U.N. Charter, or in the 1963 U.N. Declaration which precludes the bona fide use of outer space for self-defense against an aggressor. The traditional right of self-defense, therefore,

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185. U.S. Space Policy 10.

186. Johnson, Remarks, Proc. A.S.I.L. 165, 167 (1961).

extends into outer space.[187] The rights of self-defense and self-preservation in order to be meaningful cannot be limited geographically. They apply to the high seas, to sovereign, territory, and to free outer space.

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187. Haley, Space Law and Government 156-157 (1963); Goedhuis, Some Trends in the Political and Legal Thinking of the Conquest of Space, 9 Nederlands Tijschrift Voor International Recht 113, 130-132 (1962); Jaffee, Reliance Upon International Custom And General Principles In The Growth Of Space Law, 7 St. Louis U.L.J. 125, 140 (1962); Cooper, Self-Defense in Outer Space ...and the United Nations, 5 Space Digest 51-56 (Feb. 1962); McDougal, Lasswell, and Vlasic 356, 403; Schick, International Law For Outer Space, Fifth Colloquium; Woetzel, Sovereignty and National Rights in Outer Space and on Celestial Bodies, Fifth Colloquium; Forman, op. cit. supra note 165, at 68. But see Schick, Problems Of A Space Law In The United Nations, 13 Int'l & Com. L.Q. 969, 977 (1964).

Soviet jurists admit that the right of self-defense applies to outer space. When the issue concerns the right of the U.S. to self-defense, they would limit it to cases of "armed attack" only within the strict interpretation of Article 51. See Zhukov, Problems of Space Law at the Present Stage, Fifth Colloquium; Machowski, op. cit. supra note 162, at 169-174. A different standard is used, however, when the issue concerns the right of the Soviet Union to act in self-defense against U.S. reconnaissance satellites. See Crane, op. cit. supra note 161, at 706.

CHAPTER III

OVERFLIGHT BY FOREIGN MILITARY AIRCRAFT

In Chapter I we examined the legal regime of air space with particular emphasis on the legal status and transit rights therein of civil aircraft. By way of summary, the legal regime of the air space over the earth's surface may be stated as follows:

1. Every sovereign State has complete and exclusive sovereignty over the air space above its land areas (including metropolitan dependent territories), inland waters, and territorial sea, to an undetermined height.

2. The principle of "right of innocent passage," applicable to the passage of foreign vessels through national territorial seas, has never been accepted as part of the law of international flight. Therefore, aircraft have no rights in the air space of a foreign State unless specifically granted.

3. Every sovereign State in time of peace, and every neutral State in time of war, has complete, unilateral, and exclusive right to determine which, if any, foreign aircraft are permitted to enter or pass through its national air space, either in transit or for the purpose of landing.

4. The air space over the high seas and unclaimed portions of the earth's surface, not being subject to the sovereignty of any State, is free for the use of all.

In Chapter II we examined the emerging legal regime in outer space. Although still in its nascent stage, the present status of the legal regime of outer space may be stated as follows:

1. Outer space and celestial bodies, not being subject to national sovereignty, are free for exploration and use for peaceful purposes by all States on the basis of equality and in accordance with international law.

2. In the absence of an international agreement to the contrary, peaceful use of outer space includes non-aggressive military use.

3. The inherent rights of self-preservation and self-defense, having no geographical limitation, apply to sovereign territory, the high seas, international air space, and international outer space.

We now turn our attention to what is a military aircraft and in particular what is the legal status of the military aircraft within the legal regime of air space in time of peace.

A. Status of Military Aircraft in Time of Peace

In international law, all aircraft[188] are divided into

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188. The generic term "aircraft" was not defined in either the Paris Convention of 1919 or the Chicago Convention of 1944. However, Annex A of the Paris Convention defined aircraft as "Any machine that can derive support in the atmosphere from the reactions of the air." It also classified the airborne objects considered as aircraft. Aeroplanes, gyroplanes, helicopters, and ornithopters were listed as heavier than air aircraft. Kites, gliders, airships, and balloons were listed as lighter than air aircraft.

Annex 7 (Aircraft Nationality and Registration Marks) to the Chicago Convention, which supersedes the Paris Convention, adopted the definition and classification contained in Annex A of the Paris Convention.

Neither annex distinguishes between aircraft and projectiles, but one authority concludes that most projectiles are not included within the definition of aircraft, even though some piloted, rocket-propelled instruments might be both aircraft and projectiles. Shawcross and Beaumont, Air Law 13 (2d ed. 1951). Article 8 of the Chicago Convention contemplates that an airborne instrumentality can be an aircraft though pilotless.

In the U.S. "aircraft" is given a broader meaning. Section 103(c), Federal Aviation Act, defines "aircraft" as "any contrivance now known or hereafter invented, used, or designed for navigation of or flight in air." This would include all machines such as missiles, rockets, and earth satellites capable of flying in the air independently of any support derived from reaction of the air. See Cheng, The Law of International Aviation 111 (1962).

two categories: "state" (also referred to as "public" in the United States) and "civil." Since all of the multilateral air law conventions in effect today deal exclusively with the international public and private law aspects of civil aircraft (those used for commercial and private flying) in time of peace, only passing and usually exclusionary reference is made to military aircraft.[189] Understandably, military aircraft have received greater attention in attempts to draft international rules for aerial warfare.[190]

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189. On the International Private Air Law side, the Additional Protocol to the Warsaw Convention of 1929, on the unification of certain rules relating to international transportation by air, permits an adhering State to exclude therefrom by reservation air carriage by State aircraft (the U.S., Canada, Ethiopia, Pakistan, Philippines, and the Republic of Congo (Brazzaville) have exercised such reservation); Article XXVI of the Hague Protocol of 1955, amending the Warsaw Convention of 1929, permits a reservation by a State with reference to "carriage of persons, cargo and baggage for its military authorities on aircraft, registered in that State, the whole capacity of which has been reserved by or on behalf of such authority;" Article 21 of the Rome Convention of 1933, relating to damage caused by foreign aircraft to third parties on the surface, excludes "military, customs or police aircraft;" Article 3 of the Rome Convention of 1933, relating to precautionary attachment of aircraft, excludes "aircraft exclusively appropriated to a State service;" Article 16 of the Brussels Convention of 1938, relating to assistance and salvage of or by aircraft at sea, excludes "military, customs, and police aircraft;" Article 13 of the Geneva Convention of 1948, on the international recognition of rights in aircraft, excludes "aircraft used in military, customs or police services;" Article 26 of the Rome Convention of 1952, relating to damage caused by foreign aircraft to third parties on the ground, excludes "military, customs or police aircraft."

On the International Public Air Law side, Article 30 of the Paris Convention of 1919 excludes all "military, customs and police aircraft;" Article 3 of the Chicago Convention of 1944 excludes all State aircraft defined as "aircraft used in military, customs and police services;" Article 1(4) of the Tokyo Convention of 1963, on offenses and certain other acts committed on board aircraft, excludes "aircraft used in military, customs or police services."

190. See Spraight, Air Power And War Rights (1947); DeSaussure, International Law And Aerial Warfare (Thesis, I.A.S.L. McGill University, 1953).

1. Definition of Military Aircraft

Article 3 of the Chicago Convention provides:

(a) This Convention shall be applicable only to civil aircraft, and shall not be applicable to State aircraft.

(b) Aircraft used in military, customs and police services shall be deemed to be State aircraft.

(c) No State aircraft of a contracting State shall fly over the territory of another State or land thereon without authorization by special agreement or otherwise, and in accordance with the terms thereof.

(d) The contracting States undertake, when issuing regulations for their State aircraft, that they will have due regard for the safety of navigation of civil aircraft.

Although there may be doubt as to whether the above definition of state aircraft is intended to be exhaustive,[191] it is clear that military aircraft are considered as state aircraft and as such are prohibited from flying into the national air space of another country without special permission.[192] Of course, the dominant

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191. The Paris Convention of 1919 was more explicit. Article 30 provided:

"The following shall be deemed to be State aircraft:
(a) Military aircraft.
(b) Aircraft exclusively employed in State service, such as post, customs, police.
(c) Every other aircraft shall be deemed to be private aircraft.
All State aircraft other than military, customs and police aircraft shall be treated as private aircraft and as such shall be subject to all of the provisions of the present Convention."

Based upon this Article, the drafting history of the Chicago Convention, and Articles 5, 77-79 of the Chicago Convention, it appears that all government owned and operated aircraft are considered as State aircraft and that State aircraft, other than those used in military, customs and police services, are considered as civil aircraft and assimilated to private aircraft insofar as rights to fly are concerned. Cheng, International Law and High Altitude Flights: Balloons, Rockets and Man-Made Satellites, 6 Int'l & Com. L.Q. 487-505 (1957).

192. The silence of the Convention as to the privileges of military aircraft was due to a feeling that provisions dealing with military aircraft are out of place in a civil aviation convention. Lissitzyn 568-569.

factor for excluding military aircraft has been national security.

The expressions "aircraft used in military service" and "military aircraft" are not necessarily synonymous. The Chicago Convention did not adequately define "military aircraft." Attempts to classify and define military aircraft as distinguished from civil aircraft were first made at the 1910 Paris Conference on International Aerial Navigation.[193] Article 41 of the resulting final draft convention provided that military aircraft were public aircraft in the military service when they were under the orders of a commander in uniform and had on board a certificate proving the military character.[194]

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193. Minutes of Meeting, Conference International de Navigation Aerien 69 (1910). The draft presented by the Germans considered as military aircraft "those aircraft of a contracting State which are under the command of an officer of the Armed Forces duly commissioned by the State and wearing uniform, and which have on board a certificate establishing their military character." Article 33, German Draft, 1910 Paris Conference. Denmark, Italy, and Russia were of the opinion that public aircraft were those which belonged to a State.

194. Fauchille was one of the first scholars to recognize the need for categorizing and defining military aircraft. In his report to the Institute of International Law in 1902, he defined military aircraft as being under the command of an army or naval officer appointed by military authorities and manned by a military crew. Fauchille, Regime Juridique des Aerstats, 19 Annuaire de l'Institut de Droit International 19-86 (1902). In his draft convention on the Status of Aircraft in Time of War, presented to the Institute of International Law in Madrid in 1911, he defined military aircraft as follows:

> "Article 1. A military aircraft is an aircraft assigned by the State to a military duty and placed under the command of an officer, in uniform, of the land or sea forces. Every military aircraft must bear the distinctive sign of its character, attached in a visible manner to its envelope."

Fauchille, Code of Fauchille, 28 Annuaire de l'Institut de Droit International 24 (1911).

Article 31 of the Paris Convention of 1919, following the format of the draft convention produced by the Paris Conference of 1910, defined military aircraft as follows:

> Every aircraft commanded by a person in military service detailed for that purpose shall be deemed to be a military aircraft.

The distinction between military and civil aircraft took on a realistic significance after World War I in the Treaty of Versailles, wherein it was provided for all time to come, that "The Armed Forces of Germany must not include any military or naval air force."[195] However, no attempt was made in the treaty to define military or naval aircraft. It was not until 1922 that the Aeronautical Advisory Commission to the Peace Conference, after having expressed the opinion that it was impossible to distinguish between civil and military aircraft, finally and at the adamant insistence of the Supreme Council drew up rules to distinguish between civil aviation and the military and naval aviation forbidden by the Peace Treaties.[196] These rules, known as "The Nine Rules," included as military aircraft all aircraft capable of flying without a pilot, every single-seater aircraft of more than 60 horse power, all aircraft constructed in such a manner as to allow the addition of armaments such as machine guns, bomb racks, torpedos, etc., all aircraft which could exceed a speed of about 106 miles an hour while flying at a height of about

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195. See Article 198, Treaty of Versailles.

196. Between 1919 and 1922, three separate committees of air experts at Paris, Geneva, and Washington respectively, arrived independently at identical conclusions that "civil aviation is very readily convertible to war purposes, and that no means can be devised to prevent such convertibility which would not, at the same time, prejudice the development of civil air-transport." Cooper, The Right To Fly 90 (1947).

6,500 feet, or which carried fuel for more than four hours' flight at full power, or which could transport total cargo in excess of about 1,320 pounds including pilot, crew, passengers, or freight.[197]

The Madrid Convention of 1926 incorporated the identical provisions of the Paris Convention of 1919 on the subject of State aircraft.[198] The Havana Convention of 1928 also copied the subject provisions of the Paris Convention, with the single exception that the term "military and naval aircraft" was used instead of "military aircraft."[199]

Understandably, it was not until after the practices of World War I could be evaluated that the most authoritative definition of military aircraft was produced. The Draft Hague Rules of Air Warfare of 1923 [200] provided in pertinent part:

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197. Id. at 306-307. Cooper contends that these "Nine Rules," "the best regulations which the Allied air-experts could devise, after months of discussion, proved to be abortive because they penalized civil aviation." Id. at 91-93. "The intent to disarm Germany in the Air was plain; the result, a complete and tragic failure. The method used-an attempted separation of the military and civil uses of air power, prohibiting one and not interfering with the other nor with the soon-resumed German control and sovereignty of its airspace-was artificial and unrealistic. Id. at 1-2.

198. Chapter VII, Madrid Convention of 1926.

199. Article 3, Havana Convention of 1928.

200. General Report of the Commission of Jurists at The Hague, 17 Am. J. Int'l L. Supp. 245-260 (1923). The Hague Rules were formulated in the Peace Palace at The Hague by a Commission of Jurists, with the aid of military and naval advisers sent by the United States, the United Kingdom, France, Italy, Japan, and the Netherlands. Although the rules thus drafted were never adopted as an international convention, they nevertheless enjoy great weight as a sound statement of the rules of international air law applicable in time of war. See Spraight, op. cit. supra note 190, at 42.

Article 2. The following shall be deemed to be public aircraft:-
(a) Military aircraft.
(b) Non-military aircraft exclusively employed in the public service.
All other aircraft shall be deemed to be private aircraft.

Article 13. Military aircraft are alone entitled to exercise belligerent rights.

Article 14. A military aircraft shall be under the command of a person duly commissioned or enlisted in the military service of the State; the crew must be exclusively military.

Article 41. Aircraft on board vessels of war, including aircraft-carriers, shall be regarded as part of such vessels.

Later in 1939, the Harvard Research Draft on Rights and Duties of Neutral States in Naval and Aerial War[201] defined military aircraft in a somewhat different sense:

Article 1. As the terms are used in this Convention:

* * *

(j) "Aircraft" includes all craft capable of flight whether lighter or heavier than air.
(k) A "military aircraft" is an aircraft used for military purposes.
(l) A "private aircraft" is an aircraft which is not a military aircraft or a public aircraft used exclusively in government service such as posts, customs or police; the term includes an aircraft used in the carriage of goods or passengers for hire, although the aircraft is owned and operated by a State.
(m) A "neutral aircraft" is an aircraft having the nationality of a neutral State.

* * *

Article 3. An aircraft while on board a belligerent warship, including an aircraft-carrier, shall be regarded as part of such warship.

The drafters believed that no distinction could be based on the technical character of an aircraft, or warships, but only on use. The members of the Research Committee stated:

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201. Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War, with comments: Research in International Law of the Harvard Law School, 33 Am. J. Int'l L. Supp. 169-817 (1939).

> No attempt is made here to distinguish by form or structure between civil and military aircraft, nor is such distinction believed to be possible. But since attempts have been made to draw such a distinction, as in the proceedings of the Washington Conference of 1921-1922, a remark may be made on the point. The Naval Advisor to the American Delegation to the Committee suggested the military uses of aircraft to be as follows:
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> 1. To collect information.
> 2. To combat other aircraft.
> 3. To attack surface targets.
>
> To this might be added the use of aircraft as carriers of troops, public officers, etc. There is hardly an efficient commercial plane that could not be pressed into some form of auxiliary service, relieving the military-equipped planes for "front" service. There is some question whether commercial planes, unless specially constructed, can readily be converted into efficient bombers, but there is no doubt that wing racks for small bombs may be readily attached to any plane.[202]

The members further suggested that a non-military public aircraft, being used for ordinary commercial services, should be construed as a private aircraft, whether or not it is owned or used by the State.[203]

Conventions on aerial navigation seem to treat the definition of military aircraft as axiomatic. This result probably stems from the inherent difficulties in finding an adequate, all-embracing definition.[204] We have seen that in the past legal scholars and international conferences have varied considerably in attempting to formulate a workable definition of military aircraft. The different criteria used may be summarized as

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202. Id. at 223-224.

203. Id. at 224.

204. The indivisibility of air power is expressed by Cooper as follows:
"We must realize that air power is the ability of a nation to fly; that air power is indivisible, used at times for civil air transport and at times for military striking force; ...." Cooper, op. cit. supra note 196, at 1.

follows:

1. The type of ownership of the aircraft, whether public or private;

2. Distinguishing physical factors, such as national markings or a certificate of registration;

3. Design and construction of the aircraft;

4. The legal status of the captain and crew;

5. The type of service for which the aircraft was designed or used; or

6. A combination of two or more of these factors.

Germane in this regard is the practice on the national level. In the United States, for example, the control and use of navigable air space of the United States and the regulation of both civil and military operations in such air space in the interest of the safety and efficiency of both are in the Administrator of the Federal Aviation Agency (FAA).[205] The Federal Aviation Act defines "aircraft" as "any contrivance now known or hereafter invented, used, or designed for navigation of or flight in air."[206] "Civil Aircraft" is defined as "any aircraft other than a public aircraft."[207] "Public Aircraft" is in turn defined as

> ... an aircraft used exclusively in the service of any government or of any political subdivision thereof including the government of any State, Territory, or possession of the United States, or the District of Columbia, but not including any government-owned aircraft engaged in carrying persons or property for commercial purposes.[208]

This definition of public aircraft includes military aircraft. The criterion here is use. However, military aircraft is not

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205. Sec. 103(c), F.A.A. of 1958; 72 Stat. 740, 49 U.S.C. 1303.

206. Id. Sec. 101(5).

207. Id. Sec. 101(14).

208. Id. Sec. 101(30).

defined elsewhere in the Act or in the Regulations of the FAA. Interestingly though, in prohibiting flights of foreign military aircraft, the Act provides:

> ... Aircraft of the armed forces of any foreign nation shall not be navigated in the United States, including the Canal Zone, except in accordance with an authorization granted by the Secretary of State.[209]

The criterion here seems to be ownership.

We have seen that over the years the emphasis on the international level has generally been shifted from the original yardstick of status of captain and crew (Paris Conference of 1910 and Paris Convention of 1919) to design and construction of the aircraft (The Nine Rules, 1922), and finally to use and service (Harvard Research Draft and the Chicago Convention of 1944).

Against the backdrop of such divergent attempts to define military aircraft, it is no wonder that the definition adopted in Article 3(b) of the Chicago Convention[210] was couched in such indefinite and vague terms.[211] Several proposals have been advanced

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209. Id. Sec. 1108(a).

210. For an exhaustive historical and comparative study of the meaning of Article 3(b) of the Chicago Convention, see Rippon, The Legal Status Of Military Air Transport (Thesis, I.A.S.L., McGill University, 1957).

211. Cooper explains the inadequacy of Art. 3(b): "... /T/he Chicago Convention is purposely less definite than some of its predecessors. The language used was understood to be vague but was considered a more practical solution than any of the several attempts which had been made in the past to define such classes, as, for example, military aircraft. The determining factor under the Chicago definition is whether a particular aircraft is, at a particular time, actually used in one of the three special types of services. If so, it is a 'State aircraft.' Otherwise it is a 'civil aircraft.' This solution leaves for settlement, under the facts of a particular case, such difficult problems as those arising when aircraft operated by the armed services carry non-military passengers and cargo. These questions the governments affected must settle from time to time." Cooper, National Status of Aircraft, 17 J. Air L.&Com. 292, 309 (1950).

by legal scholars to remedy the deficiencies of Article 3(b). One writer suggests that military aircraft be defined as that "exploited by a State for military or hostile purposes, including auxiliary military services necessary for modern military operations."[212] Another considers "civil aircraft requisitioned by the State and used for military purposes as military aircraft."[213] Still another suggests that military aircraft should be defined as "aircraft operated by a State for military or hostile purposes."[214] An all-embracing definition proposed "military aircraft are aircraft pertaining to or under the operational control of the Department of Defence of a State."[215]

The fact remains that the definition of a military aircraft under the Chicago Convention is an open question which may depend solely or collectively upon considerations of the status of the aircraft commander, the functional purpose for which the aircraft was designed, the functional use to which the aircraft is put, and the status of the owner or operator. For example, what is the status of meteorological flights conducted by the armed forces? It appears that the use of the aircraft for military purposes is the decisive test implicit, if not explicit, in Article 3(b) of the Chicago Convention.[216] Notwithstanding, in

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212. Moursi, Conflict in the Competence and Jurisdiction of Courts of Different States to Deal with Acts and Occurrences on Board Aircraft 59 (Thesis, I.A.S.L., McGill University, 1955).

213. Villamin, Piracy and Air Law 46 (Thesis, I.A.S.L., McGill University, 1962).

214. Peng, Le Statut Juridique de L'aeronef Militaire 101 (1955).

215. Rippon, op. cit. supra note 210, at 215.

216. See Honig, The Legal Status of Aircraft 40 (1956); Cheng, State Ships and State Aircraft, 11 Current Legal Problems 225, 235 (1958).

the absence of conventional agreement as to a precise definition of military aircraft, each Contracting State would seem to be justified in reserving to itself the unilateral discretion of what constitutes a military, as distinguished from a civil flight for the purpose of excluding such flight from its national air space. This, unfortunately, leaves the status of military aircraft in a state of uncertainty and confusion, not desirable in the present-day world of fact.

2. Nationality, Registration, and Identification of Military Aircraft

In international law a State has exclusive competence to attribute its national character to aircraft. Nationality symbolizes that a special "link" or relationship exists between a State and the aircraft of that State.[217] Its principal purposes are: (1) to afford the aircraft the enjoyment of the high seas, and (2) to protect national aircraft by precluding other States from unauthorized assertions of authority for exclusive reasons. The effect of this special relationship is that the State of the flag is responsible for the international good conduct of its aircraft when in use beyond national territory. Reciprocally, that State has the right, as against other States, to see to it that its national aircraft are accorded the privileges and rights to which they are legally entitled when away from home. Equally important is the resulting right of a State to exercise a comprehensive and

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217. The concept of nationality of aircraft is derived from the law of the sea and the comparable concept of nationality of ships. The notion that aircraft like ships must possess national character of a State won wide acceptance on the initiative of Fauchille in 1901. See Fauchille, Le Domaine Aerien Et Le Regime Juridique Des Aerostats, 8 Revue Generale de Driot International Public 414-485 (1901).

ubiquitous control over its national aircraft.[218]

Both civil and State aircraft can possess nationality. Each aircraft can have only one nationality. Civil aircraft have the nationality of the State in which they are registered, such modality having been prescribed by the Chicago Convention.[219] State aircraft, including military aircraft, have the nationality of the State which owns and uses them in public service, in accordance with recognized principles of customary international law applicable to warships.[220]

The special nature of air navigation requires identification techniques for aircraft different from those employed for ships. Unlike private vessels which display the national flag of the State of registration, a distinct name, and the name of the home port, civil aircraft must bear nationality and registration marks constituted by a group of symbols consisting of a letter or letters, followed by numbers.[221] With reference to military aircraft, each State is free to choose the manner by which it

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218. McDougal, Lasswell, and Vlasic 575-577, 583-585.

219. Articles 17, 18, 19, Chicago Convention.

220. McDougal, Lasswell, and Vlasic 561. The Chicago Convention assumes that aircraft are legal entities and directly recognizes the State as the guarantor of the conduct of the aircraft possessing its nationality as well as the protector of such aircraft. At the time of the Chicago Convention, customary international air law had so completely accepted the concept of nationality of aircraft that there was no question respecting the nationality of State aircraft. Cooper, op. cit. supra note 211, at 307. A fortiori similar rights and responsibilities flow from the State to its State aircraft.

221. Article 20, Chicago Convention, implemented by Annex 7 (Aircraft Nationality and Registration Marks).

indicates the national character of its military aircraft.[222]

3. Privileges and Immunities of Military Aircraft

It is a well established principle in international law, based upon sovereign immunity, that when the armed forces of one State cross the territory of another friendly State with the acquiescence of the latter, they are not subject to the civil and criminal jurisdiction of the territorial State.[223] By the same token, it is universally accepted that a foreign warship which enters a port with the express or implied consent of the local State is immune from the local jurisdiction of that State.[224] The warship, however, is required to conform with local security, traffic, and safety regulations or promptly depart.[225] The open question is whether foreign military aircraft, when permitted to fly in the territorial air space of another State, are entitled to the same privileges and immunities from local jurisdiction as accorded warships.

The Paris Convention of 1919 incorporated the British proposal that military aircraft and their crews be granted the privileges accorded by customary international law to warships

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222. McDougal, Lasswell, and Vlasic 568. Article 42 of the draft Paris Convention of 1910 provided that the distinctive national mark to be borne by military aircraft would be "the Sovereign emblem of their State." The Draft Hague Rules of Air Warfare of 1923 provided that military aircraft should carry external marks to show its nationality and military character. Art. 3, 17 Am. J. Int'l L. Supp. 245, 246 (1923). Procedures for designating U. S. Military aircraft as set forth in AFR 66-11, 18 Sep. 1962.

223. II Hackworth, Digest Of International Law 405 (1941).

224. The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 136 (1912); Briggs, The Law Of Nations 446-447 (2d ed. 1952).

225. McDougal, Lasswell, and Vlasic 715-716.

and their crews when such aircraft were duly authorized to fly over or land in the territory of another contracting State. Article 32 provided:

> No military aircraft of a contracting State shall fly over the territory of another contracting State nor land thereon without special authorization. In case of such authorization, the military aircraft shall enjoy, in principle, in absence of special stipulation, the privileges which are customarily accorded to foreign ships of war.
>
> A military aircraft which is forced to land or which is requested or summoned to land shall by reason thereof acquire no right to the privileges referred to in the above paragraph.[226]

Although the rule stated in this Article (that military aircraft should, in the absence of stipulations to the contrary, be given the privileges of foreign warships) was not incorporated in the Chicago Convention, Cooper states that the rule "is sound and may be considered as still part of the international law."[227] Peng, after an extensive review of relevant State practice, concludes that the immunity of military aircraft from local jurisdiction is well established in customary international law as not to require any formal agreement.[228] Thus, it appears that in the absence of an express agreement to the contrary, permission to fly into foreign territory would extend to military aircraft the same privi-

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226. Note that this article did not extend extraterritorial privileges to police and customs aircraft. In fact Article 33 therein was explicit in providing that in no case shall police and customs aircraft be entitled to the privileges referred to in Article 32. The drafters felt that military aircraft personified to a higher degree, than police and customs aircraft, the public power of the State, and that military aircraft had the same inviolable character as a foreign warship in a national port. Cooper, A Study on the Legal Status of Aircraft 34 (Mimeo. Sep. 19, 1949).

227. Ibid.

228. Peng, op. cit. supra note 214, at 75.

leges and immunities accorded to foreign warships.[229] As a practical matter, however, the extent to which military aircraft may be exempt from local jurisdiction when entering foreign territory can be determined and stipulated at the time such authorization is granted.

Customary international law recognizes the immunity of a foreign warship which enters territorial waters due to force majeure.[230] It is not clear whether a military aircraft in distress enjoys the same immunity as a warship under such conditions.[231]

B. Overflight by Permission

From our analysis of the legal status of air space, the entire air space may be divided simply into two categories: (a) national air space, and (b) international air space. National air space represents such portions of the air space as are subject to national sovereignty and includes air space superincumbent over a State's territory and territorial waters. International air space represents such portions of the air space as are not subject to national sovereignty and includes air space above the

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229. See Cheng, op. cit. supra note 216, at 238; Brierly 269; McDougal, Lasswell, and Vlasic 716. Cf. Britton and Watson, International Law For Seagoing Officers 73 (2d ed. 1960); Verplaetse, International Law In Vertical Space 76-79 (1960). The immunities of military aircraft would not extend to its crew and passengers, whose status is otherwise governed by a local Status of Forces Agreement which sets out in detail the privileges and immunities of military personnel and members of the civilian component of the Armed Forces.

230. Briggs, op. cit. supra note 224, at 354. See text at notes 241, 247, 248 infra. For a view favoring full immunity for military aircraft entering in distress, see Lissitzyn 558-559.

231. McDougal, Lasswell, and Vlasic 716.

high seas (terra communis) and air space above Stateless territories (terra nullius). The legal status of the flight medium determines the need for permissive entry therein by foreign military aircraft.

1. In International Air Space

Since the air space over the high seas is not subject to the national sovereignty of any State, all aircraft, including military aircraft and other aircraft used for military purposes, enjoy the right to fly in it without prior permission or authorization of any kind. Conversely, no State may in time of peace exercise exclusive rights of sovereignty over foreign aircraft, State or civil, while in the free air space over the high seas without the consent, acquiescence or tolerance of the foreign State involved, except in the case of piracy or self-defense.[232]

2. In Foreign National Air Space

On the other hand, because of the universally recognized right of a territorial State to its complete and exclusive sovereignty therein, no aircraft used in military services may fly in or through its national air space in time of peace without its permission, acquiescence or tolerance.[233] This prohibition would appear to extend to such military aircraft drifting or taxying on the surface of the territorial sea of another State, but not to

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232. Cheng, International Law and High Altitude Flights: Balloons, Rockets and Man-Made Satellites, 6 Int'l & Com. L.Q. 487, 494 (1957).

233. This prohibition, which is incorporated in Article 3(c) of the Chicago Convention, is in consonance with the universally accepted principle in customary international law that the armed forces of one State may not in peacetime enter the territory of another State without prior authorization.

those carried on board State ships in innocent passage.[234]

Permission for military aircraft to enter foreign national air space can not generally be presumed and an unauthorized entry would amount to a violation of national territorial sovereignty. A State may grant such express permission by means of various international agreements.

States may enter into bilateral overflight agreements pertaining to military aircraft. More common in the case of the United States are the military base rights agreements[235] which usually contain a provision permitting the use of the other country's air space as well as its landing fields. Mutual Defense treaties[236] and regional agreements[237] usually provide the basis for consent for military aircraft to use the national air space of other members of the pact. By Article 43 of the United Nations Charter, members "undertake to make available to the Security

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234. See text at not 201 supra.

235. For example, Article V, Agreement Under Article VI of the Treaty of Mutual Cooperation and Security with Japan, Jan. 19, 1960, T.I.A.S. No. 4510; Article VIII, Agreement with Libya, Sep. 9, 1954, T.I.A.S. No. 3107; Article II, the Bahamas Long Range Proving Ground Agreement with the United Kingdom, July 21, 1950, T.I.A.S. No. 2099; Article I, Leased Naval and Air Bases Agreement with Great Britain covering Newfoundland, March 27, 1941, E.A.S. No. 235.

236. For example, Article VI, Treaty of Mutual Cooperation and Security with Japan, Jan. 19, 1960, T.I.A.S. No. 4509; Article VII, Mutual Defense Treaty with the Republic of China, Dec. 2, 1954, T.I.A.S. No. 3178; Article IV, Mutual Defense Treaty with the Republic of Korea, Oct. 1, 1953, T.I.A.S. No. 3097.

237. For example, Article VI, Security Treaty between the United States, Australia, and New Zealand (ANZUS Treaty), Sep. 1, 1951, T.I.A.S. No. 2493; Article 9, North Atlantic Treaty, Apr. 4, 1949, T.I.A.S. No. 1964; Article 6, Inter-American Treaty of Reciprocal Assistance (Rio Treaty), Sep. 2, 1947, T.I.A.S. No. 1838.

Council," inter alia, "rights of passage" of military aircraft through their national air space during a United Nations military action.

It is noteworthy that while Article 25 of the Chicago Convention deals with assistance measures to be afforded civil aircraft,[238] there is no comparable provision relating to military or other State aircraft in distress. Notwithstanding, there is one exception to the general rule that military aircraft are allowed to fly over foreign national air space only by special permission. If a military aircraft (or other State-owned aircraft) is in distress[239] (not deliberately caused by persons in control of the aircraft and there is no reasonable safe alternative), it can land at the nearest airport regardless of nationality or status of clearance.[240] This right of entry of all aircraft when in distress or when such entry is caused by force majeure is regarded as established by customary rules of international law.[241]

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238. Also in Article 22 of the Paris Convention of 1919.

239. "Distress" is defined in Annex 12 on Search and Rescue as adopted by the Council of ICAO (4th ed. May 1960) as "A state of being threatened by serious and imminent danger and requiring immediate action." This definition is not binding on ICAO members, since Annex 12 represents "international standards and recommended practices" under Article 37 of the Chicago Convention.

240. See Lissitzyn 560-561; Cheng, op. cit. supra note 232, at 496; Britton and Watson, op. cit. supra note 229, at 73; McDougal, Lasswell, and Vlasic 272. Report of the Ad Hoc Committee on the Peaceful Uses of Outer Space, July 14, 1959, stated: "It was also considered that certain substantive rules of international law already exist concerning rights and duties with respect to aircraft and airmen landing on foreign territory through accident, mistake or distress. The opinion was expressed that such rules might be applied in the event of similar landings of space vehicles." Space Documents 146. Cf. Par. 9, U.N. Gen. Ass. Res. 1962 (XVIII), Dec. 13, 1963, text at note 153 supra.

241. See text at note 247 infra.

C. Treatment of Aerial Intruders

A matter of extreme importance arises whenever an aircraft, and in particular a military aircraft, in time of peace crosses the vertical air boundaries of a State without the required prior permission. The critical question is whether international law prescribes any norms restricting the sovereign rights of the intruded State in the corrective action it might take against the intruding aircraft and its occupants.

It may be stated generally that prior to 1903 incidents of aerial intrusions by balloons did not cause any strain on international relations. For no prior request for permission to overfly any State was sought for or granted, no official protest was made, and no corrective action, legal or otherwise, was taken against either the intruding balloon or aviators. However, with the advent of powered flight and the increased incidence of German balloons crossing into France in 1908 (many involving German officers), the French government became concerned. It was against this background of concern over uncontrolled border crossings that France convened the diplomatic conference in 1910 on the regulation of air navigation.[242]

1. Not Covered By International Convention

It is indeed paradoxical and unfortunate that to this date conventional air law has failed to provide expressly for the treatment of aerial intruders. Article 22 of the Paris Convention of 1919 and Article 25 of the Chicago Convention of 1944 deal only with assistance measures by contracting States to civil

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242. Cooper, The International Air Navigation Conference, Paris 1910, 19 J. Air L.&Com. 127, 128-129 (1952).

aircraft in distress. It has been maintained by some scholars that a right of entry in case of distress could be implied from these Articles,[243] although an equally reasonable interpretation is that these distress Articles are limited only to aircraft that have received the requisite flight permission. In any event, they do not apply to State aircraft.

2. Unilateral Practice of States

Accordingly, this important field of air law is left to customary international law, varying national legislation, and the unilateral practice of States. The relatively unexplored legal problems of intrusion into and distress of aircraft over foreign territory were examined comprehensively by Lissitzyn in 1953. He noted that since World War II the cases of intrusion by foreign civil and military aircraft have been numerous, although most appear to have been military aircraft. Aerial intrusions may occur under a variety of circumstances and for different reasons. The aircraft may be civil or military. Military aircraft may be of the combat or non-combat type, armed or unarmed. The intrusion may be deliberate and with illicit intentions, such as attack, reconnaissance, aid to subversive activities or calculated defiance of the territorial sovereign. It may be deliberate but with harmless intentions, such as shortening a flight in bad weather. It could also be caused by mistake or necessitated by distress.[244]

Lissitzyn further observed that the treatment of aerial instrusions has varied widely. Sometimes no action was taken,

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243. Lissitzyn 565, 569.

244. Id. at 559-560.

although diplomatic protests were later lodged. At other times, the intruding aircraft were compelled to land.[245] In other instances, intruding aircraft were fired upon and shot down. In some cases the aircraft were confiscated; in others charges for use of hangar space were claimed. Once the aircraft has landed, inquiries are usually instituted; and penalties may vary from a fine and/or imprisonment imposed on the occupants held responsible, to the confiscation of the aircraft.

A study of the incidents in which intruding aircraft came under fire reveals that most of the aircraft involved were of the military type. Most of the shooting was done by the Soviet Union or its satellite countries with the aircraft most frequently going down over the high seas. In each case the attacking State claimed a violation of its territorial air space and the other State claiming that the aircraft was over the high seas or that the intrusion was accidental and that the territorial State knew or should have known this fact from the circumstances. In some cases the State of the aircraft destroyed and the States whose nationals on the plane were killed have instituted claims for damages.[246]

3. Standards in Customary International Law

Relying on maritime analogies, general principles of law recognized by civilized nations, the general interest of the world community, and upon reason, morality and humanity, Lissitzyn con-

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245. Article 9(c) of the Chicago Convention provides that any aircraft entering prohibited or restricted areas may be required to effect a landing as soon as practicable at a designated airport.

246. Lissitzyn 580.

cluded that the following standards of international law may be regarded as established or in the process of being established:[247]

1. Intruding aircraft must obey all reasonable orders of the territorial State, including orders to land, to turn back, or to fly on a certain course unless prevented by distress or force majeure.

2. In an effort to control movements of intruding aircraft, the territorial State must not expose the aircraft or occupants to unreasonable dangers. (Lissitzyn admits that the application of this standard must be flexible due to many variable factors, such as increased speeds of aircraft, tremendous destructive power of new weapon systems, characteristic of intruding aircraft, probable motives of intrusion, proximity of important military sites.)

3. In time of peace, intruding aircraft whose intentions are known to be harmless must not be attacked even if they disobey orders. (Lissitzyn recognizes that the territorial State may not always be in a position to ascertain readily the reason for the intrusion.)

4. In cases where there is reason to believe the intruder's intention may be hostile, a warning or order to land should first be given and the intruder may be attacked if it disobeys.

5. The right of hot pursuit on the high seas seems established.

6. Intruding aircraft, whether military or not, and whatever the cause of intrusion, are generally not entitled to the special privileges and immunities customarily granted to foreign warships. They and their occupants may be penalized in accordance with the civil and criminal law of the land and within the limits of generally applicable rules of international law.

7. Despite the unqualified assertions of sovereignty of the subjacent States over the airspace and express prohibitions against unauthorized entry found in international air law conventions, there is a right of entry with local immunity for all foreign aircraft, state or civil, when such entry is unintentional, due to distress, and not deliberately caused by persons in control of the aircraft. (Lissitzyn admits that the acceptance of this standard may be impeded in practice by the paramount consideration of security. Distress may be simulated in order to come within reach of prohibited or strategic areas.)

While these standards are laudable and represent the minimum norms tolerable by civilized nations, it is questionable whether there exists today an "international custom, as evidence

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247. Id. at 586-589.

of a general practice accepted as law," concerning the reciprocal rights and duties of aircraft in distress.[248] The Paris Convention of 1919 and the Chicago Convention of 1944 made it clear that the right to pass through the air space of another State is not a customary right but one which depends on treaty. In the world of fact, States are not prone to accepting methods of grant-flight rights into their territory without their consent.

4. Consideration by International Organizations

Following the shooting down of a Constellation aircraft of the El Al Israel Airlines in Bulgaria by Bulgarian fighter aircraft on July 27, 1955,[249] the United Nations noted with great concern that incidents involving attacks on intruding civilian aircraft innocently deviating across national frontiers cause loss of human life and affect relations between States. This resulted in General Assembly Resolution 927(X),[250] which called upon all States to take necessary measures to avoid such incidents, and invited the attention of the appropriate international organizations to the instant resolution and to the debate on the matter

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248. Of course, if the aircraft in distress could establish communication with the foreign State, the problem of bona fides might be reduced and any permission thus attained would eliminate the need to resort to the doubtful principle of distress.

249. As a result, all of the 51 passengers and 7 crew members of this scheduled passenger flight from London to Tel-Aviv were killed. For detailed facts, see I.C.J. Pleadings, Aerial Incident of July 27, 1955, (Israel v. Bulgaria; U.S.A. v. Bulgaria; U.K. v. Bulgaria), 48-66, 169-209, 332-342 (1959).

The I.C.J. held it was without jurisdiction to adjudicate the dispute. See Case Concerning The Aerial Incident of July 27, 1955 (Israel v. Bulgaria) Preliminary Objections, I.C.J. Reports 127 (1959).

250. Adopted Dec. 14, 1955, by a vote of 45 to 0, with 13 abstentions.

held in the tenth session of the General Assembly. It is noteworthy that the resolution does not embrace attacks upon intruding military aircraft even though they constitute the large majority of intruding aircraft attacked.

As one of the appropriate international organizations concerned, the International Civil Aviation Organization (ICAO) considered the matter in 1957. The Air Navigation Commission of ICAO, after examining the technical aspects of devising standard signals for the exchange of messages when an aircraft has committed or is about to commit an infringement of restricted air space, concluded[251] that:

(a) For the time being, it seemed unlikely that any simple and reliable system of signalling could be devised for world-wide use in cases where unauthorized aircraft had entered or were about to enter the air space of another State.

(b) For that reason, no attempt had been made at that time to introduce standard procedures.

(c) The establishing of standard procedures by which airlines would give advance notification of flights in the vicinity of restricted air space to States controlling such air space would entail more disadvantages than advantages and therefore was not feasible.

(d) States be invited to notify ICAO of any difference from the relevant provisions of Annex 2 and to bring to the attention of all concerned the details of applicable national regulations in force.

(e) The efforts of States should be directed toward ensuring that aircraft do not infringe restricted air space and that a policy of installing navigational aids to achieve this may be more fruitful than attempting to implement signalling procedures.

The legal aspects of the problem were thereafter considered by the Legal Bureau of the ICAO Secretariat. After examin-

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251. ICAO Doc. C-WP/2376 (11 March 1957). Also ICAO Doc. C-WP/2789 (5 Nov. 1958).

ing State practice and national legislations in regard to aerial intrusions in peacetime, which it found to be far from uniform, it concluded that there is a need for developing international rules on the subject.[252] The object of such rules was stated to ensure the safety of civil aircraft flying in the vicinity of, or inadvertently crossing, international frontiers, including the early clearance, without undue detention of aircraft, crew, and passengers. The following matters were pointed out as requiring legal consideration:

(a) Scope: The need for extending the scope of any such rules to State aircraft as well as civil aircraft in time of peace.

(b) Applicability: The need to have the rules cover not only cases of aerial penetration but also situations where the aircraft is operated in the vicinity of a State without having crossed that frontier into such State or where the aircraft deviates from air routes or corridors.

(c) Identification: The technical problem of establishing proper procedures for identification of intruding aircraft, particularly at great altitudes.

(d) Interception: Agreement as to interception procedures to be employed by the intruded States and required action of the intercepted aircraft.

(e) Use of Force: The need for agreement among States that force will not be resorted to merely because its aerial sovereignty has been violated. Of course, recognition was made that self-defense is a different question.

(f) Distress: The need to resolve the question whether under Article 25 of the Chicago Convention a contracting State is obliged to allow an aircraft in distress to enter its territory. Also, whether the definition of distress in Annex 12 to the Chicago Convention is adequate for the purpose of developing international rules concerning intruding aircraft. Finally, the difficult factual question whether an aircraft apparently in distress in fact has hostile intentions.

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252. ICAO Doc. C-WP/2609 (21 Feb 1958).

(g) Assistance: The desirability of extending the provisions of Article 25 of the Chicago Convention relating to assistance to aircraft in distress to apply to intruding aircraft.

(h) Hot Pursuit: The difficult problem of whether the principle of hot pursuit applies to an intruding aircraft.

(i) Treatment after landing: The need for agreement that if the intrusion is established to be inadvertent or unintentional (i.e., force majeure, bad weather, distress, mistake, accident or navigational error), the aircraft is not to be seized or confiscated, and that any detention should not be longer than necessary to ascertain the bona fide character of its entry. Such aircraft should be permitted to proceed on its journey as soon as practicable with such assistance as may be necessary. On the other hand, if the intrusion is deliberate, the territorial State should be free to impose adequate penalty on the pilot, but safeguards should be included for the protection of innocent parties.

(j) Forum: The practicability of providing machinery for the establishment of a forum for ascertaining the facts pertaining to the aerial intrusion, and for recommending compensatory or remedial measures.

The Legal Bureau recommended that the Council request the Legal Committee to study the legal aspects of the safety of civil and any State aircraft flying in the vicinity of, or inadvertently crossing, international frontiers, or flying over or in the vicinity of prohibited or restricted areas in a foreign State, with a view to the development of international rules relating thereto. It is regrettable, indeed, that no further action has been taken either by the United Nations[253] or ICAO.[254]

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253. An inquiry by ICAO to the Secretary-General of the U.N. elicited the reply that "it is not intended at this stage to take any further action with regard to this Resolution [927(X)]". Id. at 2.

254. On 17, 21 and 26 March 1958, the ICAO Council considered the recommendations of the Legal Bureau. A proposal by the Representative of Mexico that the legal aspects of the subject should be referred to the Legal Committee with a request for early consideration was defeated by a vote of 9 to 8. ICAO Doc. 7895-C/908, 15-16 (1958).

5. Need for Clarification

Pending resolution of this matter of extreme practical, international, political, military and humanitarian importance by means of international agreement, States have by their practice indicated unequivocally that they will jealously protect their aerial sovereignty and take drastic action against aerial intruders, including shooting down of civil and military aircraft with or without notice.

The practice of the United States is to take every step normally used by nations at peace to avoid loss of life. If a Soviet aircraft approached the United States, the plane would be picked up by radar over international water. Efforts would be made to have the plane land if it appeared determined to cross over national territory and fighter planes would be under orders to withhold fire until it seemed certain that the plane was actually attacking.[255]

The fact that the Soviet Union will not consider the possibility of a mistake, accident or distress in an aerial intrusion is established by its long practice of attacking immediately. In the famous RB-47 incident of 1960,[256] the Soviets shot down the United States aircraft over international waters about 30 miles from the Russian frontier. Prior to that incident, the standard Soviet declared practice was stated by Foreign Minister Gromyko as follows:

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255. Statement by U.S.A.F. spokesman, N.Y. Times, March 19, 1953.

256. See text at notes 348-354 infra.

> Soviet fighter planes never open fire on invading United States aircraft first, and only when such aircraft themselves open fire were our airmen compelled to return fire.[257]

During the debates on the RB-47 incident, the Soviet Representative stated:

> The Soviet Government is known to have given the order to its armed forces to shoot down American military aircraft, and other aircraft, forthwith in the event of their violation of the airspace of the Soviet Union....[258]

The RB-47 incident illustrates most graphically that aerial incidents are a major source of international tension. The pivotal question is usually one of fact: was the plane actually over the territory of the country which shot it down? As noted by the Legal Bureau of ICAO, equally important but unsolved questions concern the requirement of a warning, the right to shoot down the plane, and the treatment of the passengers and crew. The need for authoritative international clarification of the many delicate legal problems raised requires urgent attention and action. Nothing short of an agreement on the conventional level would satisfy the requirement of legal certainty.

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257. U.N. Security Council, 15th Year, Official Records, 857th Meeting (May 23, 1960), Doc. No. S/P.V. 857.

258. Id. 880th Meeting (July 22, 1960), Doc. No. S/P.V. 880. See also Editorial, N.Y. Times, March 24, 1964. Cf. Lissitzyn 580.

CHAPTER IV

PEACETIME RECONNAISSANCE IN INTERNATIONAL LAW

In the previous chapters we examined the legal status of air space and outer space as flight media and the legal status therein of civil aircraft, military aircraft, and spacecraft as flight instrumentalities. What remains to be considered is the effect, if any, the legal status of the activity conducted by the flight instrumentality might have on the flight medium. The activity under study is peacetime military reconnaissance[259] or surveillance.[260] We now examine the evolution and need for military reconnaissance, its jural status, the legality of peacetime reconnaissance from air space and outer space,[261] and self-defense as a permissible measure against reconnaissance satellites.

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259. Reconnaissance is "an examination or observation of an area, territory, or airspace, now usually from the air, either visually or with the aid of photography or electronic devices, to secure information regarding the terrain, the strength and disposition of enemy troops, enemy resources or activities, the location and layout of targets or of enemy installations and strong points, the results of air operations or other operations, the disposition and condition of friendly troops, the weather, or any other information regarding the situation, usually in a combat area or in enemy territory." The United States Air Force Dictionary 429 (Heflin ed. 1956).

260. Surveillance is "the close or continued observation, by any means, of an area, place, airspace, lane of approach, or field of activity, in order to accrue information or to take action when the situation warrants." Id. at 502.

261. For the purpose of this study, no legal distinction is made between military reconnaissance and military surveillance, nor is any legal distinction made between tactical reconnaissance and strategic reconnaissance. See A Survey Of Aerial Reconnaissance, 19 Interavia 180, 181 (1964).

A. Evolution of Space to Earth Observation

There are four general modes of observation: earth to earth, earth to space, space to space, and space to earth. This study concerns space to earth observation. Ever since the advent of organized armies, military commanders have been interested in obtaining quick and reliable intelligence about the strength, dispositions, and intentions of the enemy. In ancient times, the observer was posted on a hill or at the top of a tree in order to see further. Over the past two centuries, vertical observation from space to earth has advanced by raising the vantage point progressively by means of the balloon,the airplane, and now the spacecraft.

1. Balloons for Reconnaissance

It was not long after the Montgolfier brothers invented the hot-air balloon in 1782 that its military potential for reconnaissance was realized. In 1793, the French took the unprecedented step of adding a balloon corps to its military forces, and in 1794 the French Revolutionary armies became the first to use captive hydrogen balloons for reconnaissance. In 1797, Napoleon used balloon observers during his seige of Mantua, Italy. Following the unsuccessful attempt to employ a balloon corps in Egypt in 1798, Napoleon disbanded the balloon corps in 1802.[262]

Some sixty years later observations balloons came back into use again during the American Civil War, when an army balloon

262. The American Heritage History of Flight 40, 47, 54, 74 (1962).

corps was created by President Lincoln in 1861. For two years the military observers hovered over the battlefields of Virginia, trying to play the role of eyes for the Union armies. A camera was used for the first time in the balloon basket, and the then recently invented telegraph was used to transmit information to the ground. It is claimed that aerial observations of Confederate movements during the Battle of Fair Oaks in 1862 narrowly averted a Federal disaster. The North abandoned its air arm in 1863, when Federal commanders in the field showed little interest in continuing the use of the balloons.[263]

The French returned to the military use of balloons in the Franco-Prussian War of 1870-1871. They were most effective during the seige of Paris.[264]

2. Airplane for Reconnaissance

The method of aerial photography having been introduced in the late 1850's, thefirst real progress in vertical observation was not made until theadvent of powered flight and the development of the airplane in 1903. Though the military potential of the airplane during the nascent years was underrated, it was not entirely overlooked. In 1911, during the Italo-Turkish war in Libya, an Italian reconnaissance flight marked the first military use of the airplane. During the Balkan War in 1912-1913, Bulgarian aviators hand-dropped small bombs over Turkish-held Adrianople.[265]

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263. A Survey of Aerial Reconnaissance, 19 Interavia 180 (1964); The American Heritage History of Flight 65, 75-76 (1962).

264. The American Heritage History of Flight 65, 77 (1962).

265. Id. at 151, 160.

At the outbreak of World War I, the airplane was still a "toy"; the military use of the airplane was "more spectacular than effective". Tactical use of the airplane was limited by vulnerability to ground fire. Strategic bombing from airplanes was generally too inaccurate to be effective. Despite legendary individual accomplishments, air power was far from being a decisive weapon of war. The first and most important military use of the airplane by both sides was for observation of the enemy's position and activities, and the demand was for slow, stable aircraft because greater speed made good camera work difficult. With war acting as a spur to technology, aerial reconnaissance became steadily more effective. Introduction of radio transmitters in reconnaissance planes improved air-to-ground communications and coordination with ground forces. More effective cameras were developed and means of developing the photographs also became vastly more efficient. Toward the end of the war, reconnaissance efforts were so successful that troop movements could safely take place at night only.[266]

The great reconnaissance achievements of the Allied Forces during World War II have been indelibly written on the pages of history. The constant progress in aerial reconnaissance has been phenomenal. Aircraft became very efficient reconnaissance instrumentalities until the enemy devised and improved methods

266. A Survey of Aerial Reconnaissance, 19 Interavia 180, 181 (1964); The American Heritage History of Flight 160-167, 172-173 (1962).

of shooting them down. This led to the development and employment of faster, high flying, and more complex aircraft for reconnaissance at any time of day or night and in any weather.[267] With high speed and high altitude came a demand for the use of more elaborate sensors.[268] Electronically controlled, high resolution cameras and airborne radar became essential tools. To enable instantaneous relay of the information to the ground, television was incorporated for simultaneous transmission of pictures.[269]

In the early 1860's, observation altitudes of 3,500 feet in balloons were regarded as astronomical, and during World War I it was considered a feat for a reconnaissance plane to develop a speed of 45 m.p.h. On 1 May 1960, a high flying U-2, flying a reconnaissance mission, was shot down in Russia. The use of an aerial camera that could photograph large parts of Soviet territory with piercing sharpness from a plane flying in the neighborhood of supersonic speed at an altitude in excess of 60,000 feet, symbolized the state that the art of aerial reconnaissance had then

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267. A Survey of Aerial Reconnaissance, 19 Interavia 180, 181 (1964). Development of new counter-measures to shoot down fast, high flying aircraft forced reconnaissance aircraft to operate at low level for self-defense. See Low Altitude Forward Obliques, id. at 206-209 (1964).

268. See The Reconnaissance Aircraft's Sensors, id. at 210.

269. A Survey of Aerial Reconnaissance, id. at 181-184; The Camera at War, id. at 203-205.

reached.[270] Today, a Voodoo flies at over 1,000 m.p.h. and can photograph an area of 217 miles long and eight miles wide from an altitude of 45,000 feet.[271]

Present-day systems of aerial reconnaissance vary in their required capabilities with the level of engagement. Categories vary from the simpler systems for battlefield surveillance (e.g., the light observation helicopter), to multisensor high performance systems for reconnaissance of interdiction areas (such as the Mohawk), up to the strategic systems for specialized surveillance of large areas of the world.[272] Military necessity still provides a coloration to the most startling advances of aviation. In the strategic reconnaissance area, President Johnson announced on 24 July 1964 the successful development of a strategic reconnaissance weapon system of new magnitude. The RS-71 aircraft reconnaissance system, to be operational in 1965, will fly at 2,000 m.p.h. at altitudes in excess of 80,000 feet with an outstanding long range reconnaissance capability. Using multiple reconnaissance

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270. On 29 February 1964 President Johnson announced that the U.S. had successfully developed an advanced experimental jet aircraft, the A-11 (later officially designated as the YF-12A), which had been tested in sustained flight at more than 2,000 miles an hour, and at altitudes exceeding 70,000 feet. It is reported that the A-11, originally developed to replace the U-2 for long range reconnaissance missions at altitudes of over 100,000 feet, has already flown reconnaissance missions over communist territory. Aviation Week 16-18 (March 9, 1964); N.Y. Times, March 9, 1964.

271. A Survey of Aerial Reconnaissance, 19 Interavia 180, 181 (1964).

272. See further, id. at 181-185; Brown, What Will Happen To The Airplane?, Supp. to Air Force Policy Letter for Commanders 5-10 (Nov. 1964). For deep tactical intelligence, see The Photo Squadron in Action, 19 Interavia 186-189 (1964). On the Army's Mohawk, see The Keen Eyes of the Army, id. at 190-192.

sensors, the most advanced observation equipment needed to accomplish its strategic reconnaissance mission in a military environment, it can photograph an area of 60,000 square miles an hour.[273]

3. Space for Reconnaissance

In the space arena, the launching of space vehicles equipped with radio, television and photographic cameras, and weather, radiation and other measurement instruments widens the role of observation of the earth.[274] Many different kinds of observations are possible from space, including weather reconnaissance,[275] terrain mapping and geodetics,[276] astronomical photography for scientific uses,[277] and photograph of the earth to protect economic resources and activities.[278] Navigational satellites can provide the basis for all-weather determination,

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273. Defense Dep't Digest 6 (Aug. 15, 1964); Brown, id. at 9; The Future for Manned Aircraft, 41 Space/Aeronautics 40, 45 (Nov. 1964).

274. The military potentialities in outer space are vast. For a survey of the possible space-weapon developments, see Space Handbook. See also Brennan, Arms and Arms Control in Outer Space, Outer Space 123, 129-138 (1962). Cf. Evaluation of Soviet military use of space in Soviet Space Programs 47-59.

275. Meteorological satellites can serve an economic, civil, and military purpose. Space Handbook 192-198. For a comprehensive report on the operational success of the U.S. meteorological satellite system, including the TIROS series, see Staff of Senate Comm. on Aeronautical and Space Sciences, 87th Cong., 2d Sess., Meteorological Satellites (Comm. Print 1962).

276. Space Handbook 171.

277. Id. at 185.

278. For example, to detect forest fires, ice coverage, flood control, insect activity. Id. at 187. See also Meeker, Observation in Space, Law and Politics in Space 75, 80-81 (1964).

with accuracy, of the position, direction, and speed of a surface vessel or aircraft.[279] The Transit satellite system, a project of the U.S. Navy, represents satellites as aid in navigation. Ships can fix their positions to within one-half mile by receiving signals from four satellites.[280]

In addition to the civilian, scientific, and human welfare uses of space observation, man-made satellites can also be employed for military reconnaissance.[281] Space observation could in time be helpful in maintaining international peace and security by providing, for example, support of arms control and disarmament agreements, by detecting the launching of ballistic missiles, and by detecting nuclear explosions.[282] Outer space can become the mightiest observation post of the world.

Observation of the earth from space can take many forms. The passive forms include camera, telescope, and radiometer equipment. The active forms include the radar, radio telescope, infrared horizon sensor, and ultraviolet detector systems.[283] Optical observation by photography is the principal means of military reconnaissance and intelligence. Photographic reconnaissance may be conducted from an airplane, a rocket, or a satellite.[284]

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279. Space Handbook 199-201.

280. See Ley, Our Work in Space 75-84 (1964).

281. Space Handbook 171, 172, 183.

282. Meeker, op. cit. supra note 278, at 81-82; Need cited for Arms Control Observation Satellite, 6 Missile Space Daily 70 (March 17, 1964); Fusca 103.

283. Kraus, Legal Aspects of Space Communications and Space Surveillance, 29 J. Air L.&Com. 230, 232-233 (1963). For difference between photographic reconnaissance and electromagnetic reconnaissance from space, see Fusca 92-93.

284. Space Handbook 172, 178-180.

Aerial photography for reconnaissance has become a very sophisticated technology divided into five basic categories: vertical, oblique, fan, continuous strip, and panoramic. Television cameras have made night reconnaissance feasible without artificial light. It is anticipated that when film-lens resolution is further developed, it will be theoretically possible to see a 16-inch object (e.g., manhole cover in the street) from a height of 1,500 miles. The past development and future of vertical observation seems to indicate that we are rapidly approaching the time when it might be almost impossible to conceal objects, activities, and movements on the surface of the earth.[285]

The Soviet space probe which photographed and transmitted pictures of the reverse side of the moon illustrates the potential of spacecraft for reconnaissance.[286] The United States is presently using satellites most successfully for weather observation. The first of the TIROS (Television and Infrared Observation Satellites) series was launched on 1 April 1960.[287] Equipped with one wide angle and one narrow angle television camera systems, its average velocity was about 18,000 miles per hour with a perigee of 428 miles and an apogee of 465 miles. Its equipment operated for 78 days and during that time it transmitted nearly

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285. A Survey of Aerial Reconnaissance, 19 Interavia 180, 184-185 (1964). For discussion of several technical factors essential to image observation from space, see Fusca 94-103.

286. On 28 July 1964, the Ranger 7 succeeded in obtaining high-resolution photographs of the lunar surface. Space Log 32-33 (Summer 1964).

287. 1961 Symposium 1321. Since then, the U.S. has kept the meteorological community completely informed on the operations and performance of the satellite. H. R. Rep. No. 1281, 87th Cong., 1st Sess. 41 (1961).

23,000 pictures to the ground.[288] Another weather observation satellite, "Nimbus", is planned to carry six television cameras, solar converters, recorders, and command equipment.[289] Whereas the TIROS satellites could observe everything between 50 degrees northern and 50 degrees southern latitude, the Nimbus in its polar orbit will be able to see each spot on earth twice a day while there is daylight at that point.[290] In planning is another project, AEROS, which would have several advantages over the Nimbus system.[291]

The nature and extent of reconnaissance from space by the United States and the Soviet Union are difficult to ascertain in view of the classified nature of such information.[292] According to available unclassified information, it appears that the United States has five major types of reconnaissance missions in operation or planning stage: ground observation; early

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288. As of 17 July 1964 eight TIROS have been successfully orbited. They have returned over 300,000 cloud cover photographs. Space Log 26-27 (Summer 1964).

TIROS will now become the basis of the first operational weather satellite system--to be called TOS (TIROS Operational Satellite) system. Space Log 21 (Fall 1964).

289. Alexander, Nimbus Uses Wheels, Jets for Control, Aviation Week 77-79 (July 10, 1961); Space Log 29-30 (Sep. 1962).

290. Ley, op. cit. supra, note 280 at 97. NIMBUS I was launched on 28 August 1964. Space Log 13-14, 40 (Fall 1964),

291. Ley, op. cit. supra, note 280 at 97-98; Space Log 24 (Sep. 1962).

292. Hearings on H.R. 10939 395; Space Log 2 (Summer 1964).

For a list of classified payloads put into orbit since 1960 by the U.S. and the Soviet Union, see Fusca 96. Inclination and orbit life may be evidentiary of a possible reconnaissance system. An inclination of 80° will cover most of the USSR, while an inclination of 50° will cover all of the U.S. except Alaska. Also, photographic missions require very low perigees (near 100 miles) and therefore have short-lived orbits. Idem.

warning; nuclear detection; satellite detection and tracking; and satellite inspection.[293]

Satellite reconnaissance was first developed during the early 1950's in a project called PIED PIPER. The DISCOVERER program was initiated to develop operational hardware. Despite the discontinuance of launching announcements after the orbiting of DISCOVERER 38 in February 1962, the program continues. Project SAMOS (Satellite and Missile Observation System) constitutes the primary U.S. reconnaissance satellite system. Originally designated SENTRY, it is a program of satellites carrying photographic equipment designed to take detailed photographs of the ground. The SAMOS satellite, designed for reconnaissance with high-resolution radar cameras, performs much the same function as did the U-2 program. The first SAMOS was successfully orbited in 1961.[294]

A second system called Project MIDAS (Missile Defense Alarm System) is an early warrning satellite system. Equipped with infrared, telemetry, communications, and other advanced engineering test equipment, the MIDAS satellite is designed to detect heat radiating from the exhaust of the inter-continental ballistic missiles and to feed detections into the air defense warning net as to the number of missiles fired, where they were fired from, and the direction in which they are traveling. It

293. About half of all military space funding is used for the development of operational weapons systems, a large part of which is accounted for by reconnaissance and early warning satellites. Space And American Security: New Pattern in Nuclear Security, 19 Interavia 641, 645 (1964).

294. Fusca 92-103; Space Log (Summer 1964); Aviation Week 30 (Feb. 6, 1961).

is designed to increase the warning time against hostile ballistic missiles to 30 minutes. With about 10 MIDAS satellites in polar orbit, the United States hopes to keep the whole earth under continuous observation. As of 17 July 1964, three MIDAS satellites are in orbit.[295] In the development stage is the "Lofter" satellite, a system using infrared and ultraviolet rays for the detection of hostile ICBM's during their boost phase.[296]

Project VELA HOTEL is concerned with the detection and identification of nuclear explosions underground, in the atmosphere, or in space by radiation measurements. In 1963, two Vela Hotel satellites were placed into different 60,000 mile high orbits approximately 180 degrees apart.[297]

There are about 400 man-made objects in orbit today, and by 1970 it is estimated that the number will be in the several thousands. An integral part of the United States space observation program is Project SPADATS (Space Detection and Tracking

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295. Fink, New Missile Warning Satellite Succeeds, Aviation Week 33 (Feb. 3, 1964); Space Log (Summer 1964); 1961 Symposium 1319, 1323; Finney, U.S. Missiles Spotted by Satellites, N.Y. Times, Jan. 28, 1964.

296. Estep and Kearse, Space Communications and the Law: Adequate International Control after 1963?, 60 Mich. L. Rev. 873, 874 (1962); Space and American Security, op. cit. supra, note 293 at 643. Project DEFENDER is a major program for the development of systems for defense against ballistic missiles. See Haggerty, Planning Tomorrow's Defenses, 2 Aerospace 2, 5 (March 1964).

On 17 September 1964, President Johnson announced that the U.S. has "over-the-horizon" radar, making it possible to see around the curve of the earth and detect enemy aircraft and missiles seconds after they have taken off. The Washington Post, Sep. 18, 1964, p.A1, col. 8; The Washington Evening Star, Sep. 18, 1964, p.A-1, col. 8; N.Y. News, Sep. 19, 1964. See also Klass, Russians Believed to Have Radar with Over-the-Horizon Capabilities, 81 Aviation Week 19 (Sep. 28, 1964).

297. Hearings on H.R.10939 182, 186; Space Log 15 (Summer 1964); American Achievements in Space During 1963, 19 Interavia 643 (1964).

System), consisting of a series of ground-based radars that report on a space object to a control center where the data is automatically processed. When completed in 1965, it will be able to detect and track hundreds of space objects at the same time.[298]

The satellite inspection program was originally designed to provide a capability to rendezvous with and inspect orbiting objects in space with various sensors and transmit the data to ground stations. Current efforts are being limited to the development of necessary fundamental technologies for co-orbital interception and inspection.[299] On 17 September 1964, President Johnson announced that the United States has developed and tested two satellite systems (unnamed) with the ability to intercept and destroy armed satellites in orbit around the earth. Both of these anti-satellite systems are reported to be operational. One is based on the Army's Nike-Zeus anti-missile missile and the other is a complimentary system developed by the Air Force under the designation of PROJECT 437. A third anti-satellite system under development by the Navy, PROJECT EARLY SPRING--a based anti-satellite system launched by the Polaris fleet ballistic missile--would augment the Army and Air Force systems.[300]

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298. Hearings on H.R. 10939 795; Schultz, Weapons and Space, Univ. Okla. Space Conf. 60, 63-63; Space and American Security, op. cit. supra note 293, at 651.

299. Hearings on H.R. 10939 182-183. The SAINT (satellite interceptor) program, also known as Air Force Project 706, was curtailed in 1962. N.Y. Times, June 21, 1964.

300. Washington Post, Sep. 18, 1964, p.A1, col. 8; Washington Evening Star, Sep. 18, 1964, p.A-1, col. 8; Anti-Satellite Polaris Being Developed, 81 Aviation Week 18-19 (Sep. 28, 1964).

A recently initiated project, MOL (Manned Orbiting Laboratory), is designed to place two astronauts in space as an orbiting laboratory. The program is an experiment to discover man's role in military reconnaissance. Early experiments to be performed thereon include visual observations of objects on earth and in space.[301] Its military mission is to experiment to see what can be done in the way of surveillance, inspection, reconnaissance, and interception in space with an observatory of this kind. The five primary missions, all related to reconnaissance and surveillance, are: (1) general reconnaissance; (2) request reconnaissance of given spots; (3) post-strike reconnaissance; (4) continuous surveillance of an area; and (5) ocean surveillance.[302]

The Soviet Union is reported to be developing a winged reconnaissance spacecraft (combination aerodynamic/propulsion system) which will be capable of rapidly changing orbital plane as well as flight trajectory during an orbital perigee which passes through the earth's atmosphere. It is believed such a vehicle would be highly effective in rapid, extremely evasive reconnaissance maneuvers from both high and low vantage points. The spacecraft, for example, could constantly orbit over the same point on earth at an altitude as low as 50 miles through an orbital plane shift of 22.4 degrees (synchronous with the earth's

301. Hearings on H.R.10939 172-173; Webb, NASA and USAF: A Space Age Partnership, 8 The Airman 6, 11 (Aug. 1964); Fusca 93-94.

302. Stanford, New Air Force Space Role, Christian Science Monitor, Dec. 24, 1963; Butz, MOL-A Plus With Some Minuses, Space Digest 16 (Jan. 1964).

rotation). Wings are used on the vehicle to simplify the shift maneuver while eliminating heavy propellant consumption.[303]

Despite the classified secrecy that shrouds satellite reconnaissance activities, it has been deduced from information released by officials that 42 U.S. military satellites are in orbit, most of them over the Soviet Union. Of these, as many as 14 are picture-taking reconnaissance satellites.[304] Premier Krushchev is reported to have claimed that the Soviet Union has photographed U.S. military installations from outer space.[305] It must be supposed that both the United States and the Soviet Union have the capability of keeping the entire surface of the earth under the observation of spy satellites, and that both are fully employing their technological ability toward that end.

B. Need for Peacetime Reconnaissance

The need for peacetime reconnaissance activities is founded upon present day inextricable political and military technological advancements.

The international law of the 18th and 19th centuries reflected a decentralized and unorganized world area of multipolar structure which permitted the operation of a system of power balancing among the stronger States, the great movements of Western

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303. Weekly New Summary 2 (OI, USAF May 14, 1964); Fusca 103.

304. Troan, Soviet Skies Are Full of Eyes, Washington New, June 11, 1964.

305. Buffalo Evening News, May 29, 1964, p. 1, cols. 7, 8; N.Y. Times, June 1, 1964. For a report that during 1964 the Soviet Union launched 14 camera payloads as part of its COSMOS satellite program that have kept the United States under relatively continuous surveillance, see Kolcum, Operational Russian Satellites Scan U.S., Aviation Week 22 (Feb. 22, 1965).

nationalism and the expansion of colonial empires, and the limitations of the contemporary technology of violence. It reflected a policy of indifference to the common interest in restraining violence, and hence of permitting the speedy resolution of controversies between States on the simple basis of their relative strength. Private coercion and violence were accepted as permissive methods of self-help and self-vindication for conserving values and for effecting changes in the international distribution of values.[306]

In contrast, the international law of the 20th century reflects a policy of world order based on the rule of law for the mutual benefit of all States and for the peaceful settlement of their disputes with one another. Since World War II, the United States has committed itself to the active pursuit and accomplishment of these purposes with concern in the affairs of every nation on the face of the globe and with world-wide commitments and obligations. The United States has mutual security agreements with 42 of the 114 nations with whom it maintains diplomatic relations. United States troops and installations are maintained in close to 30 foreign countries or territories.[307] One of its major tasks as a global power is "to provide the major

306. McDougal and Feliciano 135-136. On the elements of power politics, see generally Schwarzenberger, Power Politics: A Study of International Society (2d rev. ed. 1951). See also Vent, Factors Influencing the Power of States, Military Aspects of World Political Geography 87-100 (1959). For an appraisal of the balance-of-power principle, see Van Dyke, International Politics 219-225 (1957).

307. Johnson, American Policy in International Affairs, 3 This Changing World 1, 2 (15 May 1965).

share of the defense of free-world interests against an aggressive Communist state which is at once both ideological and imperialistic."[308] In his address before the United Nations General Assembly in 1963, President Kennedy summed up the world-wide responsibility of the United States:

> The fact remains that the United States, as a major nuclear power, does have a special responsibility in the world. It is, in fact, a threefold responsibility--a responsibility to our own citizens; a responsibility to the people of the whole world who are affected by our decisions; and to the next generation of humanity.[309]

As the result of catastrophic changes on the military and political fronts since 1930, the United States and the Soviet Union have risen to superpower status, all other States being regarded as marginal in power and influence in relation to

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308. Ball, The Responsibilities Of A Global Power, 4 This Changing World 1, 2 (1 Nov. 1964).

309. Kennedy, New Opportunities in the Search for Peace, 3 This Changing World 1, 2 (1 Oct. 1963). See also Gardner, International Space Law and Free-World Security, 47 Space Digest 58-63 (1964), wherein it is concluded:

> "The attempt to build peaceful space cooperation and a regime of law for outer space does not eliminate the need for military space programs to maintain the security of the United States and the free world."

either of the two hostile roles of super-giants.[310] In the contemporary bipolar world arena, each of the superpowers, with all of their global interests and clashing commitments of ideology and with nuclear weapons still aimed at each other, is most conscious of the other's power and very suspicious of the other's designs for extension or projection of power. These two nuclear giants are engaged in a life and death struggle, in one case to preserve a way of life characterized by maximum personal freedoms, and in the other to attain world domination. They continue to confront and engage each other in hostile opposition, each seeking to match and balance every increment of power achieved by the other. The arena of interaction is a military one, with high levels of tension and insecurity prevailing.[311]

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310. McDougal and Feliciano 21-22, 57. As to the effect of bipolarity on the balancing of power process, see Van Dyke, id. at 222-223. But see Etzioni, Winning Without War (1964), wherein it is contended that the post WWII bipolar world is rapidly fading.

The emergence of Great Britain, France, and Red China as powers with nuclear capability cannot be overlooked for its effect on the so-called bipolar world. See Fryklund, A-Bomb's Effect Diplomatic, Washington Evening Star, Oct. 16, 1964, p. A-9, cols. 5, 6, 7.

311. Space and American Security: New Pattern In Nuclear Security, 19 Interavia 641-651 (May 1964); Bucknolts, Political and Military Geography, Military Aspects of World Political Geography 1, 16-17 (1959); McDougal and Feliciano 21-22.

Power is both an end and a means in international politics. Van Dyke, op. cit. supra note 306, at 175. The main purpose of a State in seeking to establish or maintain a balance of power is to protect its vital rights and interests. Id. at 199-219.

The problem of maintaining military security for a free society today centers around the dilemma of defense in a thermonuclear environment. The basic difficulty is that nuclear weapons have become so powerful and the means of delivering them so effective that development of an adequate defense at present does not appear feasible. The most serious military problem facing the United States today is its inability to defend against the ICBM.[312] The change in technology and the present technological infeasibility of a real defense has led the United States to rely on a strategy of deterrence.[313] It is believed essential to the maintenance of an effective deterrent position that the territory of a potential adversary be reasonably well targeted.[314] This requires close and continuous observation.[315]

Military experts maintain that the defender's reaction time (the time between the first detection of an attack and being able to put a counterstrike force safely on the way) should be less than the attacker's target time (the time interval from launch to target hit) minus detection time (the time interval from

312. Schultz, Weapons and Space, Univ. Okla. Space Conf. 62. See also Drake, We're Running the Wrong Race with Russia!, Reader's Digest 10F-12F (Aug. 1963); Hearings on H.R. 10939 99; Space and American Security, op. cit. supra note 311, at 651; Haggerty, Planning Tomorrow's Defenses, 2 Aerospace 26 (March 1964).

313. Foster, National Strategy, Security, and Arms Control, 3 This Changing World 1-4 (1 Jan. 1964); Space and American Security, op. cit. supra note 311; Baldwin, New Soviet Anti-ICBM Site Seen as Increasing Political Pressure on Pentagon, N.Y. Times, July 24, 1964.

314. Le Bailly, The Unsecret Weapon (Deterrence), Supp. to A.F. Policy Letter for Commanders 7-10 (No. 132, June 1964).

315. For an analysis of the general strategic problems, see Kahn, On Thermonuclear War (1960).

launch to first detection of launch).[316] In the case of ICBM's which are able to strike halfway around the world within a half hour, the warning time is measured in minutes. The present ground system, the BMEWS (Ballistic Missile Early Warning System), provides approximately 15 minutes warning. A space system, the MIDAS (Missile Defense Alarm System) would give warning about 30 minutes in advance of missile impact that an attack was underway.[317] In case of nuclear attack from satellites,[318] the delivery time is virtually instantaneous.[319] An orbiting hostile spacecraft could be as close as 50 miles above our heads--a lot closer than missile sites in Europe and Asia. Thus, strategic, tactical, and technological surprise is feasible today on a global scale in matter of seconds and with potentially catastrophic results.

In this essentially bipolar world of highly mobile forces and virtually instant-strike weapons of mass destruction,[320]

316. Schriever and Ward, National Security Interest in the the Law of Cosmic Space, American Rocket Society No. 1542-60 (Dec. 1960).

317. See text at notes 295 and 296 supra. See also Schultz, op. cit. supra note 312, at 63.

318. Note that the Nuclear Test Ban Treaty does not prohibit the use of nuclear weapons in time of war, nor restrict the inherent right of self-defense recognized in Article 51 of the U.N. Charter. See text at note 113 supra. Nor does the expression of intentions by the U.S. and the U.S.S.R. to refrain from placing nuclear weapons in space prevent such use. See text at note 135 supra.

319. Drake, op. cit. supra note 312, at 11F.

320. Chairman Krushchev claimed the Soviet Union possesses a "monstrous new terrible weapon" (non-nuclear) that could destroy the whole of humanity. Current News, Sep. 16, 1964, p. 1, col. 2; Washington Evening Star, Sep. 16, 1964; Washington Post, Sep. 18, 1964, p. A1, cols. 6, 7, 8.

reliable strategic warning is essential to guard against surprise attack.[321] Conventional intelligence methods no longer suffice to protect a country from the combined dangers of missiles and nuclear warheads. In the absence of a dependable international agreement on inspection, unilateral aerial and space reconnaissance--a vital source of intelligence--is the only natural solution to provide the information needed for dependable security, to guard against unmanageable surprise, and to prevent a subsequent nuclear war.[322] The object of this reconnaissance is to obtain information about the presumptive enemy which he makes impossible to secure in any other way and thus serve as a peace-making deterrent propensity.[323] Thus, the intelligence imbalance between the open societies in the Free World and the closed societies in the communist camp can be somewhat mitigated.[324] Peacetime aerial and space reconnaissance is an incalculably valuable American military

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321. The Director, United States Arms Control and Disarmament Agency, in stressing the need to improve our present security system, stated:

"In addition to being strong our forces must not be vulnerable to surprise attack. Vulnerable forces invite attack, and, perhaps, just as serious, a nation with vulnerable forces may feel forced to initiate even an unprofitable war just to avoid being the second to strike. Thus survivable military forces take the advantage out of surprise attack." Foster, op. cit. supra note 313, at 3.

322. Possony, Open Skies, Arms Control, and Peace, Space Digest 71-72 (March 1964). See Stanger, Espionage and Arms Control, Essays on Espionage and International Law 83-101 (Stanger ed. 1962).

323. The Cuban Crisis of 1962 is a living example in which United States reconnaissance forces helped to clarify the situation before a serious debacle occurred. See text at note 559 infra.

That through space reconnaissance peace can be more securely maintained than in the past, see Possony, id.; Fusca 103.

324. Schultz, op. cit. supra note 312, at 61-62.

and political tool. To be forewarned is to be forearmed.

C. Jural Status of Peacetime Reconnaissance

Having examined the evolution of and need for military reconnaissance, we now turn our attention to the jural status of peacetime military reconnaissance in contemporary international law. In view of Soviet contentions that aerial and space reconnaissance are violative of international law because the very nature of the activity constitutes both espionage and an act of aggression, a close examination of peacetime espionage and acts of aggression is required.

1. Peacetime Espionage

Spying is defined in conventional international law. Article 29 of the Hague Convention of 1907, respecting the Laws and Customs of War on Land, provides:

> A person can only be considered a spy when, acting clandestinely or on false pretenses, he obtains or endeavours to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party.
>
> Thus, soldiers not wearing a disguise who have penetrated into the zone of operations of the hostile army, for the purpose of obtaining information, are not considered spies. Similarly, the following are not considered spies: Soldiers and civilians, carrying out their missions openly, intrusted with the delivery of despatches intended either for their own army or for the enemy's army. To this class belong likewise persons sent in balloons for the purpose of carrying despatches and, generally, of maintaining communications between different parts of an army or a territory.[325]

By reason thereof, the essence of wartime espionage involves the obtaining of or attempting to obtain information clandestinely or

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325. 36 Stat. 2277, T.S. No. 539.

under false pretense in time of war. The effect of wartime espionage, so defined, is to deny thespy the protection of prisoner of war status. Espionage is distinguished from observation by a scout in uniform or from reconnaissance by an aviator under cover of darkness or distance. Such scout or aviator, if captured, is entitled to the normal treatment of prisoners of war.[326]

Additionally, Article 24 thereof provides:

> Ruses of war and the employment of measures necessary for obtaining information about the enemy and the country are considered permissible.

Thus, Articles 24 and 29 reflect the well-established customary rights of belligerents to employ spies and other secret agents for obtaining information from the enemy. Wartime espionage is regarded as a conventional weapon of war and is not characterized as an offense against international law.[327] Yet spies are punished not as violators of international law but of domestic law,

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326. Geneva Convention Relative to the Treatment of Prisoners of War, 1949; T.I.A.S. 3364; Wright, Espionage and the Doctrine of Non-Intervention in International Affairs, Essays on Espionage and International Law 3, 10 (Stanger ed. 1962).

The first known dispute as to the status of military aeronauts was doctrinal in nature and occurred during the Franco-Prussian war when in 1870 Bismarck warned that all persons in foreign balloons captured within Prussian-held territory would be treated as spies. See Ortolan, Les paysans combattant l'invasion, Revue des coure litteraires de la France et de l'etranger 758 (Oct. 29, 1870-Jan. 17, 1871); Brown, Aircraft and the Law 11 (1933).

327. II Oppenheim, International Law 422 (7th ed. Lauterpacht 1952).

for international law allows a State to punish a spy caught on its territory.[328]

The status of peacetime espionage is not established by conventional international law and is therefore subject to controversy. A few publicists support the view that peacetime espionage constitutes a violation of international law.[329] However, the better view, supported by the opinions of writers and the consistent practice of States, is that peacetime espionage is a legitimate and permissible act not contrary to international law. Oppenheim sums up the point as follows:

> Although all States constantly or occasionally send spies abroad, and although it is not considered wrong morally, legally or politically to do so, such agents have, of course, no recognized position whatever according to International Law, since they are not official agents of States for the purpose of international relations. Every State punishes them severely when they are caught committing an act which is a crime by the law of the land, or expels them if they cannot be punished.[330]

Peacetime espionage has long been tolerated under custom-

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328. Id. at 574-575. Wartime espionage is proscribed in American practice by Article 106, Uniform Code of Military Justice (10 U.S.C. 906), which defines a spy somewhat differently from Article 29, Hague Convention of 1907.

329. Wright, op. cit. supra note 326, at 10; Wright, Legal Aspects of the U-2 Incident, 54 Am. J. Int'l L. 836, 849, 850 (1960), wherein the contention is made, without citing any authority, that both peacetime espionage and aerial reconnaissance violate international law as they manifest a lack of respect for foreign territory; Korovin, Aerial Espionage and International Law, Int'l Affairs(Moscow) 49-50 (June 1960); Cohen, Espionage and Immunity--Some Recent Problems and Developments, 25 Brit. Yb. Int'l L. 404, 408 (1948).

330. I Oppenheim, International Law 862 (8th ed. Lauterpacht 1955). See also Stone, Legal Problems of Espionage in Conditions of Modern Conflict, Essays on Espionage and International Law 29-43 (Stanger ed. 1962); Beresford, Surveillance Aircraft and Satellites: A Problem of International Law, 27 J. Air L.& Com. 107, 113-114 (1960).

ary international law.[331] Peacetime spying is routine business and all great powers accept and practice espionage as a necessary part of national defense.[332] There is no international right to privacy which would render every act of espionage violative of international law.[333] Nevertheless, peacetime spying is usually proscribed by domestic law.[334] This is confirmed in Article 36 of the Chicago Convention which provides that:

> Each contracting State may prohibit or regulate the use of photographic apparatus in aircraft over its territory.

In the United States, for example, the use of aircraft for photographing defense installations is specifically forbidden.[335]

Technological developments in recent years have widened the range of methods available for the collection of intelligence

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331. For a memorandum from the U.S. representative to the U.N. Secretary-General giving detailed information on the list of Soviet espionage agents in the U.S., see U.N. Doc. No. S/4325.

As a bizarre instance of peacetime espionage, the Soviets presented to the U.S. Ambassador to Moscow a wooden carving of the Great Seal of the U.S., which was hung in his office behind his desk and which contained an electronic device which made it possible for a person on the outside, possessing a certain type of technical device, to hear everything that went on. 42 Dep't State Bull. 958-959 (1960).

Recently, it was disclosed that the Soviets had secreted 40 microphones in the American Embassy in Moscow. N.Y. Times, May 20, 1964, p. 1, col. 2; Id., May 21, 1964, p. 1, col. 3.

332. That traditional international law is oblivious of the peacetime practice of espionage, see Essays on Espionage and International Law (Stanger ed. 1962). On the practice of States, see McMahon, Legal Aspects of Outer Space, 38 Brit. Yb. Int'l L. 339, 367-369 (1964).

333. McMahon, id. at 369. See also McDougal, Lasswell, and Vlasic 540-541, 549, 636-638.

334. In the United States, peacetime espionage is the collection of information concerning any national defense installation or facility with intent or reason to believe that the information will be used to the injury of the United States or to the advantage of a foreign nation. 18 U.S.C. Sec. 793.

335. 18 U.S.C. Secs. 795, 796.

abroad. A great potential exists for use of the aircraft and spacecraft for this purpose. It is difficult to draw a legal distinction between the nature of the collection of information by a spy or undercover agent on the land or sea and the collection of information by means of aerial or space reconnaissance or surveillance. Factually, espionage involves covert, deceptive, and clandestine means. The employment and use of photographic or electronic observation techniques from high altitude aircraft or satellites, although not generally perceivable by the unaided senses, is neither covert, deceptive, nor clandestine.

It is submitted that peacetime espionage per se does not constitute a violation of international law.

2. Act of Aggression

The next facet of determining the legal nature of reconnaissance is whether it constitutes an act of aggression in contemporary international law. This brings us to the yet unsolved problem of defining international aggression. The term "aggression" has many connotations (such as "armed aggression", "indirect aggression", "economic aggression", "ideological aggression") and is used in varying contexts (such as armed attack, self-defense, act of aggression, aggressive war, international crime of aggression, threat to the peace, and so forth).

The problem of defining aggression has been baffling the world for centuries. Men have been struggling with this problem ever since St. Augustine drew a distinction between just and unjust war in order to reconcile with Christian principle the necessity of meeting with force the pagan barbarian invasions of

the fourth century. The outlawing of war, first in the Kellogg-Briand Pact of 1928 and most recently in the United Nations Charter of 1945, is weakened in its practical application by the absence of an agreed and workable distinction between aggression and self-defense.[336]

All attempts to define aggression in the League of Nations, the San Francisco Conference, and the United Nations have failed.[337] In 1956 the United Nations General Assembly's Special Committee on the definition of aggression concluded that no general consensus was attainable either as to whether a definition is possible or desirable, or as to what the definition should be if it were possible or desirable.[338] To date, no international agreement has been reached on a definition of aggression beyond that found in Article 2, paragraph 4, of the United Nations Charter, which reads:

> 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.

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336. Larson, When Nations Disagree 35-38 (1961). Larson advances as one reason for our present difficulty the fact that "aggression" is a "fighting word." He, therefore, recommends getting around the difficulty by placing emphasis on "the limitations of the right of self-defense," rather than on "aggression." Ibid. See also McDougal and Feliciano 131-135.

337. For a comprehensive examination of the history of the search for a definition, see Stone, Aggression And World Order (1958). See also McDougal and Feliciano 61-62, 143-150; Harvard Research in International Law, Draft Convention on the Rights and Duties of States in Case of Aggression, with comment, 33 Am. J. Int'l L. Supp. 819-909 (1939).

338. Stone, id. at 1. That the notion of "aggression" is complementary to the notion of "self-defense" in drawing the line between permissive and impermissive coercion, see McDougal, Lasswell, and Vlasic 413-416; McDougal and Feliciano 121. Cf. Brownlie 195.

Thus, in the absence of further international agreement, any act which does not constitute a threat or use of force against territorial integrity or political independence of another State is not aggressive.[339]

The essence of aggression under Article 2(4) is an intentional "threat or use of force." Reconnaissance, surveillance or any other form of observation per se is not within the plain meaning of that phrase. Aerial surveillance is not an attack or threat; it is merely a means of obtaining information. Surveillance aircraft and spacecraft are equated to an extension of the senses, not to a striking weapons system. They are equipped to receive impressions only, not to inflict damage.[340]

The Soviet argument that reconnaissance can only be used for a country planning aggression,[341] improperly suggests that Article 2(4) prohibits any sort of military preparation. We have seen that "military" is not synonymous with "aggression."[342]

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339. Lipson and Katzenbach 25-26.
According to a definition of aggression prepared by the Soviet Union in 1954, the State "which first commits" the following act, inter alia, would be an aggressor regardless of other relevant circumstances:
"The landing or leading of its land, sea or air forces inside the boundaries of another State without the permission of the Government of the latter, or the violation of conditions of such permission, particularly as regards the length of their stay or the extent of the area in which they may stay." Sohn, Cases on United Nations Law 850 (1956).

340. Beresford, op. cit. supra note 330, at 114-115.

341. Zhukov, Space Espionage Plans and International Law, 1961 Symposium 1095, 1098, quoting Premier Khrushchev.

342. On the relationship between "military" and "aggression," see Kittrie, Aggressive Uses of Space Vehicles - The Remedies in International Law, Fourth Colloquium 198, 203-206. See also text at notes 171 and 172 supra.

Article 51 of the United Nations Charter recognizes the need for national armed preparedness.[343] While reconnaissance may serve an offensive purpose, its primary objective in time of peace is to deter aggression by giving timely warning of its occurrence and thus provide against the possibility of a surprise attack.[344] This is a peaceful, defensive, non-aggressive use not violative of contemporary international law.[345]

3. Reconnaissance is Permissive

We have seen that peacetime espionage is equated to wartime espionage insofar as international law does not forbid States to engage in such activity but allows them to punish a spy caught on its territory. There is no agreement as to whether aerial or space reconnaissance is espionage. International law prescribes no restrictions on the nature of observation activities per se.[346] Furthermore, the consensus of the international community has failed to label aerial or space reconnaissance as an act of aggression. Therefore, it may be concluded that aerial or space reconnaissance does not constitute either espionage or an act of aggression, and would not be violative of international law unless

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343. Such preparedness justifies military maneuvers not only within national boundaries but also on the high seas and in the air space above the high seas. See Chapter I supra.

344. The absence of aggressive intent must be reasonably apparent. Beresford, op. cit. supra note 330, at 115; Goedhuis, Some Trends in the Political and Legal Thinking on the Conquest of Space, 9 Nederlands Tijschrift Voor International Recht 113, 126 (1962).

345. The relationship between "sovereignty" and "aggression" is exemplified in the U-2 incident. See text at notes 348-354, 377-385 infra. See also Kittrie, op. cit. supra note 342, at 206-212.

346. That international law is prohibitive, i.e., everything is lawful unless an express rule of positive law can be found prohibiting it, see The Lotus Case, P.C.I.J., Ser. A, No. 10, (1927).

it involves an independent breach of international law.[347] A violation of national air space sovereignty would clearly constitute such an independent breach.

Accordingly, in the absence of an international agreement to the contrary, aerial and space reconnaissance or surveillance per se are not intrinsically illegal. We now proceed to examine the legal status of reconnaissance when conducted in the various flight media, and the practice of States with regard thereto, i.e., air space over the country being observed, free air space adjacent thereto, and outer space.

D. Legality of Peacetime Reconnaissance From Air Space

The shooting down by the Soviet Union of two United States aircraft, the U-2 on 1 May 1960 inside the Soviet Union and the RB-47 on 1 July 1960 over the Baltic Sea, is admirably suited to illustrate the differences in international law between aerial reconnaissance involving an unauthorized entry into the territory of the foreign State concerned (penetrative reconnaissance) and aerial reconnaissance conducted in free air space from a position outside that State's territory (peripheral reconnaissance).

1. National Air Space

We have seen that by reason of the principle of air space sovereignty, aircraft have no rights in the air space of a foreign State in absence of permission. Therefore, while aerial reconnaissance per se is not illegal, the unauthorized entry into the territory of a foreign State for the purpose of reconnaissance

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347. Note, Legal Aspects of Reconnaissance in Airspace and Outer Space, 61 Colum. L. Rev. 1074, 1082 (1961).

is a violation of international law.

a. Problems of High Altitude Penetrative Reconnaissance- The U-2 program, which involved a series of penetrative reconnaissance flights over the Soviet Union by unarmed, one-man civilian planes carrying photographic equipment, was admittedly in operation from about 1956. It came to an end when on 1 May 1960 a U-2 plane, which ordinarily flies at an altitude of about 65,000 feet, was shot down by the Soviets at a point about 1200 miles within Soviet territory and the civilian pilot, Francis Gary Powers, a citizen of the United States, was arrested.[348]

The United States admitted that it was engaged in a "calculated policy" of collecting intelligence about the Soviet Union for "purely defensive purposes" owing to Soviet secrecy, the danger of a surprise attack, and the necessity to lessen such danger. The United States also emphasized the fact that the Soviet Union was engaged in espionage on a vast scale. However, it refrained from claiming a legal right to overfly the Soviet Union for reconnaissance purposes.[349]

During the subsequent debates in the United Nations Security Council, the fact that the U-2 program of penetrative reconnaissance violated the territorial sovereignty of the Soviet Union was emphasized by several delegations and never denied by

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348. For detailed facts of this widely publicized incident, see Wright, op. cit. supra note 329, at 836-844. For documents on the U-2 incident and the Powers trial, see Events Incident to the Summit Conference, Hearings Before the Senate Committee on Foreign Relations, 86th Cong., 2d Sess., 175, 181, 188, 195, 203, 220, 235 (1960).

349. 42 Dep't State Bull. 816-818, 851-853, 900, 905 (1960). 43 Dep't State Bull. 276-277, 350, 361 (1960). See Riesel, Soviet Spy Budget $1.5 Billion, Newport News Times-Herald, May 18, 1964.

the United States.[350] At no time was it alleged that spying as such was an international delict. The Security Council, nevertheless, declined to adopt the Soviet proposal to condemn the U-2 flight as an "aggressive act."[351] Instead it adopted an equivocal and mild resolution recommending that international problems be settled by peaceful means, appealing to member States to restrain from the use or threat of force in their international relations and to respect each other's sovereignty, and requesting the States concerned to continue their efforts to achieve general and complete disarmament under effective international control.[352] Although the question whether reconnaissance is intrinsically illegal was not specifically answered, such action does suggest that penetrative reconnaissance need not be regarded as an aggressive act.

It is noteworthy that for apparent political reasons Francis G. Powers, the pilot of the U-2 plane, was charged with and convicted by a military court of extraterritorial espionage (an intentional crime under a statute that has no application to foreign nationals) for acts committed outside the Soviet Union, when he could have been charged with the simple, non-intentional

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350. The U.S. did not even protest against the unwarned destruction of the U-2. It would appear that the general duty to warn would not be reasonably applicable to a penetration of about 1200 miles. See text at note 247 supra.

351. U.N. Doc. No. S/4321, rejected on 26 May 1960 by a vote of 7 to 2 (U.S.S.R. and Poland), Ceylon and Tunisia abstaining; 43 Dep't State Bull. 955-962 (1960).

Even Premier Khrushchev admitted that the U-2 flight was not "an act of true aggression and war." Beresford, op. cit. supra note 330, at 114.

352. U.N. Doc. No. S/4328 (S/4323/Rev.2), adopted on 27 May 1960 by a vote of 9 to 0, U.S.S.R. and Poland abstaining.

crime of unauthorized penetration into Soviet air space.[353] It was not necessary to Power's conviction to establish that he flew into Soviet air space. This may very well have been to emphasize the Soviet's primary objection to the nature of the U-2's reconnaissance activity rather than its location in Soviet air space.

While various views have been expressed, it cannot be seriously disputed that the U-2 flight was within Soviet national air space without permission and thus committed a violation of Soviet territorial sovereignty.[354] The U-2 incident stresses the need for a definitive boundary between sovereign national air space and international outer space. If different legal regimes apply to each, the orderly conduct of international activities in both regimes requires a clear line of demarcation. The U-2 incident points up most graphically that penetrative reconnaissance is illegal in international law as an independent violation of national air sovereignty.

b. Penetrative Reconnaissance in Self-Defense--The United States claim that the penetrative reconnaissance of the Soviet Union was for purely defensive purposes may have been given weight by the Security Council in rejecting the Soviet proposed resolution condemning the United States. However, whether the right of self-defense as guaranteed by Article 51 of the United Nations

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353. See Grybowski, The Powers Trial and the 1958 Reform of Soviet Criminal Law, 9 Am. J. Comp. L. 425-440 (1960), wherein it is suggested that propaganda aspects of the trial took precedence over the case against Powers.

354. Senator Fulbright, 106 Cong. Rec. 14734-14737 (June 28, 1960); Wright, op. cit. supra note 329, at 853. Contra: Beresford, op. cit. supra note 330, at 113, relying on effective control theory of air space sovereignty and suggesting possible distress of the U-2.

Charter includes the right of penetrative reconnaissance was not squarely answered.[355] That question was more vividly put into focus during the Cuban Crisis of October 1962, and is treated separately in Chapter VI herein.

2. International Air Space

We have seen that although the air space over the high seas, like the high seas themselves, is not subject to the sovereignty of any State, this does not necessarily mean that States are uninhibited in their activities on or over the high seas. The test for all such activities is reasonableness.

a. Peripheral Reconnaissance--On 1 July 1960, two months after the U-2 incident, a United States military RB-47 plane on a reconnaissance mission was shot down by a Soviet fighter in the Barents Sea north of the Soviet Union. Unlike the U-2 incident, the two governments concerned were at issue concerning the facts of the RB-47 incident. As in the U-2 affair, the Soviet Union charged before the United Nations Security Council that the RB-47 had violated Soviet air space by "new aggressive acts." The Soviet draft resolution condemning such acts was rejected by the Security Council.[356]

The United States, claiming that the RB-47 had at no time

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355. Beresford, op. cit. supra note 330, at 118 note 52 (no position taken); Wright, op. cit. supra note 329, at 848-849 (maintains that the U.N. Charter forbids defensive action except in case of "armed attack"). See also Note, op. cit. supra note 347, at 1098-1100.

356. U.N. Doc. No. S/4406, rejected by a vote of 2 in favor (U.S.S.R. and Poland) and 9 against; 43 Dep't State Bull. 244 (1960). For a Soviet view, see Mikuson, U-2, RB-47 and U.S. Foreign Policy, Int'l Affairs(Moscow) 22-28 (Aug. 1960).

came closer than 30 miles to Soviet territory, denied the charge and denounced the destruction of the plane as a brutal breach of international law. It asserted that the plane was engaged in electromagnetic observations over the Barents Seas, and that a Soviet fighter shot it down over the high seas after it had unsuccessfully tried to force it to enter Soviet air space.[357] The United States was so sure of its facts and of the strength of its legal position that it proposed to the Security Council that the incident be investigated by a commission of inquiry or adjudicated by the International Court of Justice. But the United States draft resolution was vetoed by the Soviet Union.[358]

The most significant legal feature of the RB-47 incident is that neither the United States nor the Soviet Union claimed or admitted the right of a State to shoot down a foreign aircraft over the high seas, even though it flies close to foreign territory and even though it is a military aircraft engaged in military reconnaissance.[359] It has long been Soviet practice to engage in

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357. The RB-47 flight was one of a continuous series of electromagnetic research flights well known to the Soviet Gov't to have taken place over a period of more than ten years. 43 Dep't State Bull. 163-165, 209-212, 235-244, 274-276 (1960); U.N. Security Council, 15th Year, Official Records, 880th to 883rd Meetings (July 22-26, 1960), Docs. S/P.V.880-883.

358. U.N. Doc. No. S/4409. The vote was 9 in favor of the U.S. Draft Resolution and 2 against (U.S.S.R. and Poland), with the U.S.S.R. casting its 88th veto. The Soviet Union also cast its 89th veto against a resolution proposed by Italy which would have expressed the hope that the International Committee of the Red Cross would be permitted to fulfill its tasks with respect to the members of the RB-47 crew. U.N. Doc. No. S/4411; 43 Dep't State Bull. 244 (1960).

359. During the 1954 Security Council debate over the shooting down of a U.S. patrol plane by the Soviets over the Japan Sea, the Soviet representative admitted: "It is therefore absurd to suggest that I could be defending the right of any State to shoot aircraft down over the high seas." U.N. Security Council, 9th Year, Official Records, 679th and 680th Meetings, Docs. S/P.V.679, 680 (1954).

extensive reconnaissance activities off the shores and air space of the United States.[360] The United States delegate, with the aid of maps and photographs, pointed out that on several occasions in 1959 and 1960 Soviet military aircraft penetrated the Alaskan Coastal ADIZ and flew considerable distances within the zone. He stated:

> ...the Soviet Union has been sending these electronic reconnaissance planes regularly off the coast of Alaska as close as 5 miles from our territory to gather intelligence on our radars and other electronic systems.... The difference between the United States and the Soviet Union is that we shoot their planes with cameras. They shoot ours with guns and rockets and kill or imprison our crews.[361]

The Soviet Union has never proclaimed any ADIZ over the high seas off its coast.

That the Soviet Union purports to uphold the freedom of flight over the high seas was most emphatically asserted in February 1961, after a French fighter fired some warning shots at a Soviet transport plane which apparently deviated from its flight plan within the French ADIZ some 80 miles off the coast of Algeria.[362]

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360. The British delegate said that the Security Council would have to be "in virtually permanent session" if Britain were to make an issue of every separate occasion when she was "overlooked, or overheard by the Soviet Union." U.N. Security Council, 15th Year, Official Records, Doc. No. S/P.V. 881, 13 (1960).

361. 43 Dep't State Bull. 241-242 (1960). For example, within the period of March 18, 1959 to February 5, 1960, Soviet jet bombers modified for electronic reconnaissance made six flights to within 5 to 25 miles off the coast of Alaska. On April 26, 1960, the Soviet trawler Vega, minus any fishing gear but equipped with antennas used for electronic intelligence capable of picking up radio and radar emissions, was photographed along military strategic points within 13 miles from the U.S. Atlantic coast.

362. Lissitzyn, Some Legal Implications of the U-2 and RB-47 Incidents," 56 Am. J. Int'l L. 135, 141-142 (1962).

Thus, it is well established that if the RB-47 were over the high seas, even though it might be engaged in reconnaissance, its destruction by the Soviet Union would be contrary to international law. The legality of peripheral reconnaissance was acknowledged by the United States and British delegates to the United Nations, and not disputed by the Soviets.[363]

The U-2 and the RB-47 incidents point up the vital difference between penetrative reconnaissance on the one hand which is illicit because it involves an independent breach of territorial air sovereignty and peripheral reconnaissance on the other hand which is licit because no intrusion of foreign air space is involved, a difference that has interesting implications to the nascent law of outer space if the analogy of peripheral reconnaissance from the high seas is applied to reconnaissance activities from outer space.

b. Peactime Aerial Surveillance of Ships on the High Seas--A collateral question of interest concerns the right of a State in time of peace to overfly, observe, and inspect foreign vessels, merchant and war vessels, on the high seas or other international waterways. This subject is treated later in Chapter VI in the discussion of the problems of aerial surveillance during the Cuban Crisis of 1962.

3. Treaty Right to Aerial Observation

We have seen in connection with the inspection system

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363. The Soviets released the two surviving crew members of the RB-47 from Soviet jails without prosecution in January 1961.

under the Antarctic Treaty that aerial observation may be carried out at any time over any or all areas of the Antarctica by any of the Contracting Parties having the right to designate observers.[364]

E. Legality of Peacetime Reconnaissance from Outer Space

The legality of space reconnaissance is but one of the specific legal problems considered by the Soviets to be a part of the larger subject of demilitarization of outer space, and is inextricably related to the correlative specific problems of fixing a boundary to the upper limit of air space sovereignty and of defining peaceful uses of outer space. These complicated legal issues become additionally sophisticated because the Soviets have emphasized the ideological and political nature of space law. They consider that the legality of aerospace activities depends upon the political and ideological evaluation of the nature of the specific activity rather than on the vertical location of the activity.[365] The Soviets condemn space reconnaissance because they subjectively regard reconnaissance as "aggressive" in nature.

1. Delimitation of Outer Space

The difference in the legality of penetrative reconnaissance and of peripheral reconnaissance leads us back to the fundamental importance of delimiting clearly the upper limits of territorial air space. For reconnaissance by means of artificial satellites is lawful if the latter's orbit lies outside the

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364. See text at note 41 supra.

365. Crane, Soviet Attitude Toward International Space Law, 56 Am. J. Int'l L. 685, 686-687 (1962); Soviet Space Programs 189-192, 216-217.

territorial air space of a State spied on, but illegal if it penetrates within.

The boundary question is a central point in reflecting the shift in emphasis of Soviet attitude to the nature of the activity concerned. Since 1912 the Soviet Government has espoused the traditional rules of air law that the vertical limit of sovereignty extends to air space only, although the exact boundary is indefinite.[366] At the time of the high-altitude balloon incident in 1956,[367] reference by Soviet scholars to the writings of leading French and British publicists supporting the usque ad coelum theory caused speculation as to whether the Soviets had shifted their position to claiming that Soviet sovereignty extended upward without any limitation within the air space or atmosphere.[368]

With the advent of Sputnik in 1957, the Soviet scholars advanced various theories. The first, the "ceiling" principle, pointed out that in practice sovereignty did not extend above

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366. See text at note 17 supra.

367. Thousands of balloons described as meteorological and equipped with cameras and radio were launched to investigate the atmosphere at altitudes of 80,000 to 90,000 feet. The responsible governments, U.S., Norway, and Turkey, suspended such operations after protest by the Soviet Union, Sweden, and some Eastern European countries. McDougal, Lasswell, and Vlasic 269-271. For a detailed account, see Cheng, International Law and High Altitude Flights: Balloons, Rockets and Man-Made Satellites, 6 Int'l & Comp. L.Q. 487-489 (1957). For an account by Soviet legal writers, see Kislov and Krylov, State Sovereignty in Airspace, Int'l Affairs (Moscow) 35-44 (March 1956), reprinted in 1961 Symposium 1037-1046.

368. Kislov and Krylov, id. at 41(1943); Crane, op. cit. supra note 365, at 687-689, note 9; Soviet Space Programs 194-198. It appears that the Soviet Union, like the U.S., has never recognized any upper limit to its air sovereignty. McDougal, Lasswell, and Vlasic 270-271; Survey of Space Law 11. See text at note 164 supra.

"the maximum ascent ceiling of present-day aircraft." Another theory advanced at this time was the "effective control" principle. Both the "ceiling" and the "effective control" principles were discarded in 1958, presumably on the ground that they had little value in opposing reconnaissance satellites. They were replaced by the "security" principle as the result of American press statements alleging United States intentions to launch reconnaissance and bombardment satellites. Finally, when it became apparent that States could employ reconnaissance satellites in defense of their security, the Soviets cautioned against misusing the "security" criterion and instead declared that stress should be placed on concluding an agreement on neutralization and demilitarization of outer space.[369]

It is on the principle of "security" that the Soviets base their charges of space espionage and aggression against the United States. In the U-2 incident the Soviet Union charged the United States with "aggression" and "espionage." Although admittedly the unauthorized overflight was a violation of Soviet air space, the Soviet objection was based primarily on the allegedly illegal nature of the reconnaissance activity rather than on the location of the U-2. Under the present views of the Soviet Union, it seems impossible to fix a boundary without agreement as to what activities are and are not permitted beyond that boundary.

2. Reconnaissance as Within "Peaceful" Purposes

Although the Soviet Union has never officially protested

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369. Crane, op. cit. supra note 365, at 689-692; Soviet Space Programs 198-203; Korovin, International Status of Outer Space, Int'l Affairs(Moscow), 53-56 (1959), reprinted in [illegible] Symposium 1062-1071.

against the United States space activities, Soviet newspapers, scholars, and legal specialists have consistently accused the United States of espionage and aggressive activities in connection with its various satellite programs.[370]

Soviet condemnation of specific types of United States satellites as aggressive began shortly after the U-2 incident in 1960.[371] A leading Soviet jurist, in discussing the military uses of TIROS, MIDAS, SAMOS, and DISCOVERER satellites, summarizes the Soviet point of view by stating that:

> ...American plans of space espionage directed against the security of the U.S.S.R. and the other Socialist countries are incompatible with the generally recognized principles and rules of international law, designed to protect the security of states against encroachments from outside including outer space....[372]

He believes that each State has the right to use outer space at its own discretion but not in a manner intended to cause harm or damage to other States. He contends:

> From the viewpoint of security of the state it makes absolutely no difference from what altitude espionage over the territory is conducted. A state will not feel any safer because military preparations against it are carried on at a very high altitude. The main thing is that the object of espionage and the results are the same irrespective of the altitude. Hence there is absolutely no ground for alleging that espionage at a high altitude, with the aid of artificial Earth satellites, is quite lawful under the existing rules of international law. Any attempt to use satellites for espionage is just as unlawful as attempts to use aircraft for similar purposes.[373]

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370. Soviet Space Programs 208.

371. See Crane, Guides to the Study of Communist Views on the Legal Problems of Space Exploration and a Bibliography, 1961 Symposium 1011, 1013-1015.

372. Zhukov, Space Espionage Plans and International Law, 1961 Symposium 1095, 1098-1099. For a legal analysis of the U.S. reconnaissance satellite program, see Falk, Space Espionage and and World Order: A Consideration of the Samos-Midas Program, Essays on Espionage and International Law 45-82 (Stanger ed. 1962).

373. Zhukov, id. at 1100. For a similar Polish view, see Sztucki, Security of Nations and Cosmic Space, 1961 Symposium 1164-1203.

Upon the joint launching of TIROS III and MIDAS III on 12 July 1961, the Soviet Union seized upon the opportunity to label the launchings as acts of espionage and aggression, charged the United States was using outer space for espionage because of the failure of the U-2 program,[374] and reiterated that a "spy is a spy no matter at what height it flies."[375]

The Soviet contention that United States reconnaissance satellites are illegal solely because of the "aggressive" nature of reconnaissance itself is founded upon the provisions of the United Nations Charter forbidding acts of aggression (Articles 1, 2(4), and 39).[376] In addition, they consider that the mere preparation of reconnaissance flights in space is violative of the United Nations Charter, just as they indicated that the United States violated Soviet territorial integrity even before the Powers flight by "organizing the intrusion of Soviet air space."[377] It

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374. On 25 May 1960, President Eisenhower said after his return from the abortive Summit Conference in Paris:
"In fact, before leaving Washington (for the Conference), I had directed that these U-2 flights be stopped. Clearly their usefulness was impaired.... Furthermore, new techniques, other than aircraft are constantly being developed." (Underscoring supplied) 42 Dep't State Bull. 900 (1960).

375. Soviet Space Programs 208-209; Report on National Meteorological Satellite Program, H. Report No. 1281, 87th Cong., 2d Sess. 5, 27, 41-45 (1961).

376. Zhukov, op. cit. supra note 372, at 1099; Zhukov, Conquest of Outer Space and Some Problems of International Relations, Int'l Affairs(Moscow) 88-96 (Nov. 1959), 1961 Symposium 1072, 1081; Gal, Some Legal Aspects of the Uses of Reconnaissance Satellites, Fifth Colloquium.

377. Korovin, Aerial Espionage and International Law, Int'l Affairs(Moscow) 49-50 (June 1960).
It has also been alleged that reconnaissance is a threat to the peace, endangers State security, is contrary to the 1961 U.N. Resolution, is incompatible with the principles of peaceful coexistence, and is in violation of sovereign rights of States. None of these claims have any substance in international law. See McMahon, Legal Aspects of Outer Space, 38 Brit. Yb. Int'l L. 339, 373-375 (1964).

is significant that the Soviets have apparently broadened their definition of aggression which according to their draft proposal in 1954 required a violation of territorial sovereignty by foreign military forces.[378]

The basic difficulty stems from the problem of determining the precise meaning of "peaceful" uses of outer space. The Soviets have interpreted peaceful to mean non-military.[379] On this basis the use of reconnaissance satellites would be forbidden. This position was pressed by the Soviet delegation at the Geneva meeting of the Legal Sub-committee in August 1962. Paragraph 8 of the Soviet draft declaration of basic principles on outer space prohibited the use of satellites for the purpose of collecting intelligence information.[380] Article 7 of the Soviet proposals on assistance to astronauts and spaceships stated that such satellites would be subject to confiscation if they landed on the territory of another State.[381] The United States expressed an unwillingness to agree to such provisions. Significantly, the 1963 United Nations Declaration makes no mention of reconnaissance satellites and fails to define "peaceful" uses of outer space.[382]

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378. See note 339 supra. Observation systems located outside the territorial sovereignty of any State permit their characterization as legal. Taubenfeld, The Status of Competing Claims to Use Outer Space: An American Point of View, Proc. A.S.I.L. 173, 180-181 (1963).

379. See text at note 172 supra.

380. U.N. Doc. No. A/AC.105/L.2 (1962).

381. U.N. Doc. No. A/AC.105/L.3 (1962).

382. See text at note 177 supra. See also Cooper, Aero-Space Law: Progress in the UN, 2 Astronautics & Aerospace 42, 44 (March 1964); Gardner, International Space Law and Free World Security, 47 Space Digest 58, 63 (May 1964); Schick, Prospects of a Space Law in the United Nations, 13 Int'l & Comp. L.Q. 974-976 (1964).

The United States delegation has, on the other hand, explicitly affirmed the legality of reconnaissance satellites on the basis that "peaceful" uses of outer space means non-aggressive military use. It asserted:

> ...any nation may use space satellites for such purposes as observation and information-gathering. Observation from space is consistent with international law, just as is observation from the high seas.... Observation satellites obviously have military as well as scientific and commercial applications. But this can provide no basis for objection to observation satellites.[383]

The use of reconnaissance satellites is also justified by the United States on the ground of security.[384]

For all practical purposes, the question of the alleged aggressive nature of reconnaissance aerial activities is already foreclosed. For on 27 May 1960, the United Nations Security Council exonerated the United States from a Soviet charge of aggression based on the last U-2 flight over Soviet territory. It, therefore, naturally follows that if aerial reconnaissance involving an independent violation of territorial sovereignty is not aggressive, then certainly space reconnaissance not involving an independent violation of territorial sovereignty is likewise not aggressive.

Thus, as is the case with a reconnaissance aircraft operating over the high seas, a reconnaissance satellite, situated

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383. U.N. Doc. No. A/C.1/PV.1289, G.A.O.R. 13 (1962).

384. See text at note 309 supra. See Gardner, op. cit. supra note 382, at 63.
That the prohibition against nuclear bombs in orbit (see text at note 135 supra) does not extend to reconnaissance or surveillance satellites which may primarily serve military purposes, yet have the advantage that they contribute to an "open world" and thus increase rather than diminish security, see comment to Article 2.5, Draft Space Code of the David Davis Memorial Institute of International Studies, 29 J. Air L.&Com. [illegible] (1963).

outside a State's sovereign air space and engaged in taking pictures of that State's military activities, would not be violating international law. This conclusion is supported by Soviet Premier Khrushchev, who is reported to have stated recently that United States reconnaissance aircraft flights over Cuba are a violation of international law but that the necessary surveillance over Cuba can be accomplished by satellites.[385] This is tantamount to Soviet acceptance of space reconnaissance.

F. Self-Defense Against Reconnaissance Satellites

We have previously seen that the right of self-defense has no geographical limitation and exists on land, on the high seas, and in outer space.[386] We have also seen that although it may be permissible to destroy foreign aircraft engaged in penetrative reconnaissance in a State's sovereign air space, no such right to interfere with foreign aircraft engaged in peripheral reconnaissance exists in international law. Our present inquiry concerns the permissible use of self-defense[387] against an unarmed reconnaissance satellite outside the territorial air space of a State.[388]

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385. Washington Post, July 1, 1964. See Leavitt, Speaking of Space, 47 Space Digest 64-65 (July 1964).

386. See text at note 187 supra. There is no doubt that in the event of an armed attack from outer space both the U.S. and the U.S.S.R. would exercise their right of self-defense. See text at notes 180 and 181 supra.

387. Other possible measures include diplomatic representation, retorsion, and reprisal. That reprisal is not permissible, see McMahon, op. cit. supra note 377, at 375-376.

388. Where a satellite is in a State's sovereign air space, measures might be taken against it for a violation of sovereign air space and a breach of municipal law concerning espionage. Even force might be used against the satellite as in the case of the U-2 incident. See Brownlie 261.

At the threshold we are met with the evidentiary difficulty of determining with any degree of accuracy the exact nature of the activity in which a satellite is engaged. This problem will exist until a pre-launching inspection system becomes effective or until the successful development of an inspector satellite system.[389]

A further difficulty stems from the fact that such reconnaissance activity has been characterized as an aggressive act by the Soviets. On the basis of such characterization counter-measures against reconnaissance satellites would be deemed legitimate on the ground of self-defense. However, we have seen that the better view is that aggression involves some element of threat or use of force which is wholly lacking in the case of an unarmed reconnaissance satellite. In any event, the retaliatory measures must be proportionate. Thus, a reconnaissance satellite does not give rise to the right of self-defense as a counter-measure.[390]

The Soviet contention that a reconnaissance satellite is espionage does not legalize self-defense counter-measures against it. Although international law always permits a State to take measures against espionage, such measures have always been based on the municipal law and cannot reach out beyond a State's territory.

The more problematic question is whether a State may legally take counter-measures against a reconnaissance satellite

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389. See McMahon, op. cit. supra note 377, at 377.

390. A reconnaissance satellite is not an "armed attack" within the meaning of Article 51 of the United Nations Charter. See McMahon, op. cit. supra note 377, at 377, 380. Contra: Gal, op. cit. supra note 376, at 5.

on the ground that it affects its security, even though it does not constitute an armed attack or an act of aggression.[391] Proponents of self-preservation, necessity, and anticipatory self-defense would maintain that counter-measures against a reconnaissance satellite are justified on the ground of security.[392] On the other hand, opponents of self-preservation maintain that such concept is destructive of the law.[393]

In this regard, the following statements by Mr. Becker, Legal Adviser to the State Department, made in 1958, before a Congressional committee, are apropos:

> Mr. Feldman asked: 'As to the inherent right of self-defense set forth in Article 51 of the U. N. Charter, would you consider the passage of a foreign reconnaissance satellite over United States territory (say, at a height of 500 miles) an armed attack on the United States?'
>
> Answer (by Mr. Becker): 'This is the type of question which, in my view, should not be answered hypothetically, but rather in the light of all the facts as they exist at the time. Moreover, such a determination is one of policy as well as one of law.'
>
> And again: 'Now something short of armed attack could endanger your security to an extent that you felt you were entitled to take affirmative action with respect to it... after all, it is a military judgment as to what is endangering you or what is not.'[394]

The Soviet view is similar.[395]

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391. The problem is to translate the general recognition of the right of self-defense into some workable criteria for distinguishing between the defensive and offensive uses of space. Haley, Space Law and Government 157 (1963).

392. See Cooper, Self-Defense in Outer Space...and the United Nations, 5 Space Digest 51-56 (Feb. 1962).

393. See McMahon, op. cit. supra note 377, at 380; Woetzel, Comments on U.S. and Soviet Viewpoints Regarding the Legal Aspects of Military Uses of Space, Proc. A.S.I.L. 195, 199-203 (1963).

394. Hearings Before the House Select Comm. on Astronautics and Space Exploration, 85th Cong., 2d Sess. 1305, 1309 (1958).

395. See text at note 181 supra.

It has been submitted that observation by a reconnaissance satellite is not contrary to international law. Juridically, the status of an unarmed reconnaissance satellite in free outer space should not be different from the status of a reconnaissance aircraft in free air space over the high seas. Applying the analogy of peripheral reconnaissance from air space over the high seas to reconnaissance from a satellite in outer space, it is further submitted that no State has the right to employ counter-measures against an unarmed reconnaissance satellite in outer space not engaged in any activity prohibited by international law.[396] Where the reconnaissance aircraft or reconnaissance satellite violates national air space, it is clear that the State whose sovereignty is thus violated is justified in taking affirmative action.

In conclusion, it may be stated that in a strict legal sense no established principle of international law prohibits reconnaissance per se, and no right exists to take retaliatory measures against reconnaissance aircraft or spacecraft absent an independent breach of international law. However, in this present-day world of fact the problem is extra-legal. The question is one of scientific progress, military strategy, and national policy. If a State determines that the conditions are

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396. A contrary view was expressed in a study by the Library of Congress of the United States in which it was stated that any of the sovereign nations, convinced that a reconnaissance satellite is a threat to its national security, is, to the extent it is scientifically competent to do so, at liberty to effect the malfunctioning or destruction of such spacecraft. See Kittrie, Aggressive Uses of Space Vehicles: The Remedies in International Law, Fourth Colloquium 198, 216.

present justifying action, and if effective means are available, action can be taken in self-defense in outer space.[397] In the final analysis it must be for some independent third party to decide if the action taken was legal in the circumstances.[398]

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397. See Fusca 92; Woetzel, op. cit. supra note 393, at 200; Cooper, op. cit. supra note 392, at 56; Goedhuis, Some Trends in the Political and Legal Thinking of the Conquest of Space, 9 Nederlands Tijschrift Voor International Recht 113, 131-132 (1962).

398. See Larson, When Nations Disagree 35-38 (1961); Lauterpacht, Function of Law in International Community 393-394 (1933).

CHAPTER V

THE CUBAN QUARANTINE-INTERDICTION

Having completed our legal mosaic of the status of reconnaissance and the circumstances under which peacetime reconnaissance may be permissible from air space and outer space under existing rules of international law, we now move from the general to the specific in our effort to determine with reference to the aerial surveillance of Cuba during the Cuban Crisis of 1962 whether defensive penetrative reconnaissance in the absence of war is licit in contemporary international law. As a predicate therefor, we must first assess the juridical impact, if any, of the Cuban quarantine-interdiction as a measure of self-defense on the ever-present "erosion" of the so-called freedom of the seas.

A. The Cuban Crisis of October 22-28, 1962

A broad appreciation of the Cuban Crisis of October 22-28, 1962, cannot be attained by an examination limited solely to the events of that week. In order to bring the events of that week into proper prospective, we should alternately examine all the past and present relevant background factors. As a predicate therefor, this requires an historical review of the Inter-American Regional Security System, an appreciation of the background of the accommodation by the United Nations Charter to regional organizations, and a brief review of the background incidents setting

the aura of the United States-Cuban relations since the establishment of the Castro regime in January 1959.

1. The Inter-American Regional Security System

The Organization of American States (OAS), which comprises twenty-one American States,[399] represents the oldest, largest, and most solid regional organization ever in existence. Its concept is deeply rooted in American history. From 1816 to 1824, the Holy Alliance, a combination of European powers dedicated to the maintenance of the monarchial system of government and the divine right of kings and inclined to aid the Spanish king in the recovery of his lost empire in the Western Hemisphere, threatened the security of the United States and of the Spanish American nations which had secured their independence and recognition by the United States.

It was against this background that President Monroe in a message to Congress in 1823 proclaimed the doctrine which bears his name to meet the threat of possible European intervention. The most important policy of the Monroe Doctrine was the declaration that intervention by European powers in the independence of the new South American Republics would be regarded as an unfriendly act.[400] This doctrine of non-intervention by European powers

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399. Canada is the only State in the Western Hemisphere not included.

400. Another policy declaration was that the American continent would no longer be a subject for colonization by any European power. This arose out of a controversy in which Russia claimed exclusive jurisdiction over the territorial waters off Alaska to an extent of 100 miles. Fenwick, The Organization of American States 9 (1963).

The third policy declaration was the absence of U.S. interest in European wars or European affairs. This policy was officially terminated by the NATO alliance in 1949. See Rappaport, The American Revolution of 1949, NATO Letter 2-8 (Feb. 1964).

was one of self-defense and self-preservation,[401] vital to the peace and security of the United States and the Western Hemisphere.

From the days of President Monroe and Simon Bolivar and the Congress of Panama in 1824 onward to the Rio Conference of 1947, the entire history of American intra-continental relations has been aimed primarily at the prevention and repelling of acts of aggression or intervention against any of the countries of the Western Hemisphere by non-American nations. Another objective was the settlement of their own disputes among themselves. The solution arrived at was the doctrine of collective security under which, inter alia, a threat to the independence and security of any one American State is regarded as a threat against all. This was proclaimed at Havana in 1940 and later incorporated in the Act of Chapultepec of 1945.[402]

The Monroe Doctrine[403] has been transformed over the years from a unilateral claim (in form) to self-defense honored in international law to a multilateral agreement (in substance) reflected in the Inter-American Treaty of Reciprocal Assistance of

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401. The principle of self-defense inherent in the Monroe Doctrine was clearly expressed by Secretary of State Elihu Root when he observed that "the /Monroe/ doctrine is not international law, but it rests upon the right of self-protection and that right is international law." Root, The Real Monroe Doctrine, 8 Am. J. Int'l L. 427, 432 (1914).

402. For an historical background of Inter-American unity, see Fenwick, op. cit. supra note 400, at 1-79; Thomas and Thomas 1-34; Cuban Crisis 1-8, 31-38.

403. Soviet assertions to the contrary notwithstanding (see editor's note to Schick, Cuba and the Role of Law, Int'l Affairs(Moscow) 57 (Sep. 1963)), the Monroe Doctrine is not dead. See Situation In Cuba 8, 20-21, 24-25, 34, 50, 53-55, 76, 78-79; Thomas and Thomas 338-371.

1947[404] (herein referred to as the "Rio Treaty") and the Bogota Charter of the OAS of 1948.[405] Thus, the inter-American community collectively became responsible for the protection against extra-continental subversive intervention.

2. United Nations Charter Accommodates Regionalism

When the United Nations Charter was being drafted at the San Francisco Conference in 1945, the most critical single issue threatening the adoption of the Charter was that of the relationship of the United Nations as a universal organization to regional organizations, notably the already existing organization of American States. The American States were interested in assuring that the Charter would be compatible with the principles of collective security set forth in the Act of Chapultepec.[406]

The Dumbarton Oaks Proposals had subordinated regionalism to the world organization by requiring Security Council authorization for actions by a regional defense system. The Latin American nations, distrusting the veto power in the great five powers in the Security Council and fearing that the exercise of the veto power might prevent Security Council action tc preserve peace in the Americas and might also prevent regional action under

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404. 62 Stat. 1681 (1948), T.I.A.S. No. 1838; 43 Am. J. Int'l L. Supp. 53-58 (1949).

405. The Bogota Charter did not create the OAS, rather it gave the existing Inter-American Union a more specific legal character. On the structure, legal characteristics, functions, and activities of the OAS, see Fenwick, op. cit. supra note 400; Thomas and Thomas; Cuban Crisis 13-17, 33-38.

406. The principle of regional collective security was one of the main features of the Act of Chapultepec of 1945. Fenwick, op. cit. supra note 400, at 70-72, 228-229; Thomas and Thomas 28-30.

the Inter-American system, were determined to preserve the complete autonomy of their own regional system.

What appeared at times as a hopeless deadlock was finally compromised by striking a balance between universality and regionalism. Thus, regional arrangements were accommodated by adding Articles 51, 52, 53, and 54 to the Charter, and by adding regional arrangements to Article 33. Article 51, recognizing the inherent right of individual or collective self-defense, was added to harmonize the Act of Chapultepec with the Charter.[407] Article 52(1) admitted the existence of regional arrangements. Article 52(2) obliged members of a regional arrangement to resort to regional agencies before referring a dispute to the Security Council. Article 52(3) obliged the Security Council to encourage the resort to regional arrangements for the settlement of local disputes. Article 52(4) provided that the provisions with respect to regional arrangements did not impair the competence of the Security Council to investigate any dispute involving a danger to the peace or the right of a member to bring such disputes to the attention of the Security Council. This compromise was accepted by the Latin American States only after President Truman promised that the provisions of the Act of Chapultepec would be incorporated into a permanent treaty ratified by the United States. This was accomplished by the Rio Treaty in 1947.[408]

It is noteworthy to mention parenthetically that a significant feature of the Rio Treaty is the provision authorizing

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407. Article 51 has been interpreted as an indirect recognition of the Monroe Doctrine. Schwarzenberger, Power Politics: A Study of International Society 512 (2d rev. ed. 1951).

408. Fenwick, op. cit. supra note 400, at 72-79, 517-522; Thomas and Thomas 30-32; Cuban Crisis 8-13.

collective measure decisions, both as to the facts of the situation and as to the measures to be taken to meet it, by two-thirds vote of the member States.[409] In contrast, the United Nations Charter, although more universal in its general purpose, is limited by procedural difficulties resulting from the veto power in the Security Council that its actual effective authority is much diminished.[410]

The jurisdictional aspects of the relation of the Rio Treaty to the United Nations Charter were tested in the case of Guatemala in 1954. The issue, simply stated, was whether the Security Council could entertain the complaint of Guatemala in connection with its revolution or was it obliged to refer the complaint to the procedures of the OAS first.[411] The Guatemala case established the precedent to the effect that a member of a regional organization must first exhaust remedies under the regional arrangements before the Security Council can become seized of the case.[412]

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409. Such decisions are binding on all parties, including those not concurring, except that no State is required to use armed force without its consent. Articles 8, 9, 17, and 20.

410. See McDougal, Lasswell, and Vlasic 106-107.

411. For a detailed analysis of this case, see Fenwick, Jurisdictional Questions Involved in the Guatemalan Revolution, 48 Am. J. Int'l L. 597-602 (1954). See also Sohn, Cases on United Nations Law 371-419 (1956).

412. For a penetrating analysis of regionalism under the OAS versus universality under the United Nations and the application of the "Try OAS first" principle in five cases involving relations between the United Nations and Cuba, Panama, Dominican Republic, Guatemala, and Haiti, see Claude, The OAS, the UN, and the United States, International Conciliation (No. 547, March 1964). See also Cuban Crisis 18-25.

3. Background Facts: The Betrayal of the Cuban Revolution and the Establishment of the Communist Bridgehead in Cuba

The OAS was called upon to use its powers granted under the Rio Treaty to resolve threats to the peace of the Americas immediately following its coming into effect in 1948.[413] As early as July 25, 1957, the United States expressed its concern over political unrest in Cuba. On March 14, 1958, the United States suspended arms shipment to the Batista Government which, in disregard of an agreement with the United States, had used them to combat the revolutionary movement headed by Fidel Castro.

It was not revulsion against the Batista regime alone, but the promise of political freedom and social justice for the Cuban people, that brought the Castro regime to power on January 1, 1959. Belief in Castro's objectives and integrity was instrumental in obtaining the recognition within a week of almost all the American Republics, including the United States.[414]

Soon after the Castro Government came into power, it turned away from its previous promises, permitted Communist influence to grow, attacked and persecuted its own supporters in Cuba who expressed opposition to communism, arbitrarily seized United States properties,[415] and made a series of baseless charges against the United States. It ignored, rejected, or imposed impossible

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413. See Thomas and Thomas 298-316; Cuban Crisis 18-25. For a discussion and political assessment of the principal cases in which the OAS has acted since 1959, see MacDonald, The Organization of American States in Action, 15 U. Toronto L.J. 359-429 (1964).

414. Dep't of State, Cuba 1, 4 (Pub. 7171, Inter-Amer. Series 66; April 1961).

415. Cuban seizure of U.S.-owned property began on March 4, 1959, and thereafter increased in frequency and scope. See 108 Cong. Rec. 19327 (daily ed. Sep. [illegible], 1962).

conditions on repeated United States overtures to cooperate and negotiate. During 1959 the Castro Government aided or supported armed invasions of Panama, Nicaragua, the Dominican Republic, and Haiti. All these projects, which invited action by the OAS, failed.[416] In 1960 Cuba established close political, economic, and military ties with the Sino-Soviet block, while increasing the pace and vehemence of measures and attacks against the United States. The United States did not take any defensive measures until the last half of 1960.[417]

On July 3, 1960 the United States Congress authorized the President to reduce import quotas on Cuban sugar. On July 6, 1960 President Eisenhower ordered a cut in Cuba's 1960 sugar quota. On the same day, the Cuban Government passed a nationalization law, authorizing the nationalization of U.S.-owned property through expropriation, and thereupon confiscated U.S.-owned properties in Cuba on the asserted ground that it was in reprisal against the United States reduction of the Cuban sugar quota. Such nationalization law was protested by the United States as being discriminatory, arbitrary, and confiscatory.[418] An American court declared such confiscation to have been a breach of inter-

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416. Cuba, op. cit. supra note 414, at 27. See also Claude, op. cit. supra note 412.

417. For a detailed itemization of events, see Chronology of U.S. Relations With Cuba From 1957 to 1962, prepared by the Dep't of State at the request of Senator Wayne Morse, 108 Cong. Rec. 19326-19331 (daily ed. Sep. 24, 1962). On the betrayal of the Cuban Revolution, see further Cuba, op. cit. supra note 414, at 1-10. On Caribbean tensions since 1959, see Thomas and Thomas 316-337; MacDonald, op. cit. supra note 413.

418. 180 Cong. Rec. 19329-19330 (daily ed. Sep. 24, 1962).

national law.[419]

On August 1, 1960, the United States submitted to the Inter-American Peace Committee a memorandum on the provocative actions of the Cuban Government against the United States.[420] At about the same time, the United Nations Security Council, after considering a Cuban complaint that the United States had intervened in Cuba's domestic affairs and had committed economic ag-

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419. As an exception to the act-of-state doctrine, the court found that the Cuban expropriation decree was in violation of international law because it failed to provide adequate compensation, it had as its purpose retaliation against United States' reduction of purchases of sugar, and it discriminated against United States nationals. Banco National De Cuba v. Sabbatino, 193 F.Supp. 375 (S.D.N.Y. 1961), aff'd 307 F.2d. 845 (2d Cir. 1962), rev'd 376 U.S. 398 (1964) on the ground that the act-of-state doctrine precludes United States courts from inquiring into the acts of foreign States, even though these acts had been denounced by the State Department as being contrary to international law.

Later and by amendment to the Foreign Assistance Act of 1964, the Senate added paragraph 620(e)(2) which provides that no court in the United States shall decline on the act-of-state doctrine to make a determination on the merits or to apply principles of international law in a case in which an act of a foreign state occurred after January 1, 1959, is alleged to be contrary to international law, and further that no effect shall be given to acts of a foreign sovereign that shall be found to be in violation of international law. The amendment further provides, however, that the requirements thereof are not applicable in a case in which the President determines that application of the act-of-state doctrine is required by the foreign policy interests of the United States, and a suggestion to that effect is filed on behalf of the President with the court. Public Law 88-633, 78 Stat. 1009, approved 7 Oct. 1964.

Under the amendment, which was intended to reverse the Supreme Court in the Sabbatino case, the court would presume that it may proceed with an adjudication on the merits unless the President stated officially that such an adjudication in the particular case would embarrass the conduct of foreign policy. S. Rep. No. 1188, Part 1, 88th Cong., 2d Sess. 24 (1964).

See Stevenson, The State Department and Sabbatino--Ev'n Victors Are By Victories Undone, 58 Am. J. Int'l L. 707-711 (1964); Laylin, Holding Invalid Acts Contrary to International Law --A Force Toward Compliance, Proc. A.S.I.L. 33-39 (1964); Coerper, The Act of State Doctrine in the Light of the Sabbatino Case, 56 Am. J. Int'l L. 143-148 (1962); 43 Dep't State Bull. 316 (1960).

420. 43 Dep't State Bull. 79-87, 317-346, 409-412 (1960); 44 Dep't State Bull. 667-685 (1961).

gression against Cuba, resolved to adjourn consideration of the question pending receipt of a report of the OAS which was considering the matter.[421]

Early in his regime, Castro bitterly attacked the OAS. He declared "I have no faith in the OAS ... it decides nothing, the whole thing is a lie." In March 1960, Castro publicly stated that the Cuban Government did not regard itself obligated by the Rio Treaty because "the revolution did not sign the document."[422]

On January 3, 1961, following a controversy over the number of persons in the United States Embassy in Havana, the United States broke diplomatic relations with Cuba.[423] This brought to thirteen the number of American States that had found it necessary to break diplomatic relations with the Castro Government.[424] On April 16, 1961, Castro described his regime as socialist.[425]

The abortive Bay of Pigs invasion of Cuba by Cuban refugees on April 17-19, 1961, brought assertions of necessary aid and assistance by the Soviet Government to Cuba.[426]

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421. 43 Dep't State Bull. 199-205 (1960).

422. Cuba, op. cit. supra note 414, at 30-31; 180 Cong. Rec. 19330 (daily ed. Sep. 24, 1962).

423. 44 Dep't State Bull. 103 (1961).

424. 46 Dep't State Bull. 282 (1962). Because of Cuba's subsequent role in trying to overthrow the Venezuelan Government, the OAS adopted on July 26, 1964, a resolution requiring all members to break diplomatic and commercial relations with Cuba. As a result, all of the Latin American States except one have ended diplomatic, commercial, and social relations with Cuba. Mexico is the only one retaining diplomatic relations with Cuba. Washington Post, Aug. 4, 1964, A-9, cols. 6-8; Washington Evening Star, Sep. 11, 1964, A-10, cols. 1-2; 51 Dep't State Bull. 174-184 (1964).

425. 180 Cong. Rec. 19330 (daily ed. Sep. 24, 1962).

426. 44 Dep't State Bull. 661-685 (1961).

Any doubts about the adoption by the Castro Government of a totalitarian system and its alignment with the international Communist movement, were dispelled on December 2, 1961, when Castro openly espoused Marxism-Leninism. He then stated: "I believe absolutely in Marxism ... I am a Marxist-Leninist and will be a Marxist-Leninist until the last day of my life."[427] He admitted the use of deception concerning political ideology during the early period of the revolution because he felt that "if we, when we began to have strength, had been known as people of very radical ideas, unquestionably all the social classes that are making war on us would have been doing so from that time on."[428]

In December 1961 the Council of the OAS met to consider extracontinental intervention in the Western Hemisphere and recognized the "pressing need" to consider "the dangerous situation created by the intervention of international communism in this (Western) hemisphere facilitated by the Castro regime's now publicly proclaimed alinement with the Sino-Soviet block."[429] As a result of a resolution convoked by the Council of the OAS, a meeting of consultation of Ministers of Foreign Affairs, serving as the Organ of Consultation in Application of the Rio Treaty, was agreed upon for January 23-31, 1962, at Puenta del Este, Uruguay.

Later in January 1962 the Puenta del Este Conference met and declared that as a result of the increase in intensity of the communist offensive in the Western Hemisphere, "the continental unity and the democratic institutions of the hemisphere are now

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427. 180 Cong. Rec. 19327, 19331 (daily ed. Sep. 24, 1962).

428. Id. at 19331.

429. 45 Dep't State Bull. 1069 (1961).

in danger.[430] Accordingly, the following major actions were taken:

1. The Castro Goverment of Cuba, though not Cuba, was expelled from participation in all the organs and bodies of the OAS.[431] This action was based upon Castro's acceptance of communism in 1960 as being violative of the Caracas Conference of March 1954 which condemned international communism.[432]

2. Recommended certain economic embargos, including the immediate suspension of trade with Cuba in arms and implements of war of every description.[433]

3. The foreign ministers, recognizing that the Castro Government is identified with the aims and policies of the Sino-Soviet bloc and that the threat of Cuba is an active threat to the security of the hemisphere and not merely a matter of ideological incompatibility, officially ejected Cuba from the Inter-American Defense Board.[434]

4. Established a Special Consultative Committee on Security Matters within the OAS to recommend joint action that can block communist subversive activities before they reach the level of insurrection or guerrilla war.[435]

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430. By a vote of 20 to 1, unanimous except for Cuba. 46 Dep't State Bull. 278 (1962). At this time it was clear that the Castro regime had become the spearhead of attack on the inter-American system and that it represented a fateful challenge to the inter-American system. Cuba, op. cit. supra note 414, at 36.

431. By a vote of 14 to 1(Cuba), with 6 abstentions (Argentina, Bolivia, Brazil, Chile, Ecuador, Mexico). 46 Dep't State Bull. 281 (1962).

432. Situation in Cuba 99, 101, 103.

433. By a vote of 16 to 1(Cuba), with 4 abstentions (Brazil, Chile, Ecuador, Mexico). 46 Dep't State Bull. 282 (1962).

434. By a vote of 20 to 1, unanimous except for Cuba. Id. at 281-282.

435. By a vote of 19 to 1(Cuba), with 1 abstention (Bolivia). Id. at 268, 279.

5. Urged member States

> ... to take those steps that they may consider appropriate for their individual or collective self-defense, and to cooperate, as may be necessary or desirable, to strengthen their capacity to counteract threats or acts of aggression, subversion, or other dangers to peace and security resulting from the continued intervention in this hemisphere of Sino-Soviet powers, in accordance with obligations established in treaties and agreements such as the Charter of the Organization of American States and the Inter-American Treaty of Reciprocal Assistance.[436]

In pursuance of the recommendations of the Puenta del Este Conference to prohibit trade with Cuba in arms and implements of war, the United States in February 1962 implemented its 1960 embargo by excluding from American ports foreign vessels trading with Cuba (except on humanitarian grounds for certain foodstuffs, medicines, and medical supplies) and all vessels of a country permitting arms trade with Cuba.[437]

Later in 1962 the United Nations Security Council refused to put on its agenda the Cuban charge that the OAS violated the United Nations Charter in excluding the Cuban Government from the OAS and by initiating economic enforcement measures. It also rejected a Cuban request for an advisory opinion of the International Court of Justice on the subject. The United Nations General Assembly took no action on the Cuban complaint of August 1961 alleging United States aggression,[438] and further rejected a Mongolian proposal recalling principles of the United Nations

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436. Id. at 279.

437. Presidential Proclamation No. 3447, 27 Fed. Reg. 1085 (1962); 46 Dep't State Bull. 283-284 (1962); 47 Dep't State Bull. 591-595 (1962).

438. That Cuba had placed herself outside the pale of protection against the American doctrine of non-intervention, see Thomas and Thomas 362-371.

Charter in this context.[439]

On July 26, 1962, Castro announced the formation of Integrated Revolutionary Organizations (ORI) as the precursor of the United Party of the Socialist Revolution, to be the only party in Cuba.[440]

On September 4 and 13, 1962, President Kennedy expressed concern about the Soviet build-up of armament in Cuba. Information available at that time established without doubt that the Soviets had provided the Castro Government with a number of anti-aircraft defense missiles with a slant range of 25 miles, together with extensive related radar and other electronic equipment. In addition, about 3,500 Soviet military technicians were then known to be in or en route to Cuba.[441] Addressing himself to the gravity of the problem, President Kennedy said:

> Ever since Communism moved into Cuba in 1958, Soviet technical and military personnel have moved steadily onto the island in increasing numbers at the invitation of the Cuban government. Now that movement has been increased. It is under our most careful surveillance. But I will repeat the conclusion that I reported last week, that these new shipments do not constitute a serious threat to any other part of this hemisphere.... However, unilateral military intervention on the part of the United States cannot currently be either required or justified.... If at any time the Communist buildup in Cuba were to endanger or interfere with our security in any way, including our base at Guantanamo, our passage to the Panama Canal, our missile and space activities at Cape Canaveral, or the lives of American citizens in this country, or if Cuba should ever attempt to export its aggressive purposes by force or the threat of force against any nation in this hemisphere, or become an offensive military base of significant capacity for the Soviet Union, then this country will do whatever must be done to protect its own security and that of its allies.

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439. 9 U.N. Review 1, 13 (March, 1962); Id. at 1, 14 (April, 1962); 46 Dep't State Bull. 561, 693 (1962).

440. On the establishment of the Communist bridgehead in Cuba, see further Cuba, op. cit. supra note 414, at 11-25.

441. 47 Dep't State Bull. 450 (1962).

> We shall be alert to, and fully capable of dealing swiftly with, any such development.... We shall increase our surveillance of the whole Caribbean area. We shall neither initiate nor permit aggression in this hemisphere.[442] (Underscoring supplied)

On October 3, 1962, the foreign ministers and Special Representatives of the American Republics informally met at Washington and, inter alia, observed that it was desirable to intensify individual and collective surveillance of the delivery of arms and implements of war and all other items of strategic importance to the communist regime of Cuba, in order to prevent the secret accumulation in Cuba of arms that can be used for offensive purposes against the Western Hemisphere.[443]

4. Immediate Facts

On October 3, 1962, the Congress of the United States by Joint Resolution stated, after reaffirming the Monroe Doctrine, that the United States is determined:

> (a) to prevent by whatever means may be necessary, including the use of arms, the Marxist-Leninist regime in Cuba from extending, by force or the threat of force, its aggressive or subversive activities to any part of this hemisphere;
>
> (b) to prevent in Cuba the creation or use of an externally supported military capability endangering the security of the United States; and
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> (c) to work with the Organization of American States and with freedom-loving Cubans to support the aspirations of the Cuban people for self-determination.[444]

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442. Id. at 481-482.

443. Id. at 598-600.

444. This indicates that the Monroe Doctrine is not completely multilateralized and still retains its unilateral significance for the United States. S.J. Res. 230, P.L. 87-733, 76 Stat. 698 (1962); Situation in Cuba. For a listing of the more than 100 instances in which the President used the United States Armed Forces abroad without the sanction of Congress, see id. at 80-87.

On October 16, 1962, President Kennedy received "first preliminary hard information," subsequently confirmed, of the Soviet shipment to, and installation in Cuba of medium-range ballistic missiles capable of carrying a nuclear warhead for a distance of more than 1,000 nautical miles. Other sites not yet completed appeared to be designed for intermediate-range ballistic missiles capable of traveling more than 2,000 nautical miles. In addition, jet bombers, capable of carrying nuclear weapons, were then being uncrated and assembled in Cuba, while the necessary air bases were being prepared. Accordingly, and in the interest of the defense of the security of the United States and of the entire Western Hemisphere, President Kennedy in a telecast on October 22, 1962, announced that he had directed the following initial actions to halt this offensive buildup:

1. The initiation of a strict quarantine on all offensive military equipment under shipment to Cuba.

2. The continued and increased close surveillance of Cuba and its military buildup.

3. A declaration that any nuclear missile launched from Cuba against any nation in the Western Hemisphere would be considered as an attack by the Soviet Union on the United States, requiring a full retaliatory response upon the Soviet Union.

4. The calling for an immediate meeting of the Organ of Consultation, under the OAS, to consider this threat to hemispheric security and to invoke Articles 6 and 8 of the Rio Treaty in support of all necessary action.

5. The requesting of an emergency meeting of the U. N. Security Council without delay to take action against this latest

Soviet threat against world peace.[445]

On October 22, 1962, the United States did request an emergency meeting of the U. N. Security Council.[446]

On October 23, 1962, at a special meeting of the OAS Council meeting as the Provisional Organ of Consultation, it was unanimously resolved, inter alia, that

> ... member states, in accordance with Article 6 and 8 of the Inter-American Treaty of Reciprocal Assistance, take all measures individually and collectively, including the use of armed force, which they may deem necessary to ensure that the Government of Cuba cannot continue to receive from the Sino-Soviet powers military material and related supplies which may threaten the peace and security of the Continent and to prevent the missiles in Cuba with offensive capability from ever becoming an active threat to the peace and security of the Continent.[447]

It was further resolved to inform the United Nations Security Council of this resolution.

On October 23, 1962, President Kennedy issued his Proclamation ordering the land, sea, and air forces of the United States to interdict the delivery of offensive weapons and associated material to Cuba. This order of defensive limited quarantine went into effect on October 24, 1962.[448]

On October 23, 1962, the United Nations Security Council met in emergency session at the request of the United States.[449] After presentation by the United States delegation of significant aerial photographs showing the Soviet missile installations in

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445. The President's Address of 22 October 1962, 47 Dep't State Bull. 715-720 (1962).

446. Id. at 724.

447. Adopted by vote of 20 to 0. Id. at 722-723.

448. Presidential Proclamation No. 3504, dated October 23, 1962; 27 Fed. Reg. 10401 (1962); 47 Dep't State Bull. 717 (1962).

449. See 47 Dep't State Bull. 723-734 (1962).

Cuba, the Soviet Union admitted the existence of the offensive weapons in Cuba.[450]

On October 24, 1962, Acting Secretary-General U Thant addressed an "urgent appeal" to President Kennedy and Chairman Khrushchev stressing the need for time to resolve "the present crisis peacefully."[451]

In a series of public letters exchanged between President Kennedy and Chairman Khrushchev on October 27 and 28, 1962, it was agreed that the Soviet Union would end the construction of Soviet military bases in Cuba, dismantle and return to the Soviet Union under United Nations verification the offensive weapons in Cuba, and halt the further introduction of weapons there. In return, the United States promised to lift the Cuban quarantine and to give assurances against an invasion of Cuba.[452] It was also agreed that United Nations verifications be employed in carrying out these steps.[453]

On November 2, 1962, President Kennedy made an interim report to the people stating that aerial photographs and other evidence indicated that the Soviet missiles were being dismantled and that the fixed installations at the missile sites were being destroyed.[454]

By November 13, 1962, naval units from Argentina, the

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450. Id. at 741-742.

451. Id. at 740.

452. Id. at 741-746. For a critizism of the commitment not to invade Cuba, see Skousen, Has Cuba Been Abandoned To Communism? (1962).

453. 47 Dep't State Bull. 742, 743, 745, 746.

454. N.Y. Times, Nov. 3, 1962, p. 7, cols. 3, 4.

Dominican Republic, and Venezuela, had joined the United States units to comprise the Inter-American Combined Quarantine Force (COMBQUARFOR).[455] In fact, eleven American States had contributed either vessels, troops, air crews or facilities to the operation of the quarantine.[456]

On November 20, 1962, the President reported at his news conference that Chairman Khrushchev had informed him that the Soviet IL-28 jet bombers in Cuba would be withdrawn within thirty days. Since this fact considerably reduced the danger which had faced the Western Hemisphere, President Kennedy stated that he had instructed the Secretary of Defense to lift the naval quarantine.[457]

Thus, the "quarantine" had been in effect from October 24 to November 20, 1962,[458] with the exception of October 30 and 31.[459]

B. Legal Basis For Cuban Quarantine

This study is primarily concerned with the legality of the aerial surveillance of Cuba by the United States. As a necessary predicate thereto and based upon the facts leading up to

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455. Dep't of Defense News Releases No. 1812-62, Nov. 7, 1962, No. 1831-62, Nov. 9, 1962, No. 1843-62, Nov. 13, 1962.

456. Cuban Crisis 40.

457. N.Y. Times, Nov. 21, 1962, p. 10, col. 1.

458. The Interdiction Proclamation was terminated by Presidential Proclamation No. 3507, dated Nov. 21, 1962, 27 Fed. Reg. 11525 (1962).

459. The quarantine was lifted during these two days when Acting Secretary-General U Thant was in Havana. N.Y. Times, Oct. 30, 1962, p. 1, col. 4. Aerial surveillance over Cuba was suspended during the same time. N.Y. Times, Oct. 31, 1962, p. 1, col. 5.

the Cuban crisis, we now proceed to examine and analyze the legal basis for the Cuban quarantine. A simple answer that the action was or was not lawful under existing principles of international law cannot, of course, satisfy the divergent legal thinking presently prevailing.

1. Nature of Issue

At the threshold of examining the legal basis of the United States quarantine action against Cuba, we are faced with the question of whether the quarantine presents a legal or a political issue. Dean Acheson, former Secretary of State, expressed the view that the Cuban quarantine presented a grave policy question rather than a legal one. In this regard, he said:

> In my estimation, however, the quarantine is not a legal issue or an issue of international law as these terms should be understood. Much of what is called international law is a body of ethical distillation, and one must take care not to confuse this distillation with law. We should not rationalize general legal policy restricting sovereignty from international documents composed for specific purposes.
>
> Further, the law through its long history has been respectful of power, especially that power which is close to the sanction of law....[460]
>
> I must conclude that the propriety of the Cuban quarantine is not a legal issue. The power, position and prestige of the United States had been challenged by another state; and law simply does not deal with such questions of ultimate power -- power that comes close to the sources of sovereignty. I cannot believe that there are principles of law that say we must accept destruction of our way of life. One would be surprised if practical men, trained in legal history and thought, had devised and brought to a state of general acceptance a principle condemnatory of an action so essential to the continuation of pre-eminent power as that

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460. That international law is primarily a law of power, see Schwarzenberger, Power Politics: A Study of International Society 202-207 (2d rev. ed. 1951). That law is an instrument of the strong and the relationship between strength and law in international politics, see Van Dyke, International Politics 300-305 (1957).

> taken by the United States last October. Such a principle would be as harmful to the development of restraining procedures as it would be futile. No law can destroy the state creating the law. The survival of states is not a matter of law.[461]

While the views of Mr. Acheson are not subject to unanimity of agreement amoung legal scholars, it cannot be denied that one of the most fundamental rights of States recognized by international law is the right of self-defense or self-preservation.[462] Hall expressed his views in these premises by saying:

> In the last resort almost the whole of the duties of states are subordinated to the right of self-preservation.[463]

Brierly, on the other hand, suggests a more restrictive doctrine of self-preservation by saying:

> Self-defence is a principle which applies to states no less than to individuals; and the legal content of the principle is clear, though its application in a specific case may be a matter of difficulty. In the nineteenth century, however, there was a tendency, by widening the principle to cover 'self-preservation,' to give it a scope which is quite inadmissible.... The truth is that self-preservation in the case of a state as an individual is not a legal right but an instinct; and even if it may often happen that the instinct prevails over the legal duty not to do violence to others,

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461. Acheson, Remarks, Proc. A.S.I.L. 13, 14 (1963). See also Spofford, Remarks, id. at 169-170. While the Legal Adviser to the Department of State stated that "we are armed necessarily with something more substantial than a lawyer's brief," he did admit that "it is not irrelevant which side the law is on." Chayes, Law and the Quarantine of Cuba, 41 Foreign Affairs 550 (1963).

462. I Oppenheim, International Law 297-299 (8th ed. Lauterpacht 1955). See also Van Dyke, op. cit. supra note 460, at 29-39; Starke, An Introduction To International Law 90 (5th ed. 1963). Self-defense presupposes an armed attack; self-preservation has no such limitation. Jennings, The Caroline and McLeod Cases, 32 Am. J. Int'l L. 82, 91-92 (1938).

463. Hall, International Law 322 (8th ed. 1924). See also Martial, State Control of the Air Space over the Territorial Sea and the Contiguous Zone, 30 Can. Bar Rev. 245-263 (1952).

> international law ought not to admit that it is lawful that it should do so.[464] (Underscoring supplied)

At times the distinction between a legal and political issue becomes a very sophisticated question[465] causing great complexity.[466] Notwithstanding and based upon the view that all measures of self-help must eventually be tested in the legal crucible of international law if public order is to be maintained, the Cuban quarantine will be considered as a legal question[467] in the sense that such action must be grounded upon a legal basis in order to be justified.[468]

2. Legal Considerations

Before analyzing the various legal principles upon which the Cuban quarantine may be justified, we should enumerate the relevant principles of customary international law and the parallel provisions of international conventions germane to our consideration.

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464. Brierly 404-405. Concepts of self-preservation and necessity are to be eschewed as being "destructive of the law." McMahon, Legal Aspects of Outer Space, 38 Brit. Yb. Int'l L. 339, 380 (1964).

465. As an example, see Conditions of Admission of a State to Membership in the United Nations, I.C.J. Reports 57 (1948).

466. The dividing line between a justiciable and a political dispute seems to depend upon the attitudes of the States concerned. Van Dyke, op. cit. supra note 460, at 278-279. See also Schwarzenberger, op. cit. supra note 460, at 460-465.

467. As to the role of the lawyer and the law in the Cuban crisis, see Cuban Crisis 55-57.

468. The Honorable Abram Chayes, Legal Adviser to the State Department, speaking about the continuous and complex interplay between law and action, said international lawyers "must avoid the temptation to deal with very difficult political and moral issues as though they could be resolved by rather simple and very general legal imperatives." Proc. A.S.I.L. 12 (1963). See remarks of Professor Henkin, id. at 167, and of Mr. Spofford, id. at 169.

The fundamental principles of customary international law which come into play in the premises are:

1. Respect for territorial sovereignty between independent States.

2. The freedom of the high seas in time of peace from the exclusive sovereignty of individual States, as now reflected in the Geneva Convention on the High Seas of 1958.

3. The inherent right of a State to self-defense.

4. The inherent right of a State to self-preservation.

The foregoing principles of customary international law must be balanced in the light of the following provisions of international conventions:

1. United Nations Charter, particularly Articles 2(3), 2(4), 51, 52 and 53.

2. Rio Treaty of 1947, particularly Articles 6, 8, 17 and 18.

Each of these principles will be considered ad seriatim.

a. Territorial Integrity.--The maritime quarantine, directed at the interdiction of all offensive military equipment under shipment to Cuba, was confined to the high seas. There was no invasion or occupation of Cuba's territory by armed force; nor did the quarantine in any other way violate the territorial sovereignty of Cuba.[469]

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469. One writer suggests as a "common sense interpretation" that "use or threat of military force against a state's vessels on the high seas to induce its government to change its policy or to abandon its rights, violates the state's political independence." Wright, The Cuban Quarantine, 57 Am. J. Int'l L. 546, 556-557 (1963). Cf. Views of McDougal, Proc. A.S.I.L. 163 (1963).

b. Freedom of the High Seas.--It has been asserted that the Cuban quarantine deprived the Soviet Union of its right to navigate the high seas in time of peace.[470] Such claim ignores the realities of the qualified legal regime of the high seas. We have seen that under customary principles of international law, the so-called "freedom of the seas" is not an absolute one; but rather that "freedom of the seas" yields to reasonable claims of States based upon the protection of an economic or security interest.

Article 2 of the 1958 Geneva Convention on the High Seas provides that:

> Freedom of the high seas is exercised under the provisions laid down by these articles and by other rules of international law. (Underscoring supplied)

It is further provided therein that the freedom of the high seas expressed in the Article

> and others which are recognized by the general principles of international law, shall be exercised by all states with reasonable regard to the interests of other states in their exercise of the freedom of the high seas. (Underscoring supplies)

It is submitted that nothing in this Convention proscribes against a reasonable interference of the free use of the high seas by any State where the restriction is necessary as a security or self-protective measure recognized by customary international law.

c. Pacific Blockade.--Because naval vessels were used for purposes of interdiction, the press and news commentators were quick to analogize the Cuban quarantine to a "blockade." Such characterization was improper, for in classical international

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470. Wright, The Cuban Crisis, Pro. A.S.I.L. 9 (1963).

law "blockade" requires a state of belligerency or war.[471] The United States made no assertion of a state of war or belligerency and did not seek to justify the quarantine as a blockade.[472]

Although the quarantine comes closest in analogy to a "pacific blockade," the United States did not justify the Cuban quarantine on the classical doctrine of "pacific blockade."[473] The United States has consistently opposed the application of pacific blockades to its vessels and denied the legitimacy of such actions.[474] Notwithstanding, the weight of authority seems to favor the view that a pacific blockade may not be enforced against the vessels of third nations.[475]

d. Self-Defense and Self-Preservation.--Traditional international law has over the years recognized the inherent rights of self-defense and self-preservation as the most basic rights of an independent State in the community of nations.[476] "Self-defense" maintains one scholar, "was changed from a political excuse to a legal doctrine."[477] in the case of the Caroline. In

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471. See note 93 supra.

472. See Situation in Cuba 35, 57-58, 60-61.

473. Meeker, Defensive Quarantine And The Law 57 Am. J. Int'l L. 515-524 (1963).

474. VII Hackworth, Digest of International Law 125 (1943); Briggs, The Law Of Nations 959 (2d ed. 1952).

475. It has been suggested that the legality of the "pacific blockade" is questionable under the U. N. Charter. See Wright, op. cit. supra note 469, at 554.

476. Starke, op. cit. supra note 462, at 90, 404-405. The doctrine of necessity as a basis for self-preservation has been traced back to the time of Machiavelli. See Murchison, The Contiguous Air Space Zone in International Law 60 (1956). For a comprehensive study of State practice in self-defense along historical lines, see Brownlie 183-268.

477. Jennings, op. cit. supra note 464, at 82-99. See text at note 103 supra.

that instance, Secretary of State Daniel Webster enunciated the standards governing legitimate recourse to self-defense as requiring "a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment of deliberation," and further, the action taken must involve "nothing unreasonable or excessive, since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it."[478] While self-defense has achieved the dignity of a "legal right," some scholars maintain that the less restrictive doctrine of "self-preservation" is not a legal right.[479]

Be that as it may, the fact remains that self-preservation has been the principal justification for the erosion of the "freedom of the seas" and remains a vital part of the jurisprudence of international law as witnessed by the unilateral practices of States.[480] Chief Justice Marshall recognized this fact of life in 1804 when he said:

> The authority of a nation within its own territory is absolute and exclusive. *** But its power to secure itself from injury may certainly be exercised beyond the limits of its territory.[481]

Mr. Elihu Root in discussing "the right of self-protection" as "a right recognized by international law," said in 1914:

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478. Briggs, op. cit. supra note 474, at 985. Webster's formula is "exceptionally elastic and necessarily permits anticipatory self-defence." Brownlie 265-266.

479. See text at notes 463 and 464. "Self-preservation" is a generic term which includes "self-defense" as an instance of "self-preservation." In State practice and legal doctrine, the right of self-preservation is generally regarded as identical with that of self-defense. Brownlie 186, 189-191.

480. See McDougal and Feliciano 209-216.

481. Church v. Hubbart, 6 U.S. (2 Cranch) 187 (1804).

> The right is a necessary corollary of independent sovereignty. It is well understood that the exercise of the right of self-protection may and frequently does extend in its effect beyond the limits of the territorial jurisdiction of the State exercising it.[482]

Further, he explained:

> The principle which underlies the Monroe doctrine is 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.[483]

Although the United States did not rely on either of the traditional concepts of self-preservation or self-defense,[484] it is submitted that the Cuban quarantine was necessary defensive action (individually and collectively) to counter the sudden, secretive introduction of nuclear weapons in Latin America -- an area formerly free of the direct threat of nuclear war.[485] The tests of necessity and proportionality[486] were clearly met.[487] The big dispute among scholars is centered on the effect, if any, the United Nations Charter has upon these principles of customary international law.

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482. Root, The Real Monroe Doctrine, 8 Am. J. Int'l L. 427, 432 (1914).

483. Idem.

484. Chayes, The Legal Case for U.S. Action on Cuba, 47 Dep't State Bull. 763-765 (1962); Chayes, op. cit. supra note 461, at 550-557.

485. For a penetrating analysis of this problem, see Partan, The Cuban Quarantine: Some Implications For Self-Defense, Duke L. J. 696, 709-715 (1963).

486. For a multifactoral analysis of the requirements of self-defense, see McDougal and Feliciano 217-232.

487. See Christol and Davis, Maritime Quarantine: The Naval Interdiction Of Offensive Weapons And Associated Material to Cuba, 1962, 57 Am. J. Int'l L. 525, 540 (1963); Mallison, Limited Naval Blockade or Quarantine-Interdiction: National and Collective Defense Claims Valid Under International Law, 31 Geo. Wash. L. R. 335, 355-360 (1962).

e. National Self-Defense under the U. N. Charter.--Under the U. N. Charter member States undertake to settle their international disputes by peaceful means (Article 2(3)) and to refrain from the use or threat of force in international relations against another State (Article 2(4)), except for "the inherent right of individual or collective self-defense if an armed attack occurs" (Article 51), under authority of the United Nations (Articles 24, 39, 53), or on invitation of the State where the force is being used (Article 2(1)). The controversial question that has sharply divided legal scholars is whether Article 51 has restricted the traditional inherent right of national self-defense.[488]

Some writers argue that the combined effect of Article 2(4) and Article 51 is to restrict the right of self-defense to cases falling precisely within the wording of Articles 51 "if an armed attack occurs."[489] They maintain that today Article 51 is the exclusive source of the authority to resort to self-defense. In other words, self-defense is outlawed by international law save when permitted by the U. N. Charter. Accordingly, it has been stated that the missiles in Cuba and the Soviet shipment of missiles to Cuba did not constitute "an armed attack" on the United States, and that therefore the Cuban quarantine was a unilateral, forcible action repugnant to the obligations of the

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488. For a comprehensive study of United Nations practice in these premises, see Higgins, The Legal Limits to the Use of Force by Sovereign States: United Nations Practice, 37 Brit. Yb. Int'l L. 269-319 (1964).

489. The equally authoritative French text of Article 51 uses the less restrictive words "armed aggression" rather than "armed attack." See Mallison, Remarks, Proc. A.S.I.L. 170 (1963); Higgins, id. at 299.

United States under the U. N. Charter.[490]

The opposite view is that the words in Article 51 "nothing in the present Chapter shall impair the inherent right of individual or collective self-defense" evince a clear intent not to impair the natural rights of States to use force in self-defense.[491] In other words, this school maintains that Article 51 is declaratory and not restrictive of the traditional right of self-defense. This broader view derives uncontestable support from the travaux preparatoires of the Charter. Committee I at San Francisco, which dealt with Article 2(4), said that:

> the use of arms in legitimate self-defense remains admitted and unimpaired.[492]

The record then shows that Article 51 was introduced into the Charter primarily for the purpose of harmonizing regional organizations for defense with the powers and responsibilities given to the Security Council for maintaining peace.[493] Thus it would be a dubious conclusion to say that the members of the OAS have accepted an interpretation of the right of self-defense under the

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490. Henkin, op. cit. supra note 468, at 151; Wright, op. cit. supra note 469, at 562; Wright, op. cit. supra note 470, at 10; Sohn, Remarks, Proc. A.S.I.L. 171 (1963). For a juridico-political analysis of the Cuban crisis contending that the nuclear age has rendered obsolete the use of military sanctions in all those instances where vital interests of nuclear powers are involved, see Schick, Cuba and the Rule of Law, Int'l Affairs (Moscow) 57-63 (Sep. 1963).

491. For a profound and comprehensive review of this problem, see McDougal and Feliciano 232-241.

492. 6 United Nations Conference on International Organizations (U.N.C.I.O.) 334. Cf. Wright, op. cit. supra note 470, at 17; Henkin, op. cit. supra note 468, at 165-166.

493. Brierly 417-420. Official testimony during the Senate Foreign Relations Committee Hearings in 1949 on the relationship between NATO and Article 51 was to the effect that Article 51 did not create a right but recognized the right. See Mallison, op. cit. supra note 489, at 171.

Rio Treaty which restricts their individual right to protection solely against an armed attack.[494] Based upon this broader interpretation of Article 51, the Cuban quarantine was not violative of Article 51.[495] It should be noted that neither the United States nor the OAS resolution rested its case on self-defense under Article 51.[496]

Another school of thought urges that Article 51[497] be interpreted to permit "anticipatory self-defense" -- the right to act in self-defense in anticipation of attack. This view is based on the undeniable fact that in this era of nuclear weapons and the ever-present possibility of sudden devastation, nations cannot wait for a direct armed attack[498] to actually occur.[499] It is

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494. Thomas and Thomas 250-254.

495. McDougal, The Soviet-Cuban Quarantine and Self-Defense, 57 Am. J. Int'l L. 597-604 (1963); Oliver, International Law and the Quarantine of Cuba: A Hopeful Prescription for Legal Writing, id. at 373-377; MacChesney, Some Comments on the "Quarantine" of Cuba, id. at 592-597; McDougal, Proc. A.S.I.L. 15, 164 (1963); Maktos, id. at 16,; Laylin, id. at 16; Fenwick, id. at 17; Mallison, id. at 170; Williams, id. at 172; MacChesney, ibid.

496. The State Department Legal Adviser said on Nov. 3, 1962: "The quarantine action was designed to deal with an imminent threat to our security. But the President in his speech did not invoke Article 51 or the right of self-defense." Chayes, op. cit. supra note 484, at 764; Cuban Crisis 46.

At his press conference of Nov. 20, 1962, the President, in reply to a question relating to unilateral action by the United States, said in part: "But we, of course, keep to ourselves and hold to ourselves, under the United States Constitution, and under the laws of international law, the right to defend our security." N.Y. Times, Nov. 21, 1962.

497. The concept of self-defense in Article 51 is still far from juridical precision. See Kunz, Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations, 41 Am. J. Int'l L. 872-879 (1947).

498. Article 51 speaks of "armed attack," which is a strategic, not a legal, term. Kunz, id. at 877-878. It covers all cases of attack, direct and indirect. It does not restrict the right of self-preservation or anticipatory self-defense as recognized in the Caroline Case and evinced by United Nations practice. Higgins, op. cit. supra note 489, at 299, 302-303.

submitted that "anticipatory self-defense" appears to be a new label on the traditional doctrine of "self-preservation,"[500] which like "self-defense" has not been restricted by the U. N. Charter.[501] This view was expressed by Secretary of State Rusk's statement before the Senate Committees on Foreign Affairs and Armed Services on September 17, 1962, when he said:

> No great nation can ever abandon its elementary right of unilateral action if that becomes necessary for its own security.[502]

f. Collective Self-Defense under the Rio Treaty.--The U. N. Charter prescribes the use of "regional arrangements or agencies" for the maintenance of international peace and security "provided their activities are consistent with the Purposes and Principles of the United Nations" (Article 52(1)). It further provides that "no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council" (Article 53(1)).

The Rio Treaty of 1947 constitutes the Inter-American regional system under which twenty-one American countries, including Cuba, have united for collective security.[503] It provides

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499. See Cuban Crisis 48; Henkin, Force, Intervention, and Neutrality in Contemporary International Law, Proc. A.S.I.L. 147, 148, 150-152, 167 (1963); Oppler, Remarks, id. at 171; Nanda, Remarks, id. at 172.

500. See Brownlie 225-228.

501. The vast majority of scholars insist upon this view. See Higgins, op. cit. supra note 488, at 299 note 2, 302. Contra: See Brownlie 232-247, 265-267.

502. Situation in Cuba 33.

503. For examples of collective self-defense treaties prior to World War II, see Brownlie 200-201, 219.

for collective action not only in case of armed attack (Article 3) but also "if the inviolability or the integrity of the territory or the sovereignty or political independence shall be affected by an aggression which is not an armed attack or by an extra-continental or intra-continental conflict, or by any other fact or situation that might endanger the peace of America" (Article 6) (Underscoring supplied). In such cases of collective self-defense,[504] a special body, the Organ of Consultation, consisting of the Foreign Ministers of the member States or their representatives, is to "meet immediately in order to agree on the measures ...which should be taken for the common defense and for the maintenance of peace and security of the Continent" (Article 6). The Organ of Consultation acts only by a two-thirds vote (Article 17), which is binding on all parties including those not concurring except that no State is required to use armed force without its consent (Article 20). The "use of armed force" is specifically authorized (Article 8).[505]

On October 23, 1962, the Organ of Consultation, in proper session and after considering the evidence of the secret introduction of Soviet strategic nuclear missiles into Cuba, concluded that a situation existed which endangered the peace of America[506]

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504. That "collective self-defense" lies between "individual self-defense" and "police action" in a spectrum of degree of community involvement and participation in the forcible redress of breaches of world public order, see McDougal and Feliciano 244-253. The term "collective self-defense" is not a happy one. Kunz, op. cit. supra note 497, at 875.

505. For a more detailed explanation of the function of collective self-defense under the Rio Treaty, see Thomas and Thomas 254-260, 264-274.

506. There is nothing in the U. N. Charter that takes away the right of individual members to make their own appreciations of a threat to the peace, breach of peace or act of aggression.

and pursuant to Article 6 recommended that member states

> take all measures, individually and collectively, including the use of armed force, which they may deem necessary to ensure that the Government of Cuba cannot continue to receive from the Sino-Soviet powers military material and related supplies....[507]

The Cuban quarantine was imposed by the United States to carry out such recommendation.[508] This in essence is the ground upon which the United States has rested its justification under international law for the Cuban quarantine.[509]

The legality of the Cuban quarantine under the Rio Treaty must, however, be further tested against the U. N. Charter. We have already seen that regional arrangements for the maintenance of international peace and security are in consonance with the U. N. Charter and are specifically permitted by Article 52(1). Incidentally, provisions for regional arrangements were written into the Charter at San Francisco at the instance of the Latin American countries and with the inter-American system in mind.[510]

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507. See text at notes 429, 430 and 436 supra.

508. The argument that the OAS resolution could justify the quarantine against Cuba but not vis-a-vis Russia is tenuous. Wright, The Cuban Crisis, Proc. A.S.I.L. 10, 17 (1963). That measures taken under Article 6 of the Rio Treaty may rightfully be taken against nonsignatories under Article 52 of the U. N. Charter, see Thomas and Thomas 264-268, 274-276. Compare also Chayes, Remarks, Proc. A.S.I.L. 10 (1963); Meeker, Defensive Quarantine And The Law, 57 Am. J. Int'l L. 515, 518 (1963); Fenwick, The Quarantine Against Cuba: Legal or Illegal, 57 Am. J. Int'l L. 588, 591 (1963).

509. Chayes, op. cit. supra notes 461 and 484. See also Meeker, id.; Mallison, op. cit. supra note 487; Law And Politics In Space 128 (Cohen ed. 1964).

One scholar finds the quarantine justified on grounds of self-defense but not by the OAS resolution. Seligman, The Legality of U.S. Quarantine Action Under the United Nations Charter, 49 A.B.A.J. 142 (1963).

510. Meeker, op. cit. supra note 508, at 518.

The wisdom of a separate and collateral regional system for the maintenance of international peace and security has been borne out by the subsequent abysmal failure of the Security Council to fulfil its original concept as an effective organ for keeping international peace.[511]

In compliance with the requirements of Article 54 that the Security Council shall at all times be kept fully informed of activities undertaken or in contemplation under regional arrangements, the Security Council was advised of the contemplated Cuban quarantine. Further, Article 53(1) states:

> But no enforcement action[512] shall be taken under regional arrangements or by regional agencies without the authorization[513] of the Security Council.

The Security Council, which met before the Organ of Consultation adopted its resolution of October 23 and before the proclamation of defensive quarantine was issued or carried into effect, did not see fit to take any action in derogation of the quarantine. Rather, it encouraged the parties to pursue the course of negotiation between the United States and the Soviet Union.[514] The Soviet Union resolution of disapproval of the United States quar-

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511. Brierly 114-118; Meeker, op. cit. supra note 508, at 519; Chayes, op. cit. supra note 484, at 765; Henkin, op. cit. supra note 499, at 148. See Uniting for Peace Resolution by the General Assembly, U.N. Doc. No. A/1481; 45 Am. J. Int'l L. Supp. 1 (1951).

512. "Enforcement action" here does not comprehend action of a regional organization which is only recommendatory to members of the organization. Meeker, op. cit. supra note 508, at 522. See also Thomas and Thomas 270-271, 333. In a conflict between Article 51 and Article 53, Article 51 prevails. Cuban Crisis 45-48.

513. "Authorization" does not necessarily mean "prior" or "express" authorization. Meeker, id.

514. Meeker, ibid; 47 Dep't State Bull. 740 (1962).

antine action was never brought to a vote.[515] What clearer evidence of United Nations approval is required.[516]

C. A New Option of Self-Defense in International Law

The Cuban crisis presented an unprecedented situation. The rapid and covert effort of the Soviet Union to install a major offensive missile threat, capable of mass nuclear destruction, within the Western Hemisphere, presented a challenge to the security of not only the United States and other American States, but also to the peace and security of the entire world. The Soviet offensive military threat to peace was countered with a skillful limited defensive multilateral coercive action which achieved within short order the removal of the offensive military hardware from Cuba, the restoration of the status quo of the world power structure, and the maintenance of international peace and security -- all without any resultant hostilities.

1. Traditional Concepts Inadequate

From the painful experience of this international political conflict emerged what may very well become a new vital legal option -- the "Quarantine-Interdiction."[517] Although the tradi-

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515. A Soviet draft resolution introduced in the Security Council, but not voted on, would have recognized "the right of every State to strengthen its defenses," and would have condemned the quarantine as "aimed at violating the United Nations Charter and at increasing the threat of war." U.N. Doc. No. S/5187 (1962).

516. International law governing the use of force by States will be derived not so much from treaties and decisions but more so from cautiously worded recommendations, views expressed over a period of time by a majority of States, action taken, and even the refusal to act. Higgins, op. cit. supra note 488, at 319.

517. Although the term "quarantine" has a long history in maritime law connoting a forceful and unfriendly display of power, it has been universally regarded as a peaceful act of self-preservation. Re, The Quarantine Of Cuba In International Law, 6 JAG Bull. 3, 5 (Jan.-Feb. 1964).

tional concept of belligerent blockade would apply to all ships, it is too drastic a remedy as it treats the blockade as an act of war.[518] The traditional concept of pacific blockade is too rigid in that it limits legally permissible coercion by the blockading State to the blockaded State and its ships and no others.[519] This apparent legal bifurcation, which does not permit of any middle ground, leaves the decision-maker who is faced with an unlawful initial coercion with the unrealistic and inconsistent alternatives of comprehensive blockade involving war on the one hand or "doing nothing" on the other hand.[520] The quarantine-interdiction represents a more usable conception of the pacific blockade[521] which takes into account the contemporary realities of "cold war" and permits a high degree of flexibility in its employment in a manner ranging from slight to intense degrees of coercion. In particular, the quarantine-interdiction involves the use of new limited coercive means against the vessels of a third State to meet present-day needs. Thus, it comprises a novel combination of individual traditional elements having precedent in customary international law and was carefully tailored to fit into the existing international legal fabric. As a newer form of reprisal,

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518. See note 93 supra.

519. See text at note 93 supra.

520. See testimony of Secretary of State Rusk, Situation in Cuba 135.

521. In 1958 the Deputy Judge Advocate General of the U. S. Navy, in recommending that the United States "as the stout champion of peace and freedom" should develop strategic doctrine in advance so that responding counter action will be based on plans and not the panic that follows surprise, proposed that "an intelligent and bold use of blockade as a measure short of war, and in limited belligerent action, should be included in our plans..." Powers, Blockade: For Winning Without Killing, 84. U.S. Naval Inst. Proc. 61, 66 (No. 8, Aug. 1958).

it has taken its place between the classic forms of belligerent and pacific blockade.

2. Reasonableness in Formulation and Application

We have seen that every instance of a State's extension of limited jurisdiction over the high seas is tested by the basic requirement of reasonableness. The Cuban quarantine-interdiction was a limited and selective blockade of clearly defined "prohibited materiel" of offensive weapons to Cuba. It did not prohibit the shipment of food, and did not require the prior permission of the United States for the conduct of trade in non-prohibited materiel with Cuba. The prohibited materiel, limited to specified weapon systems and related equipment, were directly related to the primary objective of removing the threat of offensive military power in Cuba and thus preserve the peace of the world and the security of the United States and of all the American Republics.[522]

In lieu of wartime capture of vessels violating the naval quarantine, the procedure prescribed by the proclamation was milder. Any vessel carrying prohibited materiel to Cuba was to "be directed to proceed to another destination of its own choice," and only upon refusal to obey that general directive was it to be sent to a United States port. The proclamation stated that force was to be used as a sanction to enforce the quarantine only as a last resort after measures short of force have been found unavailing. When resorted to, only minimum forces was to be used.[523]

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522. Presidential Proclamation No. 3504, dated October 23, 1962; 27 Fed. Reg. 1041 (1962); 47 Dep't State Bull. 717 (1962).

523. Idem.

Such an ultimate sanction of minimum necessary force was essential to juristic reality.[524]

The Proclamation empowered the Secretary of Defense to designate "prohibited and restricted zones" and "prescribe routes" located "within a reasonable distance from Cuba." Such a zone, termed "interception area" included the sea areas and appurtenant air space within the radius of 500 nautical miles from the focal points of Havana and Cape Maisi (located at the eastern tip of Cuba).[525] This "interception area" covered a relatively small area when compared with that invoked in the Declaration of Panama in 1939. We have examined many unilateral claims to self-defense ranging from economic self-defense (customs, anti-smuggling, fisheries, continental shelf) to varying degrees of national security claims recognized in international law. In the latter category, the famous Caroline case, the Virginius case, ADIZ, CADIZ, and the hydrogen bomb tests, were all examples of reasonable anticipatory self-defense recognized in customary international law. Admittedly, all of these examples are of a far more extreme nature than the quarantine-interdiction.

Sea routes through the interception area were "advised" rather than "prescribed" in Special Warning to Mariners No. 30.[526] To avoid unnecessary inconvenience to sea commerce, a clearance procedure facilitating the transit of vessels through the inter-

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524. Mallison, op. cit. supra note 487, at 388, note 200.

525. Geographical description of such zone is contained in Dep't of State Press Release No. 645, Oct. 27, 1962. For an unofficial chart of the interception area around Cuba, see Mallison, op. cit supra note 487, at 398.

526. Christol and Davis, op. cit. supra note 487, at 544-545; Mallison, op. cit. supra note 487, at 389.

ception area was put into effect by the United States.[527]

On October 25, 1962, whithin twenty-four hours after the quarantine was in effect, a United States warship of the quarantine force intercepted the first Soviet ship, an oil tanker. The United States officers being satisfied that the tanker carried no prohibited materiel, the tanker was permitted to proceed to Cuba without visit and search.[528] On the same day, twelve of the twenty-five Soviet, or Soviet-chartered, vessels which had been observed en route to Cuba reversed course.[529] On October 26, a Lebanese freighter en route to Cuba under Soviet charter was intercepted, visited, and searched by two United States destroyers. The freighter was allowed to proceed to Cuba as the cargo appeared to contain no prohibited materiel.[530]

Submarine surfacing and identification procedures, being predicated on sound signals, were harmless.[531] It is reported that the several Soviet submarines operating in the region of the Guantanamo Naval base during the peak of the Cuban crisis "all were forced to surface" by United States vessels and aircraft.[532]

The Cuban quarantine-interdiction, which was in effect only from October 24 to November 20, 1962 (except for October 30 and 31), represents the minimum amount of force necessary to prevent the accomplishment of the Soviet nuclear threat and thus

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527. Christol and Davis, op. cit. supra note 487, at 544-545; Mallison, op. cit. supra note 487, at 389-390.

528. N.Y. Times Chronology, Nov. 3, 1962, p. 7, col. 4.

529. Idem.

530. N.Y. Times Chronology, Nov. 3, 1962, p. 7, col. 5.

531. Special Warning No. 32. See Christol and Davis, op. cit. supra note 487, at 544.

532. N.Y. Times, Nov. 13, 1962, p. 3, cols. 1-5.

avert general hostilities. In meeting every test of reasonableness[533] both in formulation and in application, it evinces a restraint inbued with deep respect for the concepts, traditions, and institutions of international law.

3. Provisional Characterization and Subsequent Review

The crux of the legal question raised by the quarantine of Cuba is the right of a State to use force in self-defense in the absence of an armed attack on it and without prior authorization of the U. N. Security Council. It is noteworthy that the official United States view as expressed by the statements of the Legal Adviser of its Department of State, which sought to justify the quarantine as a regional collective security measure undertaken pursuant to a recommendation of the OAS, minimized the role of self-defense. This fact, however, does not exclude self-defense as a possible legal basis of the quarantine.[534]

Despite the conflicting theories of self-defense and the natural inclination of statesmen to avoid such a highly controverted issue, it is submitted that in the final analysis the legality of the Cuban quarantine must be founded upon traditional concepts of self-defense or otherwise fail. For collective defense action means no more than it means in general international law, i.e, that two or more States can take collective action in the right of self-defense when each has an individual right of self-

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533. The most fundamental and comprehensive test of all law is reasonableness in a particular context. McDougal and Feliciano 218.

534. That the Cuban quarantine will have an impact on the law of self-defense, see Partan, The Cuban Quarantine: Some Implications for Self-Defense, Duke L. J. 696, 700-704 (1963).

defense.[535]

We have previously analyzed the various legal principles of both customary and conventional international law germane to the Cuban quarantine. It is submitted that the quarantine, as a new form of reprisal, was factually a carefully non-destructive, minimal measure of self-defense, prompted by urgent necessity in the present posture of nuclear weapons and ballistic missiles, proportionate to the Soviet nuclear threat, and designed solely to maintain the peace and security of the United States and that of the Western Hemisphere.[536]

Legally, justification for the quarantine can be supported in international law upon at least three substantive bases. The first, most fundamental, and broadest ground is the inherent right under customary international law of the United States of national self-preservation, which includes self-defense and anticipatory self-defense. Secondly, legal justification is found in conventional international law by a realistic interpretation of Article 51 of the United Nations Charter which preserves the inherent right to national self-defense (an interpretation which does not disregard the legislative history to the Article and which recognizes the tempo and scientific capabilities of contemporary technology). Thirdly, the quarantine can also be supported in con-

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535. Thomas and Thomas 255, 259; McDougal and Feliciano 246-253.

536. The Presidential Proclamation of Oct. 23 was drafted carefully to invoke both national and collective self-defense by finding that "the peace of the world and the security of the United States and of all the American states are endangered." The same point was made in more legalistic terms by means of municipal authority (Joint Resolution of Oct. 3, 1962) and international authority (OAS Resolution of Oct. 23, 1962).

ventional international law as an exercise of the equally-inherent right of collective self-defense through the OAS, pursuant to the provisions of the Rio Treaty of 1947, and consistent with the requirements of the United Nations Charter. And, finally, the quarantine did not in any way contravene the purposes or spirit of Articles 2(4) and 51 of the United Nations Charter, but rather was in conformity with the provisions of Articles 52, 53 and 54 thereof.

The Cuban crisis has, above all, pointed out in bold relief the inadequacies of the United Nations Charter resulting primarily from poor statutory draftsmanship. The uncertainty of the scope of the right to resort to force in self-defense is regrettable. It is no wonder that some scholars have given Articles 2(4), 51, 52, 53 and 54 a restrictive interpretation incompatible with the legislative history and oblivious of the tempo and realities of the contemporary nuclear-space age. In the present premises, the application of these restrictive interpretations could have resulted in national suicide for the United States and would have frustrated the primary purpose of the United Nations to "maintain international peace and security." Although the Security Council may have been subjectively cognizant of these realities when it rejected the Soviet efforts to condemn the United States Cuban quarantine-interdiction action, the need for positive clarification of the scope of self-defense under the United Nations Charter is most urgent if the United Nations expects to play a constructive and predominant role in preserving world peace in the future.

We have seen that the outlawing of war, first in the

Kellogg-Briand Pact and most recently in the United Nations Charter, is weakened in its practical application by the absence of an agreed and workable distinction between aggression and self-defense. For any aggressor State can say that it was acting in self-defense and that, therefore, it is within the exception to the outlawing of the use of force specifically recognized in Article 51 of the United Nations Charter.

We have also seen that the fundamental test universally recognized in international law for the justification of the use of force in self-defense or self-preservation is reasonableness. There must be a reasonable apprehension of danger. The force used must be reasonable or proportionate to the real or apprehended danger.

When a State justifies its actions on the basis of self-defense, the burden of proving the legality of resort to force rests on the State claiming the necessity of self-defense. In the absence of a more viable world public order, the competence to make an initial and provisional determination of self-defense without previous authorization from the organized world community must be conceded to the claimant State.[537] However, it is equally clear that such provisional characterization of the claimant State is not final and must be subject to subsequent appraisal by other, external, impartial decision-makers, both international and national. This third factor of reasonableness, that of independent third-party judgment on the necessity and proportionality of the use of force in self-defense, rests on the universally

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537. McDougal and Feliciano 218.

accepted idea that disputes must be decided by an impartial third person capable of determination by an objective examination of the relevant facts.[538] Nor is it restricted to self-defense under customary international law, but also applies to national and collective self-defense under conventional international law.[539]

The determination to use force in the Cuban crisis was expressed initially on October 3, 1962, by the collective judgment of the Congress of the United States.[540] On October 22, 1962, the United States placed the Cuban situation before the U. N. Security Council and asked for an urgent meeting of the Council.[541] On October 23, 1962, the OAS authorized the use of force by member States in accordance with the Rio Treaty.[542] On the same day President Kennedy issued his proclamation of interdiction, which went into effect on October 24, 1962. Such provisional characterization by the United States was subject to the review of two international organizations -- the OAS on the regional level, and the United Nations on the universal level. Both the OAS and the United Nations could have determined that the quarantine was an illicit use of the right of self-defense and accordingly called for the termination of the quarantine. Instead eleven American States participated in the quarantine by joining the United States

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538. McDougal and Feliciano 218-219, 416-418; Brierly 407-408; Partan, op. cit. supra note 534, at 721; Larson, When Nations Disagree 35-38 (1961); Brownlie 195, 208 note 5; I Oppenheim, International Law 299 (8th ed. Lauterpacht 1955); Lauterpacht, The Function of Law in the International Community 394 (1933).

539. Thomas and Thomas 259-260.

540. See text at note 444 supra.

541. See text at note 446 supra.

542. See text at note 447 supra.

to comprise the Inter-American Combined Quarantine Force[543] and thus making the quarantine action multilateral and not the unilateral action of the United States.[544]

The United Nations could have condemned the quarantine, as called for by the Soviet Union, but failed to do so.[545] The Security Council, which met before the OAS adopted its Resolution of October 23, 1962, and before the proclamation of defensive quarantine was put into effect on October 24, 1962, did not see fit to take any action in derogation of the quarantine. Although a resolution condemning the quarantine was laid before the Security Council by the Soviet Union, the Security Counsil subsequently, by general consent, refrained from acting upon it and instead chose to promote the course of a negotiated settlement, with the assistance of the Secretary-General.[546] Events in fact demonstrated that despite the existence of the quarantine, the United Nations played a role in securing the removal of the Soviet missiles and strategic bombers from Cuba.[547] If implied approval of the quarantine cannot be deduced from all this, it certainly can be said that the member nations of the United Nations were unwilling to assume responsibility for condemning United States action.

What is to be learned from the complex amalgam of legal

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543. See text at notes 455 and 456 supra.

544. See Cuban Crisis 38-40.

545. See text at notes 514, 515 supra.

546. See text at note 451 supra.

547. See joint letter of the U.S. and the U.S.S.R. to the Secretary-General ending the Cuban crisis by withdrawing it from the agenda of the Security Council. U.N. Doc. No. S/5227 (1963); 48 Dep't State Bull. 153 (1963).

rules relating to the use of force by means of the quarantine is not normally found in clear-cut, unequivocal resolutions or directives of the United Nations. However, cautiously worded recommendations, views expressed over a period of time by a majority of States, and even refusal to act, as well as action taken, all add up to provide pointers to the legal limits of the use of force by States. And it is such sources, perhaps even more than from treaties and decisions, that international law governing the use of force by States will be derived.[548]

While scholarly opinion is divided as to the legal precedent value to be derived from the Cuban crisis in the development of international law,[549] it is submitted that the Cuban crisis is the most recent example of how the law grows and develops by increments to meet the exigencies of current changing times. From it has emerged the quarantine-interdiction as a new option of self-defense in current international law. More significant, however, is its direct impact on the law of self-defense. For it stands uncontested for the juridical proposition that self-preservation or anticipatory self-defense in the absence of an armed attack is permissible as an individual or collective measure under the Charter of the OAS and under the Charter of the United Nations.[550]

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548. See Higgins, The Legal Limits to the Use of Force by Sovereign States: United Nations Practice, 37 Brit. Yb. Int'l L. 269, 319 (1961).

549. That no general conclusions can be drawn from the Cuban quarantine as a precedent, see Starke, An Introduction To International Law 392 (5th ed. 1963). Another view limits the quarantine to justify as legitimate self-defense a multilateral response to the sudden deployment of a substantial nuclear striking force to an area which had formerly been free of the immediate threat of nuclear war. Partan, op. cit. supra note 534, at 715.

550. See Cuban Crisis 51-53.

CHAPTER VI

AERIAL SURVEILLANCE OF CUBA

It is undisputed that a State has sovereignty over its territorial air space and that in time of peace foreign state aircraft may not enter therein without its consent. The criticism voiced against the United States is that its aerial surveillance of Cuba in 1962 was a violation of this general principle, accepted in the Chicago and other conventions on aerial navigation, in that Cuba had not expressly consented thereto.[551] It is further maintained by the Soviet Union and the Cuban Government that the overflights of Cuba by United States reconnaissance planes, which overflights continue to this day, constitute "flagrant violations of national sovereignty."[552] We now proceed to examine, factually and legally, the aerial surveillance of Cuba by the United States.

A. The Facts of Surveillance

Uncontrovertibly, the facts establish that impliedly the Puenta del Estes resolution of January 31, 1962,[553] and expressly the resolution of the informal meeting of representatives of

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551. See Wright, The Cuban Quarantine, 57 Am. J. Int'l L. 546, 547 (1963); Schick, Cuba and the Role of Law, Int'l Affairs(Moscow) 57, 63 (Sep. 1963).

552. Smith, Johnson Reports U.S. Warning on Cuba Flights, N.Y. Times, Apr. 22, 1964, p. 18, cols. 6-8.

553. See text at note 436 supra.

American States in Washington on October 3, 1962,[554] and impliedly the resolution of the Organ of Consultation on October 23, 1962,[555] all authorized United States surveillance of the menacing activities in Cuba. This is not the first time the OAS authorized overflights of a member State. During the difficulties between Costa Rica and Nicaragua in 1955, the OAS called upon its members to make "pacific" observation flights over the regions in turmoil.[556]

President Kennedy, concerned over increased build-up of armament in Cuba, acknowledged in September 1962 that said Cuban activities were under United States surveillance, and further promised increased surveillance of the entire Caribbean area.[557] This promise was repeated on that historic October 22, 1962.[558]

It is common knowledge that the United States relied chiefly on documentary evidence, consisting of aerial reconnaissance photographs obtained exclusively by the Government of the United States, to not only convince the world that the missiles were present in Cuba,[559] but also later to persuade important segments of the United States population[560] that the missiles had in fact been removed.[561] It was also reported in the press that

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554. See text at note 443 supra.

555. See text at note 447 supra.

556. See Thomas, The Organization of American States and Subversive Intervention, Proc. A.S.I.L. 19, 20 (1961); Thomas and Thomas 313-314; Fenwick, The Organization of American States 239, note 64 (1963).

557. See text at note 442 supra.

558. See text at note 445 supra.

559. See 47 Dep't State Bull. 735, 738-739 (1962).

560. See id. at 762.

561. Barnet, The Cuban Crisis And Disarmament, Proc. A.S.I.L. 1, 6-7 (1963).

United States surveillance of Cuba was being carried on by Naval patrol planes photographing Soviet ships headed for Cuba and by military planes photographing Cuban territory obliquely from altitudes of about 40,000 feet and beyond the territorial boundaries of Cuba. The report continues:

> With the modern aerial cameras, it is no longer necessary to fly over the territory to be photographed. Using the technique of peripheral photography, often employed against the Soviet Union, the camera could easily take pictures covering the 80-mile width of Cuba.[562]

It was further reported that Major Anderson's U-2 plane was downed by a Russian controlled SAM anti-aircraft missile while flying over Cuba on October 27, 1962, and that on November 16, 1962, Castro was reported to have notified the United Nations that he would shoot down over-flying American planes. The United States was reported to have said it would take "appropriate measures" to defend American planes, and

> would defend its aerial surveillance flights over Cuba if necessary, and would continue them until the Castro government agrees to better means of guarding against an offensive military build-up there.

The United States considered such flights authorized by the OAS in meetings in Washington on October 3 and 23, 1962.[563]

Chairman Khrushchev, in his letter of October 28, 1962, to President Kennedy agreeing on a formula for ending the Cuban crisis, alluded to reports from his officers in Cuba "that American planes are making flights over Cuba."[564] In his press release statement reporting on the dismantling of the Soviet

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562. Report to the N.Y. Times by John W. Fenney on October 24, 1962.

563. N.Y. Times, Nov. 17, 1962, p. 1.

564. 47 Dep't State Bull. 743-745 (1962).

missile bases in Cuba, President Kennedy stated that "on the bases of yesterday's aerial photographs" Soviet missile bases in Cuba are being dismantled, and that the United States intended to follow closely the completion of the job by various means, "including aerial surveillance." He stated this was "in keeping with the resolution of the OAS" and the exchange of letters with Chairman Khrushchev of October 27 and 28, 1962.[565]

United States surveillance flights over Cuba have continued since the end of the Cuban quarantine.[566] It is reported that peripheral reconnaissance flights outside the three-mile limit are risky and that spy satellite cameras cannot pierce the clouds that cover large portions of Cuba during much of the year. Accordingly, high altitude U-2s and low level F-104 and F-8U Crusader jets are reportedly being used for the penetrative reconnaissance flights.[567] Although the number of overflights has not been disclosed by the United States, it was officially stated that between July 1962 and February 1963, more than 400 reconnaissance flights had been made over Cuba.[568]

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565. Id. at 762.

566. The Baltimore Sun, Nov. 22, 1963, reported: "Surveillance flights over Cuba have continued since then (the Cuban crisis), although the Soviet Union later removed the missiles which caused the crisis."
The N.Y. Times, Jan. 26, 1964, reported that U-2s are still being used for photographic reconnaissance over Cuba.
It was also reported: "The United States is using its Air Force facilities in the Panama Canal Zone as one of its bases for U-2 photo reconnaissance planes operation over Cuba." Kiker, U.S. Bases U-2s in Panama to Spy on Cuba, Phila. Inquirer, Jan. 28, 1964.

567. Collier and Barrett, We May Use Robot Planes To Eye Cuba, N.Y. Herald Tribune, May 6, 1964.

568. Sehlstedt, Russ Missiles Still In Cuba Are Said To Be Inferior, Baltimore Sun, May 4, 1964.

When in early 1964 it was reported that the 24 surface-to-air missile (SAM-2) sites installed in Cuba by the Soviets and manned by Russian crews would be turned over to Cuban troops in September 1964, tensions increased.[569] At that time Premier Castro threatened to shoot down United States surveillance aircraft with the missiles Cuba was about to inherit from the Soviet Union.[570] Premier Khrushchev declared that continued violations of Cuban sovereignty and flights into Cuban air space "may have catastrophic consequences" and denounced as "evil fabrications" assertions made in offical United States statements that surveillance overflights of Cuba were in accord with agreements reached between him and President Kennedy in October 1962.[571] President Johnson declared that the United States had warned the Cuba Government and its "friends" that any interference with the United States reconnaissance flights over Cuba would be a "very serious action", and reasserted the United States position that reconnaissance overflights of Cuba are a substitute for the on-site inspection accepted by the Soviet Union and rejected by Premier Castro after the missile crisis of October 1962.[572] In addition, the United States, in declaring that its aerial reconnaissance flights over Cuba will continue indefinitely, asserted that it regards such flights as being "thoroughly" based on the Oct. 23, 1962, resolution of the OAS, and necessary to avoid a repetition

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569. O'Leary, Russians' Departures Speed Cuban Takeover of Missiles, Washington Star, June 28, 1964.

570. N.Y. Times, May 1, 1964, p. 2, cols. 4-7.

571. Tanner, Khrushchev Says U.S. Perils World By Cuba Policies, N.Y. Times, May 2, 1964, p. 1, col. 8.

572. 50 Dep't State Bull. 744 (1964).

of the 1962 "deception." The intent to defend such flights was clearly indicated.[573]

These facts admit that United States military planes did in the past and still continue to penetrate intentionally the territorial air space of Cuba for the purpose of carrying on aerial surveillance therein. Based upon all the the operative facts, we now consider two aspects of the aerial surveillance problem:

1. The lawfulness of aerial surveillance conducted by military aircraft while in the air space over the high seas.

2. The lawfulness of aerial surveillance conducted by military aircraft while in the territorial air space of a foreign country without its express consent.

B. Aerial Surveillance in Air Space over the High Seas

In fact, there are two facets to the aerial surveillance conducted by the United States over the high seas:

1. The photographing of Cuban territory by the peripheral technique.

2. The photographing of Soviet ships bound to or from Cuba.

In law, the two may be treated as one and the same; for neither involves an actual penetration of Cuban territorial air space.

1. Peripheral Reconnaissance of Cuban Territory

We have seen in connection with the RB-47 incident that peripheral reconnaissance conducted from the high seas is licit in international law.[574] As long as the photographing aircraft remains within the confines of the air space over the high seas, it enjoys the "freedom of the air" that is characteristic of the

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573. 50 Dep't State Bull. 744 (1964); Frankel, U.S. Warns Castro On Firing at Planes, N.Y. Times, Apr. 21, 1964, p. 1, col. 8.

574. See text at notes 356-363 supra.

legal regime of such air space (res communis). We have also seen that this freedom of the air over the high seas (international air space) is a right enjoyed by all aircraft, civil and State.

Since the status of the air space over the high seas is equivalent to the status of the sea below, it naturally follows that activities proper in the latter may also be conducted in the former. Accordingly, it is universally recognized that warships and submarines may and do, in the exercise of their freedom of navigation, travel to the border of foreign territorial seas and there carry on with surveillance, reconnaissance, or other allied activities without proscription. The Soviet Union has established a long practice of engaging in extensive reconnaissance activities off the shores and air space of the United States. For example, in April 1960 the Soviet trawler Vega, equipped with electronic intelligence equipment, sailed within 13 and 30 miles of strategic American military installations located on the Atlantic coast. For years, the Soviet Union has been conducting electronic reconnaissance flights off the coast of the United States. For example, from March 1959 to February 1960 six such flights by Soviet jet bombers, modified for electronic reconnaissance, came within 5, 10, 12, 15, 20 and 25 miles respectively off the coast of Alaska.[575]

What ships may freely do on the high seas, aircraft may likewise freely do in the air space over the high seas. Clearly and undisputably, the photographing of Cuba by means of peripheral

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575. See Security Council Reject Soviet Complaint Against U.S. in RB-47 Incident; U.S.S.R. Casts 88th and 89th Vetoes, 43 Dep't State Bull. 235, 238, 241-242 (1960).

techniques on aircraft over the high seas was permissible under well established principles of customary international law.

2. Aerial Surveillance of Ships on the High Seas

We have seen that the right of warships of all States to approach, in cases of suspicion, a merchant vessel on the high seas in order to ascertain its character has long been recognized in customary international law and was recently codified in and extended by Article 22 of the 1958 Geneva Convention on the High Seas.[576] The question raised is whether this peacetime right of approach enjoyed by warships extends to military aircraft.

The peacetime practice of aerial surveillance of ships on the high seas has been going on since World War II,[577] and is based on general principles of international law.[578] Neither the 1958 Geneva Convention on the High Seas nor customary international law contains any proscription against the overflight, observation, approach or inspection of foreign vessels on the high seas. The former provides the general criteria that the freedom to fly over the high seas shall be exercised by all States "with reasonable regard to the interests of other States in their exercise of the freedom of the high seas." Unquestionably, the overflight, approach, inspection or photographing of a foreign vessel on the high seas does not in any way interfere with the right of the subject vessel to use and enjoy the freedom of the sea below; nor

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576. See text at notes 85-87 supra.

577. Sehlstedt, Air Surveillance of Ships Dates From World War II, Baltimore Sun, Sep. 16, 1964.

578. Zwanenberg, Interference With Ships On The High Seas, 10 Int'l & Comp. L.Q., 785, 786-790 (1961).

does it create any hazard to navigation on the sea or to aerial navigation above the sea.

The inspection of ships at sea by other ships is a traditional nautical exercise. It is common practice for military aircraft to overfly, observe, approach, inspect, and identify surface vessels and submarines in international waters. Both the United States and Soviet planes inspect each other's ships at sea, an exercise which is considered by both to be perfectly legal in international waters.[579]

This brings to mind the controversy in 1960 relating to the "buzzing" by aircraft in the air space above the high seas. The Soviet Union complained about the "provocative buzzing" of its nonmilitary ships by foreign aircraft. According to press reports, the Soviet Union had protested hundreds of such instances to the United States, apparently regarded as the major offender, and to Britain, France, Turkey, Greece, Denmark, Norway, and Canada.[580] The Soviet Union claimed that these incidents violated the freedom navigation on the high seas, violated Soviet sovereignty, disrupted normal relations and intensified international tensions.[581] In rejecting the charge that overflights of Soviet vessels by American planes are a hazard to the ships or a danger to the crew, the United States acknowledged that it makes such flights and asserted their lawfulness:

> It is, of course, common practice for ships and aircraft to establish mutual identification in international waters.

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579. Sehlstedt, op. cit. supra note 577.

580. N.Y. Times, July 17, 1960, Sec. 1, p. 4, col. 1; id. July 7, 1961, p. 8, col. 4.

581. McDougal and Burke 788.

> In accordance with this practice, the United States patrol planes often seek to identify ships encountered whose position and identity are not otherwise known, particularly in the ocean approaches to the United States. The pilots of these planes are under the strictest instructions, however, not to approach closer than is necessary for this purpose. That the Soviet Government alone should find it necessary to object to such identification gives rise to the question as to just what are the activities of Soviet vessels that require the Soviet government to protect such routine identification.[582]

The United States affirmed that the identification flights were within the rights of the United States, as of other States, over the high seas, and concluded by categorically stating with reference to such flights that:

> It will continue to exercise all the rights on and over international waters to which it is entitled under international law and practice.[583]

Other States similarly rejected the Soviet protests.[584]

The United States military aircraft did not exceed their right, recognized in customary international law, to approach vessels bound to or for Cuba. Certainly, this right is not as broad as the customary claims to a wider right to visit and search foreign vessels on the high seas in self-defense.[585] Nor is it as comprehensive as any of the other claims for defensive and security interests exercised on the high seas we examined in Chapter I.

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582. Id. at 788-789.
American airships did come close to the Vega and took photographs of her which revealed the absence of any fishing gear and the presence of electronic equipment. 43 Dep't State Bull. 241 (1960).

583. McDougal and Burke 799; 43 Dep't State Bull. 212 (1960).

584. McDougal and Burke 799.

585. The classic example is the case of the Virginius. See text at note 102 supra. See also Zwanenberg, op. cit. supra note 578, at 793-796.

C. Aerial Surveillance In Cuban Territorial Air Space

We have previously seen that aerial surveillance per se is not prohibited by international law. It is considered neither espionage nor as an act of aggression. However, aerial surveillance would be proscribed if it involves an independent breach of international law. A violation of national air space sovereignty would clearly involve such an independent breach.[586]

It is, therefore, admitted that where a military aircraft intentionally penetrates foreign territorial air space there is a violation of the territorial sovereignty of that foreign State, unless the latter consents to the entry or unless the entry is otherwise permitted by established rules of customary international law.

The facts undeniably establish the intentional penetration of Cuban territorial air space by United States reconnaissance aircraft. Our present inquiry is to determine whether such penetrative reconnaissance is permitted by established rules of customary international law. Basically, two issues are involved: (1) whether Cuba has consented to such overflights; and (2) whether penetrative reconnaissance is permitted in self-defense.

There are two time aspects of this problem which will be considered separately in the interest of chronology:

1. The legality of the aerial surveillance of Cuban territorial air space during the quarantine-interdiction.

2. The legality of the continuation of the aerial surveillance in Cuban territorial air space after the removal of the quarantine-interdiction.

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586. See text following note 363 supra.

1. Penetrative Aerial Surveillance During the Quarantine

We saw that the Rio Treaty, to which Cuba is a party, authorized the Organ of Consultation of the American States to agree by a two-thirds vote on measures for their common defense and for the maintenance of the peace and security of the Continent. Such decisions are binding on all parties including those not concurring, except that no State is required to used armed force without its consent.[587] The Puenta del Estes resolution, properly approved by that organ on January 31, 1962, by a vote of 19 to 1 (Cuba) with 1 abstention (Bolivia), was inclusive enough to have authorized aerial surveillance of Cuba when it urged member States "to take those steps that they may consider appropriate for their individual or collective self-defense."[588]

Aerial surveillance was a procedure thus authorized by the OAS for the purpose of acquiring information as to the nature and extent of the arms buildup which was threatening the peace and security of the hemisphere. The OAS had previously recognized its power to investigate and to obtain information when it had authorized "pacific" observation flights to check on military movements.[589]

This construction is fortified by the subsequent resolution on October 3, 1962, of the foreign ministers and Special Representatives of the American Republics in which it was "observed that it is desirable to intensify individual and collective

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587. See text at note 509 supra; Thomas and Thomas 255, 259, 333.

588. See text at note 436 supra.

589. See text at note 556 supra. In several cases, the OAS sent committees into troubled areas to investigate and obtain information. Thomas and Thomas 298-302.

surveillance of the delivery of arms to Cuba,"[590] and finally by the unanimous resolution of October 23, 1962, of the Council of the OAS as the Provisional Organ of Consultation in which it was recommended that member States, in accordance with Articles 6 and 8 of the Rio Treaty, "take all measures, individually and collectively, including the use of armed force" in the premises.[591]

All of these resolutions, although not concurred in by Cuba, are constructively accepted by and binding upon Cuba by virtue of the Rio Treaty.[592] It makes little practical difference whether under the circumstances prevailing such binding force of the OAS resolutions is treated as constructive assent, permission or consent on the part of Cuba,[593] or whether it is considered as an authorization by the OAS under the Rio Treaty for individual or collective self-defense measures. Under either approach, the result is the same: justification by the United States for any intentional penetration of the territorial air space of Cuba for surveillance purposes both before and after the United States declaration of quarantine. In the former instance, the justification is permissive;[594] in the latter instance, the justification

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590. See text at note 443 supra.

591. See text at note 447 supra.

592. See Wright, The Cuban Quarantine, 57 Am. J. Int'l L. 546, 548 (1963).

593. Compare U.S. reconnaissance overflights of central Laos at the express request of the Royal Lao government. N.Y. Times, May 22, 23, 25, 1964; Washington Post, June 7, 1964. See Higgins, The Legal Limits of the Use of Force by Sovereign States: United Nations Practice, 37 Brit. Yb. Int'l L. 269-319 (1961).

594. While international law is generally reluctant to spell out consent from inaction on the part of States, the situation is materially different when a State becomes a member in a regional organization and thereby binds itself to the actions of such organization taken on less than a unanimous vote. In such instance, the intent to be bound by constitutionally taken actions of such organization is real, whether labelled as "constructive consent" or otherwise.

is individual or collective self-defense authorized under a regional collective defense treaty.[595] Either instance is a valid substitute for, and vitiates the necessity of, express consent on the part of Cuba.

Notwithstanding however, it is submitted that any violation of Cuban air space under the circumstances was justifiable, additionally, under the customary international law concepts of self-preservation or self-defense. The operative facts herein most ideally fit the injunction of Mr. Elihu Root that every State has the right "to protect itself by preventing a condition of affairs in which it will be too late to protect itself."[596] We have seen in the case of the Caroline[597] that the principle of self-protection was relied upon to justify a violation of foreign territory. The same rule applies on the high seas. Judge Jessup, referring to the Caroline case, said in 1927:

> It must be remembered that the great principle of the inviolability of national territory is qualified by the right of self-defense. Why should it be denied that the freedom of the seas may also be subject to qualifications.[598]

Later he said that circumstances applicable when the act of self-defense involves the invasion of the territory of a neighboring State apply "a fortiori ... upon the ocean."[599]

The requirements of necessity and proportionality to the

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595. That the OAS resolution covered reconnaissance flights and validated these activities, see Cuban Crisis 42. That "pacific observation flights" are not "enforcement action" within Article 53, U.N. Charter, see Thomas and Thomas 313.

596. See text at note 483 supra.

597. See text at note 103 supra.

598. Jessup, The Law of Territorial Waters and Maritime Jurisdiction 76 (1927).

599. Id. at 97.

penetrative aerial surveillance of Cuba must take into consideration the relevant objectives of the participants.[600] The objective of the United States was the genuine conservation of the existing values by maintaining the equilibrium between the two super-powers in nuclear warfare capabilities, with direct benefit to the security of the United States, the other American States, and the entire world. On the other hand, the Soviet Union sought to extend its military power through the clandestine establishment of bases and offensive weapons in Cuba. Cuba, as the established Communist beachhead in the Western Hemisphere, facilitated the unlawful military intervention by an extracontinental totalitarian power. The introduction of a Soviet nuclear military capability in Cuba upset the precarious status quo, necessitating the immediate use of the military instrument of national policy in responding self-defense to counter the introduction of nuclear weapons into an area formerly free from the direct threat of nuclear war.[601] Penetrative aerial surveillance of Cuba under these circumstances was a reasonable and lawful exercise of the inherent right of self-preservation, a right which the United States could have acted on its own had it so desired.[602]

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600. For a more detailed multi-factor analysis of the requirements of self-defense in the Cuban crisis generally, see Mallison, Limited Naval Blockade or Quarantine-Interdiction: National and Collective Defense Claims Valid Under International Law, 31 Geo. Wash. L. Rev. 335, 356-360 (1962).

601. For a comparison of the status quo approach and the nuclear free area approach, see Partan, The Cuban Quarantine: Some Implications for Self-Defense, Duke L. J. 696, 709-715 (1963).

602. See Thomas and Thomas 335. That the overflights of Cuba were not illegal intervention because Cuba by its own action had excluded itself from the inter-American community, see id. at 336, 370.

Compare factual basis for U.S. claim to "defensive" penetrative reconnaissance in the U-2 incident of May 1960. See text at note 354 supra.

The necessity and reasonableness of this initial determination were attested to by a Joint Resolution of the Congress of the United States, the unanimous conclusion of the American Republics acting through their established regional and collective self-defense organization, and ultimately by the absence of any inconsistent determination by the U. N. Security Council.

We have seen examples of the right of self-preservation or anticipatory self-defense, of a far more extreme nature than penetrative aerial surveillance.[603] In 1873 an American vessel, the Virginius, was seized on the high seas by the Spanish forces to prevent assistance to Cuban insurgents. In 1837 we had the celebrated Caroline case, where Canadian forces crossed into United States territory, killed United States citizens, and destroyed the Caroline.

The substance of Daniel Webster's now famous dictum in the Caroline case as to justifiable acts of self-defense beyond national territory was approved in 1946 by the Judgment of the International Military Tribunal at Nuremberg.[604] In 1947 the International Military Tribunal for the Far East, sitting at Tokyo, sustained the declaration of war by the Netherlands against Japan as justifiable preventive self-defense, the proof establishing that the Netherlands had become aware of an imminent Japanese attack.[605] It appears, therefore, that the rule in the Caroline case states present customary international law as to the circumstances when a State may exercise its rights of self-defense

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603. See text at notes 102-106 supra.

604. Judgment International Military Tribunal(Nuremberg) Oct. 1, 1946, 41 Am. J. Int'l L. 172, 205 (1947).

605. McDougal and Feliciano 231-232. Bowett, Self-Defense in International Law 144 (1958); Brownlie 220, 226.

in any area outside its national territory. There is no cogent reason why the rule in the Caroline case is not now also applicable in territorial air space under the proper circumstances.

2. Penetrative Aerial Surveillance Subsequent to the Removal of the Quarantine

The hectic exchange of messages, both public and private, between President Kennedy and Premier Khrushchev on October 27 and 28, 1962, provided for the removal of the Soviet offensive long and medium range nuclear missile bases from Cuba in exchange for the end of the quarantine. In addition, the United States promised to give assurances against an invasion of Cuba if it received suitable safeguards against future shipment of offensive weapons to Cuba. All of this was to be accomplished under "appropriate United Nations observation and supervision."[606] By November 19, 1962, the offensive missile bases had been dismantled and removed. On November 20, 1962, the quarantine was lifted after Premier Khrushchev had informed President Kennedy that the offensive Soviet bombers would be withdrawn in 30 days.[607] The following day Moscow cancelled the combat-readiness alert of its armed forces.[608] Thus ended the direct confrontation between the United States and the Soviet Union.

Washington, however, refused to provide the no-invasion pledge without international inspection in Cuba and without effective safeguards against the reintroduction of the offensive weapons to Cuba. Premier Khrushchev retorted that his agreement to

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606. See text at notes 452 and 453 supra. See also Thomas and Thomas 332.

607. See text at note 457 supra.

608. N.Y. Times, Nov. 22, 1962, p. 9, cols. 1-6.

withdraw the missiles had been premised on the President's promise to give such a pledge. Physical on-the-spot inspection and verification, denied by Premier Castro,[609] thus became the nub of the problem. In the absence of an adequate inspection system, the United States declared itself free to continue aerial surveillance flights over Cuba to conduct its own inspection, alleging that this action was justified by the OAS resolution of October 23, 1962.[610] As to the no-invasion pledge, President Kennedy declared:

> As for our part, if all offensive weapons systems are removed from Cuba and kept out of the hemisphere in the future under adequate verification and safeguards, and if Cuba is not used for the export of aggressive communist purposes, there will be peace in the Caribbean.[611]

This language clearly indicated that the United States intended to keep the Castro regime under careful surveillance, with an implicit threat of military action if the Cubans showed signs of aggressive intent.[612]

Among the Soviet weapons left behind in Cuba after the 1962 confrontation were about 500 Soviet SAM-2 anti-aircraft missiles in place at 24 missile bases and an electronic command

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609. Premier Castro refused to permit on-site inspection in Cuba unless the U.S. met his demands, which included cessation of U.S. economic blockade of Cuba, cessation of subversive activities by exiled Cubans against him from U.S. territory, cessation of piratical attacks by exile groups, cessation of violations of Cuban air space and territorial waters, and the return of Guantanamo Naval Base to Cuba. N.Y. Times, Nov. 1, 1962.

610. N.Y. Times, Nov. 17, 1962, p. 2, cols. 3-5; 50 Dep't State Bull. 744 (1964). See Frankel, Diplomatic Ambiguity, N.Y. Times, Apr. 25, 1964.

611. Thomas and Thomas 332.

612. Ibid; 50 Dep't State Bull. 744 (1964).

post.[613] In addition, there were about 22,000 Soviet troops and technicians in Cuba. Soviet combat troops, which had remained as a deterrent to a United States invasion of the island, were training the Cubans in the use of advanced weapons.[614]

Thus, the year 1962 ended with a tacit understanding that there would be no package solution of the outstanding problems. Instead the Big Two would concentrate on them one step at a time. Therefore, the United States did not press the bomber question until the missiles had been removed, and did not press the removal of the combat troops until the bombers were gone.[615]

1963 opened with a barrage of charges and counter-charges of an alleged Soviet military build-up in Cuba. Soviet military aid was flowing to Cuba. On February 12, 1963, a classified report presented to the OAS by the Committee of Experts contradicted the stand of the United States that the Soviet weapons in Cuba were purely "defensive."[616] Another problem was the presence of the Soviet military in Cuba. The United States stated that the Soviet troops withdrawal remained "unfinished business," and promised that it would continue its surveillance of Cuba and would continue making representations to Moscow warning that the presence of Soviet troops in Cuba could not be tolerated indefinitely.[617]

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613. The Soviet SAM-2 missile is a relatively short-range (40-50 miles) ground-to-air missile capable of downing the U-2. The same launches used for the SAM-2 can be used for the longer-ranged (250-400 miles) SAM-3 which can carry nuclear warheads. Bringham, New Missile Crisis In Cuba?, N.Y.-Journal American, Mar. 29, 1964; Sehlstedt, op. cit. supra note 568.

614. O'Leary, op. cit. supra note 569; MacDonald, The Organization of American States in Action, 15 U. Toronto L.J. 359, 407 (1964).

615. MacDonald, idem. For an excellent summary of the Cuban crisis, see N.Y. Times, Nov. 3, 1962.

616. Thomas and Thomas 370.

617. Idem; MacDonald, op. cit. supra note 614, at 408.

The Americans had come to acknowledge, privately if not publicly, that there was no practical way of getting all the Soviets out of Cuba[618] and that their presence there, together with some formidible "defensive" weapons, was a fact of life. Thus, the tacit understanding between the Big Two was that the United States would not attack Cuba or allow it to be attacked, that the Soviet troops would stay, and that the United States overflights of Cuba would continue in lieu of on-site inspections.[619]

In November 1964, Premier Castro is reported to have stated that the surface-to-air missiles were now under Cuban control, and that the arrangements with the Soviet Union included "an obligation not to proceed unilaterally in shooting at U-2 flights." This is an admission that the Soviet Government still maintains a voice in military operations in Cuba and requires Cuba to get the consent of Moscow before using force. Premier Castro made it clear, however, that this "commitment" was "not for an indefinite period."[620] The United States policy on overflights of Cuba remains unchanged to date.[621]

From the public facts of record, it is clear that Cuba

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618. It is estimated that the number of Soviet troops in Cuba has been gradually reduced from about 22,000 in Oct. 1962, to about 5,000 - 9,000 in Dec. 1963, to about 3,000 - 4,000 in Apr. 1964. Frankel, op. cit. supra note 573. President Johnson said on April 11, 1964, that "some" Soviet troops had been removed from Cuba but that he did not want to get into a "numbers game." Chicago Tribune, May 5, 1964.

619. MacDonald, op. cit. supra note 614, at 408.

620. Lawrence, New Facts on Russian-Cuban Ties, Washington Evening Star, Nov. 11, 1964, p.A-19, cols. 1-3.

621. 50 Dep't State Bull. 744 (1964).

has never agreed expressly to the surveillance overflights by the United States. It is equally clear that the exchange of public letters between President Kennedy and Premier Khrushchev on Oct. 27 and 28, 1962, contained no express agreement to that effect. The facts, however, strongly fortify the tacit understanding between the United States and the Soviet Union permitting the continuation of such overflights as a substitute for adequate on-site inspections which Cuba refused to permit. Whether Cuba or the Soviet Union agreed expressly or impliedly in the premises is purely academic. For abundant justification, in fact and in law, otherwise exists therefor.

A retrospective analysis of the operative factors of the Cuban crisis and of the subsequent events to date establishes unequivocally that the removal of the offensive Soviet missiles and the termination of the quarantine-interdiction in Oct.-Nov., 1962, merely ended the direct menacing confrontation between the two nuclear super-giants. It was like putting a clean collar on a dirty shirt. For the United States and the Western Hemisphere are still confronted with a military threat to hemispheric peace and security from Cuba. An unknown number of Soviet military troops are still present in Cuba as "advisers" and "technicians." Soviet military aid is still flowing into Cuba. Moscow still retains a voice in the military operations of Cuba. The 24 SAM-2 Soviet missile sites can easily be converted to accommodate SAM-3 ground-to-ground nuclear missiles with a range well capable of covering large segments of the United States. Cuba's propensity to expand international communism in the Western Hemisphere was manifested recently by its open intervention and aggression in-

tended to subvert and overthrow the democratic Government of Venezuela, contrary to the principles of the inter-American system.[622] In short, while the character of the threat to hemispheric peace and security may have changed since October 1962, the serious threat is nevertheless extant.

It was through aerial reconnaissance photographs that the United States first learned that the Soviets had shipped intermediate-range ballistic missiles into Cuba. Both President Kennedy and President Johnson made it unmistakably clear that continued overflights of Cuba are a necessity to avoid the deception[623] that was practiced against the American States in 1962. Aerial reconnaissance is the only way to prevent another build-up of strategic missiles in Cuba in the absence of an agreement for on-site checks. As long as there is a need to keep an eye on what is going on in Cuba, such overflights of Cuba are a guarantee absolutely essential to the United States and the Western Hemisphere. The failure to continue such overflights might result in another critical confrontation which could easily escalate into World War III. The grim alternatives are continued aerial reconnaissance of Cuba or possible nuclear war. The fact is that aerial surveillance of Cuba has proved to be the best protection against a surprise attack and a tremendous contribution to a safer and more peaceful world.

The temporal factor that United States reconnaissance flights over Cuba have been continuing for more than two years

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622. See note 424 supra.

623. Photographs taken by U.S. reconnaissance planes convinced the world that Soviet nuclear missiles were in Cuba at a time when the Soviets were denying the fact in the United Nations. See note 559 supra.

after the removal of the quarantine is non-consequential. Determinative is the fact that the United States and other American States are still confronted with a military threat from Cuba, contrary to the Monroe Doctrine and contrary to the resolutions adopted by the OAS in 1962. All of the legal justifications for the penetrative aerial surveillance of Cuba during the quarantine of 1962 pertain for as long as the facts justifying it continue.[624] Finally, under its clear right of individual self-defense, the United States is justified in its determination that such continued reconnaissance overflights are necessary to avoid the deception which was practiced against it in 1962. At that time the Soviet Union was assuring officials in the United States that the Soviet Union was placing no offensive weapons in Cuba when in fact it had secretly installed nuclear-armed missiles there. The case of the United States surveillance overflights of Cuba graphically illustrates that the law is the last result of human wisdom acting on human experience for the benefit of the public.

D. Conclusion

The right of self-preservation or survival remains the supreme law of international life. More broadly, the objective is security - the desire to live without serious external threats to values or interests. When necessary, States normally sacrifice every other objective. The greater the threat of destruction, the stronger will be the tendency to retain the status quo of the self which is to be preserved.[625]

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624. See 52 Dep't State Bull. 24-26 (1965).

625. Van Dyke, International Politics 29-39, 153-171 (1957).

The defensive actions taken in the Cuban crisis of 1962 were limited to: (1) a quarantine-interdiction to prevent the further introduction of offensive weapons into Cuba, and (2) an aerial surveillance of Cuba to ascertain what military activities are taking place therein. The legality of the latter is inextricably dependent upon the legality of the former.

The legality of the Cuban quarantine-interdiction, which action was confined to the high seas, is sustainable on the basis of individual or collective self-defense in conformity with both customary and conventional international law. The aerial surveillance of Cuba presents a further legal problem only insofar as it involves an actual penetration of Cuban territorial air space. The crucial underlying question raised with the penetrative reconnaissance of Cuba is the extent to which a State, purporting to act in self-defense, may, in the absence of an armed attack on it and without authorization of the U. N. Security Council, take measures which would otherwise be at variance with established principles and practices of international law. This is the same issue which lies behind the controversy over the legality of the penetrative aerial reconnaissance of the Soviet Union by a United States U-2 plane in May 1960.

The U-2 incident of May 1960 and the Cuban crisis of 1962 are factually similar to the extent that both involved the penetration of foreign territorial air space by United States aircraft on a reconnaissance mission in time of peace. Both constitute a clear violation of the principle of air sovereignty unless legal justification can be found under other established principles of international law.

The inviolability of territorial air space is subject to two exceptions: (1) consent, and (2) self-defense. Unlike the celebrated U-2 incident, both of these exceptions prevail in the case of the overflights of Cuba.

In the U-2 incident there was a complete lack of consent, express or implied, on the part of the Soviet Union to the penetrative aerial reconnaissance of its sovereign territory by the United States. In the Cuban case, on the other hand, consent on the part of Cuba to the United States overflights of Cuba is founded upon the provisions of the Rio Treaty which bind Cuba as a member State to authorized measures properly voted upon by two-thirds of the member States. The OAS resolutions, which were binding on Cuba despite her non-concurrence, constitute constructive consent and thus vitiate the necessity of express consent on the part of Cuba. In such event, the justification for the penetrative aerial reconnaissance of Cuba is permissive.

In the U-2 incident, the United States invoked self-defense as justification for its peacetime penetrative aerial reconnaissance of the Soviet Union. In refusing to condemn the U-2 flight as an "aggressive act," the United Nations failed to answer whether the traditional right of self-defense includes the right of peacetime penetrative aerial reconnaissance. The Cuban Crisis brings this question into bold relief.

In the Cuban case, the doctrine of traditional self-defense appertains even though the United States did not officially rely thereon. While in the U-2 incident there exists a substantial doubt as to the necessity and proportionality of penetrative aerial reconnaissance as a defensive action under the

traditional concept of self-defense, no such doubt exists in the Cuban case.

In the U-2 incident the claim of self-defense, founded upon the necessity to guard against a surprise Soviet nuclear attack, seems to fall short of the actual or imminent danger justifying the exercise of the traditional right of self-defense. In the Cuban case, on the other hand, the sudden secretive deployment by the Soviet Union of a substantial nuclear striking force to an area which had been formerly free of the immediate threat of nuclear war constituted a clear and imminent danger to the security and safety of the United States, the Western Hemisphere, and the entire world.

Whereas the complementary concepts of necessity and proportionality were not clearly met in the U-2 incident, they were in the Cuban case. The ultimate test is reasonableness in a particular context. The peacetime penetrative aerial reconnaissance of the Soviet Union was not reasonable under the circumstances and thus not justified as defensive action under traditional concepts of international law. By contrast the peacetime penetrative aerial reconnaissance of Cuba, having met every test of reasonableness, is justified under the traditional concept of self-defense. In both cases the law remains the same; only the facts are different. In addition, the intentional penetration of the territorial air space of Cuba for surveillance purposes both before and after the United States declaration of quarantine finds justification in individual and collective self-defense under a regional collective defense treaty.

It is often said that international law is a system where States are at once their own legislators, judges, and law enforcement officers. To a limited extent, this was personified in the Cuban Crisis. The United States may be said to have been its own legislator, its own initial judge, and its own law enforcement officer. In the final analysis, however, the legality of the quarantine-interdiction and of the penetrative surveillance of Cuba must rest not only upon the reasonableness of the asserted claim but it is the toleration of and acquiescence in it by other States (external decision-makers both international and national) which ultimately establishes its lawfulness. What more eloquent expression of international community approval is needed than the failure of the U. N. Security Council or General Assembly to condemn the United States, as called for by the Soviet Union.

The Cuban Crisis of 1962 has wrought some fundamental changes in the concepts and application of international law. The quarantine-interdiction, as a more usable concept of the pacific blockade, has emerged as a new option of self-defense. More important, however, it has provided a new dimension for self-defense in contemporary international law. Whereas scholars have heretofore been divided on the current admissibility of the right of self-preservation or anticipatory self-defense, both the Cuban quarantine-interdiction and the overflights of Cuba provide recent State practice which resuscitates this most fundamental principle of customary international law.

The Cuban quarantine-interdiction stands uncontested for the juridical proposition that self-preservation or anticipatory self-defense, in the absence of an armed attack and without

authorization of the U. N. Security Council, is permissible as an individual or collective measure under the Charter of the OAS and under the Charter of the United Nations.

Of equal, if not greater, significance is the precedent value of the United States military overflights of Cuba. Pretermitting the question of constructive consent on the part of Cuba or of collective authorization by the OAS under the Rio Treaty, we now have a practice whereby the customary right of self-preservation or anticipatory self-defense justifies a State's penetration by its military aircraft of foreign territorial air space in time of "peace" for the purpose of aerial reconnaissance or surveillance. This, in effect, is no more than the application of the rule of the classic Caroline case to territorial air space. The basic principle remains the same; only the facts have changed. Such is the process of juridical growth and development to meet new factual circumstances.

There is nothing permanent except change. Change is the product of new circumstances and the response to new conditions. This is true of law, which as a stable, though viable science, cannot stand still. It is more particularly true of international law, which in the latter half of the twentieth century has been evolving with unprecedented rapidity to keep abreast of the ever-changing world conditions. International law to be viable must be practical and must adjust rapidly to new situations encountered in the dynamism and exigencies of modern life. A non-possumus attitude would be fatal. The Cuban Crisis supplies recent confirmatory evidence of this truism. As Oliver Wendell

Holmes, Jr., said in 1881: "The life of the law has not been logic; it has been experience." Or as the Romans used to say: "Ex facto outur jus."

BIBLIOGRAPHY

A. Books and Articles

Acheson, Dean, Remarks, Proc. Am. Soc. of Int'l L. 13-15 (1963).

Alexander, George, Nimbus Uses Wheels, Jets for Control, Aviation Week & Space Technology 77-79 (July 10, 1961).

American Achievements in Space During 1963, 19 Interavia 643 (1964).

The American Heritage History of Flight (1962).

Anti-Satellite Polaris Being Developed, Aviation Week & Space Technology 18-19 (Sep. 28, 1964).

Baldwin, Hanson W., New Soviet Anti-ICBM Site Seen As Increasing Pressure on Pentagon, N.Y. Times, 24 July 1964.

Ball, George W., The Responsibilities of a Global Power, 4 This Changing World 1-4 (1 Nov. 1964).

Barnet, Richard J., The Cuban Crisis And Disarmament, Proc. Am. Soc. of Int'l L. 1-9 (1963).

Becker, Loftus E., The Control of Space, 39 Dep't State Bull. 416-420 (1958).

Becker, Loftus E., Major Aspects of the Problem of Outer Space, 38 Dep't State Bull. 962-967 (1958).

Beresford, Spencer M., Surveillance Aircraft and Satellites: A Problem of International Law, 27 J. Air L.&Com. 107-118 (1960).

Berg, W. E., Weapons and Space, Proc. of Conf. on Space Science and Space Law, Univ. of Oklahoma, June 18-20, 1963 (1964).

Boggs, S. Whittemore, National Claims In Adjacent Seas, 41 The Geographical Review 185-209 (1951).

Bowett, D. W., Self-Defense in International Law (1958).

Brennan, Donald G., Arms and Arms Control in Outer Space, Outer Space 123-149 (1962).

Brierly, J. L., The Law of Nations (6th ed. Waldock 1963).

Briggs, Herbert W., The Law of Nations (2d ed. 1952).

Brigham, Dan, New Missile Crisis Building In Cuba?, N.Y. Journal-American, March 29, 1964.

Britton, Burdick H. and Watson, Liselotte B., International Law for Seagoing Officers (2d. ed. 1960).

Brown, Harold, What Will Happen To The Airplane?, Supp. to AF Policy Letter for Commanders 5-10 (Nov. 1964).

Brown, Harold Lincoln, Aircraft and the Law (1933).

Brown, Philip Marshall, Protective Jurisdiction, 34 Am. J. Int'l 112-116 (1940).

Brownlie, Ian, The Use of Force in Self-Defence, 37 Brit. Yb. Int'l L. 183-268 (1961).

Buckholts, Paul O., Political and Military Geography, Military Aspects of World Political Geography, 1-20 (1959).

Butz, J. S., MOL-A Plus with Some Minuses, Air Force and Space Digest 16 (Jan. 1964).

The Camera at War, 19 Interavia 203-205 (1964).

Carl, Beverly May, International Law - Claims to Sovereignty: Antarctica, 28 So. Cal. L. Rev. 386-400 (1955).

Carroz, Jean, International Legislation on Air Navigation Over The High Seas, 26 J. Air L.&Com. 158-172 (1959).

Chapman, Walter M., United States Policy on High Seas Fisheries, 20 Dep't State Bull. 67-71, 80 (1949).

Chayes, Abram, The Legal Case for U.S. Action on Cuba, 47 Dep't State Bull. 763-765 (1962).

Chayes, Abram, Law and the Quarantine of Cuba, 41 Foreign Affairs 550-557 (1963).

Chayes, Abram, Remarks, Proc. Am. Soc. of Int'l L. 10-13 (1963).

Cheng, Bin, International Law and High Altitude Flights: Balloons, Rockets and Man-Made Satellites, 6 Int'l & Comp. L. Q. 487-505 (1957).

Cheng, Bin, State Ships and State Aircraft, 11 Current Legal Problems 225-257 (1958).

Cheng, Bin, From Air Law To Space Law, 13 Current Legal Problems 228-254 (1960).

Cheng, Bin, The United Nations And Outer Space, 14 Current Legal Problems 247-279 (1961).

Cheng, Bin, The Law of International Air Transport (1962).

Christol, Carl Q., What's Going on in Outer Space: A Developing New Field of Law, 50 A.B.A.J. 527-532 (1964).

Christol, Carl Q. and Davis, Charles R., Maritime Quarantine: The Naval Interdiction Of Offensive Weapons And Associated Materiel To Cuba, 1962, 57 Am. J. Int'l L. 525-545 (1963).

Claude, Inis L. Jr., The OAS, the UN, and the United States, International Conciliation (No. 547, March 1964).

Coerper, Milo, The Act of State Doctrine in the Light of the Sabbatino Case, 56 Am. J. Int'l L. 143-148 (1962).

Cohen, Maxwell, Espionage and Immunity - Some Recent Problems and Developments, 25 Brit. Yb. Int'l L. 404-414 (1948).

Colgrove, Kenneth, International Aviation Policy of the United States, 2 J. Air L.&Com. 447-473 (1931).

Collier, Barnard L. and Barrett, Lawrence, We May Use Robot Planes To Eye Cuba, N.Y. Herald Tribune, May 6, 1964.

Colombos, C. John, The International Law Of The Sea (5th ed. rev. 1962).

Cooper, John Cobb, The Right To Fly (1947).

Cooper, John Cobb, A Study on The Legal Status of Aircraft (mimeo. Sep. 1949).

Cooper, John Cobb, Airspace Rights over the Arctic, 3 Air Affairs 517-540 (1950).

Cooper, John Cobb, National Status of Aircraft, 17 J. Air L.&Com. 292-316 (1950).

Cooper, John Cobb, High Altitude Flight and National Sovereignty, 4 Int'l L.Q. 411-418 (1951).

Cooper, John Cobb, Roman Law and the Maxim "Cuius est solum" in International Law (McGill 1952).

Cooper, John Cobb, The International Air Navigation Conference in Paris 1910, 19 J. Air L.&Com. 127-143 (1952).

Cooper, John Cobb, Space Above the Seas, JAG J. 8-9 (Feb. 1959).

Cooper, John Cobb, Fundamental Questions Of Outer Space Law, S. Doc. No. 26, 87th Cong., 1st Sess. 764-776 (1961).

Cooper, John Cobb, Self-Defense in Outer Space...and the United Nations, 5 Air Force and Space Digest 51-56 (Feb. 1962).

Cooper, John Cobb, Aerospace Law Over the High Seas, a paper delivered at the Fifth International Symposium on Space Technology and Science in Tokyo, Sep. 1963.

Cooper, John Cobb, Aerospace Law - Subject Matter and Terminology, 29 J. Air L.&Com. 89-94 (1963).

Cooper, John Cobb, Aerospace Law: Progress in the UN, 2 Astronautics & Aerospace 42-46 (March 1964).

Cooper, John Cobb, The Boundary Between Territorial Airspace and International Outer Space, a paper delivered at the International Symposium on Space Law, Federal Bar Association National Convention, Washington, D.C. Sep. 11, 1964.

Cooper, John Cobb, Must We Give Up Self-Defense Rights to Attain General Disarmament?, 47 Air Force and Space Digest 71-76 (July 1964).

Crane, Robert D., Guides to the Study of Communist Views on the Legal Problems of Space Exploration and a Bibliography, S. Doc. No. 26, 87th Cong., 1st Sess. 1011-1036.

Crane, Robert D., Soviet Attitude Toward International Space Law, 56 Am. J. Int'l L. 685-723 (1962).

Dean, Arthur H., The Geneva Conference On The Law Of The Sea: What Was Accomplished, 52 Am. J. Int'l L. 607-629 (1958).

Debbasch, Ch., La Zone Contigue En Droit Aerien, 24 Revue Generale de l'Air 249-266 (1961).

Dep't of State, Cuba (Pub. 7171, Inter-Amer. Series 66; April 1961).

DeSaussure, Hamilton, International Law And Aerial Warfare (Thesis; I.A.S.L., McGill University, 1953).

Dickinson, Edwin D., Are Liquor Treaties Self-Executing?, 20 Am. J. Int'l L. 444-452 (1926).

Disarmament (Hammarskjold Forum No. 4, Tondel ed. 1964).

Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War, with comment: Research in International Law of the Harvard Law School, 33 Am. J. Int'l L. Supp. 169-817 (1939).

Draft Space Code of the David Davis Memorial Institute of International Studies, 29 J. Air L.&Com. 141-150 (1963).

Drake, Francis Vivian, We're Running the Wrong Race with Russia!, Reader's Digest 10F-12F (Aug. 1963).

Essays on Espionage and International Law (Stanger ed. 1962).

Estep, Samuel D. and Kearse, Amalya L., Space Communications and the Law: Adequate International Control After 1963?, 60 Mich. L.R. 873-904 (1962).

Etzioni, Amitai, Winning Without War (1964).

Falk, Richard A., Space Espionage and World Order: A Consideration of the Samos-Midas Program, Essays on Espionage and International Law 45-82 (Stanger ed. 1962).

Fauchille, Paul, Le Domaine Aerien Et Le Regime Juridique Des Aerostats, 8 Revue Generale de Droit International Public 414-485 (1901).

Fauchille, Paul, Regime Juridique des Aerostats, 19 Annuaire de l'Institut de Droit International 19-86 (1902).

Fauchille, Paul, Code of Fauchille, 28 Annuaire de l'Institut de Droit International 24 (1911).

Fenwick, Charles G., The Declaration of Panama, 34 Am. J. Int'l l. 116-119 (1940).

Fenwick, Charles G., Jurisdictional Questions Involved in the Guatemalan Revolution, 48 Am. J. Int'l L. 597-602 (1954).

Fenwick, Charles G., The Quarantine Against Cuba: Legal or Illegal, 57 Am. J. Int'l L. 588-592 (1963).

Fenwick, Charles G., Remarks, Proc. Am. Soc. of Int'l L. 17 (1963).

Fenwick, Charles G., The Organization of American States (1963).

Fink, Donald E., New Missile Warning Satellite Succeeds, Aviation Week & Space Technology 33 (Feb. 3, 1964).

Finney, John W., U.S. Missiles Spotted by Satellites, N.Y. Times, Jan. 28, 1964.

Flemming, George, New Thrust Toward The Stars, The Airman 18-20 (March 1964).

Forman, Benjamin, Why A Military Space Program, Proc. of Conf. on Space Science and Space Law, Univ. of Oklahoma, June 18-20, 1963 (1964).

Foster, William C., National Strategy, Security, and Arms Control, 3 This Changing World 1-4 (1 Jan. 1964).

Frankel, Max, U. S. Warns Castro On Firing at Planes, N.Y. Times, Apr. 21, 1964.

Frankel, Max, Diplomatic Ambiguity, N.Y. Times, Apr. 25, 1964.

Franklin, Carl M., The Law of the Sea: Some Recent Developments (1961).

Fryklund, Richard, A-Bomb's Effect Diplomatic, The Washington Evening Star, Oct. 16, 1964.

Fundamentals of Aerospace Weapon Systems, Air Force ROTC, Air University (1961).

Fusca, James A., Space Surveillance, 41 Space/Aeronautics 92-103 (June 1964).

The Future for Manned Aircraft 41 Space/Aeronautics 40-48 (1964).

Gal, Gyula, Some Legal Aspects of the Uses of Reconnaissance Satellites, Proceedings of the Fifth Colloquium on the Law of Outer Space (1963).

Gardner, Richard N., Outer Space: Problems of Law and Power, 49 Dep't State Bull. 367-371 (1963).

Gardner, Richard N., International Space Law and Free-World Security, 47 Air Force and Space Digest 58-63 (July 1964).

General Report of the Commission of Jurists at The Hague, Rules of Aerial Warfare, 17 Am. J. Int'l L. Supp. 245-260 (1923).

Gidel, Gilbert, Le Droit International Public de la Mer (1932-1934).

Goedhuis, D., Some Trends In the Political And Legal Thinking Of The Conquest of Space, 9 Nederlands Tijschrift Voor International Recht 113-136 (1962).

Gree, L. C., The Geneva Conventions and the Freedom of the Seas, 12 Current Legal Problems 224-246 (1959).

Grzybowski, Kazimierz, The Powers Trial and the 1958 Reform of Soviet Criminal Law, 9 Am. J. Comp. L. 425-440 (1960).

Hackworth, Green Haywood, Digest of International Law (1940-1943).

Haggerty, James J. Jr., Planning Tomorrow's Defenses, 2 Aerospace 2-6 (March 1964).

Haley, Andrew G., Space Law And Government (1963).

Hall, William Edward, International Law (8th ed. 1924).

Harvard Research Draft on Crime (1935).

Harvard Research in International Law, Draft Convention on the Rights and Duties of States in Case of Aggression, with comment, 33 Am. J. Int'l L. Supp. 819-909 (1939).

Harvard Research in International Law, Piracy, 26 Am. J. Int'l L. Supp. 739-747 (1932).

Hayton, Robert D., The American Antarctic, 50 Am. J. Int'l L. 583-610 (1956).

Hayton, Robert D., Polar Problems and International Law, 52 Am. J. Int'l L. 746-765 (1958).

Hayton, Robert D., The Antarctic Settlement of 1959, 54 Am. J. Int'l L. 349-371 (1960).

Hazeltine, Harold D., The Law Of The Air (1911).

Head, Ivan L., Canadian Claims To Territorial Sovereignty In The Arctic Regions, 9 McGill L.J. 200-226 (1963).

Heinrich, Welf-Prince of Hanover, Air Law and Space, S. Doc. No. 26, 87th Cong., 1st Sess. 271-329 (1961).

Henkin, Louis, Force, Intervention, and Neutrality in Contemporary International Law, Proc. Am. Soc. of Int'l L. 147-162 (1963).

Henkin, Louis, Remarks, Proc. Am. Soc. of Int'l L. 165-169 (1963).

Higgins, Rosalyn, The Legal Limits to the Use of Force by Sovereign States: United Nations Practice, 37 Brit. Yb. Int'l L. 269-319 (1961).

Hingorani, R. C., An Attempt to Determine Sovereignty in Upper Space, 26 U. Kan. City L. Rev. 5-12 (1957).

Holmes, Oliver Wendell Jr., The Common Law (Howe ed. 1963).

Honig, J. P., The Legal Status of Aircraft (1956).

Hughes, David Morgan, Airspace Sovereignty Over Certain International Waterways, 19 J. Air L.&Com. 144-151 (1952).

Hurst, Sir Cecil J. B., Whose is the Bed of the Sea? Sedentary Fisheries Outside the Three-Mile Limit, 24 Brit. Yb. Int'l L. 34-43 (1923).

The Inter-American Security System And The Cuban Crisis (Hammarskjold Forum No. 3, Tondel ed. 1964).

Jacobini, H. B., International Aviation Law - A Theoretical and Historical Survey, 2 J. Pub. L. 314-332 (1953).

Jaffee, Morton S., Reliance Upon International Custom And General Principles In The Growth Of Space Law, 7 St. Louis U.L.J. 125-141 (1962).

Jennings, R. Y., The Caroline and McLeod Cases, 32 Am. J. Int'l L. 82-99 (1938).

Jessup, Philip C., The Law of Territorial Waters and Maritime Jurisdiction (1927).

Jessup, Philip C., The Anti-Smuggling Act of 1935, 31 Am. J. Int'l L. 101-106 (1937).

Jessup, Philip C. and Taubenfeld, Howard J., Controls for Outer Space (1959).

Johnson, John A., Remarks, Proc. Am. Soc. of Int'l L. 165-169 (1961).

Johnson, U. Alexis, American Policy In International Affairs, 3 This Changing World 1-4 (15 May 1964).

Kahn, Herman, On Thermonuclear War (1960).

The Keen Eyes of the Army, 19 Interavia 190-192 (1964).

Kelsen, Hans, General Theory of Law and State (1945).

Kennedy, John F., New Opportunities In The Search For Peace, 3 This Changing World 1-4 (1 Oct. 1963).

Kent, H. S. K., The Historical Origin Of The Three Mile Limit, 48 Am. J. Int'l L. 537-553 (1954).

Kiker, Douglas, U. S. Bases U-2s in Panama to Spy on Cuba, Phila. Inquirer, Jan. 28, 1964.

Kislov, A. and Krylov, S., State Sovereignty in Airspace, Int'l Affairs(Moscow) 35-44 (March 1956).

Kittrie, Nicholas N., Aggressive Uses of Space Vehicles - The Remedies In International Law, Proceedings of the Fourth Colloquium on the Law of Outer Space 198-219 (1961).

Klass, Philip J., Russians Believed to Have Radar with Over-the-Horizon Capabilities, 81 Aviation Week & Space Technology 19 (Sep. 28, 1964).

Korovin, E., International Status of Cosmic Space, Int'l Affairs (Moscow) 53-59 (Jan. 1959).

Korovin, Y., Aerial Espionage and International Law, Int'l Affairs 49-50 (June 1960).

Korowicz, Marek St., Introduction To International Law (1959).

Kraus, Jerome, Legal Aspects Of Space Communications And Space Surveillance, 29 J. Air L.&Com. 230-240 (1963).

Kuhfeld, Albert M., The Space Age Legal Dilemma, S. Doc. No. 26, 87th Cong., 1st Sess. 773-777 (1961).

Kunz, Josef L., Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations, 41 Am. J. Int'l L. 872-879 (1947).

Kurlsrud, Carl J., The Seizure of the Danish Fleet, 32 Am. J. Int'l L. 280-311 (1938).

Lande, Gabriella Rosner, The Changing Effectiveness of General Assembly Resolutions, Proc. Am. Soc. of Int'l L. 162-170 (1964).

Larson, Arthur, When Nations Disagree (1961).

Latchford, Stephen, The Right of Innocent Passage in International Civil Aviation Agreements, 11 Dep't State Bull. 19-24 (1944).

Latchford, Stephen, The Bearing of International Air Navigation Conventions on the Use of Outer Space, 53 Am. J. Int'l L. 405-411 (1959).

Lauterpacht, Hersh, The Function of Law in the International Community (1933).

Law And Politics In Space (Cohen ed. 1964).

Lawrence, David, New Facts on Russian-Cuban Ties, Washington Evening Star, Nov. 11, 1964.

Laylin, John G., Remarks, Proc. Am. Soc. of Int'l L. 16 (1963).

Laylin, John G., Holding Invalid Acts Contrary to International Law-A Force Toward Compliance, Proc. Am. Soc. of Int'l L. 33-39 (1964).

Leavitt, Williams, Speaking of Space, 47 Air Force and Space Digest 64-65 (1964).

LeBailly, E. B. Major General, The Unsecret Weapon (Deterrence), Supp. to A.F. Policy Letter for Commanders 7-10 (No. 132, June 1964).

Ley, Willy, Our Work In Space (1964).

Lipson, Leon, An Argument On The Legality Of Reconnaissance Satellites, Proc. Am. Soc. of Int'l L. 174-176 (1961).

Lipson, Leon and Katzenbach, Nicholas deB., Report To The National Aeronautics and Space Administration On The Law of Outer Space (1961).

Lissitzyn, Oliver J., The Treatment of Aerial Intruders in Recent Practice and International Law, 47 Am. J. Int'l L. 559-589 (1953).

Lissitzyn, Oliver J., Some Legal Implications of the U-2 and RB-47 Incidents, 56 Am. J. Int'l. L. 135-142 (1962).

Low Altitude Forward Obliques, 19 Interavia 206-209 (1964).

Mac Chesney, Brunson, Some Comments on the "Quarantine" of Cuba, 57 Am. J. Int'l L. 592-597 (1963).

Mac Chesney, Brunson, Remarks, Proc. Am. Soc. of Int'l L. 172 (1963).

Mac Donald, R. St.J., The Organization of American States in Action, 15 U. Toronto L.J. 359-429 (1964).

Machowski, Jacek, Selected Problems Of National Sovereignty With Reference To The Law Of Outer Space, Proc. Am. Soc. of Int'l L. 169-174 (1961).

Maktos, John, Remarks, Proc. Am. Soc. of Int'l L. 16 (1963).

Mallison, Jr., W. T., Limited Naval Blockade or Quarantine - Interdiction: National and Collective Defense Claims Valid Under International Law, 31 Geo. Wash. L. Rev. 335-398 (1962).

Mallison, Jr., W. T., Remarks, Proc. Am. Soc. of Int'l L. 170 (1963).

Margolis, Emanuel, The Hydrogen Bomb Experiments And International Law, 64 Yale L.J. 629-647 (1955).

Martial, Jean A., State Control of the Air Space Over the Territorial Sea and the Contiguous Zone, 30 Can. Bar Rev. 245-263 (1952).

Masterson, William E., Jurisdiction in Marginal Seas (1929).

Masterson, William E., The Hemisphere Zone of Security and the Law, 26 A.B.A.J. 860-863 (1940).

McDougal, Myres S., The Soviet-Cuban Quarantine and Self-Defense, 57 Am. J. Int'l L. 597-604 (1963).

McDougal, Myres S., Remarks, Proc. Am. Soc. of Int'l L. 15-16, 164-165 (1963).

McDougal, Myres S. and Associates, Studies in World Public Order (1960).

McDougal, Myres S. and Burke, William T., Crisis in the Law of the Sea: Community Perspectives Versus National Egoism, 67 Yale L.J. 539-589 (1958).

McDougal, Myres S. and Burke, William T., The Public Order of the Oceans: A Contemporary International Law of the Sea (1962).

McDougal, Myres S. and Feliciano, Florentino P., Legal Regulation of Resort to International Coercion: Aggression and Self-Defense in Policy Perspective, 68 Yale L.J. 1057-1164 (1959).

McDougal, Myres S. and Feliciano, Florentino P., Law and Minimum World Public Order: The Legal Regulation of International Coercion (1961).

McDougal, Myres S., Lasswell, Harold D., and Vlasic, Ivan A., Law and Public Order in Space (1963).

McDougal, Myres S. and Lipson, Leon, Perspectives for a Law of Outer Space, 52 Am. J. Int'l L. 407-431 (1958).

McDougal, Myres S. and Schlei, Norbert A., The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security, 64 Yale L.J. 648-710 (1955).

McMahon, J. F., Legal Aspects of Outer Space, 38 Brit. Yb. Int'l L. 339-399 (1964).

Meeker, Leonard C., Defensive Quarantine And The Law, 57 Am. J. Int'l L. 515-524 (1963).

Meeker, Leonard C., Avoiding Conflict In And Over Space, Proc. of Conf. on Space Science and Space Law, Univ. of Oklahoma, June 18-20, 1963 (1964).

Meeker, Leonard C., Observation in Space, Law And Politics In Space 75-84 (1964).

Menter, Martin, Astronautical Law (Thesis No. 98, Industrial College of the Armed Forces, 1959).

Menter, Martin, Formulation of Space Law, Proc. of Conf. on Space Science and Space Law, Univ. of Oklahoma, June 18-20, 1963 (1964).

Meyer, Alex, Legal Problems of Flight into the Outer Space, S. Doc. No. 26, 87th Cong., 1st Sess. 8-19 (1961).

Mikuson, I., U-2, RB-47 and U.S. Foreign Policy, Int'l Affairs (Moscow) 22-28 (Aug. 1960).

Military Aspects of World Political Geography, Air Force ROTC, Air University (1959).

Moon, Albert I., Jr., A Look At Airspace Sovereignty, 29 J. Air L.&Com. 328-345 (1963).

Moore, John Bassett, Digest of International Law (1906).

Moursi, Found K., Conflict in the Competence and Jurisdiction of Courts of Different States to Deal With Acts and Occurrences on Board Aircraft (Thesis, I.A.S.L., McGill University, 1955).

Mouton, M. W., The Continental Shelf (1952).

Murchison, John Taylor, The Contiguous Air Space Zone in International Law (1956).

Nanda, Ved, Remarks, Proc. Am. Soc. of Int'l L. 172 (1963).

Need Cited for Arms Control Observation Satellite, 6 Missile/Space Daily 70 (March 17, 1964).

Note, Legal Aspects of Reconnaissance in Airspace and Outer Space, 61 Colum. L. Rev. 1074-1102 (1961).

Note, National Sovereignty of Outer Space, 74 Harv. L. Rev. 1154-1175 (1961).

O'Leary, Jerry Jr., Russians' Departures Speed Cuban Takeover of Missiles, Washington Evening Star, June 28, 1964.

Oliver, Covey, International Law and the Quarantine of Cuba: A Hopeful Prescription for Legal Writing, 57 Am. J. Int'l L. 373-377 (1963).

Oppenheim, L., International Law (8th ed. Lauterpacht 1955).

Oppler, Alfred C., Remarks, Proc. Am. Soc. of Int'l L. 171 (1963).

Ortolan, L., Les paysans combattant l'invasion, Revue des coure litteraires de la France et de l'etranger 758 (Oct. 29, 1870 - Jan. 17, 1871).

Panama Declaration of 1939, 1 Dep't State Bull. 331-333, 334, 336-337, 360, 463-464, 662 (1939); 2 Dep't State Bull. 7-8, 61-62, 199-204, 568-569 (1940).

Partan, Daniel G., The Cuban Quarantine: Some Implications For Self-Defense, Duke L.J. 696-721 (1963).

Pender, John H., Jurisdictional Approaches To Maritime Environments: A Space Age Perspective, JAG J. 155-160 (Oct-Nov. 1961).

Peng, M. P., Le Statut Juridique de L'aeronef Militaire (1955).

The Photo Squadron in Action, 19 Interavia 186-189 (1964).

Possony, Stefan F., Open Skies, Arms Control, and Peace, Air Force and Space Digest 71-72 (March 1964).

Powers, Robert D. Jr., Blockade: For Winning Without Killing, 84 U.S. Naval Inst. Proc. 61-66 (No. 8, Aug. 1958).

Rappaport, Armin, The American Revolution of 1949, NATO Letter 2-8 (Feb. 1964).

Re, Edward D., The Quarantine Of Cuba In International Law, 6 JAG Bull. 3-14 (Jan.-Feb. 1964).

The Reconnaissance Aircraft's Sensors, 19 Interavia 210 (1964).

Report of the United States Observers on Inspection of Antarctic Stations, 3 Int'l Legal Materials 650-661 (1964).

Riesel, Victor, Soviet Spy Budget $1.5 Billion, Newport News Times-Herald, May 18, 1964.

Riesenfeld, Stephen A., Protection of Coastal Fisheries in International Law (1942).

Rippon, Clive L., The Legal Status Of Military Air Transport (Thesis; I.A.S.L., McGill University, 1957).

Root, Elihu, The Real Monroe Doctrine, 8 Am. J. Int'l L. 427-442 (1914).

Sand, Peter H., Pratt, Goeffrey N., and Lyon, James T., An Historical Survey of the Law of Flight (I.A.S.L. Pub. No. 7, 1961).

Schacter, Oscar, The Prospects for a Regime in Outer Space and International Organization, Law and Politics In Space 95-102 (1964).

Schick, F. B., Cuba and the Rule of Law, Int'l Affairs(Moscow) 57-63 (Sep. 1963).

Schick, F. B., International Law For Outer Space, Proceedings of the Fifth Colloquium on the Law of Outer Space (1963).

Schick, F. B., Problems of a Space Law in the United Nations, 13 Int'l & Comp. L.Q. 969-986 (1964).

Schriever, Bernard A. and Ward, Chester, National Security Interest in the Law of Cosmic Space, American Rocket Society No. 1542-60 (Dec. 1960).

Schultz, Kenneth W., Weapons and Space, Proc. of Conf. on Space Science and Space Law, Univ. of Oklahoma, June 18-20, 1963 (1964).

Schwartz, Leonard E., International Organizations and Space Cooperation (1962).

Schwarzenberger, Georg, Power Politics: A Study of International Society (2d rev. ed. 1951).

Schwarzenberger, Georg, The Legality of Nuclear Weapons, 11 Current Legal Problems 258-292 (1958).

Schwelb, Egon, The Nuclear Test Ban Treaty and International Law, 58 Am. J. Int'l L. 642-670 (1964).

Security Council Rejects Soviet Complaint Against U.S. in RB-47 Incident; U.S.S.R. Casts 88th and 89th Vetoes, 43 Dep't State Bull. 235-244 (1960).

Sehlstedt, Albert Jr., Air Surveillance of Ships Dates from World War II, Baltimore Sun, Sep. 16, 1964.

Sehlstedt, Albert Jr., Russ Missiles Still In Cuba Are Said To Be Inferior, Baltimore Sun, May 4, 1964.

Seligman, Eustace, The Legality of U.S. Quarantine Action Under the United Nations Charter, 49 A.B.A.J. 142-145 (1963).

Shawcross, Christopher N. and Beaumont, K. M., Air Law (2d. ed. 1951).

Skousen, W. Cleon, Has Cuba Been Abandoned To Communism? (1962).

Skubiszewski, Krzysztof, The General Assembly of the United Nations and its Power to Influence National Action, Proc. Am. Soc. of Int'l L. 153-162 (1964).

Smedal, Gustav, Acquisition Of Sovereignty Over Polar Areas (1931)

Smith, Hedrick, Johnson Reports U.S. Warning on Cuba Flights, N.Y. Times, Apr. 22, 1964.

Sohn, Louis, Cases on United Nations Law (1956).

Sohn, Louis, Remarks, Proc. Am. Soc. of Int'l L. 171 (1963).

Space and American Security: New Pattern In Nuclear Security, 19 Interavia 641-651 (1964).

Space Log (Summer 1964).

Spofford, Charles M., Remarks, Proc. Am. Soc. of Int'l L. 169-170 (1963).

Spraight, J. M., Air Power And War Rights (3d ed. 1947).

Stanford, Neal, New Air Force Space Role, Christian Science Monitor, Dec. 24, 1963.

Stanger, Roland J., Espionage and Arms Control, Essays on Espionage and International Law 83-101 (Stanger ed. 1962).

Starke, J. G., An Introduction To International Law (5th ed.1963).

Stevenson, John R., The State Department and Sabbatino--"Ev'n Victors Are By Victories Undone," 58 Am. J. Int'l L. 707-711 (1964).

Stone, Julius, Aggression And World Order (1958).

Stone, Julius, Legal Problems of Espionage in Conditions of Modern Conflict, Essays on Espionage and International Law 29-43 (Stanger ed. 1962).

A Survey of Aerial Reconnaissance, 19 Interavia 180-185 (1964).

Svarlien, Oscar, The Legal Status of the Arctic, Conflicting National Policies and Some Current International Legal Problems, Proc. Am. Soc. of Int'l L. 136-145 (1958).

Sztucki, Jerzy, Security of Nations and Cosmic Space, S. Doc. No. 26, 87th Cong., 1st Sess. 1164-1203 (1961).

Tanner, Henry, Khrushchev Says U.S. Perils World by Cuba Policies, N.Y. Times, May 2, 1964.

Taubenfeld, Howard J., Nuclear Testing And International Law, 16 Sw. L.J. 365-408 (1962).

Taubenfeld, Howard J., The Status of Competing Claims to Use Outer Space: An American Point of View, Proc. Amer. Soc. of Int'l L. 173-186 (1963).

Thomas, A. J. Jr., The Organization of American States and Subversive Intervention, Proc. Am. Soc. of Int'l L. 19-24 (1961).

Thomas, Ann Van Wynew and Thomas, A. J. Jr., The Organization of American States (1963).

Toma, Peter A., Soviet Attitude Towards the Acquisition of Territorial Sovereignty in the Antarctic, 50 Am. J. Int'l L. 611-626 (1956).

Troan, John, Soviet Skies Are Full of Eyes, Washington News, June 11, 1964.

The United States Air Force Dictionary (Helfin ed. 1956).

Van Dyke, Vernon, International Politics (1957).

Vent, Herbert, Factors Influencing The Power Of States, Military Aspects of World Political Geography, 87-100 (1959).

Verplaetse, Julian G., International Law In Vertical Space (1960).

Verplaetse, Julian G., On The Definition And Legal Status of Spacecraft, 29 J. Air L.&Com. 131-140 (1963).

Villamin, Maria Luisa, Piracy and Air Law (Thesis: I.A.S.L., McGill University, 1962).

Webb, James E., NASA and USAF: A Space Age Partnership, 8 The Airman 6-11 (Aug. 1964).

White, Thomas, D., Air and Space are Indivisible, Air Force 40-41 (March 1958).

Whiteman, Marjorie M., Conference On The Law Of The Sea: Convention On The Continental Shelf, 52 Am. J. Int'l L. 629-659 (1958).

Whiteman, Marjorie M., Digest of International Law (1963).

Wild, Payson Sibley, Contiguous Zones, Airplanes, and Neutrality, International Law Situations, 1939, 60-98 (1940).

Williams, Glanville L., The Juridical Basis Of Hot Pursuit, 20 Brit. Yb. Int'l L. 83-97 (1939).

Williams, John R., Remarks, Proc. Am. Soc. of Int'l L. 172 (1963).

Woetzel, Robert K., The Nuremberg Trials In International Law (1960).

Woetzel, Robert K., Comments on U.S. and Soviet Viewpoints Regarding the Legal Aspects of Military Uses of Space, Proc. Am. Soc. of Int'l L. 195-204 (1963).

Woetzel, Robert K., Sovereignty and National Rights in Outer Space and on Celestial Bodies, Proceedings of the Fifth Colloquium on the Law of Outer Space (1963).

Wright, Quincy, Rights and Duties under International Law as Affected by the United States Neutrality Act and the Resolutions of Panama, 34 Am. J. Int'l L. 238-248 (1940).

Wright, Quincy, Legal Aspects of the U-2 Incident, 54 Am. J. Int'l L. 836-854 (1960).

Wright, Quincy, Espionage and the Doctrine of Non-Intervention in International Affairs, Essays on Espionage and International Law 3-28 (Stanger ed. 1962).

Wright, Quincy, The Cuban Crisis, Proc. Am. Soc. of Int'l L. 9-10 (1963).

Wright, Quincy, The Cuban Quarantine, 57 Am. J. Int'l L. 546-565 (1963).

Young, Richard, The Legal Status of Submarine Areas Beneath the High Seas, 45 Am. J. Int'l L. 225-239 (1951).

Zhukov, G. P., Conquest of Outer Space and Some Problems of International Relations, Int'l Affairs(Moscow) 88-96 (Nov. 1959).

Zhukov, G. P., Space Espionage Plans and International Law, Int'l Affairs(Moscow) 53-57 (Oct. 1960).

Zhukov, G. P., Problems of Space Law At The Present Stage, Proceedings of the Fifth Colloquium on the Law of Outer Space (1963).

Zwanenberg, Anna Van, Interference With Ships On The High Seas, 10 Int'l & Comp. L.Q. 785-817 (1961).

B. International Agreements

Agreement Between The Government of the United States and the United Kingdom Concerning a Long Range Proving Ground for Guided Missiles to be known as "The Bahamas Long Range Proving Ground," July 21, 1950, 1 U.S.T.&O.I.A. 429, T.I.A.S. No. 2099.

Antarctic Treaty, Dec. 1, 1959, 12 U.S.T.&O.I.A. 794, T.I.A.S. No. 4780.

(Chicago) Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180 (1944), T.I.A.S. No. 1951.

Geneva Convention on the Continental Shelf of 1958, Sep. 15, 1958, 15 U.S.T.&O.I.A. 471, T.I.A.S. No. 5578.

Geneva Convention on the High Seas of 1958, Sep. 15, 1958, 13 U.S.T.&O.I.A. 2312, T.I.A.S. No. 5200.

Geneva Convention on the Territorial Sea and the Contiguous Zone of 1958, Sep. 15, 1958, 15 U.S.T.&O.I.A.1601,T.I.A.S.No.5639.

Ibero-American (Madrid) Convention of 1926 on Commerical Aviation.

Inter-American (Rio) Treaty of Reciprocal Assistance, Sep. 2, 1947, 62 Stat. 1681 (1948), T.I.A.S. No. 1838.

International Air Services Transit Agreement, Dec. 7, 1944, 59 Stat. 1693 (1945), E.A.S. No. 487.

International Air Transport Agreement, Dec. 7, 1944, 59 Stat. 1701, E.A.S. No. 488, denounced July 25, 1946, withdrawal effective July 25, 1947.

Pan-American (Havana) Convention on Commercial Aviation, Feb. 20, 1928, 47 Stat. 1901 (1931), T.S. No. 840.

(Paris) Convention of 1919 Relating to the Regulation of Aerial Navigation, 11 League of Nations Series 173.

Treaty Banning Nuclear Weapon Tests In The Atmosphere, In Outer Space and Under Water, Aug. 5, 1963, 14 U.S.T.&O.I.A. 1313, T.I.A.S. No. 5433.

C. United States Congressional Documents

Chronology of U.S. Relations With Cuba From 1957 to 1962, prepared by the Dep't of State at the request of Senator Morse, 108 Cong. Rec. 19326-19331 (daily ed. Sep. 24, 1962).

Events Incident to the Summit Conference, Hearings Before the Senate Comm. on Foreign Relations, 86th Cong., 2d Sess. (1960).

Hearings Before the House Select Comm. on Astronautics and Space Exploration, 85th Cong., 2d Sess. (1959).

Hearings Before the Senate Comm. on Foreign Relations and The Comm. on Armed Services, Situation In Cuba, 87th Cong., 2d Sess. (1962).

Hearings On H.R. 10939 Before the Subcommitte on Department of Defense of the Senate Committee on Appropriations and the Senate Committee on Armed Services, 88th Cong., 2d Sess. pt. 1 (1964).

House Comm. on Science and Astronautics, National Meteorological Satellite Program, H.R. Rep. No. 1281, 87th Cong., 1st Sess. (1961).

House Comm. on Science and Astronautics, U.S. Policy on the Control and Use of Outer Space, H.R. Rep. No. 353, 86th Cong., 1st Sess. (1959).

House Select Comm. on Astronautics and Space Sciences, Survey of Space Law, 85th Cong., 2d Sess. (Comm. Print 1958).

Joint Resolution Expressing the Determination of the United States with respect to the situation in Cuba, S.J. Res. 230, P.L. 87-733, 76 Stat. 697 (1962).

Presidential Proclamation No. 2667, Policy of the United States With Respect to the Natural Resources of the Subsoil and Bed of the Continental Shelf, dated Sep. 28, 1945, 59 Stat. 884, 10 Fed. Reg. 12303 (1945).

Presidential Proclamation No. 2668, Policy of the United States With Respect to the Coastal Fisheries in Certain Areas of the High Seas, dated Sep. 28, 1945, 59 Stat. 885, 10 Fed. Reg. 12304 (1945).

Presidential Proclamation No. 3447, Embargo On All Trade With Cuba, dated Feb. 3, 1962, 27 Fed. Reg. 1085 (1962).

Presidential Proclamation No. 3504, Interdiction of the Delivery of Offensive Weapons to Cuba, dated Oct. 23, 1962, 27 Fed. Reg. 10401 (1962).

Presidential Proclamation No. 3507, Terminating Authority Granted and Orders Issued in Proclamation No. 3504, dated Nov. 21, 1962, 27 Fed. Reg. 11525 (1962).

Select Comm. on Astronautics and Space Exploration, Space Handbook: Astronautics And Its Applications, H.R. Doc. No. 86, 86th Cong., 1st Sess. (1959).

Senate Comm. on Aeronautical and Space Sciences, Documents On International Aspects Of The Exploration And Use Of Outer Space, 1954-1962, S. Doc. No. 18, 88th Cong., 1st Sess. (1963).

Senate Comm. on Aeronautical and Space Sciences, Legal Problems of Space Exploration: A Symposium, S. Doc. No. 26, 87th Cong., 1st Sess. (1961).

Senate Comm. on Foreign Relations, Report on Foreign Assistance Act of 1964, S. Rep. No. 1188, Part 1, 88th Cong., 2nd Sess. (1964).

Senate Comm. on Foreign Relations, The Nuclear Test Ban Treaty, S. Exec. Rep. No. 3, 88th Cong., 1st Sess. (1963).

Staff of Senate Comm. on Aeronautical and Space Sciences, Meteorological Satellites, 87th Cong., 2nd Sess. (Comm. Print 1962).

Staff of Senate Comm. on Aeronautical and Space Sciences, Soviet Space Programs: Organization, Plans, Goals, and International Implications, 87th Cong., 2d Sess. (Comm. Print 1962).

D. Cases

Case Concerning the Aerial Incident of July 27, 1955 (Israel v. Bulgaria) Preliminary Objections, I.C.J. Reports 127 (1959).

Alabama and Kearsarge, The Case of, 1 Moore, A Digest of International Law 723-724 (1906).

Anglo-Norwegian Fisheries Case, I.C.J. Reports 116 (1951).

Banco National De Cuba v. Sabbatino, 193 F.Supp. 375 (S.D.N.Y.) 1961), aff'd 307 F.2d 845 (2d Cir. 1962), rev'd 376 U.S. 398 (1964).

Caroline, The Case of the, 2 Moore, A Digest of International Law 409-414 (1906).

Church v. Hubbart, 6 U.S. (2 Cranch) 187 (1804).

Conditions on Admission of a State to Membership in the United Nations, I.C.J. Reports 57 (1948).

Cook v. United States, 288 U.S. 102 (1933).

Corfu Channel Case (Merits), I.C.J. Reports 4 (1949).

Grace and Ruby, The, 283 F.475 (D.C. Mass. 1922).

I'm Alone, The, U.S. Dep't of State Arbitration Series, No. 2, 1-7 (1931-1935).

Island of Palmas (Miangas) Arbitration, The, 22 Am. J. Int'l L. 867-912 (1928).

Judgment International Military Tribunal (Nuremberg) Oct. 1, 1946, 41 Am. J. Int'l L. 172-333 (1947).

Lotus Case, The, P.C.I.J., Ser. A., No. 10 (1927).

Mariana Flora, The, 24 U.S. (11 Wheat.) 1 (1826).

Schooner Exchange, The, v. McFadden, 11 U.S. (7 Cranch) 136 (1812).

United States v. California, 332 U.S. 19 (1947).

Virginius, The Case of, 2 Moore, A Digest of International Law 895-903, 980-983 (1906).

E. United Nations Documents

Francois, J. P. A., Report on the High Seas to International Law Commission, U.N. Doc. No. A/CN.4/17 (1950).

Francois, J. P. A., Second Report on the High Seas, U.N. Doc. No. A/CN.4/42 (1951).

Francois, J. P. A., Report on the Regime of the Territorial Sea, U.N. Doc. No. A/CN.4/53 (1952).

Gidel, Gilbert, Memorandum on the Regime of the High Seas, U.N. Doc. No. A/CN.4/32 (1950).

Laws and Regulations on the Regime of the High Seas, U.N. Doc. No. ST/LEG/SER.B/1 (1951).

Report of the Ad Hoc Committee on the Peaceful Uses of Outer Space, July 14, 1959, U.N. Doc. No. A/4141 (1959).

Report of the Legal Sub-Committee to the Committee on the Peaceful Uses of Outer Space, U.N. Doc. No. A/AC.105/19 (1964).

Resolution of the United Nations Conference on the Law of the Sea on Nuclear Tests on the High Seas, U.N. Doc. No. A/CONF.13/L.56 (1958).

U.N. Gen. Ass. Res. 927(X): Question of the safety of commercial aircraft flying in the vicinity of, or inadvertently crossing, international frontiers, Dec. 14, 1955.

U.N. Gen. Ass. Res. 1348 (XIII): Question of the Peaceful Use of Outer Space, Dec. 13, 1958.

U.N. Gen. Ass. Res. 1472 (XIV): International Cooperation in the Peaceful Uses of Outer Space, Dec. 12, 1959.

U.N. Gen. Ass. Res. 1721 (XVI): International Cooperation in the Peaceful Uses of Outer Space, Dec. 20, 1961.

U.N. Gen. Ass. Res. 1884 (XVIII): Question of General and Complete Disarmament, Oct. 17, 1963.

U.N. Gen. Ass. Res. 1962 (XVIII): Declaration of Legal Principles Governing the Activities of States in the Exploration and Uses of Outer Space, Dec. 13, 1963.

U.N. Gen Ass. Res. 1963 (XVIII): International Cooperation in the Peaceful Uses of Outer Space, Dec. 13, 1963.

U.S.S.R. Draft Declaration of Basic Principles Governing the Activities of States Pertaining to the Exploration and Use of Outer Space, U.N. Doc. No. A/AC.105/L.2 (1962).

U.S.S.R. Draft International Agreement on the Rescue of Astronauts and Spaceships Making Emergency Landings, U.N. Doc. No. A/AC.105/L.3 (1962).