Handout #2

International Ocean Law (Law 593)
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Dispute Resolution

The dispute-resolution provisions in Part XV of the Law of the Sea Convention are innovative and are carefully crafted to maintain the Convention's delicate balances between competing interests. Article 287 instructs each ratifying nation to pick from among four possible means of settling disputes over the interpretation of the Convention: the International Tribunal for the Law of the Sea (ITLOS) (a 21-judge court located in Hamburg, Germany, established according to Annex VI), the International Court of Justice (in The Hague, Netherlands), an arbitral tribunal established pursuant to Annex VII, or a special arbitral tribunal established pursuant to Annex VIII to deal with specialized scientific issues. If the disputing countries have picked different procedures and cannot agree on a procedure, their dispute will be resolved through an Annex VII arbitration.

According to Article 297, controversies subject to mandatory dispute-resolution procedures include those involving coastal state environmental regulations that limit navigation (Article 297 (1) (a) & (b)), allegations that a coastal state is violating internationally-established environmental regulations (Article 297 (1) (c), and allegations that a coastal state has improperly seized a vessel flying the flag of another country (Article 292). Coastal states are not required to submit to these dispute-resolution procedures their decisions regarding marine scientific research on their continental shelf and exclusive economic zone (Article 297 (2)) and their decisions regarding management of their EEZ fisheries and the allocation of their surplus catch (Article 297 (3)). Ratifying countries have the option of withdrawing from mandatory dispute resolution disagreements over maritime boundaries (Article 298 (1) (a)), disputes concerning military activities (Article 298 (1) (b)), and disputes that are pending before the U.N. Security Council (Article 298 (1) (c)). Disputes relating to deep seabed mining are subject to a special regime, and the Sea-Bed Disputes Chamber of ITLOS will deal with most of these controversies. The following case was the first presented to the International Tribunal for the Law of the Sea (ITLOS):

The M/V Saiga Case (Saint Vincent and the Grenadines v. Guinea)

International Tribunal for the Law of the Sea, July 1, 1999

[Editors' note: On October 28, 1997, Guinea seized and detained the *M/V Saiga* a commercial vessel registered in Saint Vincent and the Grenadines, and prosecuted and convicted its master. On December 22, 1997, Saint Vincent and the Grenadines instituted an arbitral proceeding against Guinea in accordance with Annex VII of the Law of the Sea Convention in respect of a dispute relating to the *Saiga*. On February 20, 1998, the two countries agreed to transfer the arbitration proceedings to the International Tribunal for the Law of the Sea. On March 11, 1998, the Tribunal issued a "provisional measure" under Article 290 (1) of the Convention instructing Guinea to refrain from taking any enforcement action against the ship, its master, or crew members. From March 8 to March 20, the Tribunal held 18 public sessions hearing witnesses presented by the two parties, and receiving documentary evidence.]

Factual background

31. The Saiga is an oil tanker. At the time of its arrest on 28 October 1997, it was owned by Tabona Shipping Company Ltd. of Nicosia, Cyprus, and managed by Seascot Shipmanagement Ltd. of Glasgow, Scotland. The ship was chartered to Lemania Shipping Group Ltd. of Geneva, Switzerland. The Saiga was provisionally registered in Saint Vincent and the Grenadines on 12 March 1997. The Master and crew of the ship were all of Ukrainian nationality. There were also three Senegalese nationals who were employed as painters. The Saiga was engaged in selling gas oil as bunker and occasionally water to fishing and other vessels off the coast of West Africa. The owner of the cargo of gas oil on board was Addax BV of Geneva, Switzerland.

32. Under the command of Captain Orlov, the Saiga left Dakar, Senegal, on 24 October 1997 fully laden with approximately 5,400 metric tons of gas oil. On 27 October 1997, between 0400 and 1400 hours and at a point 10°25'03"N and 15°42'06"W, the Saiga supplied gas oil to three fishing vessels, the Giuseppe Primo and the Kriti, both flying the flag of Senegal, and the Eleni S, flying the flag of Greece. This point was approximately 22 nautical miles from Guinea's island of Alcatraz. All three fishing vessels were licensed by Guinea to fish in its exclusive economic zone. The Saiga then sailed in a southerly direction to supply gas oil to other fishing vessels at a pre-arranged place. Upon instructions from the owner of the cargo in Geneva, it later changed course and sailed towards another location beyond the southern border of the exclusive economic zone of Guinea.

33. At 0800 hours on 28 October 1997, the Saiga, according to its log book, was at a point 09°00'01"N and 14°58'58"W. It had been drifting since 0420 hours while awaiting the arrival of fishing vessels to which it was to supply gas oil. This point was south of the southern limit of the exclusive economic zone of Guinea. At about 0900 hours the Saiga was attacked by a Guinean patrol boat (P35). Officers from that boat and another Guinean patrol boat (P328) subsequently boarded the ship and arrested it. On the same day, the ship and its crew were brought to Conakry, Guinea, where its Master was detained....

35. On 13 November 1997, Saint Vincent and the Grenadines submitted to this Tribunal a Request for the prompt release of the Saiga and its crew under Article 292 of the Convention. On 4 December 1997, the Tribunal delivered Judgment on the Request. The Judgment ordered that Guinea promptly release the Saiga and its crew upon the posting of a reasonable bond or security by Saint Vincent and the Grenadines. The security consisted of the gas oil discharged from the Saiga by the authorities of Guinea plus an amount of US$ 400,000 to be posted in the form of a letter of credit or bank guarantee or, if agreed by the parties, in any other form.

[The trial court in Conakry, Guinea convicted the Master of the *Saiga* on December 17, 1997 of fraudulently importing diesel oil into Guinean territory without declaring the merchandise and paying the necessary taxes. The court fined the Master 15,354,024,040 Guinean francs and confiscated the vessel and its cargo as a guarantee for payment of the fine. On February 3, 1998, this judgment was affirmed by the Court of Appeal in Conakry, which confirmed the penalty and also imposed a six month suspended sentence on the Master. Guinea

argued that Saint Vincent and the Grenadines did not have "legal standing" to bring claims on behalf of the *Saiga* because the registration of the vessel had temporarily lapsed. The Tribunal analyzed this issue by applying the criteria in Article 91 of the Law of the Sea Convention.]

63. Article 91 leaves to each State exclusive jurisdiction over the granting of its nationality to ships. In this respect, Article 91 codifies a well-established rule of general international law. Under this article, it is for Saint Vincent and the Grenadines to fix the conditions for the grant of its nationality to ships, for the registration of ships in its territory and for the right to fly its flag. These matters are regulated by a State in its domestic law. Pursuant to Article 91, paragraph 2, Saint Vincent and the Grenadines is under an obligation to issue to ships to which it has granted the right to fly its flag documents to that effect. The issue of such documents is regulated by domestic law....

66. The Tribunal considers that the nationality of a ship is a question of fact to be determined, like other facts in dispute before it, on the basis of evidence adduced by the parties. [After reviewing the facts, the Tribunal stated that the country challenging the registration had the burden of proof. Given the statements by Saint Vincent and the Grenadines that the vessel remained properly registered according to its laws, the Tribunal ruled that Guinea had not succeeded in convincing the Tribunal that the vessel was not properly registered.]

Genuine link

75. The next objection to admissibility raised by Guinea is that there was no genuine link between the Saiga and Saint Vincent and the Grenadines. Guinea contends that "without a genuine link between Saint Vincent and the Grenadines and the M/V 'Saiga', Saint Vincent and the Grenadines' claim concerning a violation of its right of navigation and the status of the ship is not admissible before the Tribunal vis-à-vis Guinea, because Guinea is not bound to recognise the Vincentian nationality of the M/V 'Saiga', which forms a prerequisite for the mentioned claim in international law."...

79. Article 91, paragraph 1, of the Convention provides: "There must exist a genuine link between the State and the ship." Two questions need to be addressed in this connection. The first is whether the absence of a genuine link between a flag State and a ship entitles another State to refuse to recognize the nationality of the ship. The second question is whether or not a genuine link existed between the Saiga and Saint Vincent and the Grenadines at the time of the incident....

83. The conclusion of the Tribunal is that the purpose of the provisions of the Convention on the need for a genuine link between a ship and its flag State is to secure more effective implementation of the duties of the flag State, and not to establish criteria by reference to which the validity of the registration of ships in a flag State may be challenged by other States....

86. In the light of the above considerations, the Tribunal concludes that there is no legal basis for the claim of Guinea that it can refuse to recognize the right of the Saiga to fly the flag of Saint Vincent and the Grenadines on the ground that there was no genuine link between the ship and Saint Vincent and the Grenadines.

87. With regard to the second question, the Tribunal finds that, in any case, the evidence adduced by Guinea is not sufficient to justify its contention that there was no genuine link between the ship and Saint Vincent and the Grenadines at the material time....

Exhaustion of local remedies

[Guinea argued that Saint Vincent and the Grenadines could not bring an action before an international tribunal until it had exhausted local remedies pursuant to Article 295 of the Law of the Sea Convention.]

100. In the opinion of the Tribunal, whether there was a necessary jurisdictional connection between Guinea and the natural or juridical persons in respect of whom Saint Vincent and the Grenadines made claims must be determined in the light of the findings of the Tribunal on the question whether Guinea's application of its customs laws in a customs radius was permitted under the Convention. If the Tribunal were to decide that Guinea was entitled to apply its customs laws in its customs radius, the activities of the Saiga could be deemed to have been within Guinea's jurisdiction. If, on the other hand, Guinea's application of its customs laws in its customs radius were found to be contrary to the Convention, it would follow that no jurisdictional connection existed. The question whether Guinea was entitled to apply its customs laws is dealt with in paragraphs 110 to 136. For reasons set out in those paragraphs, the Tribunal concludes that there was no jurisdictional connection between Guinea and the natural and juridical persons in respect of whom Saint Vincent and the Grenadines made claims. Accordingly, on this ground also, the rule that local remedies must be exhausted does not apply in the present case.

101. In the light of its conclusion that the rule that local remedies must be exhausted does not apply in this case, the Tribunal does not consider it necessary to deal with the arguments of the parties on the question whether local remedies were available and, if so, whether they were effective....

Arrest of the Saiga

110. Saint Vincent and the Grenadines asserts that the arrest of the Saiga and the subsequent actions of Guinea were illegal. It contends that the arrest of the Saiga was unlawful because the ship did not violate any laws or regulations of Guinea that were applicable to it. It further maintains that, if the laws cited by Guinea did apply to the activities of the Saiga, those laws, as applied by Guinea, were incompatible with the Convention....

116. The main charge against the Saiga was that it violated Article 1 of Law L/94/007 by importing gas oil into the customs radius (*rayon des douanes*) of Guinea....

126. The Tribunal needs to determine whether the laws applied or the measures taken by Guinea against the Saiga are compatible with the Convention. In other words, the question is whether, under the Convention, there was justification for Guinea to apply its customs laws in the exclusive economic zone within a customs radius extending to a distance of 250 kilometres from the coast.

127. The Tribunal notes that, under the Convention, a coastal State is entitled to apply customs laws and regulations in its territorial sea (Articles 2 and 21). In the contiguous zone, a coastal State may exercise the control necessary to:

(a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea;

(b) punish infringement of the above laws and regulations committed within its territory of territorial sea. (Article 33, paragraph 1)

In the exclusive economic zone, the coastal State has jurisdiction to apply customs laws and regulations in respect of artificial islands, installations and structures (Article 60, paragraph 2). In the view of the Tribunal, the Convention does not empower a coastal State to apply its customs laws in respect of any other parts of the exclusive economic zone not mentioned above....

129. The Tribunal finds it necessary to distinguish between the two main concepts referred to in the submissions of Guinea. The first is a broad notion of "public interest" or "self-protection" which Guinea invokes to expand the scope of its jurisdiction in the exclusive economic zone, and the second is "state of necessity" which it relies on to justify measures that would otherwise be wrongful under the Convention.

130. The main public interest which Guinea claims to be protecting by applying its customs laws to the exclusive economic zone is said to be the "considerable fiscal losses a developing country like Guinea is suffering from illegal off-shore bunkering in its exclusive economic zone". Guinea makes references also to fisheries and environmental interests. In effect, Guinea's contention is that the customary international law principle of "public interest" gives it the power to impede "economic activities that are undertaken [in its exclusive economic zone] under the guise of navigation but are different from communication".

131. According to Article 58, paragraph 3, of the Convention, the "other rules of international law" which a coastal State is entitled to apply in the exclusive economic zone are those which are not incompatible with Part V of the Convention. In the view of the Tribunal, recourse to the principle of "public interest", as invoked by Guinea, would entitle a coastal State to prohibit any activities in the exclusive economic zone which it decides to characterize as activities which affect its economic "public interest" or entail "fiscal losses" for it. This would curtail the rights of other States in the exclusive economic zone. The Tribunal is satisfied that

this would be incompatible with the provisions of Articles 56 and 58 of the Convention regarding the rights of the coastal State in the exclusive economic zone.

132. It remains for the Tribunal to consider whether the otherwise wrongful application by Guinea of its customs laws to the exclusive economic zone can be justified under general international law by Guinea's appeal to "state of necessity".

133. In the Case Concerning the Gabíkovo-Nagymaros Project (Gabíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997, pp.40 and 41, paragraphs 51 and 52), the International Court of Justice noted with approval two conditions for the defence based on "state of necessity" which in general international law justifies an otherwise wrongful act. These conditions, as set out in Article 33, paragraph 1, of the International Law Commission's Draft Articles on State Responsibility, are:

(a) the act was the only means of safeguarding an essential interest of the State against a grave and imminent peril; and

(b) the act did not seriously impair an essential interest of the State towards which the obligation existed.

134. In endorsing these conditions, the Court stated that they "must be cumulatively satisfied" and that they "reflect customary international law".

135. No evidence has been produced by Guinea to show that its essential interests were in grave and imminent peril. But, however essential Guinea's interest in maximizing its tax revenue from the sale of gas oil to fishing vessels, it cannot be suggested that the only means of safeguarding that interest was to extend its customs laws to parts of the exclusive economic zone.

136. The Tribunal, therefore, finds that, by applying its customs laws to a customs radius which includes parts of the exclusive economic zone, Guinea acted in a manner contrary to the Convention. Accordingly, the arrest and detention of the Saiga, the prosecution and conviction of its Master, the confiscation of the cargo and the seizure of the ship were contrary to the Convention.

Hot pursuit

[Guinea argued that it had the right to seize the *Saiga* pursuant to the right of hot pursuit recognized in Article 111 of the Law of the Sea Convention.]

149. The Tribunal has already concluded that no laws or regulations of Guinea applicable in accordance with the Convention were violated by the Saiga. It follows that there was no legal basis for the exercise of the right of hot pursuit by Guinea in this case.

150. For these reasons, the Tribunal finds that Guinea stopped and arrested the Saiga on

28 October 1997 in circumstances which did not justify the exercise of the right of hot pursuit in accordance with the Convention....

Use of force

155. In considering the force used by Guinea in the arrest of the Saiga, the Tribunal must take into account the circumstances of the arrest in the context of the applicable rules of international law. Although the Convention does not contain express provisions on the use of force in the arrest of ships, international law, which is applicable by virtue of Article 293 of the Convention, requires that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply in the law of the sea, as they do in other areas of international law.

156. These principles have been followed over the years in law enforcement operations at sea. The normal practice used to stop a ship at sea is first to give an auditory or visual signal to stop, using internationally recognized signals. Where this does not succeed, a variety of actions may be taken, including the firing of shots across the bows of the ship. It is only after the appropriate actions fail that the pursuing vessel may, as a last resort, use force. Even then, appropriate warning must be issued to the ship and all efforts should be made to ensure that life is not endangered (S.S. "I'm Alone" case (Canada/United States, 1935), U.N.R.I.A.A., Vol. III, p. 1609; The Red Crusader case (Commission of Enquiry, Denmark - United Kingdom, 1962), I.L.R., Vol.35, p. 485). The basic principle concerning the use of force in the arrest of a ship at sea has been reaffirmed by the Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks.

Article 22, paragraph 1 (f), of the Agreement states:

> 1. The inspecting State shall ensure that its duly authorized inspectors:
>
> (f) avoid the use of force except when and to the degree necessary to ensure the safety of the inspectors and where the inspectors are obstructed in the execution of their duties. The degree of force used shall not exceed that reasonably required in the circumstances.

157. In the present case, the Tribunal notes that the Saiga was almost fully laden and was low in the water at the time it was approached by the patrol vessel. Its maximum speed was 10 knots. Therefore it could be boarded without much difficulty by the Guinean officers. At one stage in the proceedings Guinea sought to justify the use of gunfire with the claim that the Saiga had attempted to sink the patrol boat. During the hearing, the allegation was modified to the effect that the danger of sinking to the patrol boat was from the wake of the Saiga and not the result of a deliberate attempt by the ship. But whatever the circumstances, there is no excuse for the fact that the officers fired at the ship itself with live ammunition from a fast-moving patrol

boat without issuing any of the signals and warnings required by international law and practice.

158. The Guinean officers also used excessive force on board the Saiga. Having boarded the ship without resistance, and although there is no evidence of the use or threat of force from the crew, they fired indiscriminately while on the deck and used gunfire to stop the engine of the ship. In using firearms in this way, the Guinean officers appeared to have attached little or no importance to the safety of the ship and the persons on board. In the process, considerable damage was done to the ship and to vital equipment in the engine and radio rooms. And, more seriously, the indiscriminate use of gunfire caused severe injuries to two of the persons on board.

159. For these reasons, the Tribunal finds that Guinea used excessive force and endangered human life before and after boarding the Saiga, and thereby violated the rights of Saint Vincent and the Grenadines under international law,... .

Reparation

169. Article 111, paragraph 8, of the Convention provides:

> Where a ship has been stopped or arrested outside the territorial sea in circumstances which do not justify the exercise of the right of hot pursuit, it shall be compensated for any loss or damage that may have been thereby sustained.

Reparation may also be due under international law as provided for in Article 304 of the Convention, which provides:

> The provisions of this Convention regarding responsibility and liability for damage are without prejudice to the application of existing rules and the development of further rules regarding responsibility and liability under international law.

170. It is a well-established rule of international law that a State which suffers damage as a result of an internationally wrongful act by another State is entitled to obtain reparation for the damage suffered from the State which committed the wrongful act and that "reparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed" (Factory at Chorzów, Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17, p. 47).

171. Reparation may be in the form of "restitution in kind, compensation, satisfaction and assurances and guarantees of non-repetition either singly or in combination" (Article 42, paragraph 1, of the Draft Articles of the International Law Commission on State Responsibility). Reparation may take the form of monetary compensation for economically quantifiable damage as well as for non-material damage, depending on the circumstances of the case. The circumstances include such factors as the conduct of the State which committed the wrongful act

and the manner in which the violation occurred. Reparation in the form of satisfaction may be provided by a judicial declaration that there has been a violation of a right.

172. In the view of the Tribunal, Saint Vincent and the Grenadines is entitled to reparation for damage suffered directly by it as well as for damage or other loss suffered by the Saiga, including all persons involved or interested in its operation. Damage or other loss suffered by the Saiga and all persons involved or interested in its operation comprises injury to persons, unlawful arrest, detention or other forms of ill-treatment, damage to or seizure of property and other economic losses, including loss of profit....

175. After a careful scrutiny of invoices and other documents submitted, the Tribunal decides to award compensation in the total amount of US$ 2,123,357 (United States Dollars Two Million One Hundred and Twenty-Three Thousand Three Hundred and Fifty-Seven) with interest, as indicated below:

(a) Damage to the Saiga, including costs of repairs, in the sum of US$ 202,764; with interest at the rate of 6%, payable from 31 March 1998;

(b) Loss with respect to charter hire of the Saiga, in the sum of US$ 650,250; with interest at the rate of 6%, payable from 1 January 1998;

(c) Costs related to the detention of the Saiga in Conakry, in the sum of US$ 256,892; with interest at the rate of 6%, payable from 1 January 1998;

(d) Value of 4,941.322 metric tons of gas oil discharged in Conakry, in the sum of US$ 875,256; with interest at the rate of 8%, payable from 28 October 1997;

(e) Detention of Captain Orlov, the Master, in the sum of US$ 17,750; with interest at the rate of 3%, payable from 1 October 1999;

(f) Detention of members of the crew and other persons on board the Saiga, in the sum of US$ 76,000, computed as specified in the Annex; with interest at the rate of 3%, payable from 1 October 1999;

(g) Medical expenses of Second Officer Klyuyev, in the sum of US$ 3,130; with interest at the rate of 6%, payable from 1 January 1998;

(h) Medical expenses of Mr. Djibril Niasse, in the sum of US$ 6,315; with interest at the rate of 6%, payable from 1 January 1998;

(i) Injury, pain and suffering of Second Officer Klyuyev, in the sum of US$ 10,000; with interest at the rate of 3%, payable from 1 October 1999;

(j) Injury, pain, suffering, disability and psychological damage of Mr. Djibril Niasse, in the sum of US$ 25,000; with interest at the rate of 3%, payable from 1 October 1999.

176. With regard to the claims of Saint Vincent and the Grenadines for compensation for violation of its rights in respect of ships flying its flag, the Tribunal has declared in paragraphs 136 and 159 that Guinea acted wrongfully and violated the rights of Saint Vincent and the Grenadines in arresting the Saiga in the circumstances of this case and in using excessive force. The Tribunal considers that these declarations constitute adequate reparation.

177. Saint Vincent and the Grenadines requests the Tribunal to award compensation for the loss of registration revenue resulting from the illegal arrest of the Saiga by Guinea, and for the expenses resulting from the time lost by its officials in dealing with the arrest and detention of the ship and its crew. The Tribunal notes that no evidence has been produced by Saint Vincent and the Grenadines that the arrest of the Saiga caused a decrease in registration activity under its flag, with resulting loss of revenue. The Tribunal considers that any expenses incurred by Saint Vincent and the Grenadines in respect of its officials must be borne by it as having been incurred in the normal functions of a flag State. For these reasons, the Tribunal does not accede to these requests for compensation made by Saint Vincent and the Grenadines.

[Judges Warioba and Ndiaye dissented from the substantive elements of the Tribunal's decision and filed dissenting opinions. Nine other separate opinions were also filed by judges in the majority.]

From 95 Am. J. Int'l L. 630 (2001)

STATE JURISDICTION AND JURISDICTIONAL IMMUNITIES

Aerial Incident off the Coast of China

On April 1, 2001, a U.S. EP-3E Aries II airplane on a routine surveillance mission near the Chinese coast was intercepted by two Chinese-built F-8 fighter jets and then collided with one of the jets, which was closely tailing it. The damaged U.S. airplane—with its twenty-four crew members—issued a Mayday alarm and made an emergency landing on China's Hainan Island at Lingshui. The damaged Chinese fighter jet crashed into the water, and it was later determined that the pilot, Wang Wei, had died.[1]

China immediately charged the United States with responsibility for the incident, stating that the U.S. airplane had turned suddenly into the Chinese jet and then landed at Lingshui without permission. In addition to demanding an apology, China called upon the United States to end its frequent reconnaissance flights along the Chinese coast.[2] The United States responded that the airplane had been operating outside Chinese territorial waters, that the EP-3E Aries II was a large, slow-moving airplane relative to the Chinese F-8, that Chinese jets had become increasingly aggressive in approaching and tailing U.S. reconnaissance airplanes, and that the airplane had landed in distress. Consequently, no apology was appropriate, and China should allow the immediate return of the crew and the airplane to the United States.[3] Chinese officials argued, in turn, that China had the right to exclude

[7] United States *ex rel.* Wood v. American Inst. in Taiwan, C.A. No. 98-1952, 14, 18 (D.D.C. Feb. 28, 2001). For application of the Foreign Sovereign Immunities Act, 28 U.S.C. §§1330, 1602–1611 (1994), to AIT's Taiwan counterpart, see Millen Indus., Inc. v. Coordination Council for N. Am. Affairs, 855 F.2d 879 (D.C. Cir. 1988).

[1] *See* Elisabeth Rosenthal & David E. Sanger, *U.S. Plane in China After It Collides with Chinese Jet*, N.Y. TIMES, Apr. 2, 2001, at A1. According to published reports, the EP-3E Aries II contained sophisticated intelligence-gathering equipment and was a variant of the U.S. Navy's P-3 patrol craft. The missions of the EP-3E Aries II include reconnaissance, surveillance, and antisurface and antisubmarine warfare.

[2] *See* John Pomfret, *U.S., Chinese Warplanes Collide over S. China Sea*, WASH. POST, Apr. 2, 2001, at A1; Erik Eckholm, *China Faults U.S. in Incident; Suggests Release of Crew Hinges on Official Apology*, N.Y. TIMES, Apr. 4, 2001, at A1.

[3] *See* Guy Gugliotta, *U.S. Expects Return of Plane, Crew*, WASH. POST, Apr. 2, 2001, at A14; David E. Sanger, *Powell Sees No Need for Apology; Bush Again Urges Return of Crew*, N.Y. TIMES, Apr. 4, 2001, at A1.

airplanes from flying over its exclusive economic zone,[4] that the airplane should have received permission before landing in China, and that, in any event, China had the right to conduct an investigation into the incident.[5] U.S. officials took the position, however, that such flights outside a state's territory were permissible under international law and that an emergency landing in China was necessary through no fault of the United States.[6]

The standoff between the two governments lasted eleven days. On April 11, the U.S. ambassador to China, Joseph W. Prueher, sent a letter to the Chinese minister of foreign affairs, Tang Jiaxum, reflecting discussions between the two governments. The letter stated, in part:

> Both President Bush and Secretary of State Powell have expressed their sincere regret over your missing pilot and aircraft. Please convey to the Chinese people and to the family of pilot Wang Wei that we are very sorry for their loss.
>
> Although the full picture of what transpired is still unclear, according to our information, our severely crippled aircraft made an emergency landing after following inter-

[4] *See* China Ministry of Foreign Affairs Press Release on Solemn Position on the US Military Reconnaissance Plane Ramming into and Destroying a Chinese Military Plane (Apr. 3, 2001), *at* <http://www.fmprc.gov.cn/eng/9607.html> ("The act of the US side constitutes a violation of the UN Convention on the Law of the Sea (UNCLOS), which provides, among other things, that the sovereign rights and jurisdiction of a coastal State over its Exclusive Economic Zone, particularly its right to maintain peace, security and good order in the waters of the Zone, shall all be respected and that a country shall conform to the UNCLOS and other rules of international law when exercising its freedom of the high seas."); China Ministry of Foreign Affairs Press Release on Spokesman Zhu Bangzao Gives Full Account of the Collision Between US and Chinese Military Planes (Apr. 4, 2001), *at* <http://www.china-embassy.org/eng/9585.html> ("The surveillance flight conducted by the US aircraft overran the scope of 'free overflight' according to international law. The move also violated the United Nations Convention on the Law of the Sea, which stipulates that any flight in airspace above another nation's exclusive economic zone should respect the rights of the country concerned. Thus, the US plane's actions posed a threat to the national security of China."); *see also* Christopher Drew, *Old Tactics May Pull the Rug from the U.S. Claim to Plane*, N.Y. TIMES, Apr. 4, 2001, at A1.

Under the UN Convention on the Law of the Sea (to which China, but not the United States, is a party), a coastal state has the right to establish an exclusive economic zone to the maximum breadth of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured. United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, Arts. 55–59, 1833 UNTS 397, 21 ILM 1261 (1982) [hereinafter LOS Convention]. Article 58 provides with respect to overflight of this zone that "all States . . . enjoy . . . the freedoms referred to in article 87 [of the LOS Convention] of navigation and overflight . . . " and that "[i]n exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State . . . ." Article 87 provides that "[t]he high seas are open to all States . . . . [The f]reedom of the high seas . . . comprises . . . : (a) freedom of navigation; (b) freedom of overflight . . . ." Customary and conventional rules also exist regarding the immunity of sovereign vessels, the right of a flag state to exercise penal jurisdiction over persons in service of its vessels in matters of collision on the high seas, and the duty of coastal states to provide safe harbor to vessels in distress. *See, e.g., id.*, Arts. 29–32 (rules applicable to warships in territorial waters, including immunity), Art. 95 (immunity of warships on the high seas), Art. 97 (penal jurisdiction regarding high seas collisions); GREENE HAYWOOD HACKWORTH, 2 DIGEST OF INTERNATIONAL LAW, §172, at 408–23 (1941); The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116 (1812); International Law Commission, Draft Articles on Jurisdictional Immunities of States and Their Property, Arts. 5 & 16, 2 Y.B. INT'L L. COMM'N, pt. 2, at 22, 50 (1991). With respect to rules concerning airplanes, see Convention Relating to the Regulation of Aerial Navigation, Oct. 13, 1919, Art. 32, 11 LNTS 173, 195 [hereinafter Paris Convention], which provided that military airplanes authorized to land or "forced to land" in the territory of a contracting party shall enjoy "the privileges which are customarily accorded to foreign ships of war." The Paris Convention was succeeded, however, by the Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, 15 UNTS 295 (Chicago Convention), which simply provides that no military airplanes shall land on the territory of a contracting party without authorization. *Id.*, Art. 3.

In 1976, a Soviet defector flew an advanced MiG-25 fighter jet to Japan, which the United States thoroughly inspected and reportedly returned months later in crates. *See* Charles Lane, *Past Actions Undercut U.S. Case, Lawyers Say*, WASH. POST, Apr. 6, 2001, at A28.

[5] *See* China Ministry of Foreign Affairs Press Release on Solemn Position, *supra* note 4 ("according to the 1944 Convention on International Civil Aviation and the Law of the People's Republic of China on the Territorial Sea and the Contiguous Zone, the US plane shall not fly over Chinese territorial airspace without prior consent of the Chinese side. . . . In doing so, the US has violated international law and encroached upon China's sovereignty and territorial airspace.")

[6] *See* Colin L. Powell, U.S. Secretary of State, U.S. Dep't of State Press Release on Interview on Fox News Sunday (Apr. 8, 2001), *at* <http://www.state.gov> ("We understand what territorial integrity means in the concept of international law, not what some countries claim beyond what we think is appropriate. So we always fly these kinds of missions in ways that are consistent with the common understanding of international law and we will continue to do so."); Colin L. Powell, U.S. Secretary of State, U.S. Dep't of State Press Release on Interview on CBS "Face the Nation" (Apr. 8, 2001), *at* <http://www.state.gov> (referring to flights "in international air space over international waters").

national emergency procedures. We are very sorry the entering of China's airspace and the landing did not have verbal clearance, but very pleased the crew landed safely. We appreciate China's efforts to see to the well-being of our crew.

In view of the tragic incident and based on my discussions with your representative, we have agreement to the following actions:

Both sides agree to hold a meeting to discuss the incident. My government understands and expects that our aircrew will be permitted to depart China as soon as possible.[7]

The letter further stated that the meeting would commence on April 18 and would discuss the causes of the incident, possible recommendations for avoiding such collisions in the future, the return of the airplane to the United States, and related issues.

On April 12, China allowed the twenty-four crew members to leave China.[8] The next day, U.S. Secretary of Defense Donald H. Rumsfeld stated that he had spoken with the pilot of the U.S. airplane to ascertain the circumstances of the collision, and that he wished to make certain points about the incident and the practice of states regarding such matters.

One issue was as to whether or not the EP-3 had made a turn into the fighter aircraft. The answer is it did not. It was flying straight and level. It was on autopilot, and it did not deviate from a straight and level path until it had been hit by the Chinese fighter aircraft, at which point . . . the autopilot went off and it made a steep left turn and lost some 5,000 to 8,000 feet of altitude as the crew attempted to regain control.

Second, with respect to the airspace—the Chinese airspace being entered: It is well-understood in international agreements that if an aircraft is in distress that it broadcast that on the accepted international channels.

The pilot made a decision to head towards Hainan Island. I am told that . . . the crew made some 25 to 30 attempts to broadcast Mayday and distress signals, and to alert the world, as well as Hainan Island, that they were going to be forced to land there.

The other Chinese fighter aircraft was in close proximity to the United States Navy EP-3. One would assume they were in contact with their airfield.

. . . .

. . . [T]he pilots in the aircraft and the crew in the aircraft were not able to hear well, because the collision had caused pieces of metal to perforate the fuselage of the aircraft, and the noise in the aircraft was such that it made it very difficult for them to hear anything. And therefore, they really could not be aware as to whether or not their distress signals had been acknowledged.

. . . .

. . . In this instance of the collision on the end of March and the first of April, our aircraft was in international airspace. The F-8 pilot, who later hit our aircraft, made two aggressive passes at the EP-3. On one pass, he came within an estimated three to five feet of the aircraft. On the third pass, he approached too fast and closed on the EP-3 and then flew into the propeller of the outer engine. This occurred some 70 nautical miles from Hainan. The F-8 broke into two, plunged into the sea. And the collision caused the nose cone of the EP-3 to break away and damage the second engine and a propeller on the right side of the aircraft, and to send pieces of metal through the fuselage.

. . . .

[7] *See* White House Press Release on Letter from Ambassador Prueher to Chinese Minister of Foreign Affairs Tang (Apr. 11, 2001), *at* <http://www.whitehouse.gov>. Although China had insisted that the United States deliver a *dao qian*, which is a formal apology conveying an admission of wrongdoing, the language of the letter did not express such an apology. When translating the letter into Chinese, however, the official China news agency used strong terms of profound regret. *See* Eric Eckholm, *Chinese Claim a Moral Victory, Describing a Much Bigger Battle*, N.Y. TIMES, Apr. 12, 2001, at A1.

[8] *See* Craig S. Smith, *China Releases U.S. Plane Crew 11 Days After Midair Collision*, N.Y. TIMES, Apr. 12, 2001, at A1.

> We had every right to be flying where we were flying. They have every right to come up and observe our flight. What one does not have the right to do, and nor do I think it was anyone's intention, is to fly into another aircraft. The F-8 pilot clearly put at risk the lives of 24 Americans.
>
> . . . .
>
> Let me just make a comment about several other reconnaissance flights or, I should say, instances where one nation's aircraft landed at another nation's airport, but without permission and because of some sort of emergency.
>
> On February 27, 1974, a Soviet AN-24 reconnaissance aircraft was low on fuel and made an emergency landing at Gambell Airfield in Alaska. The crew remained on the aircraft overnight. They were provided space heaters and food. They were refueled the next day and they departed. The crew was not detained and the aircraft was not detained.
>
> On April 6, 1993, a Chinese civilian airliner declared an in-flight emergency and landed in Shemya, Alaska, in the United States. It was apparently a problem of turbulence; very, very severe turbulence to the point that two people died, dozens were seriously injured, and the plane made an emergency landing on the U.S. airfield. The aircraft was repaired and refueled without charge, and it departed.
>
> On 26 March, 1994, Russian military surveillance aircraft, monitoring a NATO anti-submarine warfare exercise, was low on fuel and made an emergency landing at Thule Air Base in Greenland. It was on the ground about six hours, the crew was fed, the aircraft was refueled and it departed.
>
> Now, I mention these to point out that reconnaissance flights have been going on for decades. They are not unusual. They are well-understood by all nations that are involved in these types of matters. And in similar situations, nations have not detained crews and they have not kept aircraft.[9]

The United States wished to repair the airplane and fly it out of China. After extensive U.S.-China negotiations, however, the airplane was dismantled and then returned to the United States on July 3. Thereafter, the United States offered to pay $34,567 in compensation for costs relating to the emergency landing, but China rejected the offer as falling far short of the $1,000,000 it had requested.[10]

The US Spy Plane Incident – A Preliminary Examination of Key Legal Issues

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The collision between a US reconnaissance plane and a PRC fighter plane has given rise to a number of complicated legal, political, military and moral issues. My purpose here is not to defend or criticize the actions taken by either side or to comment on the political, military or moral aspects of the incident. Rather, my purpose is to examine in as impartial a manner as possible some of the key legal issues from the perspective of international law. Given the time constraints and the complexity of the issues, the analysis is necessarily preliminary and restricted in scope.

The main sources of international law are treaties, generally accepted customs, general principles of law and the opinions of international law scholars. The two most relevant treaties are the Convention on International Civil Aviation (the Chicago Convention) and the Convention on the Law of the Seas (LOS). Both China and the US have signed and ratified the Chicago Convention. China has also signed and ratified the LOS, although the US has not.

Nevertheless, the LOS may be applicable in whole or in part as customary international law or as general principles of law. Customary international law results from a general and consistent practice of states followed by states out of a sense of legal obligation. I will assume that the relevant provisions of the LOS are applicable as customary international law or general principles of law in this case unless indicated otherwise.

1. Did the US plane have the right to spy 60-80 miles off of China's coast?

Both sides agree that the US spy plane was flying approximately 60-80 miles off of China's coast when the collision occurred, outside of China's territorial space but within the exclusive economic zone (EEZ). Under the LOS, a country's territorial waters, including the airspace above, extend 12 miles from the coast. However, a country may also claim up to a 200 mile EEZ.

All aircraft, including military aircraft, enjoy the right of overflight in an EEZ. The right of overflight is subject to certain qualifications, including that parties "shall refrain from threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of United Nations" (LOS, art. 301).

In an article published in the People's Daily Overseas Edition and summarized in the China Daily, PRC legal scholar Li Qin claims the US violated international law in part based on Article 301 of the LOS. He claims that the US's repeated reconnaissance missions in China's EEZ during peace time constitute hostile acts that threaten China's national security and violate China's sovereignty, territorial integrity and political independence.

No one has suggested that the US pilot in this instance - or apparently any US pilot on similar missions - explicitly threatened or used force against China. Nevertheless, any country subject to repeated spy missions is likely to consider the missions unfriendly or even hostile acts, as suggested that by the fact that countries often protest such missions and send up fighter planes to intercept them. Moreover, the purpose of such missions will often be to gather military intelligence information that could be used against the target state in a future armed conflict.

On the other hand, it is common practice for many countries, including China, to carry out such activities in the EEZ of other states. And although countries may protest such missions and send up fighter planes to intercept, they will often work out protocols to avoid escalation of tensions and the kind of tragic accident that occurred in this case, accepting by implication the reality and arguably the legality of such intelligence-gathering activities.

Furthermore, and significantly from a legal perspective, although aircraft are expressly prohibited from spying in the twelve mile territorial zone, they are *not* so prohibited from engaging in spying in the EEZ. Indeed, Article 19(2)(a), applicable to the territorial zone, contains virtually the same provision as Article 301 requiring states to refrain from any threat or use of force. In addition, however, Article 19(2)(c) then expressly prohibits intelligence-gathering activities. This suggests that the drafters and state signatories meant to distinguish between (i) spying and "any threat or use of force against the sovereignty, territorial integrity or political independence of the Coast state" and (ii) spying in the territorial zone and the EEZ or high seas. Had the states wanted to make spying in the EEZ illegal, they could have included an express prohibition against it just as they did for spying in the 12 mile territorial zone. Moreover, a general principle of international law is that whatever is not explicitly prohibited is permitted (see *S.S. Lotus* (1927)).

In sum, given the practice of many nations in conducting spying in the EEZ, there can be no customary international law prohibition against such activities. Nor does the LOS expressly prohibit spying in the EEZ. If anything, by implication it appears to allow it. Accordingly, the US plane appears to have been within its *legal* rights when it was gathering intelligence information 60-80 miles off of China's coast.

At that point, a collision occurred between the heavier, slower US plane and one of the two smaller, quicker PRC fighter planes sent to intercept the US plane. We do not presently know for sure whether the US or Chinese plane caused the collision. As the cause of the collision may be relevant with respect to the rights of the US crew and the US's rights over the plane, I shall divide my analysis accordingly, assuming first that the Chinese plane caused the collision and then that the US plane caused the collision.

2. *Assuming the Chinese plane caused the accident, did the US military plane in distress have the right to land on Chinese territory without obtaining prior permission? Could China have shot down the US plane?*

After the collision, the US plane reportedly issued multiple mayday warnings and then proceeded to land, without express prior permission, from Chinese authorities, who did not respond to the repeated mayday calls. China has objected to the landing based on Article 3 of the Chicago Convention, which provides that no state aircraft (including military aircraft) shall land in the territory of another state without authorization by special agreement or otherwise.

However, each state is obligated under Article 5 of the Chicago Convention to permit the planes of other states to land without permission for non-traffic purposes. Moreover, under Article 25 of the Chicago Convention, each state undertakes to render such measures of assistance to aircraft in distress as it may find practicable. Article 98 of the LOS obligates each state to require the master of ships flying its flags to render assistance to any person found at sea in danger of being lost, and, after a collision, to render assistance to another state's ship, crew and passengers. Every state must also promote the establishment, operation and maintenance of an

adequate search and rescue service. In addition, under Article VI of the Agreement on Maritime Transport between the US and PRC, both parties are obligated to give friendly assistance to a vessel involved in a maritime accident or in any other danger. The 1980 Consular Convention between the US and the PRC also contemplates that the states will take measures for saving the passengers and crew of civilian vessels and aircraft. While all of these treaties only expressly apply to civilian ships or aircraft, all support a general legal principle and customary law obligation applicable to all states to provide assistance to those in distress.

Moreover, Article 32(1) of the International Law Committee's Draft Articles on State Responsibility precludes the wrongfulness of an act such as the US plane's landing in Chinese territory in the event of distress where the pilot reasonably believed that landing was necessary to save the pilot's life or the life of the crew. Citing a number of treaties and cases, the ILC concluded in its commentary on Article 32 that "a body of State practice exists," and that in accordance with this practice, "if a State organ adopts conduct that is not in conformity with an obligation not to cross the sea or air frontier, or possibly a land frontier, of another State without the latter's authorization ... that conduct is not an international wrongful act if the organ in question was compelled to adopt it in order to save its own life or that of persons entrusted to its care."

Indeed, the alternative theory, that a plane in distress must first obtain express permission is objectionable on moral grounds. Surely any legal rule that would allow China or any other country to turn its back on a non-threatening plane in distress and say in effect, 'sorry, crash in the ocean,' would be difficult to justify. Elementary considerations of humanity would argue against any such rule.

On the other hand, a country has the right to defend itself against external threats. If a hostile military plane in the possession of known terrorists and known to be carrying bombs of mass destruction were about to enter the US, for example, simply issuing a mayday warning would not prevent the US from taking steps to verify the crew's intent and then forcing the plane to land elsewhere or perhaps even shooting the plane down if the pilot persisted despite warnings from changing course.

In the modern high-tech age, in most instances countries will be able to ascertain whether a plane constitutes a threat long before it reaches the 12 mile territorial zone. The incoming plane would appear on radar. The receiving country would ask the pilot to identify himself and state his purpose. If the pilot failed to respond, fighter planes would be sent up to intercept. If the plane continued to head toward the target country, the target country would issue verbal warnings that the plane is not cleared to land and the pilots must identify themselves and state their purpose or change course, or else they could be forced to land or fired on. Warning shots could then be fired across the nose of the incoming plane. Other indicators of the hostile intent of the plane include the nature of the craft (fighter plane, bomber, small civilian aircraft, etc.), whether the plane is opening its bomb hatch in preparation for bombing and the existence of hostilities between the countries.

In the present case, the US plane did not constitute an immediate hostile threat to China's security, and Chinese authorities knew that. China was well aware that US spy planes flew through the EEZ, as indicated by their repeated protests. No US spy plane had ever threatened China in the past. This US spy plane was on a regular mission. China was aware that the purpose of such flights was to gather intelligence, not engage in a military attack on China. The only reason the US plane ended up in Chinese territory was because of the mid-air collision, which Chinese authorities were monitoring. Moreover, the larger geo-political context makes it

impossible to assume that the US was going to drop bombs on China. It is simply inconceivable that the US would suddenly choose to put bombs on a slow spy plane, engineer a mid-air collision as a pretext to an emergency landing in Hainan (not a major military target or urban center) with the intent of then bombing China. In fact, when the second PRC fighter pilot's reportedly sought instructions whether to shoot down the US plane after the collision, Chinese authorities reportedly ordered him not to fire on the US plane, suggesting that they were well aware the US plane did not constitute an immediate hostile threat.

3. Assuming the Chinese plane caused the accident, were the crew and plane entitled to sovereign immunity after landing in distress in Chinese territory ?

Article 87(1)(b) of the LOS provides for freedom of the high seas, including freedom of overflight. Article 95 provides that warships have complete immunity on the high seas from the jurisdiction of any state other than the flag state. Article 96 provides immunity on the high seas for all state ships not used for commercial purposes. Article 110 provides that ships and military aircraft cannot be boarded on the high seas unless there are reasonable grounds for suspecting the ship or aircraft is engaged in piracy, the slave trade or unauthorized broadcasting or operating without nationality.

Article 97 provides that in the event of a collision on the high seas, no penal or disciplinary proceedings may be instituted against the master of the ship except before the judicial or administrative authorities of the flag state or of the state of which the master is a national. Similarly, Article 3 of the Brussels Convention of the Unification of Certain Rules Relating to the Immunity of State-owned Vessels limits jurisdiction for actions arising out of the non-commercial operation of military vessels to the flag state.

Several caveats are in order. First, Article 97 of the LOS does not expressly apply to aircraft. Second, neither China nor the US is a party to the Brussels Convention, although the US, in the Public Vessels Act of 1920, consented to suits in US courts for damage claims arising out of the operation of public vessels. Third, and most importantly, although the US plane may have enjoyed immunity while on the high seas, the specific issue in this case is whether the US plane continued to enjoy such immunity once it entered Chinese territory, albeit due to the need to make an emergency landing.

Generally, military troops, ships or aircraft cannot enter into the territory of another state without permission. State consent to entry may be either express or implied. In *The Schooner Exchange v. McFaddon,* 7 Cranch 116 (1812), the US Supreme Court reasoned that if a state consents to entry, then the military troops or ships would be subject to sovereign immunity. The court also noted that even in the absence of a treaty expressly providing that military ships in distress may land, general principles of law and morality compel the conclusion that states impliedly consent to allow ships in distress to seek refuge. Moreover, the implied consent to allow military ships in distress to seek refuge entails an implied consent to their sovereign immunity. Although the case was decided before the invention of aircraft, the court's reasoning regarding ships would seem equally applicable to aircraft.

As noted, the ILC concluded that a pilot who lands his plane in distress in the territory of another state without obtaining prior authorization has not committed a wrongful act, provided the landing was necessary to save the lives of the pilot or crew, landing did not create a greater peril to innocent lives and the pilot did not contribute to the distress. If the US plane's landing did not constitute a wrongful act, then there would be no reason for the crew or plane to lose its claim to sovereign immunity, although as discussed below the US may be obligated to compensate China

for costs resulting from the landing. Having surveyed the relevant law and state practice at the time, Lissitzyn likewise concluded that aircraft in distress that land in the territory of another state enjoy at minimum certain forms of immunity, at least if the intruder did not cause the distress.

> Foreign aircraft and their occupants may not be subjected to penalties or to unnecessary detention by the territorial sovereign for entry under such circumstances [i.e. distress]... at least when the distress ... has not been due to negligence chargeable to the persons in control of the aircraft.

Ships and aircraft therefore do not lose the sovereign immunity that they enjoyed on the high seas by virtue of having been forced to seek refuge in another state's territory, at least if they did not contribute to the distress. Indeed, assuming that the Chinese plane caused the accident, thus violating international law, it would seem unfair to "reward" China for violation of international law by depriving the US crew and plane of immunity.

4. *Assuming the US plane caused or contributed to accident and therefore caused or contributed to the distress, did the US military plane have the right to land on Chinese territory without obtaining prior permission?*

Article 32(2) of the ILC's Draft Articles prevents a state from relying on distress to preclude the wrongfulness of an act "if the State in question has contributed to the occurrence of the situation of extreme distress or if the conduct in question was likely to create a comparable or greater peril." Accordingly, an intruding plane in distress could lose certain rights and privileges if that plane caused or contributed to the distress. However, even if the US plane caused the collision, it would still have enjoyed the basic humanitarian right to land, subject as noted previously to verification by China that the plane did not constitute a hostile threat. Indeed, ILC commentary on Article 32 allows that planes in distress that caused the distress may land, though such landing is deemed illegal. If the landing was illegal by virtue of the US plane having caused the collision, the US, at minimum, would be liable for the loss of the Chinese plane, for the wrongful death of the Chinese pilot, and arguably for the costs associated with the illegal landing. Whether the US would lose other rights, in particular sovereign immunity over the crew and the plane, is more debatable.

5. *Assuming the US plane caused the crash, were the crew and plane entitled to sovereign immunity?*

Parties that enjoy sovereign immunity generally do not lose that immunity simply by virtue of having committed a crime or tort. Article 31 of the Vienna Convention on Diplomatic Relations, for instance, provides that a diplomatic agent shall enjoy immunity from criminal jurisdiction and to civil and administrative jurisdiction, subject to certain narrow exceptions. Diplomats who violate criminal laws may be deported, but they cannot be held in detention, interrogated or subject to criminal liability, and they may be subject to civil and administrative liability in only limited circumstances not applicable here. The 1980 Consular Convention between the US and the PRC contains similar provisions, although it does limit immunity for civil claims by a third party for damage caused by a vessel, vehicle or aircraft.

Similarly, if a military ship spies in a state's territorial sea in clear violation of Article 19(c) of the LOS, the coastal state may require the warship to leave but it cannot detain or search the ship (see LOS, art. 30). It bears emphasizing that the coastal state's rights with respect to military ships are significantly more limited than with respect to merchant ships or government ships

operated for commercial purposes. In the case of merchant ships or government ships operated for commercial purposes, the coastal state has the right to arrest persons or board a ship for investigation in certain limited circumstances, including where the crime committed on board the ship during its passage is of the kind to disturb the peace of the country or the good order of the territorial sea or the consequences of the crime extend to the coastal state. See LOS, art. 27(1).

Lissitzyn notes that there is some support in law and practice for the view that where an intrusion is attributable to the negligence or the intentional misconduct of the intruder, the intruding crew and plane may lose certain privileges. However, he also notes that given the complicated nature of flying aircraft, it is debatable whether negligence alone should diminish any of the state's privileges unless the negligence is so evident as to amount to recklessness or constructive intent. If the US plane did suddenly veer to the left, thus colliding with the Chinese fighter plane, as China claims, then perhaps such actions would meet the higher standards of recklessness and constructive intent.

Even assuming some privileges are lost, it is not clear exactly what those privileges would be. While the ILC supports the view that parties that contribute to the distress are not entitled to the preclusion of wrongfulness, the Commission's comments regarding liability in such cases are limited to a claim for monetary damages.

To sum up the analysis so far, if the Chinese plane caused the accident, the US plane would have the right to land in distress in Chinese territory and the US would be entitled to sovereign immunity with respect to the crew and plane. If the US plane caused or contributed to the accident, the US plane would still have had the right to land in distress in Chinese territory, given that China was aware that the US plane did not constitute a hostile threat. If the US plane caused or contributed to the collision, whether the crew and plane still enjoyed sovereign immunity is somewhat more debatable. There is no applicable treaty between the US and China directly on point. Further, there are divergences in practice, and some authority in law for both positions. Accordingly, there is no clear customary international law, which requires *inter alia* consistent state practice. Nevertheless, the better view, as supported by the greater weight of law and practice and scholarly opinion, is that while the US would be liable for monetary damages if the US plane caused the crash, the crew and plane would still enjoy sovereign immunity.

6. Assuming the US owes China compensation, does that give China the right to detain the pilot, the crew or the ship?

Assuming that the US did owe China compensation, China would not by virtue of its claim for compensation have the right to detain the pilot, crew or plane. Article 28(1) of the LOS states that the coastal state should not stop or divert a foreign commercial ship passing through its territorial sea for the purpose of exercising civil jurisdiction in relation to any person on board of the ship.

Article 28(2) allows states to levy execution against or to arrest a *commercial* ship for the purpose of civil proceedings where the obligations or liabilities are assumed or incurred by the ship itself in the course of its voyage through the waters of the coastal state. However, as noted, a coastal state has less rights with respect to *military* ships, and may only require that they leave the territory if they violate laws.

Accordingly, while China may be entitled to compensation for the costs associated with the US plane's landing, and for additional losses if the US plane caused the collision, China must raise its claims for damages through other channels.

7. Was China obligated to notify US consular officials and to facilitate communications between the crew and such officials?

Even assuming for the sake of argument that China had the right to detain the crew and search the plane, China was obligated to notify US consular officials as soon as possible. Article 37(c) of the Vienna Convention on Consular Relations, to which both the US and China are parties, requires the receiving state to notify without delay consular officials of the sending state in the event an aircraft registered in the sending state suffers an accident in the territory of the receiving state. Article 39 of the 1980 Consular Convention between the US and China also requires the receiving state to notify the flag state as soon as possible regarding the landing a civilian aircraft in distress in Chinese territory.

According to Article 36 of the 1980 Consular Convention, a consular official shall be entitled to provide any type of assistance to civilian aircraft in the territory of the receiving state, including boarding the aircraft as soon as landing has occurred. According to Article 37, the consular officer has the right in accordance with the law of the receiving state to investigate any incident occurring on board the aircraft and to question the pilot and crew. More generally, Article 35(1) provides that consular officials shall have the right to communicate and meet with any national of the sending state, and the receiving state shall in no way restrict access.

Conversely, the rights of the receiving state to conduct an investigation are more limited. Under Article 27(2) of the LOS, if a state arrests any person or conducts an investigation on a non-military commercial ship within its territorial sea, the state is obligated to notify a diplomatic agent or consular officer of the flag state before taking any steps and to facilitate contact between such agent or officer and the ship's crew. Similarly, Article 38 of the 1980 Consular Convention provides that when the courts or other competent authorities of the receiving state intend to take compulsory actions or to start an official investigation aboard a vessel of the other state, those authorities must notify the consular officer before initiating any such action. If because of the urgency of the matter, it was not possible for the authorities to inform the consular officer before initiating the action, and the consular officer was not present when the actions were carried out, then the authorities must promptly provide the consular officer full relevant particulars of the actions taken. It is not clear exactly when the PRC authorities met with the crew and began their investigation, and whether they had at that time notified the US consular officers about the incident. It does appear however that PRC authorities questioned the crew and boarded the plane without US consular officers present.

Article 35(2) of the 1980 Consular Convention also provides that if a national of the sending state is arrested or placed under any form of detention, the competent authorities of the receiving state shall immediately, but no later than within four days from the date of arrest or detention, notify the consulate of the sending state. Under Article 35(3), the competent authorities must also immediately inform the national of the sending state of the rights according to him under the Convention to communicate with a consular officer. Specifically, under Article 35(4), a consular officer has the right to visit a national under detention or arrest as soon as possible, but at the latest, within two days from the day on which the authorities notified the consular of the arrest or detention. PRC authorities apparently complied with the requirement to notify the consular within the allotted time. Whether they complied with the requirement to notify the detained crew members of their right to communicate with a consular officer is not clear.

Article 11 of the PRC Criminal Law and Article 16 of the PRC Criminal Procedure Law provide that the criminal responsibility of foreigners who enjoy diplomatic privileges and immunities

shall be solved through diplomatic channels. But even assuming the pilot and crew did not enjoy diplomatic privileges and immunities, they would enjoy the rights provided under the PRC Criminal Procedure Law. For instance, according to Article 96 of the Criminal Procedure Law, a criminal suspect may appoint a lawyer after the suspect is interrogated for the first time or from the day compulsory measures are adopted against him. Similarly, under Article 64, a public security organ must produce a detention warrant at the time of detention. Detainees must then be interrogated within 24 hours according to Article 65. Whether PRC authorities complied with such requirements is not clear.

NEWS ANALYSIS/TOPICS

Japan's rights and wrongs in the 'fishing boat' incident

By MARK J. VALENCIA
Special to The Japan Times

HONOLULU — Japan's violent pursuit of a suspected North Korean boat in the East China Sea has prompted both domestic and international controversy. Domestic opposition critics are questioning Japan's right to use force on the "high seas" and are using this incident to argue against expanding Japan's military activities. Prime Minister Junchiro Koizumi may use this incident to justify his plans to strengthen the military and its authority. He also wants to pass a law allowing such suspect foreign ships in Japan's 200-mile exclusive economic zone to be arrested and, if they resist, to be fired upon. A law allowing such actions in Japan's 12-mile territorial sea was passed last November.

The limits on the use of force in such situations are vague and there are precedents for such extreme measures. For example, Russian patrol boats and aircraft frequently fire on vessels illegally fishing in its claimed waters. However, Japan's promulgation and "blanket" implementation of such a law for its EEZ could lead to incidents with Russia, South Korea and China.

Japan has frequently detained South Korean boats allegedly fishing illegally in its EEZ, and in late September a Japan Coast Guard vessel even rammed and sank one such boat. Moreover, Japan has an ongoing dispute with China concerning Chinese scientific research and even alleged "spy" vessels operating in Japan's claimed EEZ. The domestic legal sanctioning of the tactics used in this incident could also amount to a new interpretation of international law that maritime powers, including the United States, may well oppose.

A U.S. satellite first spotted the alleged North Korean vessel within Japan's claimed EEZ on Dec. 18 in the vicinity of Amami-Oshima island. Japan Coast Guard vessels began pursuing the ship in Japan's claimed EEZ. During the six-hour pursuit, they fired more than 500 rounds. Four coast guard vessels finally surrounded it in China's EEZ, i.e., beyond the line Japan recognizes as the "provisional" boundary. The crew of the suspect ship then fired back, the coast guard vessels retaliated, and, after an explosion, the suspect ship sank, with the loss of all 15 hands.

A solution must be found that puts North Korea on notice that force will be used against suspected 'terrorist' vessels, but which does not undermine the principle of freedom of navigation

North Korea has denied any link to the ship, while calling the incident "brutal piracy and unpardonable terrorism." Despite the extreme rhetoric and what one may think of North Korea, the incident does raise a number of questions of international law. Japan and China are parties to the 1982 Convention on the Law of the Sea. According to that convention, a nation can board, inspect and arrest a foreign ship in its EEZ to ensure compliance with its laws and regulations. And under that convention, Japan has the right of hot pursuit if it suspects a vessel has violated its relevant EEZ laws. Moreover, the suspect vessel failed to stop for inspection as ordered. And Koizumi conferred with officials in Beijing before ordering the coast guard to halt the vessel. So far so good.

But there is no Japanese domestic law allowing such use of force in its EEZ. Only warning shots are permitted. According to the recent Saiga decision by the International Tribunal on the Law of the Sea, "the use of force must be avoided as far as possible, and where it is unavoidable, it must not go beyond what is reasonable and necessary under the circumstances."

Considerations of humanity must apply and all efforts must be made to ensure life is not endangered. If the vessel were of almost any nationality other than North Korean, firing directly at it and endangering its crew would most likely be considered an overreaction and an excessive use of force by the international community.

Further, this incident occurred partially in disputed waters, and the ship, when initially fired upon, was thought to be from the other claimant, China. Even the possibility that it was a Chinese vessel should have dictated moderation in Japan's response. Thus it would seem that this use of force, particularly in another country's claimed EEZ, was out of proportion to the alleged offense.

Japan may, however, argue that it was an act of self-defense in response to an "attack." But its coast guard vessels were the pursuers and fired first, so it is difficult for Japan to argue "self-defense." And Japan is not at 'war' with North Korea. Nevertheless, given the current international concern with terrorism, proving the vessel was a North Korean ship which was attempting to land or retrieve men or material in Japan might bolster a self-defense argument.

What then should Japan have done? It might have been more prudent to first observe the vessel surreptitiously to determine exactly what it was, whose it was, and what it was up to. This information would have determined which agency should respond. If the vessel entered Japan's territorial sea, and its presence was deemed to be noninnocent, then its arrest with the use of necessary force would have been appropriate. If it did not enter the territorial sea, a better approach might have been to make the vessel aware it was being observed. If it was a spy ship, it would most likely have left the area. If it was fishing illegally then it

would have been subject to arrest by the coast guard with an appropriate amount of force, if necessary. If possible, warning shots and, if necessary, ramming, are preferable to firing directly at an illegal fishing vessel.

There are many "spy" vessels from China, North Korea and Russia operating in waters around Japan and the potential for further incidents is high. What should Japan do? First, it needs to upgrade its detection and response capabilities and to review the relative responsibilities, coordination, and communication procedures between its Maritime Self-Defense Force and the coast guard. Second, Japan might declare that it will treat in similar fashion all suspected North Korean spy boats or boats that fail to identify themselves. But most important, Japan immediately must negotiate provisional boundaries with its neighbors or at least arrangements for responding to such situations.

However, it should proceed cautiously with legislation authorizing the use of force against "spy" vessels in its EEZ. Maritime powers like the U.S. would be wary of any agreement or interpretation that would diminish the freedom of navigation in the EEZ. Indeed, when a U.S. spy plane collided with a Chinese jet fighter over China's EEZ last April, the U.S. argued that such flights in the EEZ are permitted under the regime of "freedom of the high seas." So as not to undermine this principle, the U.S. has negotiated bilateral agreements with countries or, alternatively, seeks prior permission from the flag state to stop suspect foreign vessels on the "high seas."

Moreover, the U.S. frequently sends spy satellites and planes over North Korea and shares the information obtained with Japan. Japan would therefore be in the awkward position of arguing that it is all right for a country to use spy satellites and planes to gather intelligence over another country's EEZ, territorial sea or even its land area, but it is not acceptable for a country that has no such assets to attempt to do so in an EEZ the old-fashioned way.

One lesson to be learned from this incident is that there is a gray area surrounding navigation rights, military activities and the use of force in the EEZ. A solution must be found that puts North Korea on notice that force will be used against suspected "terrorist" vessels, but which does not undermine the principle of freedom of navigation in the EEZ. Indeed, to prevent serious spill-over effects, the rights and wrongs of such operations need to be negotiated between Northeast Asian countries — and perhaps the U.S. — the sooner the better.

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BBC

Egyptian foreign minister doubts Israeli allegations about captured arms ship

BBC Monitoring Middle East - Political; <?xml:namespace prefix = st1 ns = "urn:schemas-microsoft-com:office:smarttags" />London; Jan 7, 2002;

[redacted]

Abstract:
The talk that the Palestinians were trying to smuggle arms via Elat is illogical and that the arms-laden ship transited the Suez Canal is unreasonable because Egypt's measures in the canal do not allow arms smuggling through it, he elaborated.

[redacted]

Excerpt from report in English by Egyptian news agency MENA web site

Cairo, 7 January: ... Asked about the Israeli government's accusations against Palestinian Leader Yasir Arafat that he masterminded the **ship** incident, he replied that all the news coming from **Israel** on this score raised misgivings.

The ship was stopped 500 km offshore in international waters, so how could they know its destination, and how come any person could seek to smuggle 80 tonnes of arms on a boat at sea, Mahir wondered, adding the Israelis have said the ship's destination was Elat and then they said it was going to cross the Suez Canal.

The talk that the Palestinians were trying to smuggle arms via Elat is illogical and that the arms-laden ship transited the Suez Canal is unreasonable because Egypt's measures in the canal do not allow arms smuggling through it, he elaborated.

He added that the US side said the ship was carrying arms to Hezbollah, and this means all these news reports are conflicting and raise doubts now that discovery of the ship coincided with General Zinni's visit...

On whether Egypt will succumb to any pressures as regards return of the Egyptian ambassador to Israel, Mahir replied that Egypt does not accept any pressures in any situation.

Regarding the row triggered by Libya's objection to convening the upcoming Arab summit in Beirut, a matter which belittles expectations about it, Mahir cited a resolution issued to hold the next Arab summit at a certain timing and in a certain place...

Credit: MENA news agency web site, Cairo, in English 7 Jan 02

Egypt and Israel hold talks on fate of arms ship sailors

BBC Monitoring Middle East - Political; London; Jan 13, 2002;

Abstract:

Israel *and Egypt have opened discussions over the fate of several Egyptian sailors who were employed on the Karine-A, Egypt's ambassador to the US, Nabil Fahmi, told The Jerusalem Post in an interview on Friday [11 January]. The Egyptian sailors, who were on board the* ***ship*** *captured by* ***Israel*** *last week with a cache of weapons heading to the PNA [Palestinian National Authority], are currently in* ***Israel's*** *custody. Egypt has refrained from commenting publicly on the smuggling operation, saying it wants to see all the evidence before drawing judgment.*

Excerpt from report in English by Janine Zacharia entitled: "Egypt, Israel discussing captive Karine-A sailors"; published by Israeli newspaper The Jerusalem Post web site on 13 January

Israel and Egypt have opened discussions over the fate of several Egyptian sailors who were employed on the Karine-A, Egypt's ambassador to the US, Nabil Fahmi, told The Jerusalem Post in an interview on Friday [11 January]. The Egyptian sailors, who were on board the **ship** captured by **Israel** last week with a cache of weapons heading to the PNA [Palestinian National Authority], are currently in **Israel's** custody. Egypt has refrained from commenting publicly on the smuggling operation, saying it wants to see all the evidence before drawing judgment.

Some on board the **ship** have told Israeli officials they planned to pass through the Suez Canal and dock in Alexandria before heading towards the Gaza coast with the weaponry loaded on smaller boats. Fahmi says Egypt is investigating. "I do expect the Americans to provide us with information," Fahmi said. "There have been initial discussions between the Israeli Foreign Ministry and our charge d'affaires in **Israel**, especially with regard to the sailors themselves."...

Fahmi said Egypt would return its ambassador once "serious negotiations" between Israel and the Palestinians resume. Asked if Egypt was upset that the Palestinians planned to smuggle weapons through its territory, Fahmi insisted that all the facts were still not available, but added: "Had that been the case, it would have been a serious problem."

Some Israeli officials have weighed swapping the detained sailors for Azzam Azzam, an Israeli Druze serving 15 years of hard labour in Egypt for espionage...

Of the idea, Fahmi said: "These sailors are not accused of anything. Why do you assume that they're guilty? Secondly, it negates our whole argument that Azzam Azzam did something wrong. You just trade him off for some sailors who may have not done anything wrong?"

One Israeli diplomat said the Egyptian sailors apparently wanted to get off the **ship** when they discovered the plot to smuggle weapons, suggesting that **Israel** does not plan to charge the Egyptians with any wrongdoing.

Fahmi said the smuggling incident would not impact Egyptian- Palestinian relations in the long term "because the relations go far beyond one case or another". "That being said, I can't tell you what kind of impact it will have in the short term because I don't know the actual facts on the ship itself," he said...

Credit: The Jerusalem Post web site, in English 13 Jan 02