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ELECTRONIC RECONNAISSANCE FROM THE HIGH SEAS AND INTERNATIONAL LAW

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The controversy between the United States and the North Korean authorities consequent upon the seizure by the latter of U.S.S. *Pueblo* on 23 January 1968 revolved in part around questions of fact. The North Korean authorities accused the ship of deliberately intruding into the territorial sea claimed by them (apparently 12 miles in width); the United States denied that the ship had approached the North Korean coast so closely. At no time, according to published data, have the North Korean authorities asserted the right to seize the ship on the ground that it had been engaged in electronic reconnaissance of North Korea while remaining on the high seas. Abstention from making such a claim of right corresponds to the pattern of conduct followed in comparable situations by the Soviet Union.[1] There is, furthermore, no available evidence that the North Korean authorities have formally proclaimed or established outside the territorial sea claimed by them a contiguous zone for security control of navigation.

It has, nevertheless, been suggested that there may be a trend in international law toward the emergence of a right to proclaim and enforce on the high seas contiguous zones of unspecified extent for the prevention or control of electronic reconnaissance by foreign vessels, including warships.[2] Although further technological progress may make such reconnaissance less and less useful, its utility cannot be said to have already disappeared. Consequently, it seems appropriate to consider the extent, if any, to which such a trend has actually manifested itself.

It is conceivable that under international law a coastal state could have at least three kinds of rights designed to enable it to prevent or control foreign electronic reconnaissance from adjacent areas of the high seas:

First, the right to proclaim contiguous zones in which it could forbid

all vessels, including foreign warships, to engage in electronic reconnaissance of any kind, with a concomitant right to enforce such prohibition by seizure and forfeiture of the offending ship and, possibly, imposition of criminal penalties upon the ship's personnel. In the *Pueblo* incident, the North Korean authorities seem to have, in fact, come close to enforcing the policy underlying such a possible right, without publicly enunciating or justifying it.

Second, the right to proclaim contiguous zones in which the collection of information about the coastal state by electronic means would be regarded as a violation of international law by the state engaged in such collection, but without the right to seize the foreign ships concerned.

Third, the right to punish individuals, including members of foreign armed forces, for engaging in forbidden electronic reconnaissance, in a contiguous zone of the high seas, when such individuals are apprehended within the territorial jurisdiction of the offended state. Such a right, by itself, would probably be the least effective safeguard of the interest of the coastal state in controlling electronic reconnaissance. It could be combined, however, with the second type of possible rights.

But the statement that a state conceivably *could* have certain rights under international law does not imply that it already has them or that there is a trend toward the emergence of such rights or that it is desirable for them to exist. Rules of international law usually reflect an accommodation of several interests and rest on a consensus which can be formally manifested in a treaty or inferred from uniformities in the practice of states. What, then, are the relevant existing or emerging rules?

The most authoritative, though not universally binding in a formal sense, guides to the relevant international law of the sea today are two Geneva Conventions on the Law of the Sea concluded in 1958—the Convention on the Territorial Sea and the Contiguous Zone and the Convention on the High Seas.[3] Not all states—or even a majority of states—are parties to these treaties.[4] In particular, North Korea, which is not recognized as a state by a large number of states, is not entitled to become a party to either of these conventions.[5] Nevertheless, since many of the provisions of these treaties represent rules generally accepted by the international community, they are an appropriate starting point for an analysis of the relevant content of international law and of trends in it.

Directly relevant to the question of establishment of contiguous zones for security purposes is article 24 of the Convention on the Territorial Sea and the Contiguous Zone, which reads as follows:

> 1. In a zone of the high seas contiguous to its territorial sea, the coastal state may exercise the control necessary to:
>
> (a) Prevent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea;
>
> (b) Punish infringement of the above regulations committed within its territorial sea.
>
> 2. The contiguous zone may not extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured.
>
> 3. Where the coasts of two states are opposite or adjacent to each other, neither of the two states is entitled, failing agreement between them to the contrary, to extend its contiguous zone beyond the median line every point of which is equidistant from the nearest points on the baselines

from which the breadth of the territorial seas of the two states is measured.

It will be noted that "security" is not one of the specified purposes for which contiguous zones may be established. The omission is deliberate. The draft articles prepared by the International Law Commission which formed the basis of the work of the 1958 Conference on the Law of the Sea contained a provision similar to the first two sections of the finally adopted text of article 24. It did not contain any mention of "security" but also omitted the word "immigration."[6] At the Conference, Poland proposed that paragraph 1 of the article be replaced by the following text: "In a zone of the high seas contiguous to its territorial sea, the coastal state may take the measures necessary to prevent and punish infringements of its customs, fiscal or sanitary regulations, and violations of its security."[7]

In the First Committee of the Conference, where amendments required only a simple majority, the Polish proposal was adopted, after little reported discussion, by a vote of 33 to 27, with 15 abstentions.[8] But in the plenary meeting, where a two-thirds majority was necessary, the proposal failed of adoption, receiving 40 votes against 27 negative votes, with nine abstentions. Instead, the Conference adopted, by 60 votes to none, with 13 abstentions, a U.S. proposal which became the text of article 24.[9] Again, there was virtually no reported discussion, and the names of the states voting for and against the proposal are not listed.

Although the Polish proposal thus received a clear majority of the delegations voting (though not of the 87 delegations present at the Conference), the lack of a single vote in opposition to the U.S. proposal suggests that the sentiment in favor of the Polish proposal was not as strong as the number of votes cast for it might indicate. This impression is further borne out by the failure of any state, upon signing, ratifying, or acceding to the convention, to reserve its right to establish contiguous zones for security purposes, although numerous reservations have been entered to other provisions of the convention.[10] Nevertheless, it should be noted that numerous states, including Poland and the Republic of Korea, are not parties to the convention.[11] Some states, including Poland, have had provisions in their national legislation for security zones in the adjacent areas of the high seas.[12] It cannot be said, therefore, that article 24, in limiting contiguous zones to the purposes stated in it, has declared or established a rule clearly applicable to states which are not parties to the convention.[13] But the evidence does not indicate any trend in state practice toward expanding or strengthening claims of right to establish contiguous zones for security purposes. In particular, the authorities of North Korea do not appear to have proclaimed any such zones.

Article 24 of the Convention on the Territorial Sea and the Contiguous Zone contains another relevant limitation. It states that a contiguous zone "may not extend beyond twelve miles from the baseline from which the breadth of the territorial sea is measured." This means that a state which claims a territorial sea of 12 miles—as do the North Korean authorities—may not have a contiguous zone at all. Although this limitation has also been criticized by some writers,[14] it appears to have encountered virtually no opposition in the 1958 Conference.[15] But it cannot be said to be absolutely clear that it applies to states which are not parties to the convention.

But even if the provisions on contiguous zones contained in the Convention on the Territorial Sea and the Contiguous Zone are regarded as inapplicable to states which are not parties to the convention, it does not

follow that they have a right to enforce contiguous zones for security purposes by seizing or otherwise interfering with foreign warships on the high seas. Article 8 of the 1958 Convention on the High Seas provides:

> 1. Warships on the high seas have complete immunity from the jurisdiction of any state other than the flag state.
>
> 2. For the purposes of these articles, the term "warship" means a ship belonging to the naval forces of a state and bearing the external marks distinguishing warships of its nationality, under the command of an officer duly commissioned by the government and whose name appears in the Navy List, and manned by a crew who are under regular naval discipline.

The term "high seas," furthermore, is defined in article 1 as meaning "all parts of the sea that are not included in the territorial sea or in the internal waters of a state." Since article 24 of the Convention on the Territorial Sea and the Contiguous Zone refers to "a zone of the high seas contiguous to . . . territorial sea," it seems clear that the absolute immunity of warships provided in article 8 of the Convention on the High Seas extends to warships within the contiguous zone of another state.

This provision, moreover, must be regarded as declaratory of general international law and applicable to all states, regardless of their being parties to the convention. The Preamble of the Convention on the High Seas speaks of its provisions as being "generally declaratory of established principles of international law." No such statement appears in any of the other 1958 Conventions on the Law of the Sea. Article 8, moreover, was adopted without dissent, and no state has made any reservation with respect to it.[16]

This view is supported by the practice of states. Despite the tensions associated with the cold war and similar political conflicts, states have generally refrained from claiming the legal right to interfere with foreign warships or aircraft outside their territorial seas or territorial airspace, even when there were grounds for believing that the ships or aircraft were engaged in electronic reconnaissance in close proximity to the territory of the coastal state. Particularly significant in this connection is the attitude of the Soviet Union in the U.N. Security Council debates concerning the shooting down by Soviet planes of U.S. Air Force patrol aircraft. During such a debate in September 1954, after such an aircraft had been shot down over the Sea of Japan,

> No participant . . . asserted or admitted the right to shoot down foreign reconnaissance aircraft over the high seas, no matter how closely it approached to the territorial sea. Vyshinsky, the Soviet representative, stated:
>
> Mr. Lodge said that the Soviet Union representative was apparently defending the right of the Soviet Union to shoot aircraft down over the high seas. If he had not made his speech in haste then I am sure Mr. Lodge would not have said that, for my whole argument on this question was concentrated on proving that the incident involving the Soviet and United States aircraft occurred over Soviet territory and not over the high seas. It is therefore absurd to suggest that I could be defending the right of any State to shoot aircraft down over the high seas.
>
> It is others who wish to defend this right. We are opposed to it . . .[17]

Very similar was the debate in the Security Council in 1960 after a U.S. Air Force RB-47 patrol plane had been shot down by Soviet aircraft. Again, the Soviets charged the plane had intruded into Soviet airspace and disobeyed an order to land. None of the nations involved in the debate—including the U.S.S.R.—"claimed or admitted the right of a state to shoot down a foreign aircraft over the high seas, even if it flies within close proximity of the state's territory and even if it may be engaged in military reconnaissance," although several representatives, including the Soviet, "suggested that flights close to the territorial sea of another country may be undesirable as possibly leading to incidents . . ." Indeed, the British representative, without contradiction, "expressly upheld the right to conduct such flights for reconnaissance purposes, and said that Soviet aircraft had engaged in such flights without being shot down."[18] And when North Korean forces shot down a U.S. Navy EC-121 reconnaissance aircraft in April 1969, once more the allegation was that it had intruded into North Korean airspace.[19]

It thus appears that the Soviet Union and other Communist states or authorities have never officially claimed a right to attack or interfere with foreign aircraft over the high seas in proximity to their coasts, on the ground that such aircraft was, or could be reasonably suspected of being, engaged in electronic reconnaissance. There is nothing to indicate, moreover, that foreign surface vessels, and particularly foreign warships, are in this respect considered to be different from foreign aircraft. And no state appears to have advanced the view that electronic reconnaissance from the high seas justifies an attack on the ship or aircraft engaged in it as a matter of the coastal state's right of self-defense.

The record further indicates that Soviet-bloc governments do not appear to have ever officially asserted that electronic reconnaissance from the high seas is a violation of international law. In this connection, it is also significant that the Outer Space Treaty of 1967,[20] which is largely a product of negotiations between the Soviet Union and the United States and to which both states are parties, contains no prohibition of military reconnaissance from outer space.

The analysis here presented, which indicates that there is no support in the official claims or views of states for the position that electronic reconnaissance from the high seas justifies an attack upon or interference with foreign ships or aircraft engaged in such reconnaissance, is, of course, limited to the relations of states at peace with each other. It is obvious that in time of war enemy warships and military aircraft on or over the high seas may be attacked, whether or not they are engaged in reconnaissance. The question whether the relations between the United States and the North Korean authorities in 1968 and 1969 involved, despite the armistice of 1953, elements of belligerency and therefore gave the latter a right to attack U.S. warships and aircraft engaged in electronic reconnaissance from the high seas or airspace above the high seas is outside the scope of this article. North Korean authorities do not appear to have claimed any such right in connection with the seizure of the U.S.S. *Pueblo* or the shooting down of the EC-121.

It has been suggested that although "passive" electronic reconnaissance from the high seas may be permissible, a different rule may or should apply to "active" reconnaissance in which the observing ship or aircraft sends, for example, deceptive signals to create the false impression that it is within the territorial sea or airspace of the coastal state for the purpose of testing the latter's reaction time.[21] Although this distinction may have theoretical merit, it does not appear to have been

officially and publicly drawn by any state.

The suggestion that there may or should be a trend in international law toward making electronic reconnaissance from the high seas unlawful, and permitting coastal states to establish contiguous zones to prevent it, is, in large part, based on the contention that such reconniassance operates unfairly against the smaller and weaker coastal states that do not have the capabilities to engage in similar reconnaissance activities off the coasts of the stronger states.[22] The record does not indicate that such a trend is already under way.

First, the fact that on certain occasions some states or authorities (including the U.S.S.R. as well as North Korea) have actually attacked or interfered with foreign reconnaissance aircraft or vessels (as in the case of the U.S.S. *Pueblo*) over or on the high seas has no significance with respect to the development of a new rule of law in the light of their failure to admit such acts or attempt to justify them in legal terms. They have, indeed, sought in all such cases to create the impression, through official statements, that the foreign aircraft or ships had violated their sovereignty by intruding into their territorial airspace or territorial sea and that the acts of interference took place in such airspace or sea. The failure to claim a legal right of interference with foreign vessels or aircraft on or over the high seas in such situations shows that the coastal states or authorities concerned did not believe that such a claim of right would be legally tenable or acceptable to the international community or, perhaps, in their own best interests.

Second, the number of small states or entities that have committed such acts of interference appears to have been very small. The evidence thus fails to support the contention that small states in general have an interest in establishing a right to interfere with foreign ships or aircraft engaged in electronic reconnaissance off their coasts on or over the high seas.

Third, it is unlikely that a new rule of law assumed to be beneficial to the smaller states will come into existence if the stronger states do not favor it. By hypothesis, the suggested rule would work to the disadvantage of the stronger states and therefore is not likely to gain their support.

Fourth, there is no evidence that the international community today regards such a rule as desirable or that the sentiment in its favor is increasing.

There remains the question of the right of the coastal state to impose criminal penalties on members of crews of foreign reconnaissance ships and aircraft for participation in intelligence gathering from the high seas if they are subsequently apprehended within the territory of the coastal state. One of the bases of criminal jurisdiction of states over aliens is the so-called "protective principle," which enables a state to prosecute and punish in its courts foreign nationals for committing acts abroad against its security. Although the scope of the principle is not well defined and its employment in practice is relatively infrequent, its existence is widely recognized in the literature of international law and is reflected in a substantial number of provisions in national penal laws. After World War I, the French Court of Cassation upheld its application in the French courts against foreign nationals such as a Spaniard who was convicted of a crime against French security committed during the war in Spain by maintaining correspondence with enemies of France.[23] If this principle is interpreted broadly, it can be applied to persons engaging in intelligence gathering, by electronic or other means, from the high seas or even from the territory of another state. Such a broad application of the principle, however, could be regarded as unreasonable

(despite the French precedents) and unsupported by consistent state practice. In a world in which all the stronger powers have maintained for a long time large intelligence-gathering establishments, a liberal application of the "protective" principle would expose a substantial number of individuals to criminal penalties and would probably work to common disadvantage.

The fact that the persons accused of violating the security of the coastal state by electronic reconnaissance acted in the performance of their official duties as military personnel or government employees is another factor to be considered. There are old precedents for the view that soldiers invading the territory of another state in time of peace cannot be made personally liable by the latter for the acts of violence they commit in that territory pursuant to orders;[24] but in recent years a number of airmen arriving in intruding foreign military or state aircraft have been prosecuted and punished for the intrusion without giving rise to the complaint that such exercise of jurisdiction is unlawful solely on the ground that they had acted in the performance of official duty.[25] All these cases, however, have involved charges of intrusion rather than reconnaissance from the high seas. There appears to be no precedent for prosecution by a coastal state of foreign military or other government personnel for the latter type of activity. The law in this matter cannot be regarded as well settled, but the official status of such personnel is a weight in the balance against the reasonableness and lawfulness of such prosecution. Also, the possibility of such prosecution after the apprehension of the personnel concerned within the territory of the coastal state cannot be regarded as an effective sanction against electronic reconnaissance. This is still another factor to be considered in weighing and balancing the interests involved. Apprehension of the accused persons within the territory of the coastal state after voluntary entry into it is not likely to be a frequent occurrence, and the employment of this base of jurisdiction would be haphazard, throwing further doubt on its reasonableness. All in all, it may be concluded that international law does and should prohibit prosecution by a coastal state of foreign military or other government personnel for electronic reconnaissance from the high seas.

Although international law does not forbid electronic reconnaissance from the high seas and does not empower the coastal state to interfere with foreign warships or aircraft engaged in it, such reconnaissance is likely to be resented by coastal states and to heighten international tensions. It should be resorted to, therefore, only if careful study indicates that its costs are substantially outweighed by its benefits to the state that engages in it. The need for it may decline with the further development of other means of surveillance and intelligence gathering.

FOOTNOTES

1. See, e.g., Oliver J. Lissitzyn, "The Treatment of Aerial Intruders in Recent Practice and International Law," *The American Journal of International Law*, October 1953, p. 559; Oliver J. Lissitzyn, "Some Legal Implications of the U-2 and RB-47 Incidents," *ibid.*, January 1962, p. 135.

2. See, e.g., the paper of Mr. William E. Butler, in American Society of International Law, 63d Annual Meeting, April 1969, *Proceedings*, p. 7.

3. U.S. Treaties, etc., *United States Treaties and Other International Agreements*, (Washington: U.S. Govt. Print. Off., 1964), v. XV, pt. 2, p. 1606; *ibid.*, 1963, v. XIII, pt. 2, p. 2312.

4. As of 1 January 1969, 39 states have ratified or acceded to the Convention on the Territorial Sea and the Contiguous Zone, and 43 states have ratified or acceded to the Convention on the High Seas. See *U.S. Treaties in Force*, 1969, p. 310-311.

5. See articles 26 and 28 of the Convention on the Territorial Sea and the Contiguous Zone and articles 31 and 33 of the Convention on the High Seas. North Korea has not been invited by the United Nations General Assembly to become a party to either of these conventions under these articles.

6. *Yearbook of the International Law Commission, 1956*, v. II, p. 264. The latter word was inserted at the Conference.

7. U.N. Conference on the Law of the Sea, 1st, 1958, *Official Records*. A/CONF.13/39 (Geneva: 1958), v. III, p. 107, 232. The Republic of Korea and Yugoslavia proposed the insertion of the words "or security" in paragraph 1 of the Commission's draft. *Ibid.*, p. 107, 226.

8. *Ibid.*, p. 181. The states voting for and against the proposal are not listed in the *Official Records*.

9. *Ibid.*, A/CONF.13/38, v. II, p. 40, 126.

10. For the texts of all reservations and objections to them see *Multilateral Treaties in Respect of Which the Secretary-General Performs Depositary Functions: List of Signatures, Ratifications, Accessions, etc. as at 31 December 1968*, ST/LEG/SER.D/2 (New York: United Nations, 1969), p. 334-338.

11. Yugoslavia, which favored the addition of the word "security" in article 24, has ratified the convention without any reservation. *Ibid.*

12. As of 1959, the list of such states included Argentina, Chile, Ecuador, El Salvador, Greece, Honduras, Iran, Republic of Korea, Poland, Saudi Arabia, Venezuela, and Yugoslavia; and, less clearly, France, Rumania, and the U.S.S.R. United Nations Legislative Series, *Laws and Regulations on the Regime of the High Seas* (New York: United Nations, 1951), v. I, p. 51, 61, 67, 71, 73, 80, 81, 87, 116, 131, 134; *ibid., Supplement* . . . (New York: United Nations, 1959), especially p. 23, 24, 27, 28, 30. Of these states, only Rumania, U.S.S.R., Venezuela, and Yugoslavia had by 1 January 1969 become parties to the Convention on the Territorial Sea and the Contiguous Zone. *U.S. Treaties in Force*, 1969, p. 311. Communist China appears to have established several limited "military security" areas or the like on the high seas adjacent to its territory in which the movements of foreign vessels are forbidden or restricted. See Tao Cheng, "Communist China and the Law of the Sea," *The American Journal of International Law*, January 1969, p. 47, 64-65.

13. *Cf.*, in this connection, the judgment rendered by the International Court of Justice in 1969 in the North Sea Continental Shelf Cases *(Federal Republic of Germany v. Netherlands)*, reported in *International Law Materials*, May 1969, p. 340, in which the Court held Germany, not a party to the 1958 Convention on the Continental Shelf, not bound by a rule set forth in that convention. The omission of "security" from the list in article 24 has been criticized by some writers. See, e.g., Myres S. McDougal and William T. Burke, *The Public Order of the Oceans* (New Haven: Yale University Press, 1962), p. 590-591, 604-607.

14. See McDougal and Burke.

15. Venezuela, however, ratified the convention "with express reservation in respect of . . . paragraphs 2 and 3 of article 24 . . ." Australia, the Netherlands, the United Kingdom, and the United States objected to this reservation. *Multilateral Treaties*, p. 331-338.

16. U.N. Conference on the Law of the Sea, 1st, A/CONF.13/40, v. 4, p. 67-76; *ibid.*, A/CONF.13/38, v. 2, p. 21, 59-61; *Multilateral Treaties*, p. 340-342. In proposing the provision which eventually became article 8, the International Law Commission said: "The principle embodied in paragraph 1 is generally accepted in international law." United Nations, *Yearbook of the International Law Commission*, 1956, v. II, p. 280.

17. Oliver J. Lissitzyn, "Some Legal Implications of the U-2 and the RB-47 Incidents," *The American Journal of International Law*, January 1962, p. 135, citing U.N. Security Council, *Official Records*, 9th Year, 679th and 680th Meetings (10 September 1954), Docs. S/P.V. 679, 680.

18. *Ibid.*, citing U.N. Security Council, *Official Records*, 15th Year, 880th to 883rd Meetings (22-26 July 1960), Docs. S/P.V. 880-883.

19. See, in general, U.S. Congress, House, Committee on Armed Services, Special Subcommittee on the U.S.S. *Pueblo, Inquiry into the U.S.S. Pueblo and EC-121 Plane Incidents*, Report . . . 91st Cong. 1st sess., 28 July 1969 (Washington: U.S. Govt. Print. Off., 1969), p. 1675-1681; statements in *The Department of State Bulletin*, 5 May 1969, p. 382, 383. At his news conference on 18 April 1969, President Nixon said in part:

> . . . back over 20 years and throughout the period of this administration . . . , we have had a policy of reconnaissance flights in the Sea of Japan similar to this flight. This year we have had already 190 of these flights without incident, without threat, without warning at all. . . . I have today ordered that these flights be continued. They will be protected . . . *Ibid.*, p. 377.

20. U.S. Treaties, etc., *United States Treaties and Other International Agreements*, v. XVIII, pt. 3, p. 2410.

21. See, e.g., the remarks of Professor Roger Fisher, American Society of International Law, *Proceedings, 1969*, p. 28.

22. See, especially, the paper of Mr. William E. Butler, in *Proceedings, 1969*, p. 7.

23. See, in general, William W. Bishop, Jr., *International Law: Cases and Materials*, 2d ed. (Boston and Toronto: Little, Brown, 1962), p. 464-465, and sources there cited; American Law Institute, *Restatement, Second, Foreign Relations Laws of the United States* (St. Paul: American Law Institute Publishers, 1965), p. 92-94.

24. See, especially, the cases discussed in Charles C. Hyde, *International Law Chiefly as Interpreted and Applied by the United States*, 2d rev. ed. (Boston: Little, Brown, 1945), v. 1, p. 820-822.

25. For some examples, see Oliver J. Lissitzyn, "The Treatment of Aerial Intruders in Recent Practice and International Law," *The American Journal of International Law*, October 1953, p. 559, 565-566, 581-585; Lissitzyn, 1962, p. 135-136. *Cf.* "Aerial Intrusion for Hostile Purposes," *The American Journal of International Law*, April 1956, p. 442.