

The Yale Journal of International Law

Volume 16, Number 2, Summer 1991

Articles

Iran Air Flight 655 and Beyond: Free Passage, Mistaken Self-Defense, and State Responsibility

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I. INTRODUCTION

On July 3, 1988, the U.S.S. *Vincennes* shot down Iran Air Flight 655, while deployed to protect neutral shipping in the Persian Gulf. The *Vincennes*, simultaneously engaged in a surface encounter, fired in the mistaken belief that the civil airliner was an attacking Iranian military aircraft. Refusing a U.S. offer of *ex gratia* compensation, Iran has taken its case to the International Court of Justice (ICJ).¹ The United States raised preliminary jurisdictional

1. Iran submitted its application to institute proceedings against the United States on May 17, 1989. Aerial Incident of 3 July 1988 (Iran v. U.S.), 28 I.L.M. 843 (1989) [hereinafter Iranian ICJ Application] (pagination references herein are to printed ICJ document). After numerous delays, Iran filed its legal memorial on July 24, 1990. *Iran Files Complaint to World Court over U.S. Downing of Airbus*, Reuters, July 24, 1990 (LEXIS, Nexis library, Wires file). While the case is pending, the memorial is not considered a public document and thus the legal theories advanced before the ICJ by Iran can only be gleaned from

objections on March 4, 1991,² but given the jurisdictional provisions of the applicable civil aviation treaty, it appears as though the U.S. challenge will fail. Despite its withdrawal in the recent *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua Case)*,³ the United States will most likely remain before the ICJ to contest the Flight 655 case on its merits.

This article seeks to assess the legal theories upon which the ICJ should rely in resolving the Flight 655 proceedings and to explore the implications of these doctrines beyond this particular case. In its opinion the ICJ might draw on one or more of five distinct substantive areas of the law: 1) treaty-based international civil aviation law; 2) the right of self-defense under the U.N. Charter; 3) traditional freedom of the seas principles; 4) customary air and sea warfare law; and 5) fundamental human rights principles.⁴ The analysis focuses on the primary obligations under international law incumbent upon the *Vincennes* and the secondary obligation of state responsibility upon their breach. The Flight 655 case presents the ICJ with the opportunity to clarify limitations on the right of self-defense, specify the treatment of international

preliminary indications in its ICJ Application. The statement made by the Iranian Foreign Ministry at the time the memorial was filed merely reiterated the Iranian position that the *Vincennes'* action in shooting down Flight 655 was an intentional violation of international law. *Iran Files Complaint Against USA for Shooting Down Passenger Plane*, Voice of the Islamic Republic of Iran, 03:30 GMT 24 July 1990 (LEXIS, Nexis library, Current file). This statement explicitly confirmed Iran's position that Flight 655 was shot down within Iranian airspace, a claim that is only implicit in its ICJ Application. See *infra* note 65 and accompanying text.

2. *U.S. Contests World Court's Jurisdiction in Iran Airbus Case*, Reuters, Mar. 5, 1991 (LEXIS, Nexis library, Wires file). Letter from Arthur T. Witteveen, ICJ Information Secretary, to David Linnan (May 2, 1991) [hereinafter ICJ Letter] (copy on file with *Yale Journal of International Law*).

3. *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)* 1986 I.C.J. 4, 17 [hereinafter *Nicaragua Case*]. In the *Nicaragua Case* the United States did not recognize the ICJ's power to indemnify the plaintiff based on principles of state responsibility. See, e.g., O'Connell, *The Prospects for Enforcing Monetary Judgments of the International Court of Justice: A Study of Nicaragua's Judgment Against the United States*, 30 VA. J. INT'L L. 891 (1990). However, with U.S. support, the U.N. Security Council recently affirmed the principle that international law provides for indemnity in connection with the unlawful use of armed force. See S.C. Res. 674, __ U.N. SCOR at 3, U.N. Doc. S/RES/674, 29 I.L.M. 1561-63 (1990). See also Note, *The Downing of Iran Air Flight 655: Highlighting the Need for International Adjudication of Damages*, 13 SUFFOLK TRANSNAT'L L. J. 656 (1990).

4. This article does not discuss international human rights law as a potential source of obligation, despite the view of at least one commentator that a human rights analysis might be applicable to the Flight 655 incident. See, e.g., Lowenfeld, *Looking Back and Looking Ahead*, 83 AM. J. INT'L L. 336 (1989). Rather, this inquiry argues that the law of armed conflict is directly applicable to the *Vincennes'* actions under aviation treaty law. Recourse to human rights law is unnecessary for several reasons. First, the law of armed conflict contains its own standards for the protection of noncombatants. Second, recourse to human rights law would entail a shift in the focus of civil aviation law from the treatment of aircraft to the treatment of passengers generally. Third, the unsettled nature of human rights law also makes it difficult to apply in individual situations, leaving states unable to establish clear rules of conduct for their military forces and civil aviation authorities. Finally, reliance on human rights law might deprive any derived rule of broad acceptance, given some states' views that international law is inapplicable to individuals, or that human rights issues present political rather than legal principles.

civil aviation in limited or regional conflicts, and to delineate the responsibility of a state when it has breached an international duty.

Views of the Flight 655 incident commonly fail to distinguish between the *Vincennes*' misapprehension of attack by Flight 655 and the legality of Flight 655's destruction. They incorrectly deduce that the mistaken but reasonable use of force against Flight 655 would be lawful if the *Vincennes*' simultaneous use of force against attacking speedboats were legitimate and its mistaken assessment of Flight 655 as an attacking F-14 were reasonable.⁵ This inquiry concludes that, irrespective of the reasonableness of the mistake and the lawfulness of the use of force against the speedboats, the United States is legally responsible for the downing of Flight 655.

Part II provides background for the analysis by reviewing the pertinent facts of the Flight 655 incident, outlining the parties' arguments before the ICJ, and the United States challenge to the jurisdiction of the ICJ. Part III focuses on the law of naval warfare. First, it explores the conflict between the rights of free passage for neutrals and the rights of belligerents under older sea warfare law together with the *Vincennes*' deployment to protect neutral shipping in the Persian Gulf. It then discusses the development of the law governing modern-day neutral aircraft overflight of naval operations and the genesis of the lawful force analysis pursued by the United States. Part IV outlines basic international civil aviation law principles drawing in part on the law of the sea. Part V explores the U.N. Charter interpretation and the duty applicable under the general law of armed conflict with specific aspects of mistake. Part VI discusses approaches to the mistaken use of armed force under the objective or subjective basis of state responsibility. Finally, Part VII attempts to synthesize the preceding analysis and to outline an objective standard governing injury to civilians and neutrals over international waters or territorial airspace.

II. IRAN AIR FLIGHT 655: THE CASE

A. Prologue: The Facts

Events foreshadowing the downing of Flight 655 may be traced back as early 1984,⁶ when the United States gave notice that U.S. naval forces operat-

5. U.S. State Department spokesman Richard Boucher stated that the United States would argue that the *Vincennes* acted in self-defense after its crew mistook Iranian jetliner for hostile warplane and that "[t]he mere fact that this belief was erroneous does not alone make the actions of the *Vincennes* unlawful." Kempster, *Wary Bush Says Force is Still an Option on Hostage*, L.A. Times, Aug. 16, 1990, at I1, col. 1; State Department Regular Briefing, Fed. News Serv., Aug. 15, 1989 [hereinafter State Department Briefing].

6. "The presence and activities of naval forces in the Gulf area caused numerous problems to international civil aviation." *Report of ICAO Fact-Finding Investigation: Destruction of Iran Air Airbus A300 in the Vicinity of Qeshm Island, Islamic Republic of Iran on 3 July 1988* (Nov. 1988), Attachment B to Letter of S.S. Sidhu, International Civil Aviation Organization Secretary General (Jan. 11, 1989),

ing in the Persian Gulf during the Iran-Iraq War would take measures against perceived threats.⁷ Aircraft flying below 2,000 feet not cleared for approach to, or departure from, an airport were requested to avoid flying closer than five nautical miles to U.S. warships. Aircraft approaching within that radius were required to establish and maintain radio contact with U.S. warships on 121.5 MHz (international air distress or IAD frequency) or 243 MHz (military air distress or MAD frequency). If their intentions were unclear, aircraft approaching U.S. warships below 2,000 feet were at risk of being fired upon.

On May 17, 1987, while in international waters and outside the war zones declared by both Iran and Iraq, the *U.S.S. Stark* was damaged by Iraqi Exocet missiles launched from a location beyond the protective radius of the U.S. warning.⁸ As a result, U.S. naval commanders in the Persian Gulf received revised rules of engagement clarifying their powers to take protective measures when hostile intent was manifested and emphasizing both their responsibility to protect their forces and their authority to act in self-defense in anticipation of hostile attack.⁹

Beginning in early 1987, U.S. naval vessels commenced escorting convoys through the Persian Gulf to keep open oil transportation routes during hostilities.¹⁰ Following the *U.S.S. Stark* incident, the United States publicized an international notice to airmen (U.S. NOTAM) in September 1987, warning that U.S. warships in the area were taking additional defensive precautions.¹¹

ICAO Doc. AN 13/4.3-89/7, at 11, C-1 - C-4 [hereinafter *ICAO Report*]; see also 28 I.L.M. 896 (1989). The ICAO was concerned with warships vectoring aircraft without regard to civilian air traffic control and feared problems caused by incompatible communications equipment and by misinterpreted challenges to aircraft during critical takeoff and landing periods. *Id.* at C-2 to C-4. During June, the month immediately preceding the Flight 655 incident, all U.S. naval forces in the Gulf issued a combined total of 150 aircraft challenges, of which two were to commercial aircraft and 125 were to Iranian military aircraft. The Department of Defense provided no further detail concerning the geographic distribution of the challenges. See *Department of Defense Investigation Report: Formal Investigation into the Circumstances Surrounding the Downing of Iran Air Flight 655 on 3 July 1988*, App. E to the *ICAO Report, supra*, at E-18 [hereinafter *DOD Report*].

7. See *ICAO Report, supra* note 6, at 10 (copies of the joint USCINCPAC and USCINCENT NOTAM (112119 KFDC) are on file in the offices of the *Yale Journal of International Law*).

8. See Vlahos, *The Stark Report*, PROC. U.S. NAVAL INST., May 1988, at 64. Two Exocet missiles were launched, one at a distance of 22.5 nautical miles and the other somewhat closer. *Id.*

9. See Parks, *Righting the Rules of Engagement*, PROC. U.S. NAVAL INST., May 1989, at 83.

10. At first, protective measures were limited to American-flagged vessels. From 1981 to 1988, Iran and Iraq made approximately 453 attacks on Persian Gulf shipping. O'Rourke, *Gulf Ops*, PROC. U.S. NAVAL INST., May 1989, at 42, 43 [hereinafter O'Rourke, *Gulf Ops*]. See also O'Rourke, *The Tanker War*, PROC. U.S. NAVAL INST., May 1988, at 30, 31-32 [hereinafter O'Rourke, *The Tanker War*] (information on flag registry, type of merchant ship attacked, method of attack and casualties from 1984-87). See McDonald, *The Convoy Mission, id.* at 36. Minor incidents involving Iraqi or Iranian firing on or near U.S. naval forces continued through early 1988. During the first half of 1988, 27 attacks on merchant shipping were attributed to Iraq and 42 to Iran. See O'Rourke, *Gulf Ops, supra*, at 43. Many of the attacks on Iran's merchant shipping during this period were carried out by Iranian Revolutionary Guards employing high speed small boats. See Chapin, *Countering Guerillas in the Gulf*, PROC. U.S. NAVAL INST., Jan. 1988, at 65, 67.

11. See *ICAO Report, supra* note 6, at 10-11, F-4 to F-5 (a copy of the NOTAM (FAA FDC 052/87) is on file in the offices of the *Yale Journal of International Law*).

Under the new terms, all aircraft operating in the Persian Gulf area were advised to monitor the IAD or MAD frequencies. Unidentified aircraft and those approaching U.S. warships with unknown intentions would be contacted on these frequencies. Aircraft failing to respond to warnings or to requests for identification or those generally operating in a threatening manner, risked being attacked. The U.S. NOTAM was widely disseminated through the Federal Aviation Administration as well as through military and civilian channels. However, it was not promulgated by the responsible treaty-based international civil aviation authorities.¹² The U.S. NOTAM, which lacked distance and altitude warnings, was incompatible with the predictability required for safety purposes in international civil aviation.¹³

On April 18, 1988, U.S. warships and aircraft undertook Operation Praying Mantis, a naval operation directed against Iranian oil platforms and naval vessels implicated in Gulf attacks on merchant shipping.¹⁴ During the course of the operation, Iranian military aircraft were launched from nearby Bandar Abbas airfield, the civilian-military airport from which Flight 655 took off. At various times, these Iranian aircraft appeared close to attacking U.S. aircraft.¹⁵ Other Iranian aircraft, observed events from afar, apparently to provide radar information, thereby exhibiting "targeting behavior."¹⁶ Further, the U.S. policy expressly limiting protective measures to American-flagged vessels was modified in the course of the operation to allow U.S. naval aircraft to respond to retaliatory Iranian attacks on nearby oilfield shipping.¹⁷ Soon thereafter, the Secretary of Defense issued a policy statement recognizing a relatively narrow set of traditional belligerent rights under the law of sea warfare, while otherwise implicitly asserting rights of neutrals premised on traditional ideas of free passage on the high seas even during wartime.¹⁸

12. *Id.*

13. *See id.* at 11.

14. *See* Langston & Bringle, *The Air View: Operation Praying Mantis*, PROC. U.S. NAVAL INST., May 1989, at 54; Perkins, *The Surface View: Operation Praying Mantis*, PROC. U.S. NAVAL INST., *supra*, at 66. Operation Praying Mantis was organized after the U.S.S. *Roberts* sustained serious mine damage; the mining was attributed to Iran. *See* O'Rourke, *Gulf Ops*, *supra* note 10, at 44.

15. *See* Langston & Bringle, *supra* note 14, at 57-58.

16. Perkins, *supra* note 14, at 70. *See also* *The Vincennes Incident*, PROC. U.S. NAVAL INST., Jan. 1990, at 19, 20 (letter to editor from M.C. Agresti, officer on the *Vincennes*).

17. President Reagan authorized U.S. naval aircraft to attack Iranian speedboats in the vicinity of the *Scan Bay*, an oilfield barge of Panamanian registry with fifteen American oilworkers aboard, when it reported itself under attack. O'Rourke, *Gulf Ops*, *supra* note 10, at 47.

18. In an April 29, 1988 policy statement, the U.S. Secretary of Defense announced that: [a]id will be provided to friendly, innocent, neutral vessels flying a non-belligerent flag outside declared war-exclusion zones that are not carrying contraband or resisting legitimate visit and search by a Persian Gulf belligerent. Following a request from the vessel under attack, assistance will be rendered by a U.S. warship or aircraft [if its mission permits such assistance].

Id. The United States was not the first nation with naval forces in the Gulf to adopt this position. France had apparently adopted and acted on a similar policy as early as December 1987. *Id.* *See also* Cigar, *The Soviet Navy in the Persian Gulf: Naval Diplomacy in a Combat Zone*, 42 NAVAL WAR C. REV. 56 (Spring 1986). The above policy statement does not refer to the high seas, presumably in an attempt to equate

On May 20, 1988, the *Vincennes* arrived in the Persian Gulf.¹⁹ During the afternoon and evening hours of July 2, 1988, and continuing into the morning of July 3, armed speedboats manned with Iranian Revolutionary Guards positioned themselves at the western approach to the Strait of Hormuz and challenged merchant ships, a tactic that previously had been a precursor to attack.²⁰ During the evening of July 2, the *U.S.S. Montgomery* responded to the distress call of a Danish-registered supertanker reportedly under attack by three Iranian speedboats.²¹ The same day, two Iranian F-14 aircraft came within seven miles of another U.S. warship, the *U.S.S. Halsey*.²² Other F-14 aircraft were known to have been deployed recently to Bandar Abbas airfield.²³

Early on the morning of July 3, while on patrol in the western approaches to the Strait of Hormuz, the *Montgomery* listened to challenges over the radio and observed numerous armed Iranian speedboats approaching a Pakistani merchant vessel. Shortly thereafter it heard several explosions to the north, in the direction of the Iranian side of the Strait. The *Vincennes* was dispatched to the area to investigate the *Montgomery's* report of speedboats apparently preparing to attack merchant ships.²⁴ The *Vincennes's* helicopter was sent into the area, where it reportedly was fired upon by Iranian small boats at approximately 9:15 a.m. local time.

The *Vincennes* and the *Montgomery* immediately headed to the location of the helicopter and speedboats. This brought them relatively close to the offshore Iranian islands of Qeshm and Hengham. Upon their arrival, some armed Iranian speedboats were deemed to have demonstrated hostile intent.

transit passage rights through the Strait of Hormuz, with traditional high seas free passage rights. *See infra* notes 252-54. In addition, this statement might be interpreted as approving "war-exclusion zones." *But see* Leckow, *The Iran-Iraq Conflict in the Gulf: The Law of War Zones*, 37 INT'L & COMP. L.Q. 629, 637-38 (1988) (Iraqi exclusion zone is illegal); Russo, *Neutrality at Sea in Transition: State Practice in the Gulf War as Emerging International Customary Law*, 19 OCEAN DEV. INT'L L. 381, 389-90 (1988) (criticizing Iraqi sink-on-sight instructions for its war zone and opining that even within war zone only regular military targets could be attacked); Fenrick, *The Exclusion Zone Device in the Law of Naval Warfare*, 24 CANADIAN Y.B. INT'L L. 91, 116-22 (1986) (neither belligerent paid particular heed to legal issues connected with either side's exclusion zones); Note, *Air Attacks on Neutral Shipping in the Persian Gulf: The Legality of the Iraqi Exclusion Zone and Iranian Reprisals*, 8 B.C. INT'L COMP. L. REV. 517 (1985) (Iraqi exclusion zone is illegal). *See also* Levie, *Means and Methods of Combat at Sea*, 14 SYRACUSE J. INT'L L. & COM. 727, 736-38 (1988) (discussion of different publicists). Despite this ambiguity, most recent expressions of U.S. views appear to cast doubt on the legality of war zones. *See* DEP'T. OF THE NAVY (JAG), ANNOTATED SUPPLEMENT TO THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS 7-38 n.141 (NWP 9 (Rev. A)/FMFM 1-10 1989) [hereinafter 1989 ANNOTATED COMMANDER'S HANDBOOK].

19. On June 28, 1988, the *Vincennes* received copies of the flight schedules for commercial airliners overflying the Persian Gulf. *DOD Report, supra* note 6, at E-16.

20. *See id.* at E-6 to E-7.

21. *Id.* at E-7.

22. *Downing of Iranian Airliner: Hearing Before Armed Services Comm.*, 100th Cong. 2d Sess. ___ (Sept. 8, 1988), Fed. News Serv. (LEXIS, Nexis library, Wires file) [hereinafter *Armed Services Committee Hearing*].

23. *DOD Report, supra* note 6, at E-6.

24. *Id.* at E-7.

At 9:43 a.m., the *Vincennes* opened fire on these boats with its forward five-inch gun.²⁵ At this time, the *Vincennes* was also closely monitoring a P-3 Iranian military aircraft, which was some sixty-two nautical miles to the west.²⁶ During these events the *Vincennes* was approximately forty-seven nautical miles from Bandar Abbas airfield and approximately eleven nautical miles from Iran's Qeshm Island. The *Montgomery* was even closer to Iranian territory, approximately seven nautical miles from Hengham Island. Thus, apparently both the *Vincennes* and the *Montgomery* were within the twelve mile limit of Iranian territorial seas. Although within an international strait, they were approximately thirty-two nautical miles from the closest portion of the Iranian mainland and approximately twenty nautical miles from the closest Omani territory on the far side of the Strait of Hormuz.²⁷ A third warship, the *U.S.S. Sides*, was located approximately eighteen nautical miles from the *Vincennes*, fifteen nautical miles from Flight 655's closest eventual approach.²⁸

In the midst of the *Vincennes*' surface engagement with the speedboats,²⁹ at 9:47 a.m., Flight 655 took off from Bandar Abbas airfield with 290 persons on board. It was a commercial flight scheduled to travel to Dubai at an altitude of 14,000 feet within a recognized twenty mile-wide international air corridor (A59).³⁰ Flight 655 departed from Bandar Abbas twenty minutes behind schedule and began a steady climb to its assigned altitude of 14,000 feet. At this point the exact chronology becomes crucial, because Flight 655 was airborne for only seven minutes. During all seven minutes, the aircraft stayed within its assigned flight corridor, departing a maximum of four miles from its centerline.

Within the *Vincennes* Combat Information Center (CIC) separate groups controlled air and surface engagements, each group coordinated by an officer reporting to the commander of the *Vincennes*. A reconstruction of events employing the *Vincennes*' computer data shows that, apparently under combat stress, CIC personnel responsible for air defense misinterpreted significant por-

25. *Id.*

26. *Id.* at E-31.

27. All distances are based on the scale and locational plots of *Figure 2: Track of IR655 of the ICAO Report*, *supra* note 6, at 22, which were derived from data provided by the *Vincennes*. See *Figure 1, infra*, for illustration of the location of the relevant parties.

28. *DOD Report*, *supra* note 6, at E-26. The *Montgomery* was approximately five nautical miles from the *Vincennes*. *Id.* at E-25, E-39.

29. Iran had instituted a procedure for notifying its air traffic control facilities of military activities that posed a risk to civil aircraft. In such a case no air traffic clearances were given to civil aircraft intending to fly through the affected airspace. However, such a notice was not in effect on July 3. The Bandar Abbas and Teheran air traffic control units were apparently unaware of hostile activities at sea. *ICAO Report*, *supra* note 6, at 12.

30. A59, the air corridor ten miles wide on both sides of a centerline, was the route used for flights between Bandar Abbas and Dubai, as well as Kabul and Jeddah. Between June 2 and July 3, 1988, there were a total of sixty-six flights on A59, with a maximum of six flights on any one day. *Id.*

tions of the objective data.³¹ The *Vincennes*' radar began to monitor Flight 655 almost immediately upon its takeoff. Although the airbus had been assigned a distinctive friend or foe IFF Mode Three civilian transponder signal, apparently soon after take-off, *Vincennes*' personnel mistakenly attributed to the airbus an IFF Mode Two military transponder signal of a variety used in the past by Iranian F-14 aircraft.³² *Vincennes* CIC personnel consulted commercial air schedules at 9:45 a.m., but because of the airbus' delayed takeoff, they failed to identify the unknown aircraft as a commercial flight. At the same time, the *Vincennes* contacted the Iranian P-3 aircraft and instructed it to keep clear of the *Vincennes*.

At 9:49 a.m., the *Vincennes* broadcast its first challenge and warning--including the course, altitude and distance of the aircraft--on the MAD frequency, which Flight 655 was unequipped to receive. At 9:50 a.m., the *Vincennes* repeated its warning on the IAD frequency, employing longitude and latitude coordinates. Flight 655 was equipped to receive the IAD frequency.³³ The *Vincennes*' forward gun misfired at this point in the ongoing surface engagement. To permit firing of its after-gun, it executed a high speed turn, which was sharp enough to dislodge loose objects in the CIC. This presumably increased the sense of urgency and attack among *Vincennes*' personnel.³⁴ At thirty-two nautical miles, the *Vincennes* reported to its task force commander by radio that it was being approached by an inbound F-14 aircraft not responding to warnings. At this time, the *Vincennes* took tactical command of the *U.S.S. Sides*.³⁵ At 9:51 a.m., the commanding officer of the *Vincennes* informed its task force commander of his intention to engage the putative Iranian F-14 aircraft at twenty nautical miles. The task force commander concurred, but advised the *Vincennes* to warn the aircraft before firing.³⁶ The *Vincennes* then delivered challenges to the "Iranian fighter" on MAD frequency and the "unidentified aircraft" on IAD frequencies, giving course, speed and altitude.³⁷ Meanwhile the *U.S.S. Sides*' personnel evaluated Flight 655 as an Iranian commercial flight,³⁸ and an officer in the *Vincennes* CIC suggested

31. See *DOD Report*, *supra* note 6, at E-4, E-48 to E-49. Navy psychiatrists who were consulted in the formal U.S. investigation referred to such misinterpretation as "scenario fulfillment."

32. The Mode Two IFF signal apparently came from an Iranian C-140 aircraft. See *The Vincennes Incident*, *supra* note 16, at 19. See also *DOD Report*, *supra* note 6, at E-51.

33. *DOD Report*, *supra* note 6, at E-34.

34. While the data from the *Vincennes*' system only Flight 655's assigned IFF Mode Three signal, multiple CIC personnel recalled identification of Flight 655 as an F-14; some even remembered observing IFF Mode Two signals. *Id.* at E-35.

35. *Id.*

36. *Id.* at E-36.

37. *Id.*

38. *Id.*

to his commanding officer the possibility that the aircraft was a commercial flight.³⁹

At 9:52 a.m., while the airbus was at an altitude of 10,000 feet and a distance of twenty-five nautical miles, the *Vincennes* issued another warning on MAD frequency. At twenty nautical miles successive warnings were transmitted on IAD and MAD frequencies.⁴⁰ At this point several CIC personnel remarked that the altitude of the unidentified aircraft began to decrease while its speed increased, as though in an attack dive. However, the *Vincennes*' systems data indicated that the aircraft was still ascending.⁴¹ At 9:53 a.m., the *U.S.S. Sides*' commanding officer determined Flight 655 not to be a threat, and the personnel in the command center concluded that the unidentified aircraft might be a commercial airliner.⁴²

Approximately forty seconds before the *Vincennes* fired its missiles, the *U.S.S. Sides* issued a warning on IAD frequency identifying Flight 655 by range, bearing and, unlike the *Vincennes*' warnings, its correct IFF Mode Three signal.⁴³ While Flight 655 was at 12,000 feet and still ascending, various *Vincennes* CIC personnel noted that the unidentified aircraft had descended several thousand feet by the time it had reached a distance of twelve nautical miles.⁴⁴ The *Vincennes* issued a last warning on MAD frequency.⁴⁵ At 9:54 a.m. and ten nautical miles distance, the *Vincennes* fired anti-aircraft missiles. At that time, Flight 655 was at 12,950 feet and still climbing.⁴⁶ The airbus was struck by the *Vincennes*' missiles at a distance of eight nautical miles and at an altitude of 13,500 feet.⁴⁷

At the time he ordered the missile launch, the commanding officer of the *Vincennes* believed that the *Vincennes* and the *Montgomery* were the subject of a coordinated sea and air attack involving Revolutionary Guard speedboats and an F-14 aircraft, which was in fact Flight 655. Based on the surveillance information obtained on the nearby Iranian P-3 aircraft which had exhibited "targeting behavior," the commanding officer thought the Iranians were conducting a coordinated attack on the *Vincennes*.⁴⁸ Apart from the immediate

39. *Id.* at E-37.

40. *Id.* at E-37 to E-38.

41. *Id.* at E-38.

42. *Id.* at E-39.

43. *Id.* at E-40.

44. *Id.* at E-39 to E-40.

45. *Id.* at E-40.

46. *Id.* at E-41. The *Vincennes* CIC personnel predominantly recalled the target's altitude at firing as having been between 7,000 and 8,000 feet.

47. *Id.* at E-42.

48. See *Armed Services Committee Hearing*, *supra* note 22; Friedman, *The Vincennes Incident*, PROC. U.S. NAVAL INST., May 1989, at 72. But see *Comments & Discussion, The Vincennes Incident*, PROC. U.S. NAVAL INST., Sept. 1989, at 87 [hereinafter Carlson letter] (letter to the editor from D.R. Carlson, Commanding Officer of *U.S.S. Sides*, criticizing Friedman's evaluation). For responses to the Carlson letter, see, e.g., *The Vincennes Incident*, *supra* note 16.

Iran Air Flight 655

situation, this mistaken perception was linked to similar Iranian military behavior displayed during Operation Praying Mantis and during the first few days of July 1988.

Since Flight 655's crew is dead and its flight recorder apparently remains unrecovered, any reconstruction of the crew's perspective is difficult. However speculative an answer may be, though, the question must be addressed why Flight 655 did not respond to the *Vincennes*' radio challenges commencing approximately three minutes after its departure from Bandar Abbas. Flight 655's radio simply was not capable of receiving the seven warnings on MAD frequency. But it was capable of receiving the four warnings on IAD frequency. An ultimate explanation for Flight 655's failure to respond to the four warnings on IAD frequency -- three from the *Vincennes* and the final warning from the *U.S.S. Sides* -- may never be known, because nobody knows the actual radio frequency and channel selection on Flight 655's two dual channel radios at the specific time each IAD frequency warning was given.⁴⁹ Reconstructing Flight 655's communications, it appears that the first, third, and fourth challenges on IAD frequency did not coincide with Flight 655's routine message traffic.⁵⁰ However, the warnings in their general form may have been difficult to decipher even had one radio been tuned to the IAD frequency at all times. Only the fourth and final

49. Following the 1987 dissemination of the U.S. NOTAM, Iran Air had directed its aircraft to monitor IAD frequencies while flying over the Persian Gulf. This warning was repeated at Flight 655's preflight crew briefing. Although Flight 655 was equipped with two dual channel radios, the channels were switched back and forth manually between IAD and air traffic control frequencies because only two of the four channels could be used at any one time. See *ICAO Report, supra* note 6, at 13. During take off, Flight 655 communicated in rapid succession on three separate frequencies with Bandar Abbas airport tower, Bandar Abbas approach, and Teheran air traffic control. Additionally, it soon would have been required to contact Dubai. Presumably, Flight 655 also should have monitored the IAD frequency as required by Iran Air policy. Thus, Flight 655 had to work with at least five different frequencies, only two of which could be received simultaneously.

50. *Id.* at 16.

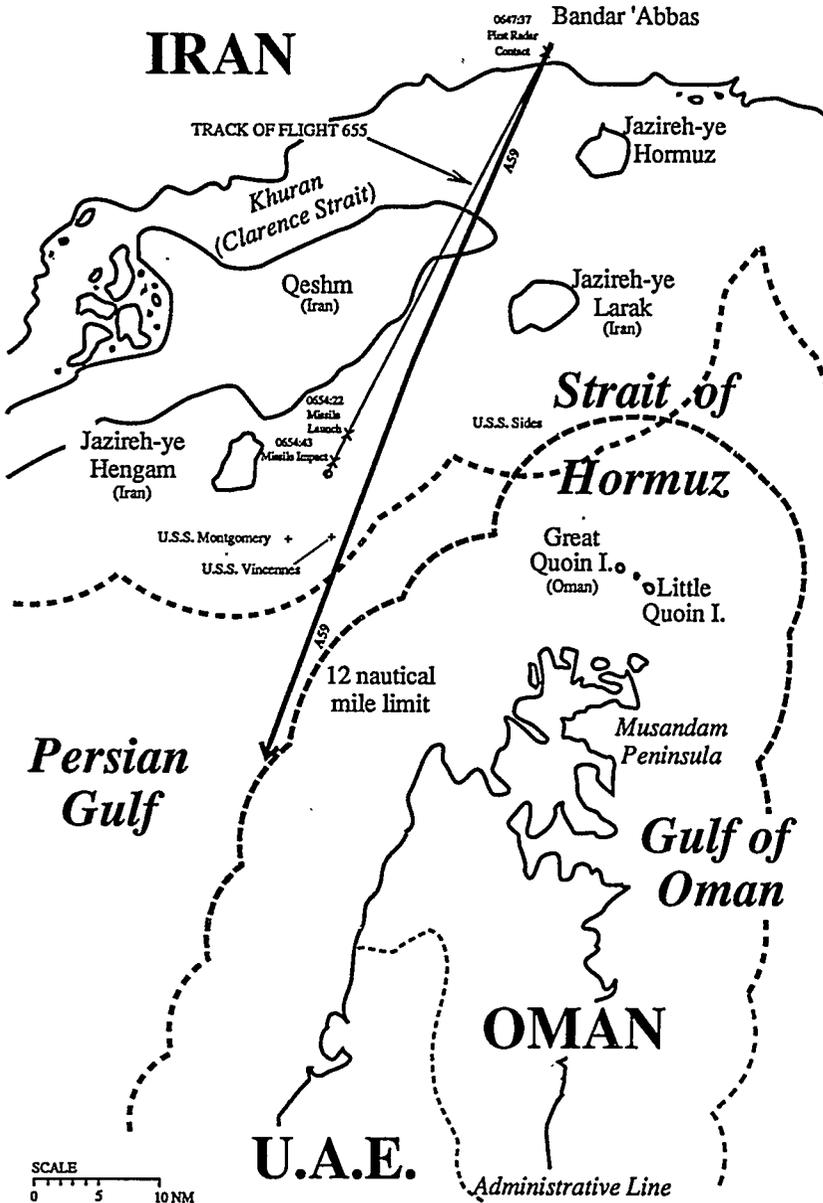


Figure 1. Positions within the Strait of Hormuz during the Flight 655 incident. At the time of missile launch, the *Vincennes* was located at 26° 30' 47" North, 56° 00' 57" East, the *Montgomery* was located at 26° 31' North, 55° 55' 12" East, and Flight 655 was located at 26° 40' 06" North, 056° 02' 41" East. Locations and track of Flight 655 are based on data from the *Vincennes* contained in the *ICAO Report*. For a description of the Strait placing the events within its bounds, see I OFFICIAL RECORDS OF THE FIRST UNITED NATIONS CONFERENCE ON THE LAW OF THE SEA 129-30 (1958), U.N. Doc. No. A/CONF. 13/6/Add.1.

challenge from the *U.S.S. Sides* referred to Flight 655 by its easily recognizable IFF Mode Three signal.⁵¹ Retrospectively, it is impossible to determine whether Flight 655's lack of response to the warnings was due to its failure to monitor the IAD frequency while still caught up in takeoff procedures or whether the crew did not identify their flight as the one being challenged. Therefore, considering their timing and the form of delivery, though, it seems unlikely that Flight 655 received or understood the warnings despite the efforts of the *Vincennes*' crew.

Both the U.S. Department of Defense⁵² and the International Civil Aviation Organization (ICAO), the treaty-based regulatory authority for international civil aviation,⁵³ conducted formal investigations of the Flight 655 incident. Both investigations concluded that the *Vincennes* had shot down Flight 655 in the good faith, but mistaken belief that it was a military aircraft with hostile intentions.⁵⁴ Among the immediate causes cited for the misperception were: intelligence warnings of Iranian military activities, heightened concern by the *Vincennes* that the unidentified aircraft was part of a larger attack, the *Vincennes* inability to match the unidentified aircraft with a scheduled commercial departure, the mistaken association of a military IFF Mode Two signal with the aircraft, reports by some *Vincennes* CIC personnel of the aircraft descending and accelerating in a manner approximating an attack profile, Flight 655's course closing directly on the *Vincennes* and *Montgomery* while slightly diverging from A59's centerline, a lack of identifiable weather radar or similar electronic emissions characteristically associated with civilian aircraft, the continuing identification of Flight 655 as an F-14, and Flight 655's failure to respond to warnings.

The U.S. Department of Defense and the ICAO agreed on immediate causation, but differed in their evaluations of the incident. The Defense Department Report concluded that under the circumstances, the downing of Flight 655 was not the result of negligent or culpable conduct by U.S. Navy personnel. Essentially, this meant that the mistake was reasonable.⁵⁵ The Report also concluded that Iran shared responsibility for the tragedy, because it had permitted its civilian airliner to fly at a relatively low altitude air route in close proximity to armed conflict between Iranian Revolutionary Guard speedboats and U.S. naval vessels.⁵⁶

51. *Id.* at 17.

52. *DOD Report*, *supra* note 6.

53. *ICAO Report*, *supra* note 6.

54. *See DOD Report*, *supra* note 6, at E-46; *ICAO Report*, *supra* note 6, at 24-25.

55. *DOD Report*, *supra* note 6, at E-46 to E-47.

56. *Id.* at E-46. The Defense Department's preliminary recommendation, later withdrawn by a higher authority, was that all Persian Gulf overflights should be at relatively high altitudes to remove them from the reach of the combatants' missiles because the safety of low level civil air traffic in the Gulf could not be assured otherwise.

The ICAO investigation did not express any opinion on the reasonableness or unreasonableness of the *Vincennes*' mistake. Instead, the ICAO proposed a series of safety measures that would leave international civil aviation largely undisturbed, while requiring combatants to share information with civilian air traffic control and to accommodate the routine operation of international civil aviation. At issue between the two positions is the larger question whether international civil aviation law or international legal principles governing the use of force take precedence when civil aircraft operate in war theaters.

Although U.S. Navy channels initially reported the downing of Flight 655 as the destruction of an Iranian F-14, within a relatively short period of time the tragedy became the focus of discussion before the U.N. Security Council and the ICAO. The United States offered direct compensation to the families of the 290 persons who perished on Flight 655,⁵⁷ but refused to admit fault or to compensate Iran Air for the loss of its airbus.⁵⁸ Although this *ex gratia* offer remains open, Iran has declined it and instead has chosen to pursue the case before the ICJ.

B. *The Legal Arguments*

Although the confidential nature of the ongoing ICJ proceedings conceals the precise legal positions of the parties,⁵⁹ the legal theories apparent in the public statements of Iran and the United States reveal a significant difference of opinion concerning which, if any, international law obligations were violated in the shooting down of Flight 655. In part, the divergence is attributable to differing characterizations of the facts. The Iranian view disregards the ongoing speedboat attack on the *Vincennes*, thus casting the U.S. conduct simply as a violation of international civil aviation law. The United States has premised its position on the idea that the downing of Flight 655 occurred in self-defense and was therefore incidental to the lawful use of force. Thus, the U.S. position appears to ignore any problems of civil aviation law. Beyond these differing factual perceptions of the incident, the two states also disagree over the applicable legal concepts, with Iran focusing on principles of international civil aviation law and the U.S. on the law of armed conflict.

57. Compensation offered amounted to \$250,000 for heads of household working to support a family and \$100,000 for all other persons. See Kempster, *supra* note 5. The offer was apparently acceptable to states other than Iran, because they accepted compensation for the death of their citizens. Lacayo, *A Game of Winks and Nods: Why Both Sides Are Downplaying a U.S. Payment to Iran*, TIME, Nov. 20, 1989, at 65, col. 1.

58. The United States wanted to avoid channeling the funds through the Iranian government, which presumably would have final control over the amount disbursed. *U.S. Offers Airbus Compensation*, Facts on File World News Digest, July 28, 1989, at 561, col. D1.

59. See *supra* note 1; ICJ Letter, *supra* note 2.

1. *Iranian Position Before the International Court of Justice*

In its ICJ Application, Iran took the position that in shooting down Flight 655, the United States violated the air safety and overflight provisions of the 1944 Convention on International Civil Aviation (Chicago Convention),⁶⁰ and the 1971 Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage) (Montreal Convention),⁶¹ an antiterrorism and air-hijacking treaty.⁶² Iran requested that the ICJ declare that the United States had violated the Chicago Convention, including its preamble, articles 1, 2, 3 *bis*,⁶³ 44(a) and 44(h), and annex 15, as well as recommendation 2.6/1 of the Third Middle East Regional Air Navigation Meeting of the ICAO (recommendation 2.6/1).⁶⁴ Iran's primary legal contentions before the ICJ probably will be twofold: 1) the *Vincennes*' action violated Iran's right to control the airspace above its territory, including the airspace above its territorial seas (hence the recitation of articles 1 and 2); and 2) the use of armed force against civil aircraft is absolutely prohibited under the preamble, articles 44(a) and 44(h), and proposed article 3 *bis*, which Iran presumably views as declaratory of existing law. The unspoken assumption behind these claims is that international civil aviation law trumps self-defense concerns.

The Iranian invocation of recommendation 2.6/1 touches on state attitudes with respect to prohibited zones and danger zones over international waters. The recommendation, promulgated in 1984, addresses the problem of cooperation in air traffic control, specifically the coordination of military and civil use of airspace to maximize air safety.⁶⁵ The recommendation criticizes the invocation of prohibited zones for military purposes over international waters.⁶⁶ It essentially provides that temporary military danger zones outside a state's territory may be established only in consultation with responsible air traffic control authorities.⁶⁷ By referring to annex 15 of the Chicago Convention,

60. Convention Between the United States of America and Other Governments Respecting International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, T.I.A.S. No. 1591, 15 U.N.T.S. 295 [hereinafter Chicago Convention]. The United States is a party to the Chicago Convention.

61. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage), Sept. 23, 1971, 24 U.S.T. 564, T.I.A.S. No. 7570, 10 I.L.M. 1151 (1971) [hereinafter Montreal Convention]. The United States is a party to the Montreal Convention.

62. See Iranian ICJ Application, *supra* note 1, at 8, 10; Cody, *Iran Suing U.S. in World Court: Compensation Sought for Vincennes' Shooting Down of Airliner*, Wash. Post, May 20, 1989, at A16, col. 1.

63. Article 3 *bis* is inapplicable because the proposed amendment has not yet been adopted by the requisite number of parties. See *supra* note 256.

64. See ICAO, INTERNATIONAL STANDARDS AND RECOMMENDED PRACTICES: AERONAUTICAL INFORMATION SERVICES, ANNEX 15 TO THE CONVENTION ON INTERNATIONAL CIVIL AVIATION (7th ed. 1987); *Report of the Third Middle East Regional Air Navigation Meeting* (March 27-April 13, 1984), ICAO Doc. 9434 [hereinafter *Third MIDRAN Report*].

65. *Id.* at 2.6/1 (e), (g); *id.* at 2.6.8.

66. *Id.* at 2.6/1 (e).

67. *Id.* at 2.6/1 (g).

Iran apparently contends that the U.S. NOTAM had no legal effect, either because it attempted to create what otherwise might be considered temporary airspace reservations in the Persian Gulf, or because the U.S. NOTAM did not constitute effective notice of U.S. variation under article 38 of the Chicago Convention.⁶⁸

2. *American Position Before the International Court of Justice*

American views with respect to the Flight 655 incident have been expressed in mixed fora, including the U.N. Security Council, the ICAO Council, in cooperation with the ICAO investigation, the official Department of Defense Report, and in the congressional testimony of the Department of State's Legal Adviser and various naval officers responsible for the official Department of Defense investigation. As a result, one should recognize that official U.S. statements concerning the Flight 655 incident represent a mixture of political and legal viewpoints. The United States has consistently asserted the position that, as a matter of international law, it is not legally responsible for the downing of Flight 655. It bases this contention on two claims: First, the *Vincennes* shot down Flight 655 in the good faith belief that it was a hostile aircraft threatening immediate harm to the *Vincennes* and/or the *Montgomery*. Second, Iran shares responsibility for the tragic accident.

The Legal Adviser asserted before Congress that because the use of force against Flight 655 was lawful, state responsibility principles precluded legal responsibility for the downing of Flight 655.⁶⁹ Significantly, the testimony concerning "lawful force" fails to articulate clearly the reasoning followed in reaching such a legal conclusion. The legal significance of the second claim of shared Iranian responsibility, however, is less obvious. It might be considered solely a political statement, similar to then Vice-President Bush's statements before the U.N. Security Council that the Flight 655 incident would not have occurred but for Iran's continuing failure to comply with Security Council resolutions seeking to end the Iran-Iraq War.⁷⁰ On the other hand, the attempt to assign legal responsibility to Iran also resembles an omissions analysis in that it asserts that Iranian officials were at fault for not preventing Flight 655 from overflying a warship engaged in battle.⁷¹

68. The ICAO Report indicated specifically that the U.S. NOTAM did not conform to the requirements of annex 15. See ICAO Report, *supra* note 6, at 11.

69. See DEP'T ST. BULL., No. 2139, Oct. 1988, at 58-59, reprinted in *Agora: The Downing of Iran Air Flight 655*, 83 AM. J. INT'L L. 320, 321-22 (1989) [hereinafter *Agora*].

70. *Id.*

71. *Id.* at 321.

Regarding the speedboat attack on the *Vincennes*, the Legal Adviser's congressional testimony on August 4, 1988, included two basic statements concerning the claim of shared Iranian responsibility:

The Government of Iran should not have allowed gunboats to attack our vessels and aircraft. That government also should not have allowed a passenger airline [sic] to fly over a battle zone -- especially not unless it was equipped and prepared to respond to our Navy's repeated warnings.⁷²

The Legal Adviser seemed to contemplate two separate breaches of legal duties, one in connection with the speedboat attack and the other in permitting overflight of the surface engagement by a civilian airliner.

Given the Legal Adviser's position as a legal rather than a diplomatic officer and the fact that he was speaking to Congress, it seems likely that the omissions analysis has a legal rather than a diplomatic significance. However, this analysis is problematic because the speedboat attack was actually undertaken by an irregular force, the Revolutionary Guards, as opposed to Iran's regular armed services. The Legal Adviser's statement must be contrasted with Vice-President Bush's assertion before the U.N. Security Council that:

The U.S.S. *Vincennes* acted in self-defense. This tragic accident occurred against a backdrop of repeated, unjustified, unprovoked, and unlawful Iranian attacks against U.S. merchant shipping and armed forces . . . It occurred in the midst of a naval attack initiated by Iranian vessels against a neutral vessel and, subsequently, against the *Vincennes* when it came to the aid of the innocent ship in distress.⁷³

The above formulations are strikingly different. The Legal Adviser was apparently unwilling or unable formally to attribute the speedboat attack on the *Vincennes* to the Iranian government. If the Legal Adviser's choice of words reflects underlying concern about formal attribution of the action to Iran, the legal basis for this reluctance may be sought in the recent *Case Concerning United States Diplomatic and Consular Staff in Teheran*.⁷⁴ To the extent

72. DEP'T ST. BULL., No. 2139, Oct. 1988, at 58-59, reprinted in *Agora*, supra note 69, at 321-22.

73. DEP'T ST. BULL., No. 2138, Sept. 1988, at 42-43, reprinted in *Agora*, supra note 69, at 321. The Vice-President's statement should be understood as an attempt to fit the use of armed force by the *Vincennes* into the scheme of the United Nations Charter, and specifically into article 51. However, as a legal matter it is debatable whether the repulse of an attack by an armed band constitutes self-defense for international law purposes. See, e.g., Linnan, *Self-Defense, Necessity and U.N. Collective Security Under International Law: American and Other Views*, 1 DÜKE J. COMP. & INT'L L. 27, 76 n.74, 115 n.223 (1991).

74. *Case Concerning United States Diplomatic and Consular Staff in Teheran (Iran v. U.S.)*, 1980 I.C.J. 3 [hereinafter *Hostage Case*]. The United States asserted that the armed "militants" occupying the American Embassy and holding the hostages acted on behalf of Iran's revolutionary government and therefore under color of state authority. See [1980] 1 Y.B. INT'L L. COMM. 91. The ICJ opined that the conduct of the militants who had seized the Embassy and its staff "might be considered as itself directly imputable to the Iranian State only if it were established that . . . the militants acted on behalf of the State." *Hostage Case*, supra, at 29. For this precedent and the agency-style "on behalf of" analysis, see RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §207(c) (1989) [hereinafter RESTATEMENT THIRD].

The ICJ eventually attributed responsibility to Iran on the basis of its *post hoc* governmental approval of the militants' action where the hostage situation occurred in its territory and continued over an extended

attribution of the speedboat attack is problematic, Iran's violation of international law in connection with the sea attack should not be characterized as a government-sponsored armed attack, but rather as a violation by omission of the government's duty to prevent the use of its territory and the activities of its nationals in preying on neutral shipping in the Persian Gulf.⁷⁵

Then Vice-President Bush's statement before the U.N. Security Council in which he asserted that the *Vincennes* defended itself against an attack by "Iranian vessels" may be subject to further interpretation. Under some views of international law, self-defense can only be asserted against the attack of another state, while a necessity analysis governs appropriate responses for attacks on a state by private individuals traditionally referred to as "armed bands."⁷⁶ On the one hand, harboring armed bands may raise the issue of indirect aggression under international law.⁷⁷ On the other hand, armed band

period of time. Hostage Case, *supra*, at 29. However, the ICJ did not automatically accept the U.S. position that the "Government of Iran, in tolerating, encouraging, and failing to prevent and punish the [militants'] conduct, violated its obligations." *Id.* at 30. This is even more surprising since the case arose out of an ongoing, and almost universally condemned violation of diplomatic and consular immunities. To the extent such concerns underlie the Legal Adviser's choice of words, they merely reflect the larger legal problem developing in the area of indirect aggression and the treatment of armed bands under international law. See *infra* note 76 and accompanying text.

75. See generally 1 J. MOORE, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN A PARTY 539-63 (1898); C. BEAMAN, THE NATIONAL AND PRIVATE "ALABAMA CLAIMS" AND THEIR "FINAL AND AMICABLE" SETTLEMENT (1871) (*Alabama* arbitration involved British responsibility for havoc wrought outside its territory by Confederate raider *Alabama* and similar vessels outfitted in British shipyards). The *Alabama* proceedings are generally acknowledged as the earliest and perhaps the leading precedent for imposing responsibility on state for actions undertaken by private parties on or from its territory against interests of another state in apparent violation of territorial state's legal obligation to prevent misuse of its territory. For American views of international law of the omission analysis, see RESTATEMENT THIRD, *supra* note 74, §207. Given past practice during World Wars I and II, which has increasingly led belligerents to assert practical control over neutral shipping, both belligerents in the Gulf War might dispute the existence of a duty not to fire on neutral tankers carrying the other belligerent's cargo. Even were such activity permissible for regular naval forces, the legitimacy of such activity by groups such as the militants would still remain at issue. However, this question has apparently not been raised here, despite a symmetry problem that such groups if viewed as armed bands should presumably never be able to engage in such activity unless they are either pirates or at least acting "on behalf of" the Iranian government, which implies that any attack should be considered to be "on behalf of" Iran.

76. See generally Brownlie, *International Law and the Activities of Armed Bands*, 7 INT'L & COMP. L.Q. 712 (1958). Current international law scholarship treats the armed band problem predominantly in terms of attribution for purposes of state responsibility. See, e.g., M. GARCIA-MORA, INTERNATIONAL RESPONSIBILITY FOR HOSTILE ACTS OF PRIVATE PERSONS AGAINST FOREIGN STATES (1962); Sperduti, *Responsibility of States for Activities of Private Law Persons*, 10 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 373 (1987); Christenson, *The Doctrine of Attribution in State Responsibility*, in INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS (R. Lillich ed. 1983). There is substantial disagreement concerning the legal treatment of armed bands, both as a technical and a political matter. The issues are framed as indirect aggression versus the permissibility of assistance to self-determination movements, which are called national liberation movements in socialist international law. See Linnan, *supra* note 73, at 72 n.67, 73 nn.68-69, 74 n.70.

77. Traditionally, outside of special areas such as piracy, international armed attacks generally have been conducted by the armed forces of a state. More recently, commentators have raised the question whether a state that supports persons committing terrorist acts abroad should be held legally responsible for their acts. See Christenson, *supra* note 76, at 321, 336; Lillich & Paxman, *State Responsibility for*

attacks on another state's armed forces may be considered beyond international law *per se*, instead being covered by municipal law under protective jurisdiction principles recognized, but not necessarily controlled by international law.⁷⁸

In addition to the previously noted complications concerning the nature of the combatants in the surface engagement, one must also consider the international law basis for the Legal Adviser's congressional testimony addressing Flight 655's overflight of a battle zone.⁷⁹ Beyond the international civil aviation law versus self-defense issue of whether the *Vincennes* could prohibit use of A59, the more basic problem of freedom of the seas is at stake. The question does not involve the high seas *per se* because the events occurred in the Strait of Hormuz, but could be analogized to the high seas under comparable free passage principles given the transit passage regime governing overflight of straits.⁸⁰ The Legal Adviser's views implicitly conflict with the ideas of free passage over international waters that govern recommendation 2.6/1. They also run counter to the longstanding U.S. position that rights of transit passage exist on and over international straits, because the Legal Adviser's views might permit closure of a strait to overflight. However, before the ICJ can reach these issues, it first has to decide on the challenge to its jurisdiction filed by the United States.

C. American Challenge to the Jurisdiction of the International Court of Justice

On March 4, 1991, the United States filed a preliminary objection to the jurisdiction of the International Court of Justice in the Flight 655 case. The Iranian response is due no later than December 9, 1991.⁸¹ The jurisdictional stage of the Flight 655 proceedings presents two questions: 1) the likelihood of success of the U.S. challenge of the ICJ's jurisdiction under the Chicago and Montreal Conventions; and 2) if the United States loses its jurisdictional challenge, the probability of its withdrawing or remaining before the ICJ and litigating on the merits. The jurisdictional challenge involves the conflict

Injuries to Aliens Occasioned by Terrorist Activities, 26 AM. U.L. REV. 217, 251-75 (1977). See also M. GARCIA-MORIA, *supra* note 76; Sperduti, *supra* note 76, at 373. American commentators have advanced the view that permitting the use of its territory as a base for the commission of terrorist acts abroad is enough to create state responsibility. See Lillich & Paxman, *supra*, at 258-60 (Texas cattle claims); 8 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 749-55 (1967); AMERICAN-MEXICAN CLAIMS COMMISSION, REPORT TO THE SECRETARY OF STATE 51 (1948). However, this analysis may go beyond any precedent. The difference between finding a violation of an international obligation in merely failing to prevent or punish armed band attacks conducted from a state's territory and the formal attribution of that armed band's attack to the state, parallels the difference between reparation liability for damages caused and the apparent commission of an act of aggression against another state with all its attendant consequences.

78. See *infra* note 280 and accompanying text.

79. See *supra* note 72 and accompanying text.

80. See *infra* notes 251-53 and accompanying text.

81. See *supra* note 1.

between the U.S. position that the *Vincennes* acted in self-defense, and the Iranian claim that mandatory jurisdiction lies under articles 84 and 85 of the Chicago Convention and article 14 of the Montreal Convention. It appears that the United States will win the jurisdictional challenge as to the Montreal Convention, lose as to the Chicago Convention, but choose to remain before the ICJ.

Although the ICAO Council has a quasi-judicial function and parties to a dispute may appeal its judgment, it is not a court and may thus adopt flexible procedures to determine both the facts and law applicable to the dispute.⁸² The ICAO investigation called for under the initial Council decision of July 14, 1988, was arguably part of a preliminary quasi-judicial, fact-finding process. The Council reached a decision in its March 17, 1989 action, after the U.S. attempt to negotiate a settlement through its offer of *ex gratia* compensation had failed. Under articles 84 and 85 of the Chicago Convention, a party to the dispute may appeal a Council decision on issues of law and fact to an *ad hoc* arbitral tribunal or to the International Court of Justice, as successor to the Permanent Court of International Justice named in the Chicago Convention. Jurisdiction appears compulsory when the interpretation or application of the Chicago Convention and its annexes is at issue, while in all other cases both parties must consent to ICJ jurisdiction.⁸³ Thus, jurisdiction under the Chicago Convention exists in a dispute over the proper relationship between self-defense and duties concerning aircraft safety and overflight rights under the Chicago Convention.

Initially, the United States may claim either that a state's assertion of self-defense is self-judging⁸⁴ or, in the alternative, that the Iranian Application is inadmissible on the ground that as a judicial body the ICJ is unsuited or unable to pass judgment on the inherent right of self-defense under article 51 of the U.N. Charter. However, the ICJ's disposition of analogous issues in the *Nicaragua Case*⁸⁵ makes it doubtful that the United States could successfully rely on such arguments. For this reason, the keystone of U.S. jurisdictional arguments will probably focus on the proper interpretation of article 89 of the Chicago Convention, which provides that "[i]n case of war, the provisions of this Convention shall not affect the freedom of action of any of the contracting States affected, whether as belligerents or as neutrals."⁸⁶ At least three plausible interpretations of this article are possible. According to the first interpretation, article 89 renders the Convention inoperative, because the Flight 655

82. T. BUERGENTHAL, LAW-MAKING IN THE INTERNATIONAL CIVIL AVIATION ORGANIZATION 80, 136 (1969).

83. *Id.* at 143-46.

84. Linnan, *supra* note 73, at 85-89; see *infra* notes 402-406 and accompanying text.

85. See 1984 I.C.J. at 429-41 (jurisdiction of ICJ and admissibility of application).

86. Chicago Convention, *supra* note 60, at art. 89.

incident occurred in the midst of the Iran-Iraq War and the *Vincennes* was a neutral warship taking defensive measures. In the alternative, the United States might argue that article 51 of the U.N. Charter concerning self-defense has completely preempted article 89 of the Chicago Convention by virtue of article 103 of the U.N. Charter. If article 89 of the Chicago Convention renders the Convention inapplicable to wartime incidents, then there will be no dispute recognized by the terms of the Convention, and thus no mandatory appeal of the ICAO Council decision. However, this interpretation is inconsistent with the language of article 89, the ICJ's understanding of article 89, and its understanding of a "dispute" implied in its 1972 judgment *Appeal Relating to the Jurisdiction of the ICAO Council*.⁸⁷

The second reading, which Iran might assert in response to the American jurisdictional arguments, maintains that the language of article 89 does not contemplate making the entire Chicago Convention inapplicable during wartime. Instead, this reading construes the wording "shall not affect the freedom of action of any of the contracting States affected," to concern only the rules governing territorial airspace. An inquiry into how the Chicago Convention in the absence of article 89 might restrain belligerents and neutrals reveals that it established the principle that a state has complete and exclusive sovereignty over the airspace above its territory and territorial waters, including the right to close its airspace to foreign aircraft.⁸⁸ Were a belligerent entitled to close its airspace as in peacetime, it could avoid air attacks on its territory. Article 89's mention of neutrals would be necessary, because some claim that the Chicago Convention regime implies a positive duty to permit some overflight despite the territorial character of a state's airspace. This would be inconsistent with the closure of territorial airspace by neutral states to all belligerent aircraft during wartime. Under this second reading, the freedom of action preserved to belligerents and neutrals relates specifically to the peacetime territorial airspace concept and a desire that it not conflict with established wartime practices such as belligerent bombing of the enemy state and a neutral state's closure of its airspace. If article 89 addressed only the territorial airspace regime, it would arguably not apply to Flight 655's downing when viewed as a maritime incident occurring over international waters. While more consistent than the first reading with the "freedom of action" language of article 89, this

87. *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pak.)*, 1972 I.C.J. 46.

88. Article 1 of the Chicago Convention appears to grant this right by adopting the sovereignty scheme of the Paris Convention. Paris Convention for the Regulation of Aerial Navigation, Oct. 13, 1919, 11 L.N.T.S. 173 (never ratified by the United States). See 6 UNPERFECTED TREATIES OF THE UNITED STATES OF AMERICA 1776-1976, at 411 (C. Wiktor ed. 1984) [hereinafter 1919 Paris Convention]. See, e.g., Goedhuis, *Questions of Public International Air Law*, 81 REC. DES COURS 201, 209-10 (1952 II). Since a significant number of states did not join the Paris Convention, the Chicago Convention with its larger number of state parties established the general rule.

position fails to explain clearly why only the territorial airspace rules should be displaced.

The third reading of article 89, which is advocated in this article, presents problems for both the United States and Iran. Under this reading, article 89 does not render the entire Chicago Convention inapplicable in wartime. Rather, the Chicago Convention continues in force during wartime, subject to the caveat that the law of armed conflict take precedence over inconsistent provisions of the Chicago Convention and its annexes. This would entitle Flight 655 to receive the treatment required for noncombatant aircraft under the law of armed conflict. A violation of the Chicago Convention would occur only if a downing were impermissible under the law of armed conflict.

From the U.S. perspective, this position is problematic because the ICJ could assert the equivalent of preliminary jurisdiction to resolve the questions whether: 1) the downing of a civilian airliner would normally violate the Chicago Convention or its annexes; and 2) whether the law of armed conflict would permit the downing of Flight 655 when viewed as a noncombatant aircraft. For Iran, this approach would force it to abandon the substantive position underlying its ICJ Application, which claims that the legality of Flight 655's downing is governed solely by civil aviation treaty law and not by the principles of the law of armed conflict. Under this approach, based on the Chicago Convention, the ICJ would reach a decision on jurisdiction and the merits largely through an examination of the law of armed conflict.

Turning to the Montreal Convention, the Iranian invocation of this multilateral agreement against the actions of a state's armed forces seems strained.⁸⁹ Judging by its final submission to the ICAO Council,⁹⁰ the Iranian ICJ Application relies upon the Montreal Convention in an attempt to criminalize the *Vincennes*' alleged breach of international obligations. Mandatory jurisdiction of the ICJ concerning interpretation or application of the Montreal Convention is determined by article 14 without regard to the decision of the ICAO Council.

Article 14's jurisdictional grant to the ICJ is premised on a disagreement concerning the Montreal Convention that: 1) cannot be settled through negotiation, 2) for which arbitration of the dispute cannot be organized within six months, and 3) is referred to the ICJ in conformity "with the Statute of the Court." Despite U.S.-Iranian negotiations surrounding the U.S. *ex gratia* offer of compensation, it is unclear whether the parties included the Montreal Convention in their negotiations. In addition, unless the ICAO Council proceedings are characterized as an attempt to arbitrate the dispute, Iran apparent-

89. See, e.g., E. McWHINNEY, *THE ILLEGAL DIVERSION OF AIRCRAFT AND INTERNATIONAL LAW* 45-58 (1975); N. JOYNER, *AERIAL HIJACKING AS AN INTERNATIONAL CRIME* 216-29 (1974) (Montreal Convention as extension of anti-hijacking and sabotage conventions rather than general air safety treaty).

90. See *supra* note 64 and accompanying text.

ly never requested arbitration of any dispute concerning the Montreal Convention. When released, the private diplomatic record may reveal Iranian efforts to negotiate and arbitrate the Montreal Convention's coverage of the Flight 655 incident. However, without such a showing, Iran cannot meet article 14's requirements for ICJ jurisdiction.

Even with evidence of attempted negotiation and arbitration, two further objections to jurisdiction remain. Article 14's reference to the Statute of the Court might call into play U.S. reservations, although the ICJ rejected a similar argument under the Chicago Convention in the 1972 *Appeal Relating to the Jurisdiction of the ICAO Council*.⁹¹ Moreover, the nature of the Montreal Convention as an anti-hijacking and sabotage treaty seems to preclude its application to the acts of armed forces governed by the law of armed conflict under article 89 of the Chicago Convention.

Given that the ICJ jurisdiction provisions of both the Chicago and Montreal Conventions limit jurisdiction to disputes arising under those treaties, it is possible that without independent jurisdictional grounds, the Iranian claims concerning air safety and free overflight under the Chicago Convention will proceed on the merits, while the U.S. jurisdictional challenge will dispose of the claim under the Montreal Convention. The question remains whether the United States will remain before the ICJ or will withdraw from the litigation, as it did in the *Nicaragua Case*, if any portion of the Iranian ICJ application proceeds to adjudication on the merits. In responding to reporters' questions and elaborating on President Bush's 1989 statement that the United States would appear and litigate the Iranian claims before the ICJ, a State Department spokesperson indicated that:

Iran is suing under the Chicago and Montreal Conventions in which we agreed to the submission to the Court of various civil aviation disputes. We will contest Iran's suits on jurisdictional grounds and on the merits. But we recognize the Court's authority under these two conventions to determine whether it has jurisdiction. Our participation is aimed at challenging Iran's assertions. In any event, the Court will proceed with the case whether we participate or not. By appearing, we will be able to present our case and protect US interests most effectively.⁹²

The reference to both jurisdictional grounds and the merits apparently indicates the government's willingness to litigate on the merits should the jurisdictional challenge fail. Additionally, the U.S. efforts to convince other nations (chiefly the Soviet Union) to accept the ICJ authority in resolving certain multilateral and bilateral treaty disputes, as well as practical and political imperatives given the current Middle East situation and attempts at rapprochement with Iran, seem to support the idea that the United States will

91. *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pak.)*, 1972 I.C.J. at 53, 60, 117 (Indian reservation regarding disputes between Commonwealth countries in India's general declaration accepting ICJ jurisdiction should take precedence over Chicago Convention's jurisdictional provisions).

92. *State Department Briefing*, *supra* note 5.

contest the case on the merits should its jurisdictional arguments fail. However, responding to the question whether the United States would reserve the right to withdraw from the litigation or whether it would acknowledge the ICJ's authority to award an indemnity, the State Department spokesperson declined to comment on such "speculative" questions. The interests at stake and the concerns recited above make it likely that the United States will remain before the ICJ to contest the merits if its jurisdictional challenge fails.

III. FREEDOM OF THE SEAS AND COMBATANT RIGHTS

Understanding the Flight 655 incident requires an appreciation of its special character as a maritime incident. Traditional maritime use of force law incorporated free passage principles *sub silencio*. These free passage and overflight principles have influenced modern civil aviation law and lie concealed in both states' positions before the ICJ. Historically, the United States has adopted a broad view of free passage by neutral vessels in international waters, and a narrow view of belligerent rights, particularly with regard to exclusionary zones. The downing of Flight 655 presents only the latest instance of a very old problem: freedom of the seas and reconciliation of the rights of belligerents and nonbelligerents. Under a broad view, the *Vincennes* as a neutral warship was present in the Persian Gulf to protect nonbelligerent oil tankers from belligerent attacks in connection with the ongoing Iran-Iraq War. Under a narrow view, the *Vincennes* was a combatant that shot down a civilian airliner. This section argues that the United States claim before the ICJ--based on an expansive notion of combatant rights, a duty to avoid requirement, and a lawful force analysis--contradicts its historical commitment to freedom of the seas and ultimately conflicts with its long-term national interests.

A. *Traditional Notions of Freedom of the High Seas and the Vincennes' Character as a Neutral Warship*

From their inception, aviation law and the law of aerial warfare⁹³ have borrowed from the law of the sea.⁹⁴ The earliest rules governing noncombat-

93. The 1923 *Hague Radio and Aerial Warfare Rules* adopted maritime concepts. J. SPAIGHT, AIR, POWER AND WAR RIGHTS 409-10 (3d ed. 1947). During this period, various publicists recognized the difficulty of determining the law of aerial warfare simply by extending the legal principles governing sea or land warfare. See, e.g., Sandiford, *Evolution du droit de la guerre maritime et aérienne*, 68 REC. DES COURS 555, 660-80 (1939-II); Garner, *La réglementation internationale de la guerre aérienne*, 30 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIQUE 372, 380 (1923). See also J. BAKER & L. MCKERNAN, SELECTED TOPICS CONNECTED WITH THE LAWS OF WARFARE AS OF AUGUST 1, 1914, at 580-609 (1919), reprinted in 3 THE INQUIRY HANDBOOKS (1974) (aerial warfare).

94. Civil law of international air and space is largely governed by treaties such as the Chicago Convention. However, written agreements are rare with regard to aerial warfare and the legal status of noncombatants. See, e.g., the Agreement Supplementary to the Nyon Arrangement, L.N. Doc.

ant flights over belligerent forces on the high seas were derived directly from maritime free passage rules and principles of belligerent engagement.⁹⁵ Preliminary analysis must focus on: 1) air and maritime law relating to the rights and duties of civilian aircraft, and 2) the rights and duties of neutral warships asserting neutral free passage rights during wartime.⁹⁶

Traditional notions of the high seas regard international waters as "neutral highways" not subject to the legal control of any one state.⁹⁷ Nations generally recognize freedom of the high seas,⁹⁸ a right now guaranteed by treaty.⁹⁹ With limited exceptions,¹⁰⁰ a state does not have any authority or jurisdiction to interfere in peacetime with the passage of a foreign vessel on the high seas.¹⁰¹ The thorny problem is how to reconcile the interests of belligerents and nonbelligerents in their use of the common maritime arena during wartime.

Under traditional views, belligerent rights to conduct hostilities and neutral rights to trade on the high seas were coequal. Exceptions to freedom of the high seas, encompassing unrestricted passage and protection of commerce, were enunciated in the rules of traditional sea warfare. Free passage on the high seas could be interrupted under prize law principles of visitation, search, and capture applicable to belligerent and neutral shipping. This position was

C.409.M.273.1937.VII, *reprinted in* 31 AM. J. INT'L L. SUPP. 179, 182 (1937) (extends treaty provisions in naval warfare to include aerial matters). *See also* 3 C. HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED BY THE UNITED STATES 2014-15, 2021 (2d ed. 1945); Green, *Aerial Considerations in the Law of Armed Conflict*, 5 ANNALS AIR & SPACE L. 89 (1980); *infra* notes 168-180 and accompanying text (1923 *Hague Radio and Aerial Warfare Rules*).

95. *See* J. SPAIGHT, *supra* note 93, at 399-401. *See also* J. STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT: A TREATISE ON THE DYNAMICS OF DISPUTES AND WAR LAW 613 (1974).

96. *See infra* notes 340-68 and accompanying text. The second point relating to the rights and obligations of neutrals caught up in hostile engagements will be addressed later in further detail.

97. For an introduction to the history of this doctrine, see 1 D. O'CONNELL, THE INTERNATIONAL LAW OF THE SEA 1-28 (1982); 1 G. GIDEL, *Le droit international publique de la mer*, 125-212 (1932); P. POTTER, THE FREEDOM OF THE SEAS IN HISTORY, LAW AND POLITICS 11-96 (1924).

98. *See generally* 1 D. O'CONNELL, *supra* note 97, at 1-28; 1 G. GIDEL, *supra* note 97, at 213-24; The United States has been and remains a strong proponent of freedom of the seas. Any U.S. advocacy for restricting freedom of the seas is the exception rather than the rule.

99. Convention on the High Seas, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82, [hereinafter 1958 LOS High Seas Convention](constituent agreement under 1958 LOS to which United States is party); U.N. Convention on the Law of the Sea, U.N. Pub. No. E.83.V.5 (1983) [hereinafter 1982 LOS High Seas Convention]; (United States not a party and has not entered into force due to insufficient number of signatories).

100. The exceptions generally relate to boarding powers on the high seas for enforcing prohibitions on piracy and slavery.

101. *See, e.g.,* Owners of *The Jessie, The Thomas F. Bayard and The Pescawha* (Gr. Brit. v. U.S.), 6 R. INT'L ARB. AWARDS 57, 58-59 (1921); Owners, Officers and Men of *The Wanderer* (Gr. Brit. v. U.S.), *id.* at 68, 71-75 (1921); Laughlin McLean (Gr. Brit. v. U.S.), *id.* at 82, 84 (1921). *See also* Charterers and Crew of *The Kate* (Gr. Brit. v. U.S.), *id.* at 77 (1921); Owners of the Cargo of *The Coquitlam* (Gr. Brit. v. U.S.), *id.* at 45 (1920).

implicitly reaffirmed in the United States extension of navy protection to neutral vessels in the Persian Gulf prior to the Flight 655 incident.¹⁰²

Traditional prize law categorized vessels by nationality and function. Enemy merchant ships generally were subject to seizure, but not to unannounced attack, since they were unarmed. Neutral merchant ships benefitted from the traditional noncombatant treatment of all unarmed vessels, but were subject, with their cargo, to belligerent seizure only under the recognized doctrines of nonneutral service, contraband, and blockade. Although disputes arose among states over the details of this law,¹⁰³ neutral vessels and cargos generally were accorded special protection for both legal and political reasons. The state of an injured neutral might respond to unwarranted attacks by invoking sanctions, as the United States did to France and Britain during the Napoleonic Wars, or by entering the war on the side of an enemy, as the United States did in the War of 1812.¹⁰⁴

Under a traditional sea warfare analysis, the *Vincennes* was a neutral warship present in the Persian Gulf for the legitimate purpose of protecting neutral shipping.¹⁰⁵ Faced with "unlawful" belligerent activities, a neutral

102. See *supra* note 18 and accompanying text. This presumes placement of protection of transit passage through the Strait of Hormuz on the level of traditional free passage rights on the high seas. This section will focus on free passage, not transit passage.

103. See, e.g., 1 P. JESSUP & F. DEAK, *NEUTRALITY: ITS HISTORY, ECONOMICS AND LAW: THE ORIGINS* (1935).

104. See generally W. PHILIPS & A. REEDE, 2 *NEUTRALITY: ITS HISTORY, ECONOMICS AND LAW: THE NAPOLEONIC PERIOD* (1936); Sherman, *Orders in Council and the Law of the Sea*, 16 AM. J. INT'L L. 400, 561 (1922). Older views of freedom of the seas, particularly in wartime, are often characterized as splitting along political lines of "maritime" and "Continental" powers. See, e.g., P. POTTER, *supra* note 97, at 171-207.

105. Precedents for such activity date back as far as the First and Second Armed Neutralities of 1780 and 1799 and the French-American Quasi-war of 1798-1800. They are also found in the World War I stationing of naval gunners on neutral American merchant ships to protect them from submarine attack, and in the Nyon Agreement from the Spanish Civil War. See, e.g., Kunig, *Nyon Agreement* (1937), 4 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 57 (1982).

It might be argued that, in the absence of a U.N. Security Council determination characterizing either Iran or Iraq as the "aggressor," the United States legally could maintain a neutral equipoise toward both belligerents. See, e.g., Note, *Air Attacks on Neutral Shipping in the Persian Gulf: The Legality of the Iraqi Exclusion Zone and Iranian Reprisals*, *supra* note 18, at 524-25. However, this assumes that such a Security Council designation of aggression is a precondition to duties of opposition to aggression attached under the modern U.N. Charter law. For the presentation of this position as the U.S. view, see UNITED STATES DEP'T OF THE NAVY, *LAW OF NAVAL WARFARE*, para. 232 [hereinafter 1955 LAW OF NAVAL WARFARE], reprinted in R. TUCKER, *THE LAW OF WAR AND NEUTRALITY AT SEA* (1955); see also 1989 *Annotated Commander's Handbook*, *supra* note 18, at para. 7.2.1. In accordance with U.N. practice, the Security Council resolutions calling for a cease fire and negotiated resolution to the conflict omitted the designation of either party as the aggressor. If third party states adhered to neutrality obligations, such as impartiality, few such problems would arise. For the contemporary notion of nonbelligerence as opposed to the traditional concept of neutrality, see, e.g., J. KOPFER, *DIE NEUTRALITÄT IM WANDEL DER ERSCHEINUNGSFORMEN MILITARISCHER AUSEINANDERSSETZUNGEN* (1975); 11 M. WHITEMAN, *supra* note 77 at 139-210 (1968); Schindler, *Aspects contemporains de la neutralité*, 121 REC. DES COURS 221 (1967-II), problems occur whenever nonbelligerents elect to deal preferentially with a belligerent state that may be regarded objectively as the aggressor state. During the Iran-Iraq War, nonbelligerent Arab Gulf states offered financial and other aid to Iraq, while those countries sought the protection of neutral status under prize law for their oil tankers. To the extent merchant vessels either sailing under their flag or carrying their oil to

state could respond either directly through the immediate use of armed force or after the fact in the form of a reprisal.¹⁰⁶ The *Vincennes*' actions did not constitute an armed reprisal, commonly considered unlawful under U.N. Charter law,¹⁰⁷ and the problem is determining the duties governing its immediate use of force. As a preliminary matter, the question can be reduced to whether under current armed conflict law, the proper rules for the *Vincennes*' treatment of noncombatants were those traditionally applicable by belligerents either to merchant ships or to civil aircraft of neutral or enemy status.¹⁰⁸ Although the distinction between enemy and neutral noncombatants has largely disappeared from the rules of land warfare under modern treaty law,¹⁰⁹ naval and aerial warfare are still governed largely by customary law.¹¹⁰ Older precedents do not provide a clear answer but suggest on principle that neutral warships should treat belligerent merchant shipping and noncombatant aircraft no worse than belligerents may treat similarly situated neutrals, subject to recognized exceptions in the law of neutrality. This view is compelled by

export markets were attacked by Iranian forces, the question arises whether those Iranian attacks might be rationalized as armed reprisals permitted as a matter of customary law against non-belligerents not adhering to the traditional obligations of neutrals. See Russo, *supra* note 18. Otherwise, the question may be posed whether the same partial acts of nonbelligerents should be viewed as hostile acts in a traditional sense. See Mehr, *Neutrality in the Gulf War*, 20 OCEAN DEV. INT'L L. 105 (1989).

106. Retaliation might be tempered by the recognition that any use of armed force could signal the abandonment of neutrality and the assumption of belligerent status. Accordingly, neutral reprisals against belligerent merchant ships or aircraft are rare.

107. See Bowett, *Reprisals Involving Recourse to Armed Force*, 66 AM. J. INT'L L. 1 n.2 (1972). See also Barsotti, *Armed Reprisals*, in THE CURRENT REGULATION OF THE USE OF FORCE 79-84 (A. Cassese ed. 1986); RESTATEMENT THIRD, *supra* note 74, § 905.

108. During the two World Wars, principles of naval warfare were more often broken than espoused. As a matter of state practice and customary international law, the extent to which these principles have retained their force of law or have been replaced by new norms is unclear. See R. TUCKER, INTERNATIONAL LAW STUDIES, 1955, THE LAW OF WAR AND NEUTRALITY AT SEA 26-32, 181-190 (1955). See also 1989 *Annotated Commander's Handbook*, *supra* note 18; 1955 LAW OF NAVAL WARFARE, *supra* note 105, at para. 5.4 to 5.4.2.

109. See Protocol I Additional to the Geneva Conventions of 1949, Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I]. When neutral lives and property were taken or destroyed, this would be treated typically as a case of state responsibility, involving a duty to protect alien lives. This analysis has been extended implicitly to the Korean Airlines Flight KE 007 incident. See Cheng, *The Destruction of KAL Flight KE 007, and Article 3 bis of the Chicago Convention*, in AIRWORTHY: LIBER AMICORUM HONOURING PROFESSOR DR. I.H.PH. DIEDERIKS-VERSCHOOR 71-72 (1985). There is some basis beyond mere formalism for distinguishing between warfare on land and at sea. Land warfare often involves civilians that do not possess a legal right of presence, whereas neutral ships caught up in battles still may rely on their independent right to free passage in international waters.

110. See Protocol I, Art. 49, *supra* note 109, at 25 (implicitly excludes any coverage of effects of "armed conflict at sea or in the air"). Levie, *supra* note 18, at 728-30. Although areas of the traditional law of naval warfare such as the bombardment of ports may be covered, this does not address the Flight 655 problem involving downing a civilian aircraft over international waters. Other post-U.N. Charter treaties also have some limited application to naval and aerial warfare, but only in marginal areas such as protection of hospital ships and medical aircraft. See, e.g., Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Oct. 21, 1950, 75 U.N.T.S. 287 (general humanitarian precepts); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Oct. 21, 1950, 75 U.N.T.S. 85; 2 D. O'CONNELL, *supra* note 97, at 1105.

notions of reciprocity, the goal of minimizing injury and damage to noncombatants, and the obligation of neutral parties to avoid participation in conflicts. Under these circumstances and beyond the scope of the 1907 Hague Conventions and successor treaty law, the older customary sea warfare law applicable to neutrals is a preferred source for principles governing the treatment of noncombatants.¹¹¹

B. *Military Zones of Exclusion and Abrogation of Freedom of the High Seas in the Twentieth Century*

Reaching back to the Russo-Japanese War of 1902-1904, belligerent warships generally could not prohibit the passage of neutral merchant ships through areas of hostile engagement on international waters.¹¹² This resulted from the absolute right of neutrals to travel the high seas, a right characterized as coequal to belligerent rights to fight in the same waters. The *res nullius* legal character of the high seas implied that no vessel could lay claim to more sea than its hull occupied.¹¹³ For purposes of further discussion, this inquiry

111. See generally A. HIGGINS, THE HAGUE PEACE CONFERENCES AND OTHER INTERNATIONAL CONFERENCES CONCERNING THE LAWS AND USAGES OF WAR (1909); Moessner, *Hague Peace Conferences of 1899 and 1907*, 3 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 204 (1982); Scott, *The Work of the Second Hague Peace Conference*, 2 AM. J. INT'L L. 1 (1908). See also 1907 Hague Convention VI Relating to the Status of Enemy Merchant Ships at the Outbreak of Hostilities, reprinted in DOCUMENTS ON THE LAWS OF WAR 71 (A. Roberts & R. Guelff eds. 2d ed. 1989) [hereinafter DOCUMENTS ON THE LAWS OF WAR]; 1907 Hague Convention (VII) Relating to the Conversion of Merchant Ships into Warships, *id.* at 79; 1907 Hague Convention (VIII) Relative to the Laying of Automatic Submarine Contact Mines, *id.* at 85; 1907 Hague Convention (IX) Concerning Bombardment by Naval Forces in Time of War, *id.* at 93; 1907 Hague Convention (XI) Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War, *id.* at 101; 1907 Hague Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War, *id.* at 109. See also *infra* note 138 and accompanying text.

112. Under special circumstances, neutral ships might be subject to search. If no cause for further interference with their passage was discovered, vessels theoretically were free to sail through the armed conflict.

113. In *The Marianna Flora*, Justice Story argued that:

Upon the ocean, then, in time of peace, all possess an entire equality. It is the common highway of all, appropriated to the use of all; and no one can vindicate to himself a superior or exclusive prerogative there... The general maxim in such cases is, *sic utere tuo, ut non alienum laedas*.

It has been argued, that no ship has a right to approach another at sea; and that every ship has a right to draw round her a line of jurisdiction, within which no other is at liberty to intrude. In short, that she may appropriate so much of the ocean as she may deem necessary for her protection, and prevent any nearer approach.

This doctrine appears to us novel, and is not supported by any authority. It goes to establish upon the ocean a territorial jurisdiction, like that which is claimed by all nations within cannon shot of their shores, in virtue of their general sovereignty. But the latter right is founded upon the principle of sovereign and permanent appropriation, and has never been successfully asserted beyond it. Every vessel undoubtedly has a right to the use of so much of the ocean as she occupies, and as is essential to her own movements. Beyond this, no exclusive right has ever yet been recognized.

The Marianna Flora, 24 U.S. [11 Wheat.] 1, 42-44 (1826).

This should be understood in opposition to the competing but disfavored traditional view of freedom of the seas as based on *res communis*. Under this view, neutrals could deny belligerents the right to engage in hostilities at sea. See, e.g., W. SCHÜCKING, DER DAUERFRIEDE: KRIEGSAUFSATZE EINES PAZIFISTEN

refers to any claimed right to exclude neutrals from high seas battle locations as a "battle zone,"¹¹⁴ and to claims establishing broad exclusionary areas on the high seas as a "war zone."¹¹⁵ This analysis must also distinguish international waters *per se* from littoral areas adjoining territorial seas, where a greater degree of belligerent control might be recognized.

Early twentieth century publicists reconciled the conflict between the coequal rights of combatants and neutrals by suggesting that neutrals choosing to sail through belligerent engagements did so at their own peril.¹¹⁶ The visible nature of the engagement and the element of voluntary assumption of risk tipped the scale in favor of belligerent rights. This view is demonstrated in a letter to *The Times (London)* by the British publicist T.E. Holland addressing neutral rights and the mining problem during the Russo-Japanese War.

[There is] a perpetually recurring conflict between belligerent and neutral interests. They are, of course, irreconcilable, and the rights of the respective parties can be defined only by way of compromise. It is beyond doubt that the theoretically neutral right of ships, whether public or private, to pursue their ordinary routes over the high seas in time of war, is limited by the right of the belligerents to fight on those seas a naval battle, the scene of which can be approached by such ships only at their proper risk and peril. In such a case the neutral has ample warning of the danger to which he would be exposed did he not alter his intended course. It would, however, be an entirely different affair if he should find himself implicated in belligerent war risks, of the existence of which it was impossible for him to be informed, while pursuing his lawful business in waters over which no nation pretends to exercise jurisdiction.¹¹⁷

T.E. Holland's view was echoed in international legal commentaries published immediately after the Russo-Japanese War.¹¹⁸ Although belligerent warships could not exclude neutral ships from any areas of international waters, neutral vessels proceeded through areas of hostilities at their own peril, a view that was premised on ample warning.¹¹⁹

54 (1917); *but see* C. MEURER, *THE PROGRAM OF THE FREEDOM OF THE SEA: A POLITICAL STUDY IN INTERNATIONAL LAW* 17 n.5 (L. Frachtenberg trans. 1919), *reprinted in* 9 *THE INQUIRY HANDBOOKS* (1974). The accepted doctrinal view of the high seas in the twentieth century seems to have been that they have a *res nullius* character, although the "common heritage of mankind" treatment of seabed resources under the 1982 LOS Convention admittedly moves closer toward *res communis*.

114. This characterization parallels the Legal Adviser's wording, but does not accept his apparent position on the law. *See supra* note 70 and accompanying text.

115. Following Oppenheim, it is customary to speak of war theaters for purposes of establishing the legal boundaries for conducting hostilities at sea.

116. *See, e.g., infra* notes 117-19 and accompanying text. Another possible way to resolve the neutral-belligerent conflict would be to require belligerents temporarily to halt their engagements in the presence of neutral vessels. However, such a procedure would have restrained belligerents' own right to freely use the high seas, thereby moving toward a *res communis* view.

117. *The Times (London)*, May 25, 1904, at 10.

118. *See* A. HERSHEY, *THE INTERNATIONAL LAW AND DIPLOMACY OF THE RUSSO-JAPANESE WAR* 244-45 (1906); F. SMITH & N. SIBLEY, *INTERNATIONAL LAW AS INTERPRETED DURING THE RUSSO-JAPANESE WAR* 296 (1905).

119. Subsequent discussion will cover the parallel issue of whether the neutral party is present at its own peril since the belligerent warships under a necessity rationale may attack or defend themselves without hinderance during an actual engagement. *Cf.* 3 C. HYDE, *supra* note 94, at 1952-53.

At the turn of the century, the United States supported a broad interpretation of the law of neutrality and freedom of the high seas. Accordingly, any asserted right by a belligerent to interdict passage on the high seas was inimicable to American views.¹²⁰ Such a belligerent claim would constitute an unacceptable attempt to control the high seas on a quasi-territorial basis without any foundation in customary law.¹²¹ The traditional law of contraband and blockade constituted the exception, under which rules the carriage of war goods and access to a belligerent's ports and coastline could be prohibited to neutrals. The U.S. view on contraband law and the permissible scope of blockade reflected the customary law and the 1856 Declaration of Paris.¹²² The United States generally acknowledged a belligerent warship's right to capture a neutral blockade runner or contraband cargo, but required validation and adjudication by a prize court¹²³ and other formal controls.¹²⁴

The problem of interdicting passage was aggravated in the late nineteenth century with the advent of underwater contact mines.¹²⁵ These mines had both offensive and defensive potential, but the legality of their employment was

120. While most violations involved German submarine attacks, the United States, which was neutral at the time, was careful to protest similar British claims to exclusionary zones on the high seas as unlawfully restricting neutral commerce and freedom of the seas. *See infra* notes 140-55 and accompanying text.

121. Customary and treaty law provided a basis for controlling activities in maritime areas contiguous to land, but the asserted control extended to the traditional high seas.

122. *See UNITED STATES NAVAL WAR COLLEGE, INTERNATIONAL LAW TOPICS AND DISCUSSIONS 1905*, at 107-131 (1906) (including text of Declaration).

123. These controls inhibited wanton destruction of neutral prizes and removed any justification for simply sinking the blockade runner. *See NAVAL WAR COLLEGE, INTERNATIONAL LAW DISCUSSIONS, 1903: THE UNITED STATES NAVAL WAR CODE OF 1900*, at 88 (1904) [hereinafter 1900 Code] (neutral prizes could be destroyed only in specified instances of traditional military necessity, art. 50 of the United States Naval War Code of 1900, but providing in any case for adjudication). The Naval War Code of 1900 seems to accept seizure of a contraband-carrying neutral vessel as well as its cargo as common practice; U.S. acquiescence, however, is historically atypical. *Id.* at 82, 83.

124. *Id.* at 125. The United States was also a participant in the International Naval Conference concerning neutral commerce in times of war, which resulted in the 1909 Declaration of London. *See UNITED STATES NAVAL WAR COLLEGE, INTERNATIONAL LAW TOPICS: THE DECLARATION OF LONDON OF FEBRUARY 26, 1909 (1909)* (including text of Declaration). The 1909 Declaration of London, a follow-up to the 1907 Hague Conference, was never ratified by the signatory powers, although its terms were initially followed during World War I. Article 17 of the Declaration failed to specify how far out to sea a blockade could extend, contemplating potential extension onto the high seas. *Id.* at 49-53. By contemporary standards, U.S. views regarding neutral rights were not extreme insofar as the doctrine of continuous voyage seemingly applied to contraband and blockade situations. The continuous voyage principle was controversial when the Naval War Code was drafted in 1900. *See 1900 Naval War Code, supra*, note 123, at 12. Article 44 of the 1900 Naval War Code clarifies its view on blockades. *Id.* at 85, 87. The destination rules for treatment of contraband under its articles 34-36 may have contemplated continuous voyage. *Id.* at 82, 83. This perhaps resulted from the American experience in the Civil and Spanish-American Wars.

125. The history of mines or torpedoes, as they were originally known, arguably stretches back to the sixteenth century. *See Levie, Mine Warfare and International Law*, 62 *INTERNATIONAL LAW STUDIES: READINGS IN INTERNATIONAL LAW FROM THE NAVAL WAR COLLEGE REVIEW 1947-1977*, at 271 (1980). However, they only became effective with technical improvements made during the nineteenth century.

unclear under the traditional law of naval warfare.¹²⁶ In theory, mines could be used legitimately in an offensive capacity under blockade doctrine to close enemy ports or defensively to hold enemy warships from a belligerent's coast.¹²⁷ Laying mines offensively or defensively in belligerent territorial waters was accepted,¹²⁸ but other military concerns, particularly the capacity for long-range guns to bombard coastal targets from beyond the three mile limit, led belligerents to employ mines in adjacent areas on the high seas. Mines inflicted controversial losses on neutral shipping during the Russo-Japanese War, but the dispute related to their indiscriminate use, rather than the proclamation of war zones. The rights of neutral states were restricted by belligerent assertions of authority to impede neutral shipping on the high seas.¹²⁹ Moreover, the "blind" nature of mines, capable of sinking merchant ships without warning, also violated traditional principles of international law.

In the Russo-Japanese War's aftermath, the American view of underwater mines and blockades continued to stress the rights of neutral shipping.¹³⁰ Since blockade doctrine only permitted the confiscation of the blockade running ship and its cargo, the danger of mines killing noncombatants was troublesome.¹³¹ Although neutral merchant ships were thought to "enter the field of hostile operations at their own risk,"¹³² the use of mines for blockade purposes required prior warning of the danger and independent control of the areas by belligerent warships. Greater liberty was recognized for the use of mines in territorial waters.¹³³

The Second Hague Conference followed closely after the Russo-Japanese War. Its handling of the mining issue should be understood in the context of many claims that mines interfered with neutral rights to free passage on high seas during the war. While the 1907 Hague Convention VIII Relative to the Laying of Automatic Submarine Contact Mines¹³⁴ addressed some aspects of the new military technology, it neither authorized nor expressly prohibited

126. For a survey of different national practices and relevant international attitudes prior to World War II, see *Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War*, 33 AM. J. INT'L L. SUPP. 167, 695-708 (1939) [hereinafter *1939 Draft Convention on Neutral Rights*].

127. Under contemporary views, the high seas normally commenced immediately beyond the three mile boundary of territorial waters controlled by littoral states. A theoretical debate existed over whether an effective blockade as contemplated by the 1856 Declaration of Paris required the participation of at least some surface vessels. However, this traditionalist claim was raised more prominently during World War I and throughout the 1930's in connection with the employment of submarines or aircraft to enforce blockades.

128. *But see infra* note 135 (British desire to prohibit commercial blockades at 1907 Hague Conference).

129. This was accompanied by a general perception that Russia in particular had in effect abandoned traditional restrictions of sea warfare law on the destruction of neutral prizes. *See also infra* note 329.

130. *See generally* UNITED STATES NAVAL WAR COLLEGE, *supra* note 122.

131. *Id.* at 152-53.

132. *Id.* at 149.

133. *Id.* at 152-53.

134. *Supra* note 111.

the planting of mines on the high seas. At the Conference, the British representative noted this ambivalent attitude toward mining and called for prohibitions on mines in international waters.¹³⁵ Just before World War I, the Institute of International Law also took the position that laying underwater mines on the high seas was in violation of international law.¹³⁶

The Second Hague Conference encountered broader problems in reconciling belligerent rights and neutral rights to freedom of the seas. Sharp disputes remained from the Russo-Japanese War, and the 1907 Second Hague Conference failed to reach a consensus on the matter. Agreement at the Conference was limited largely to the noncontroversial aspects of naval warfare, relating to humanitarian concerns. The Conference attempted to overcome the disputes through promulgation of Hague Convention XII Relative to the Establishment of an International Prize Court, which established an international prize court of appellate jurisdiction specializing in cases involving neutral vessels. Major naval powers, however, declined signature pending clarification of international law principles relating to the high seas.¹³⁷ As a result, the British government convened the related London Naval Conference to resolve the matter. This led to the 1909 Declaration of London, which essentially codified international prize law. The Declaration's basic philosophy was to separate belligerent from neutral rights in a manner that allowed incursions on neutral free passage rights traditionally recognized under substantive law, but required compensation. Failing ratification by Great Britain, the Declaration of London and effectively Hague Convention (XII) never entered into force.¹³⁸ As a result, maritime warfare is still largely governed by customary law.

British and German war zones in World War I represented the first large scale denials of free passage to neutral shipping in broad geographic zones on the high seas.¹³⁹ The American view of the nature and legal character of these zones changed in the course of the war. Early declarations by Britain and Germany of war zones covered littoral high seas areas, yet they did not

135. *1939 Draft Convention on Neutral Rights*, *supra* note 126, at 698 (speech of Sir Ernest Satow). Britain took the general position that the use of mines for purpose of a commercial blockade should be prohibited. See *Levie*, *supra* note 125, at 273.

136. *Id.*

137. A. HIGGINS, *supra* note 111, at 437-38.

138. See 1 J. GARNER, *INTERNATIONAL LAW AND THE WORLD WAR 19-36* (1920) [hereinafter J. GARNER, *INTERNATIONAL LAW*] (general status of sea warfare law from First Hague Conference through beginning of World War I).

139. Such a danger was already perceived during the Spanish-American War, when it was feared that the United States might lay mines along the blockaded coast of Cuba. Neutral nations would have considered this to be a violation of the international law of blockade. See E. BENTON, *INTERNATIONAL LAW AND DIPLOMACY OF THE SPANISH-AMERICAN WAR* 139 (1908). Whether the United States did not intend to mine or was dissuaded from doing so cannot be determined, but in any case the mining did not occur. *Levie*, *supra* note 125, at 272.

conform to the United States views of blockade doctrine.¹⁴⁰ In 1917, Germany expanded earlier zones to include broad areas of the ocean linked to a declaration of unrestricted submarine warfare.¹⁴¹ Neutral merchant ships were free to sail through the war zone but only at peril of unannounced attack.

A contemporary American publicist noted the novelty of early British¹⁴² and German¹⁴³ war zones and their restrictive effect on neutral commerce. He observed, however, that a belligerent had the right and possibly the duty to notify neutrals of "actual hostilities" commencing in the area.¹⁴⁴ He defined a maritime war zone as "a portion of the sea which on account of its geographical proximity to one or the other belligerent territories becomes ... the actual theater of hostilities."¹⁴⁵ He also noted that the waters within the war zone remained part of the high seas. "[B]elligerents have no right to appropriate any portion of the high seas and to [sic] close them to the navigation of neutral vessels."¹⁴⁶ Belligerent rights with regard to neutral vessels in the zone were no different from their rights beyond the war zone.¹⁴⁷

Early American views of maritime war zones suggested a nascent contiguity approach, focusing on belligerent territory even if the zones extended over the high seas. Thus, these zones involved issues of coastal defense and attack, rather than issues concerning the right to free passage on the high seas. This analysis of war zones was substantially similar in formulation and justification to U.S. views in 1905 of underwater mines and blockades,¹⁴⁸ but did not treat war zones purely under blockade doctrine.¹⁴⁹ These war zones, however, are different from those discussed here. They are closer in substance to broad zones of warning in which belligerents may and perhaps must warn

140. See *infra* note 150. For a more detailed review of then-contemporary American views of international law, see J. GARNER, *PRIZE LAW DURING THE WORLD WAR: A STUDY OF THE JURISPRUDENCE OF THE PRIZE COURTS, 1914-1924* (1927) [hereinafter J. GARNER, *PRIZE LAW*] (1927).

141. See *infra* note 154. This was justified under the German view by a claim of necessity. See also 3 C. HYDE, *supra* note 94, at 1948-52; J. GARNER, *PRIZE LAW, supra* note 140, at 329-54; Garner, *Some Questions of International Law in the European War: War Zones and Submarine Warfare*, 9 AM. J. INT'L L. 594 (1915) [hereinafter *War Zones and Submarine Warfare*].

142. The British war zones were enforced by minefields. These mines could not be used lawfully with the sole object of intercepting commercial shipping. See *1907 Hague Convention VIII Relative to the Laying of Automatic Submarine Contact Mines, supra* note 111, at art. 2.

143. The German war zone was to be enforced by mining the waters and by submarines, in violation of existing legal principles of sea warfare. See, e.g., Garner, *War Zones and Submarine Warfare, supra* note 141, at 596.

144. *Id.* at 596-97. See also C. HYDE, *MARITIME LAW 35-40* (1918), reprinted in 8 *THE INQUIRY HANDBOOKS* (1971).

145. Garner, *War Zones and Submarine Warfare, supra* note 141, at 596.

146. *Id.* at 597.

147. *Id.*

148. See *supra* notes 130-33 and accompanying text.

149. In contrast to other nations, the United States did not regard war zones as blockades in the traditional sense. See Garner, *Some Questions of International Law in the European War: Blockades*, 9 AM. J. INT'L L. 818 (1915). Some activities within war zones could technically be analyzed as reprisals. See Garner, *War Zones and Submarine Warfare, supra* note 141, at 606.

neutrals of impending conflicts.¹⁵⁰ These zones did not have an absolute exclusionary character for neutrals. Accordingly, the American publicist cited as a principle "that ought never to be disputed"¹⁵¹ the opinion stated at the 1907 Second Hague Conference that "the high seas constitute a 'great international highway and that the right of neutrals to navigate those seas should take precedence of [sic] the transitory rights of belligerents to fight their battles thereon.'"¹⁵² This American view was radically different from the German and British perceptions of war zone declarations as valid methods for cutting off enemy commerce, a method reminiscent of traditional blockades.

The 1917 German declaration of an expanded war zone, which excluded neutral shipping by threatening submarine attack, was perceived as a qualitatively different challenge to traditional notions of neutral rights. It ultimately led the United States to enter World War I.¹⁵³ While American concerns over neutral rights prior to entering the War are normally perceived solely as involving "unlawful" submarine conduct,¹⁵⁴ that conduct was only a means for the belligerent to establish a geographically broad exclusionary zone on the high seas.¹⁵⁵ There would have been little reason to enter the War if Ameri-

150. The historical rejection by the U.S. of the assumption of the risk arguments relating to neutrals in war zones is expressed in the course of the submarine warfare controversy. See, e.g., 3 C. HYDE, *supra* note 94, at 2003-21.

151. Garner, *War Zones and Submarine Warfare*, *supra* note 141, at 597.

152. *Id.* (quoting Sir Ernest Satow of British Delegation speaking at Hague sessions in connection with mining and restraints on freedom of high seas).

153. See 3 C. HYDE, *supra* note 94, at 2010-13, 2017-18.

154. See *id.* at 2003-13. This perception is linked in popular conscience with the sinking of the *Lusitania*, but it also reflects a more general concern with whether the rules governing surface craft should apply to submarine warfare.

155. While our investigation has focused largely on American views of the war zone problem with respect to free passage of transatlantic merchant shipping, the problems of other neutral countries with both British and German maritime war zones should not pass unnoticed. The establishment of war zones in littoral international waters seriously impeded fishing. In addition, it had the effect of an illegal blockade of neutral ports and substantially increased the difficulty and cost of maritime commerce by closing peacetime high seas shipping routes for intra-European trade. See P. VIGNESSE, *THE NEUTRALITY OF NORWAY IN THE WORLD WAR (1932)*; A. VANDENBOSCH, *THE NEUTRALITY OF THE NETHERLANDS DURING THE WORLD WAR 191-293 (1927)*. Further, despite the necessity to discount for propaganda, one should also note the considerable volume of wartime German work on freedom of the seas and claims that British war zones and other practices violated international law. See, e.g., F. STIER-SOMLO, *DIE FREIHEIT DER MEERE UND DAS VÖLKERRECHT (1917)*; W. VAN CALKER, *DAS PROBLEM DER MEERESFREIHEIT UND DIE DEUTSCHE VÖLKERRECHTSPOLITIK (1917)*; H. TRIEPEL, *DIE FREIHEIT DER MEERE UND DER KÜNFTIGE FRIEDENSCHLUSSES (1917)*; H. WEHBERG, *DAS SEEKRIEGSRECHT (1915) (HANDBUCH DES VÖLKERRECHTS, F. Stier-Somlo ed., 1915)*; Gellmann, *Meeresfreiheit im Kriege*, 2 *ÖSTERREICHISCHE ZEITSCHRIFT FÜR ÖFFENTLICHES RECHT* 656 (1915-16). See also Hershey, *The German Conception of the Freedom of the Seas*, 13 *AM. J. INT'L L.* 207 (1919) (different political attitudes in Germany according to which freedom of high seas could be obtained prospectively either through a massive increase in naval strength or through changes in sea warfare law eliminating doctrines such as contraband or blockade). To the extent that these German proposals contemplated deep changes in maritime law that would have amounted to protection of private property in sea warfare law equal to that under land warfare law, it seems difficult to fault them. A similar official American position had led to the U.S. abstention from the 1856 Declaration of Paris because it did not go far enough. Such positions also resembled in many respects those urged by President Wilson in the postwar peace process.

can views of international law had recognized Germany's right to exclude absolutely neutral merchant ships from such war zones. Upon entering the war, American conduct provided further evidence of a nascent contiguity exception for asserting limited belligerent control over, but apparently not absolute powers of exclusion from, littoral areas of the high seas. The United States took part in mining the North Sea¹⁵⁶ and created its own coastal defensive zones extending as far as ten miles out to sea, seven miles beyond the prescribed territorial waters.¹⁵⁷

The first broad use of aviation warfare occurred in World War I, but there were few if any incidents involving civilian aircraft and maritime forces.¹⁵⁸ Even at that early date, however, it appears that overflight rights were considered part of freedom of the high seas and free passage rights under customary law. Neutral aircraft overflight of wartime military operations was immediately analogized to and treated under older maritime rules regarding the reconciliation of belligerent and neutral rights. Neutrals ventured into the midst of belligerent engagements at their own peril. The problem was that questions had been raised during the War whether neutral vessels should enjoy the same measure of freedom of the high seas. Neutral aircraft were also troublesome to maritime military operations, because they might betray belligerent forces' positions and strengths by engaging in reconnaissance activity analogous to maritime prize law's nonneutral service. The presence of neutral aircraft presented practical problems not only in battle, but more broadly during general wartime operations on the high seas.

The fact that President Wilson's Fourteen Points specifically included freedom of the high seas demonstrates the importance of the free passage issue in American eyes in the immediate aftermath of World War I. President Wilson included freedom of the seas principles in the first three Paris drafts of what became the Covenant of the League of Nations.¹⁵⁹ This initiative was

156. 1939 Draft Convention on Neutral Rights, *supra* note 126, at 705.

157. *Id.* at 696 (33 such areas were established under Executive Orders from 1917-18, prohibiting nighttime passage and otherwise restricting freedom of all vessels, including neutral merchant ships). Authority for the president to promulgate defensive airspace zones over U.S. territory, including territorial waters by Executive Order, was first granted under section 4 of the Air Commerce Act of 1926. Air Commerce Act § 4, 44 Stat. 570, *repealed by* Pub. L. No. 85-726, § 1401(a); 72 Stat. 806 (1958). For details of defensive air zones existing at that time, see UNITED STATES NAVAL WAR COLLEGE, INTERNATIONAL LAW SITUATION AND DOCUMENTS: SITUATION, DOCUMENTS AND COMMENTARY ON RECENT DEVELOPMENTS IN THE INTERNATIONAL LAW OF THE SEA 604-07 (1956). It appears that those zones not within the territorial boundaries or waters of the United States were connected with defensive sea zones and covered U.S. military installations such as Guantanamo Bay, Cuba and various islands located in the Pacific Ocean west of Hawaii.

158. UNITED STATES NAVAL WAR COLLEGE, INTERNATIONAL LAW SITUATIONS, 1928, at 68-69 (1929) (citing J. SPAIGHT, *supra* note 93 at 382, concerning absence of World War I incidents affecting neutral civilian aircraft).

159. See 1 D. MILLER, THE DRAFTING OF THE COVENANT 46, 50, 55, 61, 70 (1928). In President Wilson's first Paris draft, a statement of the principles was suggested as an additional article. See 2 D.

not, however, solely an American one. For example, Italy submitted a draft scheme incorporating freedom of the seas principles at the first meeting of the Preliminary Peace Conference's Commission studying the constitution of the proposed League of Nations.¹⁶⁰ In the end, however, incorporation of free passage principles into the Covenant was abandoned for political reasons in favor of a disarmament solution.¹⁶¹

Freedom of the high seas and the revision of sea warfare law next arose at the 1921-1922 Washington Conference on the Limitation of Armament,¹⁶² which is best remembered for the resulting naval treaty imposing quantitative limits on warships. The British delegation submitted a resolution that the submarine be outlawed as a weapon of war because its use "leads inevitably to acts which are inconsistent with the laws of war."¹⁶³ This proposal was defeated because it was perceived as favoring powers, like Great Britain, which possessed strong surface navies.¹⁶⁴ However, in its draft Treaty Relating to the Use of Submarines and Noxious Gases in Warfare the Conference affirmed that submarines were subject to international law's restraints on surface warships, including the prize law principles of visitation, search and capture. It stipulated that unlimited commerce-destroying submarine warfare of the World War I variety would violate international law.¹⁶⁵ War zones were not mentioned *per se*, but unlimited submarine warfare was indelibly linked to the German declarations of war zones. The draft Treaty failed at the ratification stage,¹⁶⁶ but its submarine provisions were declaratory of existing customary law. Significantly, the Conference reached no agreements on aerial

MILLER, *supra*, at 92. Wilson's second and third Paris drafts contemplated an international convention to determine the rights of belligerents on the high seas, coupled with the idea that strict adherence to the letter and sense of the convention would be a fundamental covenant to be enforced by the League by denying offending states access to the high seas. This would have been linked to the idea that unlawful interference would constitute impairment of a state's political independence under a predecessor of League Covenant article 10, vestiges of which remain in article 2(4) of the U.N. Charter.

160. Point 4 of Annex 3 to the Minutes of February 3, 1919, *reprinted in* 1 D. MILLER, *supra* note 159, at 247. While there was no German participation in designing the League, German academic literature supported some kind of enforcement of freedom of the seas principles by an international organization. Limited support also existed in American scholarship for empowering an international organization to enforce freedom of the high seas against belligerent assertion of rights. *See* P. POTTER, *supra* note 97, at 239-44.

161. The initiative apparently failed due to British resistance to any general treatment of sea warfare, analogous to the failure of the 1907 Second Hague Conference. *See* P. POTTER, *supra* note 97, at 240-41.

162. *See Conference on the Limitation of Armament, Report of the American Delegation Dated February 9, 1922*, 16 AM. J. INT'L L. 159, 178-85 (1922) [hereinafter *Armament Limitation Report*].

163. *Id.* at 185.

164. *Id.* at 186-87.

165. *Id.* at 187-88. *See* Treaty Relating to the Use of Submarines and Noxious Gases in Warfare, Feb. 6, 1922, 6 UNPERFECTED TREATIES OF THE UNITED STATES OF AMERICA 1776-1976, at 395 (1984) (ratified by Senate and President, but failed in adoption from lack of ratification by foreign governments).

166. France failed to ratify, and unanimity was required for effectiveness. *See* DOCUMENTS ON THE LAWS OF WAR, *supra* note 111, at 147.

warfare, but provided for a Commission to meet and revise the laws of warfare to accommodate aircraft and other technological advances.¹⁶⁷

The 1923 Hague Radio and Aerial Warfare Rules¹⁶⁸ drafted by the Commission of Jurists to Consider and Report Upon the Revision of the Rules of Warfare represented the first attempt to resolve the problems presented by neutral overflight of high seas military operations.¹⁶⁹ It contained two parts: the 1923 Hague Radio Rules and the 1923 Hague Aerial Warfare Rules. Although never adopted in legally binding form, the rules remain influential as an early statement of aerial warfare law, and portions of it have become customary law. It is useful to examine these rules to observe the struggle to deal with the problems caused by the new aviation technology within the traditional parameters of customary law, and their effect on the balance of belligerent and neutral rights.

Article 11 of the 1923 Hague Aerial Warfare Rules provides for general freedom of air passage outside the jurisdiction of any state, including over the high seas, but article 30 contains a special rule:

In case a belligerent commanding officer considers that the presence of aircraft is likely to prejudice the success of the operations in which he is engaged at the moment, he may prohibit the passing of neutral aircraft in the immediate vicinity of his forces or may oblige them to follow a particular route. *A neutral aircraft which does not conform to such directions, of which he has had notice issued by the belligerent commanding officer, may be fired upon.*¹⁷⁰

It is important to recognize that the apparent theoretical basis for firing upon a neutral under article 30 is not one of self-defense, since a non-attacking neutral aircraft is involved. Article 30 itself was drafted to cover overflight situations both on land and at sea, but the distinction between the territorial case and the *res nullius* character of the high seas comes into play. In the

167. *Armament Limitation Report*, *supra* note 162, at 189-90.

168. For a short history of the early problems and sources of air warfare law, see DOCUMENTS ON THE LAWS OF WAR, *supra* note 111, at 121-23. For the text of the rules alone, see *id.* at 123; 17 AM. J. INT'L L. SUPP. 245-60 (1923); 32 AM. J. INT'L L. SUPP. 12-56 (1938); Despatch from the First British Delegate to the International Commission for the Revision of the Rules of Warfare Together with the General Report of the Commission of Jurists to Consider and Report upon the Revision of the Rules of Warfare, British Parliamentary Command Paper 2201, Miscellaneous No. 14 (1924); UNITED STATES NAVAL WAR COLLEGE, INTERNATIONAL LAW DOCUMENTS, 1924, INTERNATIONAL AGREEMENTS WITH NOTES AND AN INDEX 96-154 (1926) [hereinafter International Law Documents, 1924]. For the full proceedings of the Hague Conference, see LA GUERRE AÉRIENNE: RÉVISION DES LOIS DE LA GUERRE, LA HAYE 1922-1923 (1930) [hereinafter *Hague Conference Proceedings*]. All texts herein from the *Hague Conference Proceedings* are the author's translation from the original French; it was not possible to secure an official English copy of the Conference proceedings. The translated passages are reproduced in the accompanying footnotes.

169. American international law scholar John Bassett Moore served as Chairman of the Commission. Concerning the Commission's work, see generally, Garner, *Proposed Rules for the Regulation of Aerial Warfare*, 18 AM. J. INT'L L. 56 (1924); Rodgers, *The Laws of War Concerning Aviation and Radio*, 17 AM. J. INT'L L. 629 (1923).

170. DOCUMENTS ON THE LAWS OF WAR, *supra* note 111, at 123 (emphasis added). The commentary to article 30 of the 1923 Hague Aerial Warfare Rules specifies that passage over the high seas is included in this formulation. INTERNATIONAL LAW DOCUMENTS, 1924, *supra* note 168, at 126.

maritime case the provision harkens back to the coequal nature of belligerent and neutral rights to usage of the high seas, and evokes the maritime warfare principle that imposed a practical limitation on a neutral vessel's right to sail into the midst of a belligerent engagement.¹⁷¹ Recognizing that neutrals entered such an area voluntarily and at their own peril after fair warning by the sight of the combatants, a neutral aircraft should be excludable from a battle zone only by virtue of its potential interference with one belligerent's right to attack another.¹⁷² For example, an aircraft might fly through a belligerent's line of fire and so interfere with its attack. In the maritime situation, at least, beyond the interference problem article 30's language countenancing intentional firing upon neutral aircraft inferentially permitted it only for warning purposes, rather than for the purpose of shooting it down, and only after the neutral "has had notice issued by the belligerent commanding officer."¹⁷³ To the extent it is patterned on customary law, article 30 presumably would permit aimed fire to shoot down an aircraft only when it actually interfered, or was about to interfere, with a hostile engagement.

The sensitivity of belligerent rights to exclude neutral aircraft from high seas operations is best understood in light of delegate exchanges at the Conference. In the context of discussing a draft predecessor of article 30, a Dutch Commission member challenged exclusionary practices affecting neutrals on or over the high seas indicating:

[T]his article is one of the most important of the entire project. War zones caused a thousand difficulties during the last war. Up to now, there has been no regular legal provision permitting belligerents to create maritime war zones. The proposed article tends to give a right ... which was never recognized in maritime law, as is demonstrated by the literature on the subject.

Here the Dutch delegate read two pages verbatim from the leading American work on international law, extreme behavior for an international conference, but perhaps understandable because it was directed against a draft American proposal. He continued:

During the war entire oceans were transformed into war zones in the name of reprisals and now one is prepared to give discretionary powers to military com-

171. There is an element of ambiguity here, since the provision speaks in terms of "the success of operations in which he is engaged at the moment" rather than combat itself.

172. This essential difference between the underlying rationales of war zones and battle zones has been recognized, as well as the tendency of combatants for their own purposes to assimilate the two into one category. See R. TUCKER, *supra* note 108, at 301 n.43. Whether done consciously or unconsciously this arguably was the case with the Legal Adviser's congressional testimony.

173. The commentary to article 30 of the 1923 Hague Aerial Warfare Rules addresses the point as follows:

The rapidity of its flight would enable an aircraft to embarrass the operations of land or sea forces, or even operations in the air, to an extent which might prove most inconvenient or even disastrous to a belligerent commander. To protect belligerents from improper intrusions of this kind, it is necessary to authorize belligerent commanders to warn off the intruders, and, if the warning is disregarded, to compel their retirement by opening fire.

INTERNATIONAL LAW DOCUMENTS, 1924, *supra* note 168, at 125.

manders concerning aerial navigation. For all of these reasons, the Dutch delegation hesitates to consecrate as a right that which neutrals experienced as an abuse during the war.

At this point the French delegate indicated that the Dutch expression of alarm seemed excessive, because the matter did not concern the creation of war zones but rather the nature of aviation. The provision's inspiration came from an existing treaty concept that hospital ships could not hamper combatants' movements and that combatants could order them off or order them to adopt a certain course. The British delegate then called to the Conference's attention operative language in the draft provision linking the power to restrict neutral aircraft to the formula "within the immediate vicinity of military operations," noting that naval experts considered all maritime mined areas to fall within the operations of the fleet. As a result, military operations should be defined or replaced by a narrower formulation. The rejection of war zones and adherence to a narrow battle zone concept was emphasized thereafter by the Conference president's remarks that the focus was not on zones, but rather on military operations.

Rather than following the British delegate's suggestion to alter "military operations" in the text, the war zone problem was addressed in the commentary to article 30 of the Hague Aerial Warfare Rules as follows:

It is easy to see that undue hardship might be occasioned to neutrals if advantage were taken of [the power to exclude neutral aircraft] so conferred on belligerent commanding officers and attempts were made to exclude for long or indefinite periods all neutrals from stipulated areas or to prevent communication between different countries through the air over the high seas. The present provision only authorises a commanding officer to warn off aircraft during the duration of the operations in which he is engaged at the time. The right of neutral aircraft to circulate in the airspace over the high seas is emphasised by the provisions of Article 11, which provide that "outside the jurisdiction of any State ... all aircraft shall have full freedom of passage."

Thus, in demonstrating conscious separation of the war and battle zone concepts, the exchanges between Conference delegates seemed to assume that there was no inherent right to order neutrals to avoid an area despite extensive World War I maritime practices involving the announcement of protected shipping lanes, the navicert system, and the diversion of vessels for search and similar purposes. The 1907 Hague Convention (X) treaty provisions to which the French delegate referred conceptually assimilated hospital ships into the definition of neutral ships. That treaty regulation substantially paralleled the customary law view that neutrals were present at their own peril and could not interfere with the combatants' engagement, while adding the power of belligerents to order detours, a power that was tied effectively to a threatened or ongoing hostile engagement. In the hospital ship context, however, the regulation was aimed largely at belligerent vessels of a special class. Except for their

exemption, these special noncombatant belligerent vessels would have been forced to submit to belligerent commands anyway.

The French delegate's remarks reveal a consciousness of reconnaissance activities and radio transmissions from neutral aircraft and a fear of espionage or nonneutral activities.¹⁷⁴ Despite the attempt in article 30 of the 1923 Hague Rules of Aerial Warfare to maintain the traditional balance between neutral and belligerent rights in overflight of maritime engagements, articles 6 and 7 of the 1923 Hague Radio Rules demonstrate the difficulty of dealing with these problems within the purview of existing rules. Article 6 characterizes the radio transmission of military intelligence by a neutral vessel or aircraft on or over the high seas as a "hostile act," assimilating it into the traditional concept of nonneutral service. Article 7 provides:

In case a belligerent commanding officer considers that the success of the operation in which he is engaged may be prejudiced by the presence of vessels or aircraft equipped with radio installations in the immediate vicinity of his armed forces or by the use of such installations therein, he may order neutral vessels or neutral aircraft on or over the high seas:

- (1) To alter their course to such an extent as will be necessary to prevent their approaching the armed forces operating under his command; or
- (2) Not to make use of their radio transmitting apparatus while in the immediate vicinity of such forces.

A neutral vessel or neutral aircraft, which does not conform to such direction of which it has had notice, exposes itself to the risk of being fired upon. It will also be liable to capture, and may be condemned if the Prize Court considers that the circumstances justify condemnation.¹⁷⁵

Unlike article 30 of the 1923 Hague Aerial Warfare Rules, article 7 of the 1923 Hague Radio Rules is based on the idea of self-defense or a similar nonneutral service concept, as witnessed by its condemnation and capture provisions. Moreover, while article 30 of the 1923 Hague Aerial Warfare Rules permits restrictions on neutrals only when "the presence of aircraft is likely to prejudice the success of the operations in which he is engaged at the moment," article 7 of the 1923 Hague Radio Rules permits broad regulation of a neutral vessel's or aircraft's passage if a military commander believes "the success of the operation in which he is engaged may be prejudiced." The commentary to article 7 attempts to limit its scope:

To avoid undue hardship to neutrals, [exclusion upon notice of] the belligerent commander is limited to the duration of the operations in which he is engaged at the time. The article presupposes the actual presence of naval or aerial forces engaged in operations, and that the measures will not be applicable to widely extended zones or to zones in which no military action is taking place.¹⁷⁶

174. *Hague Conference Proceedings*, *supra* note 169, at 45. The problems of dealing with the visitation and search of aircraft continue. *See, e.g.*, 1955 *LAW OF NAVAL WARFARE*, *supra* note 105, at 5-11 n.21.

175. *INTERNATIONAL LAW DOCUMENTS*, 1924, *supra* note 168, at 105.

176. *Id.* at 104.

Comparing this language with its equivalent under article 30 of the 1923 Hague Aerial Warfare Rules reveals a subtle difference conceptually linked to the Conference exchanges regarding war zones. While the commentary to article 30 apparently addresses the general war zone concerns expressed by the Dutch delegate, the commentary to article 7 seems more concerned with restricting the effect on neutral rights in the immediate vicinity of military operations, as expressed by the Conference president. The distinction is not coincidental. While the Conference participants apparently desired article 30 to extend customary law to cover aircraft, they seemed to regard the broader restrictions in article 7 as an attempt to change customary law. Through these changes, article 7 threatened to upset the balance between belligerent and neutral rights.

Perhaps the most problematic aspect of article 7 of the 1923 Hague Radio Rules was its presumption that disregard of a belligerent's order to avoid military operations or follow a specific course should be equated with non-neutral service. Since nonneutral service under traditional law may change both neutral and noncombatant status, in one fell swoop it could justify the use of aimed fire to down an aircraft.¹⁷⁷ Moreover, while the customary free passage principles underlying article 30 of the 1923 Hague Aerial Warfare Rules are addressed to on-going combat, the bootstrap approach of article 7 of the 1923 Hague Radio Rules would permit aircraft and vessel diversion under noncombat circumstances. This was a marked departure from traditional free passage analysis. Previously, absent *de minimis* navigational concerns, there was no clear basis beyond prize law for interfering with a neutral vessel's or aircraft's free passage rights in a noncombat situation. Traditional prize law had recognized a belligerent warship's authority to fire, and if necessary to sink, a neutral merchant ship that was attempting to flee its lawful visitation and search. However, this was not a function of nonneutral service, and the neutral vessel could always submit to avoid destruction.

177. Since transmitting intelligence is considered as participation in hostilities under article 16 of the 1923 Hague Aerial Warfare Rules, if a neutral aircraft did so it would lose its noncombatant status. The commentary to article 7 does not address this point directly, but the commentary to article 6 notes that "[t]he vessel or aircraft concerned renders itself liable to be fired upon at the moment when the act is committed and is also liable to capture." INTERNATIONAL LAW DOCUMENTS, 1924, *supra* note 168, at 101-02. The commentary to article 7 largely portrays the problem of neutral aircraft as a matter of interfering with belligerent radio communications. However, if this were all article 7 need only provide for neutral radio silence, a neutral aircraft so inclined could simply continue its course and transmit reconnaissance information after clearing the radio silence area or upon landing. The desired power to divert neutral aircraft seems to spring more from the impossibility of stopping a neutral aircraft to determine whether it had rendered nonneutral service, as would have transpired under traditional maritime visitation and search. In modern hostilities, given more sophisticated reconnaissance possibilities such as radar, high altitude reconnaissance aircraft, and satellite observation, it seems less likely that belligerents would rely on information gathered through coincidental neutral overflights. To that extent, the fear of nonneutral service seems reduced if not eliminated completely. *But see* Fenrick, *supra* note 18, at 110-11 (Britain's fear of Soviet vessels passing reconnaissance information to Argentina was significant factor in its declaration of 200 mile total exclusion zone during Falklands conflict).

Article 30 of the 1923 Hague Aerial Warfare Rules was more adept at maintaining the traditional balance. Its commentary regarding civilian aircraft expressly notes that it "is not intended to imply any encroachment on the rights of neutral States,"¹⁷⁸ followed by a statement that "[i]t is assumed that no neutral public or military aircraft would depart so widely from the practice of States as to attempt to interfere with or intrude upon the operations of a belligerent State."¹⁷⁹ Article 30 is phrased generally in terms of "operations," rather than the terms of customary law, under which a neutral assumed the risk of destruction in combat only. However, article 30 might still be reconciled with customary law under a broad concept of competing belligerent and neutral high seas usage rights.

Article 7 of the 1923 Hague Radio Rules implicitly departed from customary law in permitting outright exclusion of aircraft, albeit while avoiding broad geographic application as under a war zone concept. This conclusion is undeniable in light of the fact that article 7 also applied to neutral vessels, thus disturbing the older balance of surface free passage rights between belligerents and neutrals. Nonetheless, this proposed law retained the risk-shifting approach of customary maritime law, since prior receipt of notice was required before firing upon a neutral. It is noteworthy that the commentary to article 7 lacks a disclaimer of encroachment on the rights of neutral civilian aircraft while containing one on the neutral public or military aircraft. This presumably represents a recognition of the potentially graver consequences of a rule imputing nonneutral service to neutral public aircraft, thus permitting their downing by aimed fire.

Based on the 1923 Hague Radio and Aerial Warfare Rules, international law opinion *de lege ferenda* in the 1920s¹⁸⁰ acknowledged that under certain circumstances, involving likely hinderance of ongoing military operations, belligerent warships could direct neutral aircraft to circumvent a surface battle zone. This departed from customary law analysis, since under traditional ideas of neutrality as applied to civilian aircraft a belligerent would have had no right to prohibit overflight even during combat. Rather, the neutral aircraft might proceed at its own peril. Under this traditional analysis, a belligerent had the duty of giving notice and could not fire until its message had been received. The risk of a failed receipt was assigned to the belligerent.

178. INTERNATIONAL LAW DOCUMENTS, 1924, *supra* note 168, at 126.

179. *Id.* The term "public" aircraft encompassed only nonmilitary government aircraft used for customs or police service. It remained ambiguous whether neutral civilian aircraft could be excluded absolutely under a form of the battle zone doctrine. This ambiguity was addressed in article 213 of the 1941 *Tentative Instructions for the Navy*. See *infra* notes 199-217 and accompanying text (specifying that neutral public aircraft must obey belligerent instructions in vicinity of military operations).

180. The prominent participation of American scholars on the Commission of Jurists, and U.S. support for incorporating the 1923 Hague Rules into a treaty, seems to indicate that these rule represent the contemporary American international law position.

Regarding surface passage rights, the United States was a party to the 1930 Treaty of London¹⁸¹ and the related 1936 London Protocol,¹⁸² which reaffirmed as customary law that submarines were subject to the same rules as surface warships in dealing with merchant shipping. As a result, unlimited submarine warfare, including attacks without warning, was deemed unlawful. By implication, war zones that exposed neutral merchant ships to danger by presuming that they were hostile shipping were also rejected by the international community.

Between the World Wars, the most prominent American publicist writing on the law of maritime warfare found the basis for the British and German war zones in a contiguity theory of general territorial self-defense still paralleling views expressed during World War I.¹⁸³ Accordingly, the permissible scope of the high seas war zone was limited largely to the littoral seas. War zones could not be established on the high seas at a distance from the belligerent's territory, and never for offensive purposes. A special exception was made for defensive measures away from the belligerent's coast, such as minefields surrounding coaling stations to protect national vessels against "unlawful" attack, presumably by submarine. Under this view, however, war zones were evaluated less as an abrogation of freedom of the seas and more as a special case of necessity or self-defense.¹⁸⁴

American scholarly opinion on neutral shipping and war zones incorporated the 1939 Harvard Research in International Law Draft Convention on the Rights and Duties of Neutral States in Naval and Aerial War.¹⁸⁵ Article 70 provides that "[a] belligerent may not establish on the high seas outside of a [blockade zone extending fifty miles from the coast], a barred zone or other area however described in which it seeks to impose special prohibition, restriction or regulation upon the passage of neutral vessels."¹⁸⁶ This "blockade zone" was part of a broader concept limiting minelaying to any belligerent's territorial waters and to blockade zones off belligerent coasts.¹⁸⁷ While

181. With the exception of Part IV, the Treaty of London soon expired by its own terms. The 1936 London Protocol was designed to make the Treaty more effective, in part because the Treaty itself was originally signed by relatively few countries. See *infra* note 182.

182. *Procès-Verbal Relating to the Rules of Submarine Warfare Set Forth in Part IV of the Treaty of London of April 22, 1930*, 31 AM. J. INT'L L. SUPP. 137-39 (1937), reprinted in DOCUMENTS ON THE LAWS OF WAR, *supra* note 111, at 149.

183. See 3 C. HYDE, *supra* note 94, at 1948-52. In the War's immediate aftermath, Hyde advocated an even more restrictive view. See C. HYDE, *supra* note 144, at 35-40.

184. This view did not address the position often found in non-American sources that a reprisal against "unlawful" prior conduct of another belligerent constituted self-defense, a position the German government maintained during World War I. De Visscher, *Les lois de la guerre et la théorie de la nécessité*, 24 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIQUE 74 (1917).

185. 1939 *Draft Convention on Neutral Rights*, *supra* note 126.

186. *Id.* at 694. Article 70 recognizes a special belligerent power to restrict neutral radio transmissions in the vicinity of belligerent armed forces, a power directed specifically at the danger of espionage and nonneutral acts. *Id.*

187. *Id.* at art. 1; see also *id.* at arts. 69, 83.

"not believed to express any existing rule of law,"¹⁸⁸ this statement clearly recognized the general rejection of war zones beyond the littoral seas except for an arbitrarily defined contiguous zone of fifty miles to accommodate modern weaponry and limited precedents in that area.¹⁸⁹

Article 102 of the 1939 Draft Convention on Neutral Rights is best understood as the considered American view *de lege ferenda* of the international law rule reconciling neutral civilian overflight of a battle zone with military exigencies related to battle zones.¹⁹⁰ It refined the basic approach of article 30 of the 1923 Hague Aerial Warfare and Radio Rules:

Neutral aircraft over the high seas, if warned of the proximity of combat or of operations immediately preparatory thereto, shall make a reasonable detour to avoid interference therewith. The commanding officer of the belligerent forces may indicate the route to be followed and may escort the neutral aircraft around the area in question. If a neutral aircraft disregards the directions which it receives from the belligerent, it takes the risk of being fired on but the belligerent is responsible to the neutral State for any damages resulting from requiring an unreasonable deviation.¹⁹¹

Since article 102 was applicable only to "combat or ... operations immediately preparatory thereto," it was closer to customary law ideas than article 30. It contemplated that a neutral civilian aircraft proceeded at its peril only after having received a belligerent's communication. The onus lay upon the belligerent to give effective notice.

While patterned on article 30's adherence to the idea that belligerent and neutral high seas usage rights were coequal, the 1939 Draft Convention on Neutral Rights abandoned much of the 1923 Hague Radio Rules' article 7.¹⁹² Under a reasonableness analysis, it concluded that beyond permitting belligerents to order diversion it was impossible to prevent a passenger in a neutral aircraft from noting the positions and strength of combatants, and later passing this information along to the other belligerent-passenger reconnaissance as unwitting nonneutral service.

Thus, just prior to World War II, the U.S. view, based on a freedom of the high seas analysis and customary law, flatly rejected the idea that belligerents could interfere with neutral passage by establishing exclusionary war

188. *Id.* at 692. The confusing legal status of underwater mines and their history is the apparent reason for the lack of clarity in the law. See *supra* notes 126-37 and accompanying text.

189. 1939 Draft Convention on Neutral Rights, *supra* note 126, at 692-93.

190. This should not be considered a reference to American views of military necessity. By specifically addressing overflight of battle zones and requiring notice before firing, the drafters could not have intended that military necessity supersede the rule. If they had so intended, it would not have been necessary to articulate the rule in the first place.

191. 1939 Draft Convention on Neutral Rights, *supra* note 126, at 773.

192. The 1923 Hague Aerial Warfare and Radio Rules bifurcated treatment of neutral overflight and neutral radio use was avoided by treating the use of radio as a problem to be addressed under article 70, which applies only to neutral vessels and only permits prohibitions on the use of the radio in the vicinity of belligerents.

zones on the high seas beyond some ill-defined contiguous zone.¹⁹³ The concept was not difficult to apply in the case of defensive zones before a belligerent's coast, but delimiting offensive zones remained problematic. Their delimitation seems to have been influenced by vague ideas stemming from blockade doctrine, even if they were not characterized as blockades, or did not technically satisfy blockade doctrine requirements. Even within the zone, general self-defense concerns and blockade doctrine did not justify all actions against neutral shipping. There was apparently no absolute right even in contiguous zones to exclude neutral shipping, which might proceed on the high seas through a contiguous war zone at its own peril, given the danger of mines and submarines.¹⁹⁴ Belligerents had a right, and probably an obligation, to give notice to neutral shipping of the existence of a war zone on the high seas and to specify safe passage lanes.¹⁹⁵ Freedom of high seas overflight was recognized under American views and in customary law, but not yet by treaty.¹⁹⁶ In the absence of treaty or extensive precedent, however, the concepts surrounding war zones could only be extended by analogy to overflight by neutral civilian aircraft.

American rejection of the war zone concept is implicit in the reaffirmation of a narrow traditional view of blockade law, accompanied by aircraft provisions borrowed from the 1923 Hague Rules, in the *Tentative Instructions for the Navy of the United States Governing Maritime and Aerial Warfare, May 1941*,¹⁹⁷ which served as the naval warfare law manual during World War

193. It can be argued that the United States had adopted a different or more expansive view concerning the power of neutrals to assert a zone contiguous to their coastlines in which belligerents should refrain from hostilities. During the Civil War, the French government as a neutral state asserted that the *U.S.S. Kearsarge* could not engage the *C.S.S. Alabama* in French territorial waters. French warships towed the *C.S.S. Alabama* from its berth in a French port to beyond the three mile boundary, where the *U.S.S. Kearsarge-C.S.S. Alabama* engagement eventually took place. See 1 J. MOORE, DIGEST OF INTERNATIONAL LAW 723-24 (1906); 1 F. WHARTON, DIGEST OF INTERNATIONAL LAW 108-09 (1886). This incident, however, concerned neutral territorial waters and thus did not give rise to a particularly expansive position.

Preceding its entry into World War II, the United States joined with 20 other states in asserting in the 1939 Declaration of Panama that the neutrals had an inherent right to have the waters "to a reasonable distance from their coasts" free of hostile acts. See 34 AM. J. INT'L L. SUPP. 17 (1940). This security zone extended from 300 to 1200 miles out from the coast. See Masterson, *The Hemisphere Zone of Security and the Law*, 26 A.B.A. J. 860 (1940).

194. Belligerent rights against neutral shipping in such contiguous war zones might have extended beyond traditional law's visitation and search, but the exact extent is not relevant here.

195. General proclamation in lieu of individual notice might suffice unless it were clear that a neutral merchant ship could not have known about the war zone. This assumes that no blockade was claimed, satisfying the requirements of traditional law.

196. See Cooper, *Space Above the Seas*, JAG J. 8, 31 (1959), reprinted in EXPLORATIONS IN AEROSPACE LAW: SELECTED ESSAYS BY JOHN COBB COOPER, 1946-1966, at 194, 196-97 (I. Vlasic ed. 1968); The Law of the Air and the Draft Articles Concerning the Law of the Sea Adopted by the International Law Commission at its Eighth Session, I OFFICIAL RECORDS OF THE FIRST UNITED NATIONS ON THE LAW OF THE SEA 64, 67-68 (1958) (prefactory Doc.A/Conf.13/4).

197. UNITED STATES NAVY, TENTATIVE INSTRUCTIONS FOR THE NAVY OF THE UNITED STATES GOVERNING MARITIME AND AERIAL WARFARE arts. 29-37, 213-18 (1944) [hereinafter 1941 TENTATIVE INSTRUCTIONS FOR THE NAVY].

II. Nonetheless, World War II witnessed a substantial repetition of British and German World War I war zone practices, as well as unrestricted U.S. submarine warfare in the Pacific theater. That these practices did not effectively change the customary law of sea warfare, however, was demonstrated by the postwar trials of Admiral Donitz, the former Commander in Chief of the German Navy, on charges of waging unrestricted submarine warfare and violating the 1936 London Protocol by establishing war zones. He was acquitted of charges relating to attacks on British merchant ships, given British practices that deprived them of traditional protections, such as arming them and providing armed convoy escort and instructions to ram submarines. He was convicted on charges of attacking neutral merchant ships and of establishing war zones.¹⁹⁸

As regards aircraft, immediately prior to World War II the 1923 Hague Radio and Aerial Warfare Rules were adopted virtually in toto into American military practice in the 1941 *Tentative Instructions for the Navy*.¹⁹⁹ Subject to the caveat that a state's rules of military engagement do not necessarily represent its views on international law, the 1941 *Tentative Instructions for the Navy* arguably diverged from contemporaneous American scholarship and so deserve closer examination. Acknowledging that they were only intended to provide guidance in the novel aerial warfare area and were not necessarily representative of existing law,²⁰⁰ the 1941 *Tentative Instructions for the Navy* followed the 1923 Hague Radio and Aerial Warfare Rules almost literally on the issues of radio rules, nonneutral service and overflight of naval operations.

As a general matter, the 1941 *Tentative Instructions for the Navy* adhere to the 1923 Hague Rules' rejection of any claim to establish war zones. However, their piecemeal adoption of the 1923 Hague Rules created ambiguity as to the circumstances under which belligerents might fire upon neutral aircraft. One ambiguity is introduced by the fact that the notation accompanying paragraph 44 of the 1941 *Tentative Instructions for the Navy* refers only

198. On account of allied behavior, the Tribunal refrained from imposing punishment, but affirmed the continued force of the principles. 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG 556-59 (1948).

199. See DEP'T OF THE AIR FORCE, INTERNATIONAL LAW -- THE CONDUCT OF ARMED CONFLICT AND AIR OPERATIONS 4-3 (AF Pamphlet 110-31, Judge Advocate General Activities Nov. 19, 1976) [hereinafter 1976 Law of Air Warfare].

200. The 1941 *Tentative Instructions for the Navy* state:

The following instructions have been prepared in accordance with international law, treaties, conventions, statutes of the United States, and where any specific point is not covered by the above, in accordance with the policy and attitude of the United States on the subject, due consideration being given to court decisions, Executive pronouncements, and international practice [The 1923 Hague Radio and Aerial Warfare Rules have] not been ratified nor [were they] accepted in toto by the United States or any other first-class power. It is important as representing the first and only officially convened assembly of international representatives to discuss and report upon rules of aerial warfare.

1941 TENTATIVE INSTRUCTIONS FOR THE NAVY, *supra* note 197, Introduction.

to article 7 of the 1923 Hague Radio Rules,²⁰¹ while its paragraph 214 omits any direct reference to the general overflight provisions in article 30 of the 1923 Hague Aerial Warfare Rules.²⁰² Given the different theoretical bases of the two Hague provisions and article 7's apparent departure from existing customary law, one must consider the extent to which the 1941 *Tentative Instructions for the Navy* diverge from the overall scheme of the 1923 Hague Radio and Aerial Warfare Rules and abandon article 30's traditional approach of balancing belligerent and neutral rights.

In substance, paragraph 214 of the 1941 *Tentative Instructions for the Navy* appears largely to adopt the article 30 approach in cases when firing on neutral civilian aircraft. It refers to the use of "necessary force," while specifying that an aircraft and crew which unknowingly violate a prohibition to enter a specific area are not subject to either confiscation or prisoner of war treatment. Paragraph 214 does not contain the "likely prejudice" language of article 30, nor is it specifically restricted to ongoing or impending combat operations as was article 102 of the 1939 Draft Convention on Neutral Rights.²⁰³ The most ambiguous point, however, is that, while paragraph 44 retains verbatim the

201. A neutral vessel or neutral aircraft that transmits, when on or over the high seas, information destined for a belligerent concerning military operations or military forces shall be liable to capture. A cross-reference to the 1941 *Tentative Instructions for the Navy*, provides that a neutral vessel is liable to capture and treatment as though it were an enemy merchant vessel if it transmits information in the interest of the enemy. *Id.* at para. 39(d). Paragraph 43(b) states that under normal circumstances, liability to capture ends with the termination of the voyage of the neutral vessel or the flight of the neutral aircraft, unless it had enemy character under Paragraph 39. *Id.* at arts. 39, 43(b). It does not seem, however, that a neutral aircraft could be fired upon automatically. Paragraph 44 states that:

In case a belligerent commanding officer considers that the success of the operation in which he is engaged may be prejudiced by the presence of vessels or aircraft equipped with radio installations in the immediate vicinity of his armed forces or by the use of such installations therein, he may order neutral vessels or neutral aircraft on or over the high seas:

- (a) To alter their course to such an extent as will be necessary to prevent their approaching the armed forces under his command; or
- (b) Not to make use of their radio transmitting apparatus while in the immediate vicinity of such forces or with specified limits or hours or in regard to specified matters [a cross-reference follows to the form of a declaration of prohibition];
- (c) He may take measures to insure observance of such order;
- (d) A neutral vessel or neutral aircraft, which does not conform to such direction of which it has had notice, exposes itself to the risk of being fired upon. It will also be liable to capture, and may be condemned if the court considers that the circumstances justify condemnation.

Id. at para. 44.

202. Paragraph 214 states:

A neutral civil aircraft found . . . in the immediate vicinity of military operations must obey any order given it by the belligerent. If it does not obey, it is liable to the use of necessary force. If it enters such . . . vicinity contrary to prohibition, it is liable to confiscation and its personnel to treatment as prisoners of war unless its entrance was due to *force majeure* or was made in ignorance of the prohibitions.

Id. at para. 214.

203. It may represent more of an implicit military necessity approach. *See infra* notes 417-30 and accompanying text. This does not change, however, the exegesis of the "necessary force" language due to the legal interpretation of military necessity. Military necessity posits choice of a course of action from among lawful alternatives. Simply invoking military necessity would not resolve the underlying conflict with free passage principles.

requirement under article 7 of the 1923 Hague Radio Rules of "receipt" of a prior order, paragraph 214 speaks in terms of a failure to follow orders. This approach differs markedly from the analogous provisions of article 30 of the 1923 Hague Aerial Warfare Rules and of article 102 of the 1939 Draft Convention on Neutral Rights, which assigned the risk of a failure to receive such orders to the belligerent. One can argue that the cross-reference in paragraph 214 of the 1941 *Tentative Instructions for the Navy* to paragraph 44 implies that its receipt rule should still apply to the allocation of the risk of a failure to receive those orders under paragraph 214. However, by focusing on the right of the belligerent to use "necessary force" instead of on the belligerent's duty to warn, paragraph 214 seemingly changed from the traditional approach that balanced coequal belligerent and neutral rights to an approach that addresses the question in terms of lawful force. A lawful force analysis abandons the principle, implicitly preserved under article 30 of the 1923 Hague Aerial Warfare Rules and article 102 of the 1939 Draft Convention on Neutral Rights, that only warning shots are permitted until a neutral aircraft positively interferes with an ongoing engagement between two belligerents.

"Innocent violation" of diversionary orders under paragraph 214 of the 1941 *Tentative Instructions for the Navy* is addressed only in terms of confiscability of the neutral aircraft, assuming that it was not shot down. Inferentially, the use of necessary force may render uncompensable neutral war losses resulting from failure to receive an order, insofar as paragraph 214's language speaks of confiscation, as opposed to condemnation.²⁰⁴ While unreasonable beliefs concerning the neutral aircraft's knowledge of the diversionary order might rebut the assertion that force was "necessary," this leaves open a broad area of risk allocation under the 1941 *Tentative Instructions for the Navy*.

Since World War II, American practices in areas involving tension between military concerns and freedom of the seas, including foreign civil aircraft overflight, have developed largely outside the context of active hostilities. An example grounded in national security concerns the formation of the contiguous United States Air Defense Identification Zones (ADIZ). Extending 200 to 300 nautical miles over the Atlantic and Pacific Oceans, these zones were established by Executive Order in the 1950s.²⁰⁵ Three other postwar practices of

204. Articles 236-39 of the 1941 *Tentative Instructions for the Navy* address capture of aircraft in the classic maritime terminology of visitation, search, capture, and condemnation, and mandate judicial proceedings in the case of "capture." If aircraft were destroyed in an engagement as opposed to being captured, under the scheme articulated, judicial proceedings do not seem to be mandated as they would be in the case of the destruction of a neutral "prize." Cf. 1941 TENTATIVE INSTRUCTIONS FOR THE NAVY, *supra* note 197, at art. 218 (opposing application of necessary force concept to capture).

205. ADIZ require aircraft to file prior flight plans, to report position and altitude, to identify themselves in a timely fashion, and, if necessary, within an ADIZ zone, to comply with "special security instructions." 14 C.F.R. §§ 99.19, 99.7 (1990). While such a zone extends considerably further over the high seas than the contiguity precedents, perhaps justifiably so given the greater speed and reach of aircraft, it is not absolutely exclusive in character and fits within a direct territorial defense rationale. *See generally*

nations have restricted high seas overflight either temporarily or permanently.²⁰⁶ These peacetime practices involved warnings to avoid large expanses of ocean because of nuclear tests on remote islands,²⁰⁷ missile launches over

UNITED STATES NAVAL WAR COLLEGE, 51 INTERNATIONAL LAW SITUATION AND DOCUMENTS, 1956: SITUATION, DOCUMENTS AND COMMENTARY ON RECENT DEVELOPMENTS IN THE INTERNATIONAL LAW OF THE SEA 579 (1957); 14 C.F.R. §§ 99.1-99.41 (1990) (current ADIZ coverage). Canadian air law recognizes similar zones (CADIZ). See Cooper, *supra* note 196, at 198-99. More Canadian than American scholarship has concerned itself with the legality of ADIZ and CADIZ under international law, generally arguing for their legality under self-defense principles and against their prohibition under article 12 of the 1944 Chicago Convention. See, e.g., J. MURCHISON, THE CONTIGUOUS AIR SPACE ZONE IN INTERNATIONAL LAW 12-17 (1956); Martial, *State Control of the Air Space over the Territorial Sea and the Contiguous Zone*, 30 CAN. B. REV. 245 (1952). *But cf.* The Law of the Air and the Draft Articles Concerning the Law of the Sea Adopted by the International Law Commission at its Eighth Session, *supra* note 196, at 69-71 (noting protests against unilaterally declared restrictive air zones by other countries in contrast to acceptance of ADIZ and CADIZ). Among American scholarship, the question of their legality has been raised in connection with modern treaty guarantees of freedom of high seas overflight. See Cooper, *supra*, at 199. Some argue for their validity in spite of seemingly absolute treaty language based on the practice of nations and their reasonableness. See M. MCDUGAL & W. BURKE, THE PUBLIC ORDER OF THE OCEANS: A CONTEMPORARY INTERNATIONAL LAW OF THE SEA 787 (1962). Modern treaty formulations limit freedom of high seas overflight so as not to impinge on others' freedom of overflight, which on their face would support an air traffic safety requirement but not a national security rationale. RESTATEMENT THIRD, *supra* note 74, §521. The assertion of the national security concept as the basis for interfering with the innocent passage of foreign civil aircraft during peacetime in broad high seas zones would be problematic if traditional American law of the seas principles were applied.

206. During this period, the traditional three mile extent of territorial waters has been expanded in treaty and customary law concepts to embrace a variety of zones, including expanded territorial waters (up to twelve nautical miles), a twelve-mile zone contiguous to territorial seas, and an exclusive economic zone extending up to 200 nautical miles from the baseline of the territorial sea. See RESTATEMENT THIRD, *supra* note 74, § 511; see also *id.* §§ 512-17. The international law basis for these zones differs between nations. Both prior to and after the 1982 LOS Convention, the United States asserted the position that zones such as the 200 mile exclusive economic zone are recognized under the customary law of the sea and, while traditional rights of innocent passage existed on and over these portions of the seas, technically these zones were no longer part of the high seas. *Id.* § 514(2). The 1982 LOS Convention does not explicitly designate the exclusive economic zone as part of the high seas. *Id.* § 514 comment b. The Convention left unresolved a theoretical dispute between some states claiming that these areas continue to have high seas character and many coastal states, including the United States, arguing the opposite. In the American view, a coastal state exercises full sovereignty over its territorial seas and limited policing rights over the contiguous zone. *Id.* § 511 comment a. However, most traditional high seas rights, beyond the economic exploitation of such resources as fishing areas, continue to be recognized in these zones. As the United States has chosen for political reasons not to enter into the final 1982 LOS Convention, presumably it is still subject to the customary law regime.

207. During the 1950s, nuclear tests on the Bikini and Eniwetok Atolls caused the United States to declare expanses ranging from 20,000 to 400,000 square miles of the surrounding Pacific Ocean to be "warning zones." See McDougal & Schlei, *The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security*, 64 YALE L.J. 648, 650-51 (1955). No authority was asserted for excluding air and sea traffic, but few problems were encountered with the presence of unauthorized aircraft or vessels. *Id.* at 682. *But see* The Diago Fukuryu Maru, 4 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 550 (1965). In the 1950s, American publicists divided on the question whether such warning zones violated freedom of the high seas principles. For opposition to these warning zones, see Margolis, *The Hydrogen Bomb Experiments and International Law*, 64 YALE L.J. 629 (1985). *But see* McDougal & Schlei, *supra* (argued to uphold burdens on freedom of high seas attendant to nuclear tests since international law permitted these sorts of warning zones in connection with national security – based activities even in peacetime). Questions were raised in preparatory work for the 1958 LOS Convention whether such warning zones could be reconciled with the proposed treaty recognition of freedom of overflight over the high seas. See The Law of the Air and the Draft Articles Concerning the Law of the Sea Adopted by the International Law Commission at its Eighth Session, *supra* note 196, at 69-70. The United States carefully avoided a claim that it might "clos[e] off a portion of the seas as a matter of enforceable right." 4 M. WHITEMAN, *supra*, at 550

oceanic test ranges,²⁰⁸ and the usage of smaller high seas areas for military training, such as high seas gunnery ranges.²⁰⁹ These practices must be under-

(quoting U.S. delegation paper prepared for 1958 U.N. Conference on the Law of the Sea). The U.S. instead maintained that warning zones were predicated on voluntary compliance and observed as a matter of comity. *Id.* However, following the adoption of the 1958 LOS High Seas Convention, American publicists who argued in favor of the tests during the 1950s included them among the practices of nations supporting the idea that the apparently strong free overflight treaty provisions should not be read too restrictively because the practice had not been rejected specifically at the 1958 Convention. *See* M. MCDUGAL & W. BURKE, *supra* note 205, at 786-87. This position is questionable, however, since a resolution of the 1958 U.N. Conference recognized that "there is a serious and genuine apprehension on the part of many States that nuclear explosions constitute an infringement of the freedom of the seas." 2 D. O'CONNELL, *supra* note 122, at 812.

The United States has ratified a treaty banning these forms of nuclear testing. *See* Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and Under Water, Aug. 5, 1963, 14 U.S.T. 1313, T.I.A.S. No. 5433, 480 U.N.T.S. 43 (1963). However, continued French testing of nuclear devices has raised the question of exclusionary zones again and has indicated through state practice the probable illegality of establishing such absolute exclusionary zones beyond territorial waters in peacetime. *See id.* at 812-13. Note, *Exclusion of Ships from Non-Territorial Weapons Testing Zones*, 99 HARV. L. REV. 1040 (1986) (exclusionary issues raised by continued French testing and Greenpeace activity). *See also* D. MCTAGGERT & R. HUNTER, GREENPEACE III: JOURNEY INTO THE BOMB (1978) (story of Canadian Greenpeace activist's voyage into danger zone); Yates, *State Responsibility for Nonwealth Injuries to Aliens in the Postwar Era*, INTERNATIONAL LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS 213, 217 (R. Lillich ed. 1983) (Canada protested seizure and detention of McTaggart's vessel and crew by French Navy in which injuries occurred). *See also* Protesters Say French Told Yacht to Shun Atoll, N.Y. Times, Dec. 2, 1981, at A6, col. 4. France's failure to assert a broader exclusionary zone during the Mururoa testing is probably a fair indication of its view that, at least in peacetime, it could not impede freedom of the high seas by excluding vessels beyond its territorial jurisdiction. A parallel conclusion has been reached for U.S. exclusion of foreign shipping from a missile weapons testing zone (Kwajalein Atoll). Note, *Exclusion of Ships from Non-Territorial Weapons Testing Zones*, *supra*, at 1049-57 (debating whether exclusionary zone is lawful).

208. Since the 1950s, the United States, in cooperation with Britain and other countries, has maintained and operated missile testing ranges over large expanses of open ocean. For specification of countries, see H. REIFF, THE UNITED STATES AND THE TREATY LAW OF THE SEA 368-70 (1950); Note, *Exclusion of Ships from Non-Territorial Weapons Testing Zones*, *supra* note 207, at 1050-51. Where there are launches, warnings are given for vessels and aircraft to avoid the target areas. *See, e.g., id.* at 1047-48 (procedures for Kwajalein Missile Range). The Soviet Union has occasionally claimed temporarily exclusive use of high seas areas of the Pacific Ocean for rocket testing and has requested third party states, including the United States, to inform their shipping and aircraft to avoid the designated target area. *See* M. MCDUGAL & W. BURKE, *supra* note 205, at 787. American views following ratification of the 1958 LOS Convention are evident in the 1960 refusal of President Eisenhower to lodge a protest against the Soviet announcement. *Id.* The President declared that the United States had claimed the right to use the high seas for such scientific experimentation and therefore was not in a position to protest the practice. The U.S. did not take the attitude that such a zone could be closed absolutely since it had "notified everybody concerned, and then taken the proper measures to warn away from the areas involved anyone that might be damaged." *Transcript of the President's News Conference on Foreign and Domestic Matters*, N.Y. Times, Jan. 14, 1960, at 14, col. 1. *See also* 4 M. WHITEMAN, *supra* note 77 at 621-22. Liability for damage to aircraft ignoring such a danger has not been resolved, although articles II and III of the Convention on the International Liability for Damage Caused by Space Objects impose strict liability on launching states for damage to aircraft by a "space object" (defined in article I(d) to include launch vehicles and component parts). *See, e.g.,* N. MATTE, AEROSPACE LAW: FROM SCIENTIFIC EXPLORATION TO COMMERCIAL UTILIZATION 158-60 (1977).

209. From time to time nations use areas of the high seas for dangerous military training, such as bombing and gunnery practice. The Soviet Union and associated states proposed that "[n]o naval or air ranges or other combat training areas limiting freedom of navigation may be designated on the high seas near foreign coasts or on international routes." IV *Official Records of the First United Nations Conference on the Law of the Sea*, U.N. Doc. No. A/Conf.13/C.2/L.32, at 124 (1958). The proposal, which was overwhelmingly defeated, was characterized by its authors as not to apply generally to the open seas. *See*

stood against the backdrop of the 1958 LOS Convention and its component Convention on the High Seas. As the first treaty to specify that rights of free overflight are included in the freedom of the high seas, the 1958 Convention of the High Seas characterizes freedom of the high seas generally as a system of balanced rights as opposed to one of absolute rights.²¹⁰ A technical question thus arises as to whether restrictive practices predating the 1958 Convention were made impermissible by its freedom of overflight provision which purports to recognize limitations on free passage only in the reciprocal rights of other states.²¹¹ While a reasonableness analysis has been advanced affirming the survival of these practices, this permissive view is not entirely consistent with the 1958 High Seas Convention's language.²¹²

Following World War II, American military views on the treatment of neutral aircraft in maritime hostilities were articulated in the Navy's 1955 *Law of Naval Warfare*.²¹³ Although merely a statement of naval policy,²¹⁴ the 1955 *Law of Naval Warfare* provided guidance concerning international law in maritime conflict.²¹⁵ It is thus important as an official statement of immediate postwar American views of sea warfare law. Its paragraph 421, recognized basic high seas free overflight rights of aircraft, while paragraph 430(b) provided:

Within the immediate area or vicinity of naval operations, a belligerent may establish special restrictions (see, for example, [the successor provision to 1941 *Tentative Instructions for the Navy* paras. 43 & 44 and ultimately Hague Radio Rules art. 6 & 7]²¹⁶) upon the activities of neutral vessels and aircraft and may

M. MCDUGAL & W. BURKE, *supra* note 205, at 786. In the course of discussion, the United States declared that it did not seek to close areas to shipping, or presumably aircraft, but merely to provide a warning of the danger. State Department instructions to the U.S. Delegation indicated that the United States had been careful not to close off portions of the high seas as a matter of enforceable right. Warnings were predicated on voluntary compliance, a view followed both in British and French practice. See 2 D. O'CONNELL, *supra* note 97, at 809-10.

210. 1958 LOS High Seas Convention, *supra* note 99, at art. 2. The parallel provision in the 1982 LOS Convention, article 87, contains substantially identical language with regard to free overflight. 1958 LOS High Seas Convention, *supra* note 99, at art. 87.

211. The technical formulation of rights of overflight as one element of the freedom of the high seas originated in the 1950s International Law Commission consideration of the status of the high seas under customary law in preparation for the 1958 LOS Convention. See *The Law of the Air and the Draft Articles Concerning the Law of the Sea Adopted by the International Law Commission at its Eighth Session*, *supra* note 246; 1958 LOS High Seas Convention, *supra*, at art. 2; 1982 LOS High Seas Convention, *supra*, at art. 75; RESTATEMENT THIRD, *supra* note 71, § 521.

212. See, e.g., M. MCDUGAL & W. BURKE, *supra* note 205, at 730-923.

213. *Supra* note 106.

214. 1955 LAW OF NAVAL WARFARE, *supra* note 105, at para. 110 n.1 (functional statement of the official policy).

215. *Id.* at para. 100.

216. The reference is to paragraph 520(a) of the 1955 *Law of Naval Warfare*, which provides: A neutral merchant vessel or aircraft which, when on or over the high seas, transmits information destined for a belligerent concerning military operations or military forces is liable to capture. Within the immediate vicinity of his forces, a belligerent commanding officer may exercise control over the communications of any neutral merchant vessel or aircraft whose presence might otherwise endanger the success of his operations . . . A neutral vessel or aircraft which does not

prohibit altogether such vessels and aircraft from entering the area. Neutral vessels and aircraft which fail to comply with a belligerent's orders expose themselves to the risk of being fired upon. Such vessels and aircraft are also liable to capture.²¹⁷

Although military practice rules articulated under the 1955 *Law of Naval Warfare* generally follow those of the 1941 *Tentative Instructions for the Navy*, in several respects they differ significantly from a legal point of view. While inferentially rejecting the war zone concept and recognizing high seas free passage rights for neutral aircraft, the 1955 *Law of Naval Warfare* articulates an apparently absolute rule permitting wartime exclusion of neutral aircraft from the "immediate area or vicinity of naval operations." Not only is the entire scheme premised upon a failure to comply with belligerent orders, but collateral provisions have also dropped the few instances in the 1941 *Tentative Instructions for the Navy* that condition the neutral's "at risk" status on receipt of the belligerent's diversionary order. While the relevant provisions in the 1955 *Law of Naval Warfare* that parallel the 1941 *Tentative Instructions for the Navy* omit the necessary force terminology, their substantive approach was not changed given the general treatment of force under the military necessity provisions.²¹⁸ The 1955 *Law of Naval Warfare* abandoned those free passage concerns visible in customary law and adopted *sub silentio* an operational theory of ship or fleet self-defense. To avoid confusion with the war and battle zone concept as already under discussion, this inquiry refers to this self-defense concept, based on concentric zones incorporating different kinds of protective measures, as the "bubble" theory of self-defense (because the zones reach above and below the ocean's surface, extending from the protected locus to a distance determined by the nature of the threat).²¹⁹

Under the bubble theory, a warship may exclude all vessels and aircraft within a specific radius and can undertake defensive action against any vessel or aircraft that trespasses upon the restricted area without permission on the theory that it displays hostile intent. While the bubble theory clearly states military policy, its legality is unclear. Applied in a high intensity general conflict (i.e., in the protection of a carrier battle group in the Norwegian Sea during a putative U.S.-Soviet conflict, the kind of mission for which the *Vincennes* was intended as an Aegis class warship), modern weaponry may render the battle and bubble zone coincident. However, a situation such as the

conform to a belligerent's control exposes itself to the risk of being fired upon and renders itself liable to capture.

1955 LAW OF NAVAL WARFARE, *supra* note 199, at para. 520(a).

217. Subparagraph 503(d)(7) is cross-referenced, providing that "[n]eutral merchant vessels are in general liable to capture if performing any of the following acts . . . (7) Violating regulations established by a belligerent within the immediate area of naval operations (see para. 430(b))." *Id.* at para. 503(d)(7).

218. *Id.* at para. 220(a).

219. See, e.g., Kassing, *Protecting the Fleet*, in PROBLEMS OF SEA POWER AS WE APPROACH THE TWENTY-FIRST CENTURY 293, 309 (J. George ed. 1978) (concepts of area, local, and point defense).

Flight 655 incident involves a more limited conflict.²²⁰ The concept of "trespass" of the bubble implies the territoriality rejected under traditional free passage principles. Thus, while generally embracing freedom of the high seas principles, the 1955 *Law of Naval Warfare* patently lost the traditional linkage between neutral free passage rights and battle zone overflight.

The language of relevant provisions of the most current statement of U.S. naval policy, the 1989 *Annotated Commander's Handbook*, is substantially identical to that of the 1955 *Law of Naval Warfare*.²²¹ For example, paragraph 7.8 of the 1989 *Annotated Commander's Handbook* addresses belligerent control of the immediate area of naval operations and, like paragraph 430(b) of the 1955 *Law of Naval Warfare*, provides for capture, with destruction in appropriate cases, if such belligerent regulations are violated.²²² Once again, the risk of non-receipt of belligerent warnings rests with the neutral vessel or aircraft. The annotation for military lawyers states that:

Belligerent control over neutral vessels and aircraft within an immediate area of naval operations, a limited and transient claim, is based on a belligerent's right to attack and destroy his enemy, his right to defend himself without suffering from neutral interference, and his right to ensure the security of his forces.²²³

Considering our earlier examination of balancing belligerent and neutral usage rights under customary law, the recited rationales for a right to attack the enemy and to defend oneself without neutral interference are not problematic. They are perfectly compatible with traditional views of coequal belligerent and neutral free passage rights. However, the rationale of ensuring the security of forces is problematic. This legal assertion of the "bubble" concept goes beyond early customary law, but maintains that neutral free passage rights may be abrogated in a battle zone or the immediate vicinity of naval operations.²²⁴ It is this concept's implicit transfer of the risk of nonreceipt of diversionary warnings that lies at the heart of the Flight 655 situation. In a limited conflict situation such as the Iran-Iraq War, the problem is created technically by the imputation of hostile intent to any vessel or aircraft by virtue of its conduct

220. See *infra* note 526 and accompanying text.

221. See 1989 *Annotated Commander's Handbook*, *supra* note 18, at para. 7.8, 7.8.1. It recognizes, however, the trend in belligerent practices to widen interdiction of maritime commerce, thus restricting free passage rights of neutrals within the narrow confines of traditional blockade doctrine in large scale armed conflict. This idea is opposed to limited armed conflict, where blockade-based interdiction is "a useful means to regulate the competing interests of belligerents and neutrals," by satisfying the traditional criteria of establishment, notification, effectiveness, limitation, and impartiality. *Id.* at para. 7.7.5. Technically, the blockade was to be accomplished largely if not exclusively by the placement of mines. This raises the traditional question of whether blockades may lawfully exist without a ship's participation.

222. *Id.* at para. 7.9.

223. *Id.* at para. 7.8 n.141.

224. See *supra* note 374 and accompanying text (unidentified aircraft cleared as target at 20 miles distance).

in not responding to a warship's hail.²²⁵ The military directives implementing this characterization of aircraft or vessels as hostile threats are the "rules of engagement," which in the *Vincennes* incident are apparently still classified.²²⁶ The question remains, however, whether the rules of engagement as military directives comply with the requirements of international law.²²⁷

Since World War II, the United States has been involved in at least four incidents that impeded high seas passage on national security grounds: the Cuban Missile Crisis, the mining of Haiphong Harbor, the mining of Nicaraguan waters in support of the Contras, and the initial economic blockade of Iraq following its invasion of Kuwait. During the so-called Cuban Quarantine of 1962, the United States claimed that its warships were entitled to visit and search foreign ships on the high seas surrounding Cuba to prevent the passage of nuclear missiles to Cuban launching sites. This claim of right apparently derived from the questionable traditional idea of peaceful blockade as a use of force short of war. The action was disputed but never repudiated,²²⁸ since the Missile Crisis was resolved politically before any serious incidents occurred. At the height of the Vietnam War, the United States mined harbors in North Vietnam to interdict seaborne supplies and military activities.²²⁹ What is significant about this activity is that the United States, while involved in a major conflict, felt constrained to limit mining to belligerent territorial waters, to give general notice of the danger, and to allow neutral shipping a grace period in which to depart. This self-restraint, along with general attempts to avoid damage to non-North Vietnamese aircraft and vessels, demonstrates the U.S. conviction that the precepts of pre-World War II customary and treaty

225. This change may date back to the Spanish Civil War and to the rules of engagement implementing the Nyon Agreement. See D. O'CONNELL, *THE INFLUENCE OF LAW ON SEA POWER* 120-22, 172-73 (1975) (British rules of engagement). See also Frank, *Misperception and Incidents at Sea: The Deutschland and Leipzig Crises*, 43 *NAVAL WAR C. REV.* 31, 42-44 (Spring 1990).

226. See Parks, *supra* note 9 (general concept of rules of engagement in light of Flight 655 incident); Shearer, *Rules of Engagement and the Implementation of the Law of Naval Warfare*, 14 *SYRACUSE J. INT'L L. & COM.* 767 (1988) (references to *Stark* incident). See also Roach, *Rules of Engagement*, 14 *SYRACUSE J. INT'L L. & COM.* 865 (1988). The Department of Defense investigation into the Flight 655 incident indicated that the primary responsibility of a commanding officer under the applicable Persian Gulf rules of engagement was "defense of his ship from attack or from threat of imminent attack." *DOD Report, supra* note 6 at E-15. The *Vincennes* properly selected and applied the correct rules of engagement. *Id.* at E-50. Based on the information presented to the *Vincennes*' commanding officer, engagement of the unidentified aircraft (Flight 655) was "within the parameters of the rules of engagement." *Id.* See also *Nejad v. U.S.*, 724 F. Supp. 753, 756 (C.D. Cal. 1989) (dismissal of Flight 655 related wrongful death cases in which Secretary of Navy invoked state secrets privilege as to rules of engagement under which *Vincennes* operated).

227. To the extent the rules of engagement are military orders, they put the individual officers applying their provisions in a difficult situation, given the generally accepted idea that unlawful orders should not be followed. Cf. 32 C.F.R. § 700.605 (1990) (U.S. naval regulation mandating compliance with international law and authorizing disregard of other regulations if necessary to comply with international law).

228. See, e.g., MacChesney, *Some Comments on the "Quarantine" of Cuba*, 57 *A.J.I.L.* 592 (1963); Wright, *The Cuban Quarantine*, 57 *AM. J. INT'L L.* 546 (1963).

229. See *Contemporary Practice of the United States Relating to International Law*, 66 *AM. J. INT'L L.* 836, 837-40 (1972); see also C. ROUSSEAU, *LE DROIT DES CONFLITS ARMÉS* (1983).

maritime law regarding non-hostile aircraft and shipping should be observed.²³⁰

In the *Nicaragua Case*, the ICJ imputed certain mining activities directly to the United States.²³¹ While no notice was given of the location of the mines, allegedly laid to disrupt foreign commerce, all were within Nicaraguan territorial waters. The United States again specifically avoided any high seas mining. Initially, U.S. enforcement of the economic blockade of Iraq and Kuwait declared by the U.N. Security Council on August 6, 1990,²³² also appeared to raise issues of customary law.²³³ This situation changed on August 25, 1990, when the U.N. Security Council officially sanctioned the use of armed force by member states to ensure the blockade's efficacy.²³⁴

All of these actions were carried out either in littoral areas or in apparent reliance on continuous voyage principles, and two of the four maneuvers avoided the high seas completely. While the free passage principles embedded in customary law have been abandoned in favor of ship defense under the bubble theory, they appear to have survived under American views of a belligerent's power to close international waters to nonbelligerents.

Finally, one must inquire whether the United States' apparent failure to challenge openly the legality of the maritime war zones declared by the belligerents in the Iran-Iraq War represented a change in U.S. policy. Implicit recognition of these zones, which were declared in coastal areas and around oil-loading facilities in the Gulf, does not seem to represent a change in policy. These exclusionary zones had a littoral location, or involved artificial islands and were generally narrow in scope. Thus they fell within U.S. contiguity ideas. In addition, official U.S. policy in the Iran-Iraq War embraced a broad view of neutral rights, including free passage claims inconsistent with the war zone concept.²³⁵

Summing up the general development of the exclusion of civilian aircraft from high seas battle zones, little precedent exists beyond the analogy to the exclusion of neutral vessels by a belligerent from surface engagements, on the ground that their presence would interfere directly with belligerent combat

230. See *supra* note 227.

231. See *infra* note 565-67 and accompanying text.

232. S.C. Res. 661, U.N. Doc. S/RES/661, 29 I.L.M. 1325-27 (1990).

233. On August 17, 1990, the United States issued Special Warning No. 80 in its Notice to Mariners series reciting reliance on collective self-defense and specifying that ships travelling to or from Iraq and occupied Kuwait might be visited and searched in the Straits of Hormuz and Tiran, or at other choke points. The U.S. attitude that self-defense permits this high seas interference differs from the classical prize law view, which distinguished clearly between impeding high seas passage under the law of war and the law of peace.

234. This authorization altered the formal justification for U.S. naval actions from a claim of assisting the government in Kuwait in its policy of collective self-defense to one of enforcing Security Council measures. S.C. Res. 665, U.N. Doc. S/RES/665, 29 I.L.M. 1329-30 (1990).

235. See *supra* notes 18 and accompanying text.

operations. Prior to World War I, the concepts of freedom of the seas and neutral rights mandated rejection of such a rule. Instead, the balance between coequal belligerent and neutral high seas usage rights was struck so that any neutral vessel intruding into a belligerent engagement did so at its own risk. Beginning in World War I, however, the neutral vessel rule that provided the analogy was disputed, and the special character of aircraft was stressed in the aftermath of the War. In the interwar period, the asserted new permissive practice of excluding neutral vessels or aircraft from high seas battle zones was actively challenged in treaty discussions,²³⁶ but portions of the 1923 Hague Radio and Aerial Warfare Rules seemed to suggest a departure from principles of customary law.

Under the 1939 Draft Convention on Neutral Rights, collective American scholarly opinion appeared once again to be consistent with the traditional customary law view. Neutral aircraft could be ordered to avoid combat operations, but an aircraft was not present at its own peril unless it had received a warning that it should avoid the battle zone. The risk of unsuccessful or ineffective communication lay with the combatant, and the scope of this risk should be appreciated, given that modern skies were even then increasingly filled with civilian aircraft using international transit routes.

From the viewpoint of U.S. practice, the 1941 *Tentative Instructions for the Navy* as the U.S. Navy's *de facto* law of sea warfare manual during World War II applied much of the 1923 Hague Radio and Aerial Warfare Rules, while changing its focus from reconciliation of competing belligerent and neutral high seas usage rights to a lawful force analysis. Following World War II, the 1955 *Law of Naval Warfare* and the 1989 *Annotated Commander's Handbook* continued to reject the concept of war zones. Following a lawful force analysis, however, they now espouse a seemingly absolute right of belligerents to exclude neutral aircraft and vessels from military operations zones under the bubble theory. Accordingly, the risk of failure to receive the diversionary order rests with the neutral aircraft or vessel.²³⁷ This view lies at the heart of the Legal Adviser's congressional testimony in which he applied a lawful force analysis.²³⁸

Postwar U.S. practice concerning peacetime military warning or danger zones has involved the same general freedom of the high seas issues that drove the analysis of the rights of neutrals between the World Wars. Beyond defense-

236. See *supra* notes 174 and accompanying text.

237. Also, one should note that U.S. practice, as articulated under the lawful force analysis, understands the law of war as a discrete body of legal principles applicable to the course of armed conflict, untouched by modern international law's general restrictions on the use of force. 1955 *LAW OF NAVAL WARFARE*, *supra* note 105, at para. 110, n. 3; 1989 *Annotated Commander's Handbook*, *supra* note 18, para. 7.2.1. To this extent, its principles are applicable to armed conflict only once it has been determined that general restraints on the use of armed force under the U.N. Charter and related law have been satisfied.

238. DEP'T ST. BULL., No. 2139, Oct. 1988, at 58-59, reprinted in *Agora*, *supra* note 69, at 321.

-based claims to assert limited restrictions in contiguous areas, there is no general claim of right under international law to establish prohibited, or even substantially restricted, zones on or over the open seas. Instead, where U.S. activities temporarily have created dangers on the open sea, the United States has chosen to warn vessels and aircraft to avoid the danger zone without laying claim to an absolute right to exclude them. Compliance with diversionary order is characterized as voluntary. Based on limited experience, the United States does not appear to consider aircraft and vessels to be present at their own risk. In the few instances involving pending or active hostilities, the United States has purported largely to follow the spirit, if not the letter, of blockade doctrine,²³⁹ and has restricted mining and similar activities affecting neutral shipping to contiguous, mostly territorial waters.

Looking beyond American views, it is unclear how much of the older customary law applicable to neutral aircraft overflight has survived. To the extent states' views can be read between the lines in recommendation 2.6/1,²⁴⁰ on which Iran relies in its ICJ Application, and in criticisms of other recent examples of high seas exclusionary zones -- such as declared by Great Britain and Argentina in the Falklands conflict²⁴¹ -- some states would assert that the applicable international law principles governing neutral overflight of belligerent operations derive more from free passage than from use of force rules.²⁴² On its face, recommendation 2.6/1 might be treated as addressing only peacetime military uses of the high sea, in which case it differs little from American views. However, given perennially unsettled conditions in the Middle East and recommendation 2.6/1's issuance shortly after the original U.S. Navy warning of potential defensive action, it seems directed at wartime conditions and specifically the Iran-Iraq War. To the extent recommendation 2.6/1 is evidence of the currently accepted law of armed conflict and neutral free passage rights as read into the Chicago Convention under article 89, the naval operations bubble theory has become questionable at least as applied

239. This was not the case with the Cuban Quarantine, where the United States admitted that the activity was not a blockade *per se*, which would imply that hostilities had commenced. Therefore the right to impede free passage was based on concepts of peaceful blockade or quarantine. *See supra*, note 235.

240. *See supra* notes 66-69 and accompanying text and *infra* note 243.

241. *See Fenrick, supra* note 18, at 109-11; *Levie, supra* note 18, at 736-38. *See also* Craig, *Falklands Operations II: Fighting by the Rules*, 37 NAVAL WAR C. REV. 23, 23-25 (May-June 1984) (British view of exclusion zones justified as self-defense under U.N. Charter art. 51).

242. Recommendation 2.6/1 was accompanied at the Third Middle East Regional Air Navigation Meeting by some indications under related recommendation 2.6/8 that the ICAO members present (including the United States) viewed overflight restrictions in high seas areas, even for military purposes, as possibly infringing upon annex 2 to the Chicago Convention. Similarly, prior to the Flight 655 incident the creation of Iranian and Iraqi exclusion zones in the heavily traveled international waters of the Persian Gulf was criticized as impermissible. *See Fenrick, supra* note 18, at 121, 125 (applying reasonableness analysis). The U.N. Security Council also viewed attacks as a violation of free passage rights. *Id.* at 120-21. The Soviet Union condemned Britain's 200-mile total exclusion zone surrounding the Falklands at the height of that conflict, claiming that the act violated the 1958 LOS Convention by arbitrarily closing wide areas of the sea to nonbelligerent shipping and aircraft. *Id.* at 111.

during a limited conflict in the absence of notice to nonbelligerent civil aircraft.

In the Flight 655 incident the question arises whether general American interests are well-served in abandoning free passage rights for a lawful force analysis. Unfortunately, the Legal Adviser's congressional testimony showed little sensitivity to these free passage concerns or the interests at stake in ideas of war or battle zones versus the "bubble" concept. The experience of the *Vincennes* captures the tension between free passage principles and combatant rights in its dual role as both a combatant and a neutral warship asserting free passage rights. If the *Vincennes* as a combatant could disregard free passage principles and close the seas to Flight 655, it is unclear where to draw the line under international law for belligerents closing the seas to nonbelligerent oil tankers in the Persian Gulf.²⁴³ Are free passage rights for nonbelligerent oil tankers more important than nonresponsibility for putative self-defense? To the extent hostilities in a post-Cold War world tend toward regional conflicts such as the Iran-Iraq War, and as international commerce grows in importance, the United States should find that its long-term interests are better served by supporting free passage principles rather than an expansive view of combatant rights. In view of a changing world, the lawful force analysis espoused in the 1955 *Law of Naval Warfare* and the 1989 *Annotated Commander's Handbook* requires reevaluation.

IV. INTERNATIONAL CIVIL AVIATION LAW: OVERFLIGHT AND AIR SAFETY

Beyond jurisdictional aspects already discussed, three aspects of civil aviation treaty law might be applied to the Flight 655 incident to determine what duties, if any, the *Vincennes* violated. The first involves the question of free overflight rights, already noted in connection with recommendation 2.6/1 and maritime free passage principles as qualified by article 89 of the Chicago Convention. The free passage concept, rooted in maritime principles, affects the regulation of aircraft operation. Second, the Chicago Convention and its Annexes directly govern aircraft operation over international waters, which raises the question whether Iran can be faulted for Flight 655's operation if it complied with the Convention. Finally, the ICJ must confront the apparent Iranian position that an air safety duty exists that absolutely prohibits firing upon civil airliners.

The regulatory framework for international civil aviation exists under the Chicago Convention and is administered by the ICAO as the rule-making body. At the time of the Chicago Convention's adoption, the principle of free overflight of the high seas was recognized in customary law, but not under treaty

243. See *supra* note 228.

law.²⁴⁴ The scope of free passage principles in territorial waters and international straits was also disputed.²⁴⁵ Although the 1958 LOS High Seas Convention codified freedom of overflight for the first time, it merely defined which waters constituted the high seas, thereby leaving unchanged the Chicago Convention's regulatory structure for flights.²⁴⁶

Although states may restrict and regulate overflight of their own territories for reasons including military necessity or public safety,²⁴⁷ only the so-called Rules of the Air, contained in annex 2 to the Chicago Convention,²⁴⁸ are mandatory over the high seas.²⁴⁹ The Rules of the Air also apply in areas beyond the high seas unless specifically displaced by states' regulation of their own airspace.²⁵⁰ The extent of the territorial seas was three miles under customary law when the Chicago Convention and the 1958 LOS High Seas Convention (1958 LOS Convention), to which the United States is a party, were signed in 1944 and 1958, respectively. Both negatively define where the high seas, and thus mandatory coverage of the Rules of the Air, begin. However, the limit of territorial seas has been extended to twelve miles under both the 1982 U.N. Convention on the Law of the Sea (1982 LOS Convention) and under modern customary law. In international straits, the 1982 LOS specifically limits sovereign rights over territorial seas and provides for an unrestricted right of transit passage for shipping and aircraft.²⁵¹

244. See, e.g., Cooper, *supra* note 196, at 198. Already the 1919 Paris Convention viewed airspace above the high seas as subject to free passage and airspace above a state's territory and adjacent territorial waters as subject to the state's exclusive sovereignty. Paris Convention, *supra* note 89. See 1 G. GIDEL, *supra* note 97, at 516-17. However, relatively few states were signatories to the Convention. Although not a signatory, the United States signed the 1928 Havana Convention on Commercial Aviation, which contained analogous language in its article 1. Convention Between the United States and Other American Republics, Feb. 20, 1928, T.S. No. 840 (1931).

245. See, e.g., Cooper, *supra* note 196, at 200-01.

246. See The Law of the Air and the Draft Articles Concerning the Law of the Sea adopted by the International Law Commission at its Eighth Session, *supra* note 83, at 80-85.

247. *Id.*

248. See INTERNATIONAL CIVIL AVIATION ORGANIZATION, INTERNATIONAL STANDARDS: RULES OF THE AIR, ANNEX 2 TO THE CONVENTION ON INTERNATIONAL CIVIL AVIATION (8th ed. July 1986) [hereinafter ANNEX 2 TO THE CHICAGO CONVENTION]. Only the mandatory provisions of annex 2 are viewed as compulsory law, while ICAO "recommendations" made in pursuance of the treaty may be voluntarily adopted by the individual states. T. BUERGENTHAL, *supra* note 82, at 80-85.

249. See Chicago Convention, *supra* note 60, at art. 12.

250. *Id.*

251. See Milde, *United Nations Convention on the Law of the Sea – Possible Implications for International Air Law*, 8 ANNALS OF AIR & SPACE L. 167, 175-88 (1983). The U.S. failure to ratify the 1982 LOS Convention raises the question whether it enjoys the benefit of the Convention's novel "transit passage" concept, which is a compromise between traditional narrower innocent passage and broader free transit views, or whether the older innocent passage principles of the 1958 LOS Convention and the *Corfu Channel Case* should apply to it. See RESTATEMENT THIRD, *supra* note 75, § 513(3). Beyond this lies the peculiar question of whether U.S. naval activities, such as those of the *Vincennes*, fall within the definition of "transit passage." Even if they do not, by analogy to the *Corfu Channel Case*, they may not violate Iranian sovereignty and U.N. Charter article 2(4) to the extent they were specifically intended to counter Iranian attempts to cut off free transit rights of merchant shipping through the Strait of Hormuz. While the Iranian ICJ Application did not explicitly raise the issue, the question may arise during an analysis of the lawfulness of the *Vincennes'* employment of force under U.N. Charter provisions. See Caminos, *The*

Although the Flight 655 incident occurred within the Strait of Hormuz, the plane's flight path prior to its downing was within Iran's territorial seas. The *Vincennes* and *Montgomery* were also within the twelve mile zone because of their proximity to the Iranian islands of Queshm and Hengham. Under article 39(3) of the 1982 LOS Convention, aircraft overflying international straits are subject only to the mandatory coverage of annex 2.²⁵² Given that the 1982 LOS has not been ratified by enough states to enter into force, the regulatory jurisdiction of littoral states remains unclear within the airspace above those portions of international straits which are considered part of their territorial waters. On the one hand, the official U.S. position is that the transit passage regime has become customary law. As a result, airspace over international straits arguably should not fall within the jurisdiction of littoral states and thus only annex 2's mandatory rules should apply.²⁵³ On the other hand, disregarding any disputes regarding whether the transit passage regime is a part of customary law, article 39(3) of the 1982 LOS Convention was in derogation of the Chicago Convention, which recognizes the regulatory jurisdiction of littoral states as linked to their territorial sovereignty and thus territorial waters.²⁵⁴ It is questionable whether available evidence of state practice is legally sufficient to conclude that, with regard to aviation operations, customary law has displaced air treaty law under the Chicago Convention. The resolution of this question will determine whether Iran even had the authority under international law to promulgate generally applicable civil aviation operation rules for the airspace in question.

Article 3 *bis*, cited in the Iranian ICJ Application, implicitly reuses the question whether an absolute duty not to fire upon civilian airliners existed. Following the 1983 downing by Soviet air defense forces of Flight KE 007,²⁵⁵ efforts to amend the Chicago Convention²⁵⁶ resulted in an extraordi-

Legal Regime of Straits in the 1982 United Nations Convention on the Law of the Sea, 205 REC. DES COURS 9 (1987-V) (special role of international law designed to secure rights of passage through international straits for all ships and aircraft); see also Reisman, *The Regime of Straits and National Security: An Appraisal of International Law Making*, 74 AM. J. INT'L L. 48 (1980) (U.S. military interests in preserving free passage through international straits); Moore, *The Regime of Straits and the Third United Nations Conference on the Law of the Sea*, 74 AM. J. INT'L L. 77 (1980) (possible interpretation of 1982 LOS to preserve adequate free passage rights).

252. See Caminos, *supra* note 251, at 158-63.

253. This undercuts the idea of an obligation on the part of Iran to issue special operating regulations to aircraft overflying the Strait of Hormuz, which was implicit in the views expressed by the Legal Adviser in his congressional testimony. See *supra* notes 73-81 and accompanying text.

254. An additional complication arises because under the 1958 LOS Convention innocent passage was literally applied only to surface vessels. See, e.g., Caminos, *supra* note 251, at 58-61. For our purposes, it suffices to note that this placed relatively more importance on the continued application of the provisions of the Chicago Convention. As a result, transit passage could arguably become part of customary law under freedom of the seas principles while at the same time the applicable operational air regulatory jurisdiction under the Chicago Convention would remain unchanged.

255. See *Destruction of Korean Air Lines Flight 007*, 30 Dec. 1983, ICAO: Action with Regard to the Downing of the Korean Airlines Aircraft, 23 I.L.M. 864 (1984); Documents Concerning the Korean Air Lines Incident, 2 I.L.M. 1109 (1983). During World War II, a number of civilian airliners were shot

nary session of the ICAO Assembly which unanimously approved article 3 *bis*. Article 3 *bis* has not yet received a sufficient number of ratifications to become treaty law, but there is an issue whether it simply codified existing law.²⁵⁷

Article 3 *bis* contains the following material clauses:

The contracting States recognize that every State must refrain from resorting to the use of weapons against civil aircraft in flight and that, in case of interception, the lives of persons on board and the safety of aircraft must not be endangered. This provision shall not be interpreted as modifying in any way the rights and obligations of States set forth in the Charter of the United Nations.²⁵⁸

Commentators have identified problems relating to the proper interpretation of article 3 *bis*,²⁵⁹ caused in part because it was aimed too literally at the then recent Flight KE 007 tragedy.²⁶⁰ However, it has been argued that it is declaratory of existing customary law.²⁶¹ If a principle of customary international civil aviation law establishes absolute liability for shooting down civil airliners -- even when they trespass on prohibited military areas within a state's territory and *arguendo* are engaged in reconnaissance activity²⁶² -- presumably it would also encompass overflights of international waters and thus could, subject to the effect of article 89 of the Chicago Convention, also apply to the Flight 655 incident.

down, including neutral aircraft over international waters. See J. SPAIGHT *supra* note 95, at 403-08. See also Hughes, *Aerial Intrusions by Civil Airliners and the Use of Force*, 45 J. AIR L. & COM. 603 (1980); Lissitzyn, *The Treatment of Aerial Intruders in Recent Practice and International Law*, 47 AM. J. INT'L L. 559 (1953). See generally J. BENTZIAN, *DER UNERLAUBTE EINFLUG VON LUFTFAHRZEUGEN IN FREMDES STAATSGEBIET IN FRIEDENSZEITEN UND SEINE RECHTSFOLGEN* (1982) (extensive catalogue of peacetime incidents from end of World War II through 1980).

256. See 23 I.L.M. 705 (1984) [hereinafter Art. 3 *bis*] (protocol and text of art. 3 *bis*). See generally International Civil Aviation Organization, *Plenary Meetings, Resolutions and Minutes*, ICAO Doc. 9437, A25-Res., P. Min. [hereinafter *ICAO Extraordinary Assembly*]; International Civil Aviation Organization, *Executive Committee, Report, Minutes and Document*, ICAO Doc. 9438, A25-EX.

257. As of April 30, 1991, the Legal Bureau of the ICAO Secretariat in Montreal had received 61 of the 102 ratifications of ICAO member states necessary to approve this amendment. Telephone interview with Legal Bureau (Apr. 30, 1991). The United States had not yet ratified article 3 *bis* to date.

258. Art. 3 *bis*, *supra* note 256, at 706.

259. See Cheng, *supra* note 111, at 49.

260. Article 3 *bis* apparently prohibits shooting-down an aircraft overflying a state's territory "without authority or if there are reasonable grounds to conclude that it is being used for any purpose inconsistent with the aims of this Convention." Art. 3 *bis*, *supra* note 256, at paras. (b)-(d). This language seemingly addresses the Soviet argument that KE 007 was engaged in espionage. Commentators have interpreted this language broadly as applying to "any purpose inconsistent with the aims of this Convention." See Cheng, *supra* note 109, at 68. By reserving the issue under U.N. Charter provisions, the delegates clearly intended to apply articles 2(4) and 51 of the Charter to the lawful use of armed force and self-defense. See generally Linnan, *supra* note 74, at 57. Commentators have viewed the issues not as a problem of self-defense but rather as a question of the protection and treatment of foreigners within a state's territory. Cheng, *supra* note 109, at 70-72.

261. See sources *supra* note 258 and *infra* note 270.

262. In the Flight KE 007 incident, the Soviet Union claimed that the airline had been engaged in espionage and that the flight's departure time had been delayed to coincide with certain satellite positions and that the flight itself was on a mission coordinated with other agencies. However, the ICAO investigatory report rejected these claims as unsupported by evidence. See *Report of the ICAO Factfinding Commission*, attachment to State Letter L/E 4/19.4-83/130 (Dec. 1983), 23 I.L.M. 865, 894 (1984).

While the "recognition" language of the first clause of article 3 *bis* may indicate that the ICAO Assembly viewed it as merely declaratory of existing customary law, this seems doubtful based upon the proceedings and the history of the provision's prior drafts.²⁶³ Furthermore, even if declaratory of existing customary law, through the reservation of "rights and obligations of States set forth in the United Nations Charter," article 3 *bis* recognizes a qualification on that customary law. It is clear from the proceedings that the delegates had in mind articles 2(4) and 51 of the U.N. Charter concerning the lawful use of armed force and principles of self-defense.²⁶⁴ This is consistent with the interpretation of article 89 of the Chicago Convention²⁶⁵ because article 89 is phrased in pre-U.N. Charter terminology while modern law analyzes the use of armed force in terms of its legality under the U.N. Charter.

The limited commentary on article 3 *bis* to date has viewed the issues involved in the downing of a civilian airliner not as a true self-defense problem, but rather as a question of the protection and treatment of foreigners within a state's territory. As a result, the applicable international law standards focus on the protection of alien lives.²⁶⁶ However, simply asserting that these principles should govern without examining the underlying scope of the self-defense and necessity dispute seemingly ignores the fact that the delegates were primarily concerned about the principles of self-defense and the lawful

263. Cheng, *supra* note 109, at 59-61, 63-67; Richard, *KAL 007: The Legal Fallout*, 9 ANNALS AIR & SPACE L. 147, 154 (1984). *But see* Milde, *Interception of Civil Aircraft vs. Misuse of Civil Aviation (Background of Amendment 27 to Annex 2)*, 11 ANNALS OF AIR & SPACE L. 105, 125-27 (1986) (ICAO Legal Bureau has taken position that art. 3 *bis* is merely declaratory of customary law). While written between the World Wars and prior to the Chicago Convention, the 1923 Hague Rules for Radio and Aerial Warfare allowed belligerents to fire upon and capture neutral civilian aircraft. *See supra* notes 168-80 and accompanying text. While no precedent existed for forcing innocent neutral aircraft to circumvent belligerent military operations, there is a long tradition of capture of neutral merchant vessels by belligerents on account of "non-neutral" activities. The question remains open whether and how much of the traditional law of war should be transposed to present situations. In addition, the permitted transfer by analogy from the law of sea warfare to air warfare is debatable.

264. *See generally* Linnan, *supra* note 74, at 68-77 (differing views of legality of armed force under relevant U.N. Charter provisions).

265. *See supra* notes 88-89 and accompanying text.

266. *See* Cheng, *supra* note 109, at 70-72. Cheng's rejection of the self-defense rationale was based on its open-endedness and possibility of "endless abuses." *Id.* at 73. *See also* Lowenfeld, *supra* note 4, at 341 n.17 (indirectly supporting the state responsibility view by agreeing with Cheng's customary law analysis).

use of force.²⁶⁷ In the context of Flight 655, such an approach also fails to take into account article 89.

Following the 1984 drafting of proposed article 3 *bis*, in 1986 the ICAO Council promulgated amendment 27 to the mandatory Rules of the Air.²⁶⁸ Still colored by the Flight KE 007 incident, the literal language and history of amendment 27 focused on the interception of foreign civil aircraft by military aircraft. While the term "interception" is ambiguous and while amendment 27 may not extend to the Flight 655 incident without a tortured interpretation of the term "aircraft" to include the *Vincennes*' anti-aircraft missiles,²⁶⁹ amendment 27 purports to cover the activities of intercepting military aircraft by requiring under section 3.8.1 that such interceptions comply with "appropriate regulations and administrative directives issued by contracting States in compliance with the [Chicago Convention]" having "due regard for the safety of navigation of civil aircraft."²⁷⁰

After extended debate, the "due regard" language attempted to reconcile state views with respect to whether the Chicago Convention permitted the regulation of intercepting military aircraft.²⁷¹ Although the language adopted may encompass self-defense principles apparently recognized under article 3 *bis*, the United States and the Soviet Union consider amendment 27 *ultra vires* and therefore merely as a special recommendation rather than a mandatory part of annex 2.²⁷² The United States argues that the Chicago Convention in its

267. The peculiar situation of a warship under attack on the high seas raises the issue whether any actions undertaken in its defense are within the ambit of U.N. Charter art. 51. *See, e.g.*, DIE GRENZEN DES VÖLKERRECHTLICHEN GEWALTVERBOTS 124, 125 (proceedings of the 1985 meeting of the Deutsche Gesellschaft für Völkerrecht 1986) (comments of Schindler and Hailbronner in open discussion following presentation of papers); *but see id.* at 147 (Frowein responding to Schindler and Hailbronner in expressing opinion that article 51 applies to such incidents and even to ship's self-defense within an international strait). Conversely, under another view of international law, the question arises whether U.N. Charter article 2(4) restrains a state from using any amount of armed force within its own borders when a civilian aircraft enters a state's airspace without authority. *See e.g., id.* at 148, 152 (comments of Frowein and Hailbronner that downing foreign aircraft over state's territory should be violation of fundamental human rights law and proportionality principles). *See also* J. BENTZIEN, *supra* note 255. Based upon the limited evidence of state practice before the ICAO and ICJ, it appears that states treat both under U.N. Charter articles 2(4) and 51. This article proposes to apply a self-defense analysis both to attacks on neutral innocent ships in international waters and to the downing of civilian airlines over a state's territory.

268. *See generally* Milde, *supra* note 251 (background of amendment 27).

269. The relevant portion of article 3 *bis* is subject to the express qualifier that it "shall not be interpreted as modifying in any way the rights and obligations of States set forth in the Charter of the United Nations." Art. 3 *bis*, *supra* note 256, at 706.

270. ANNEX 2 TO THE CHICAGO CONVENTION, *supra* note 248, at 13.

271. *See* Milde, *supra* note 251, at 108-22. The United States essentially took the position that amendment 27 was an attempt by the ICAO Council to make binding international law outside the normal treaty process of the ICAO Council's legislative function. It considered this beyond the ICAO's jurisdiction.

272. Milde, *supra* note 251, at 120. The ICAO Secretary General was informed by the Acting U.S. Representative on July 21, 1986 that:

[T]he United States of America does not accept any provision of Annex 2 or any other Annex, as constituting a Standard or Recommended Practice applicable to State aircraft. In accordance with Article 3(a) of the [Chicago Convention], the Convention and its Annexes are not applicable to State aircraft. Insofar as any provision of Annex 2 addresses the operation or control of State

current form specifically excludes application to state aircraft and cannot purport to regulate them even when intercepting foreign civil aircraft.²⁷³ Beyond formalism, the clear concern lies in an extension of the issues surrounding proposed article 3 *bis* with regard to principles of self-defense and necessity under international law.²⁷⁴

V. PRIMARY OBLIGATIONS RESTRAINING THE USE OF ARMED FORCE

International law governing the use of armed force and its consequences is fragmented.²⁷⁵ The historical categories of *jus ad bellum* (the law of going to war) and *jus in bello* (the law of the conduct of war) have been transformed by modern prohibitions on the use of force, subject to limited exceptions, such as self-defense under article 51 of the U.N. Charter and collective actions taken under the authority of a U.N. organ.²⁷⁶ The conduct of hostilities is now governed by a mixture of the older customary law of warfare and modern treaty-based humanitarian law, while the law of armed conflict presents special problems in the context of naval warfare and ship defense.²⁷⁷

Resolution of the Flight 655 incident requires close attention to several areas of this fragmented body of law. Section A below discusses modern restraints on the use of armed force under the U.N. Charter. Section B applies precedents involving the mistaken use of armed force to develop the nature of the primary duty applicable to its use. Section C discusses doctrinal approaches to the mistake problem, including traditional ideas of noncompensable war damages to determine whether, as a legal matter, the downing of Flight 655 should be deemed incidental to the *Vincennes*' surface engagement or should be treated separately. This inquiry concludes that the downing of Flight 655 was not incidental to the speedboat engagement as a matter of law and that doctrinal approaches to mistake at the level of primary obligation do not excuse the *Vincennes*' actions. It also concludes that the duty incumbent on the

aircraft, the United States of America considers such provision to be in the nature of a Special Recommendation of the Council, advisory only.

Id. at 121-22 (reprint of official letter).

273. If proposed article 3 *bis* were ratified, it would apply to state aircraft.

274. The ICAO records concerning the Flight KE 007 incident and the text of proposed article 3 *bis* are disregarded in an editorial note in annex 2 to the Chicago Convention. ANNEX 2 TO THE CHICAGO CONVENTION, *supra* note 248, at 38. The note states that "every State must refrain from resorting to the use of weapons against civil aircraft in flight." *Id.* The ICAO Assembly unanimously recognized this view in its 1984 adoption of proposed article 3 *bis*. The editorial note leaves the impression that the duty is absolute, omitting the qualifier that it is subject to states' rights under the appropriate U.N. Charter provisions. See *supra* notes 270-71 and accompanying text.

275. See generally Greenwood, *The Concept of War in Modern International Law*, 36 INT'L & COMP. L.Q. 283 (1987).

276. The most recent example is the military action against Iraq. See S.C. Res. 670, U.N. Doc. S/RES/670, 29 I.L.M. 1334-36 (1990).

277. See, e.g., Ronzitti, *The Right of Self-Defense and the Law of Naval Warfare*, 14 SYRACUSE J. INT'L L. & COM. 571 (1988).

Vincennes in connection with the use of force was not due care, but rather a higher standard requiring the use of force to be justified in fact.

A. *Modern Restraints on War: U.N. Charter Issues and the Flight 655 Incident*

Any inquiry into restraints on the unilateral use of armed force entails the interpretation of the inherent right of self-defense under article 51 of the U.N. Charter. Article 51 is subject to different interpretations, due to conflicting national views of the international law concept of self-defense.²⁷⁸ For the purposes of this inquiry, the divergent views of self-defense may be reduced to a contest between the "textualist interpretation" of articles 51 and 2(4), which claims that any use of armed force is unlawful unless it involves "self-defense" or occurs under a U.N. organ's authority, and the "customary law approach" to these articles. The "customary law approach" holds that article 51 was intended to preserve some restrictive idea of self-defense under customary law (as opposed to articulating entirely new law), whereas for the textualist approach "self-defense" is a term of art, linked to the "armed attack" language of article 51 and modern non-Anglo-American doctrinal views of self-defense. The Legal Adviser's apparent view of the speedboat attack as an "armed band" attack is significant because as a doctrinal matter, textualist interpretations exclude the use of force against armed bands from "self-defense" under article 51 because it either does not constitute an "armed attack," or on the theory that such actions not attributable to a state are governed by necessity principles not justifying the use of force under modern law.²⁷⁹

If the speedboat attack were not attributable to Iran, or did not constitute armed attack under the textualist approach, under such an approach the *Vincennes*' use of force would lie outside the international law self-defense concept

278. The ICJ has the opportunity in deciding the Flight 655 case to resolve these conflicts implicit in, but not clearly addressed by, the recent *Nicaragua Case*. See generally Linnan, *supra* note 73 (setting forth competing views chiefly in terms of textualist interpretations versus those that attempt to preserve a restrictive version of customary law). This does not imply that this or any other ICJ decision should be taken as having binding character beyond the particular case given articles 38(d) and 59 of the Statute of the Court. 59 Stat. 1055, T.S. 993. The *Vincennes*' presence within the 12 mile limit of Iranian territorial seas when it shot down Flight 655 raises two additional distinct issues: 1) whether by using force the *Vincennes*' went beyond its rights under a transit passage regime; and 2) the extent to which traditional necessity and similar self-defense principles can be reconciled with the status of the waters in which the *Vincennes* was located. Although these problems are important issues as a matter of international law and naval policy, they are beyond the scope of this article.

279. For recent conflicting national views of international law, see *Report of the International Law Commission on the Work of its Thirty-Second Session*, [1980] 2 Y.B. INT'L L. COMM'N. 33, U.N. Doc. A/CN.4/SER.A/Add.1 (1980) (Part 2). See Barboza, *Necessity (Revisited) in International Law*, in *ESSAYS IN INTERNATIONAL LAW IN HONOUR OF JUDGE MANFRED LACHS* 27 (J. Makarczyk ed. 1984); Salmon, *Faut-il codifier l'état de nécessité en droit international?*, *id.* at 235.

and thus would be arguably unlawful (unless the entire armed band problem could be considered under municipal law).²⁸⁰

This inquiry adopts the position that self-defense under article 51 should incorporate a restrictive idea of customary law under a narrow self-preservation rationale,²⁸¹ and rejects the idea that the status of the speedboats or an overly narrow reading of armed attack should alone determine the right of the *Vincennes* to use armed force in its own defense. Self-defense in modern terms is a relatively new international law concept, however, so views concerning any "mistaken" self-defense concept exist in precedents largely in inchoate form. Beyond the UN Charter's general restraints on the use of armed force, Chicago Convention article 89 compels examination of the law of armed conflict.

B. *The Law of Armed Conflict and Primary Obligation*

While mistakes in the use of force are not uncommon in armed conflict, applicable international law precedents are rare. Here the nature of the Flight 655 incident as a maritime incident is significant. The few prior maritime precedents are inconsistent, but the older ones are consistent with a view that only a duty of due care attaches to the use of armed force.²⁸² On the other

280. Few jurists would seriously question the *Vincennes*' ability under municipal law to lawfully return the speedboats' fire if attacked. A restrictive reading of article 51 of the U.N. Charter by itself would not justify an act of self-defense by the *Vincennes* against armed band attacks. In order to justify such an act, choice of law problems must be confronted. For example, municipal self-defense law could be applied, using an effects analysis that could focus on the American vessel's nationality. Cf. *The S.S. Lotus* Case (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (application of Turkish penal laws to French officer of French vessel for death of Turkish nationals on Turkish vessel involved in collision with French vessel); 18 U.S.C.A. § 2331 (1990) (municipal law jurisdiction extended over "terrorist acts" outside United States based solely on American nationality of victims, reversing previous bias toward territoriality). The alternative source of law might be special municipal law principles of protective jurisdiction, which would focus on the *Vincennes*' character as a government warship.

Municipal law could also apply to a determination of whether the downing of Flight 655 was a case of mistake. This approach, however, raises the problem that it is difficult *ex ante* to distinguish between an actual attack (i.e., a speedboat attack) from innocent activity mistaken for an attack (as when Flight 655 was mistaken for an attacking Iranian F-14). Without prejudging whether a mistaken apprehension of attack should be analyzed in municipal law under strict liability rules, or under an objectively or subjectively based negligence standard, from a purely municipal law point of view it may be appropriate to apply the most forgiving subjective standard in light of the overriding purposes of protective jurisdiction. Consigning the question to municipal law does not therefore provide adequate assurance of an acceptable resolution.

One possible alternative might be to assert that humanitarian principles and international human rights law effectively constrain any municipal law resolution. However, beyond the fact that such rights are not universally recognized and that there is no consensus concerning their specific content, a focus on victims provides no guidance unless used simply as a pretext for importing self-defense or necessity limitations under another name.

281. As opposed to older, broader ideas of self-preservation. See Linnan, *supra* note 73, at 58.

282. See *infra* notes 348-61 and accompanying text (discussion of *The Marianna Flora* and *The Palmyra*).

hand, more modern land-based precedents appear to require that the use of armed force actually be justified.²⁸³

The implicit comparison of the land-based mistaken use of force precedents with the maritime precedents may be interpreted in one of two ways. On the one hand, they may represent a distinct rule differentiating between land and sea cases (bearing in mind that the Flight 655 incident involves aviation law, but would be regarded as a maritime case under traditional principles). On the other hand, they may be treated as general armed conflict precedents evidencing progressive development in duties applicable to the use of armed force under modern law. Under the latter view, older maritime precedents requiring only due care in the use of force arguably have been superseded by more recent land-based precedents requiring that the use of force actually be justified (see *Figure 2*).

Restraints on Use of Force		
	<i>Due Care</i> <i>(maritime law)</i>	<i>Absolute Standard</i> <i>(land-based law)</i>
<i>Reasonable Mistake</i>	No Violation	Violation
<i>Unreasonable Mistake</i>	Violation	Violation

Figure 2

To the extent the Flight 655 incident involves a duty cognizable under the laws of armed conflict, and assuming the existence of a good faith reasonable mistake, any result reached by the ICJ will depend on whether it accepts the existence of special rules for maritime cases, as opposed to modern development in armed conflict law. The reasonableness analysis commonly advanced by American jurists in terms of both the law of the sea and the use of force would favor a due care standard and a specific maritime rule.²⁸⁴ This inquiry concludes, however, that the due care standard is inapplicable in the context of the *Vincennes*' mistake.

283. See *infra* notes 376-408 and accompanying text (discussion of the *Waima*, *Mazuia*, the *Greco-Bulgarian Frontier*, and *Mukden Incidents*).

284. See, e.g., M. MCDUGAL & W. BURKE, *supra* note 205, at 730-923; M. MCDUGAL & F. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION* 231-32 (1961); McDougal, *Authority to Use Force on the High Seas*, 20 *NAVAL WAR C. REV.* 19 (Dec. 1967).

1. *Maritime Approaches to Misapprehension of Attack or Mistaken Self-Defense*

Two older high seas misapprehension of attack incidents are particularly relevant to an assessment of the Flight 655 incident: the 1826 Supreme Court prize case of *The Marianna Flora*,²⁸⁵ and the 1904 *Dogger Bank Incident*²⁸⁶ involving the Russian fleet and British trawlers. These incidents predate modern limitations on the use of force, but are couched in terms of self-defense and involve otherwise unlawful actions. They are representative of different approaches under traditional sea law to attacks on nonbelligerents that modern law would view as mistaken self-defense.

The 1904 *Dogger Bank Incident* is interesting not least of all due to its visceral resemblance to the downing of Flight 655. Early in the Russo-Japanese War, elements of the Russian Baltic Fleet were dispatched to the Far East. Rumors were rife that the fleet would be attacked in European waters by hostile torpedo boats.²⁸⁷ Following third party sightings of unidentified torpedo boats off Norway and in anticipation of a night attack, during the afternoon preceding the incident the Russian fleet commander issued special orders permitting each ship to fire if attacked by torpedo boats. The subsequent *Commission Report* notes that "[t]hese precautions seemed to be justified by the numerous reports [from Russian officials concerning] hostile attempts to be feared, which in all likelihood would take the form of attacks by torpedo boats."²⁸⁸ As the Russian fleet progressed through the North Sea in a state of heightened readiness, a transport fell behind due to mechanical problems. In mid-evening and under conditions of low visibility, the transport apparently mistook a merchant ship and other vessels for lurking torpedo boats, opened fire on them, and radioed ahead that it was under attack. The fleet commander then signalled all ships to redouble their vigilance.²⁸⁹ Shortly after midnight leading elements of the Russian fleet crossed a high seas area being fished by

285. 24 U.S. (11 Wheat.) 1 (1826) (Story, J.).

286. Also referred to in older commentary as the North Sea or Hull Incident. See *Finding of the International Commission of Inquiry Organized Under Article 9 of the Convention for the Pacific Settlement of International Disputes, of July 29, 1899*, 2 AM. J. INT'L L. 929 (1908) [hereinafter *Commission Report*]; *Dogger Bank Incident (Gr. Brit. v. Russ.)*, Hague Ct. Rep. (Scott) 403-412 (Perm. Ct. Arb. 1916). See also Lebow, *Accidents and Crises: The Dogger Bank Affair*, 31 NAVAL WAR C. REV. 66 (1978); R. DE LA PENHA, LA COMMISSION INTERNATIONALE D'ENQUÊTE SUR L'INCIDENT ANGLO-RUSSE DE LA MER DU NORD (1906); A. HERSHEY, *supra* note 118, at 217-45; F. SMITH & N. SIBLEY, *supra* note 118, at 275-319 (list of arguably analogous international incidents); R. GABORIT, QUESTIONS DE NEUTRALITÉ MARITIME SOULEVÉES PAR LA GUERRE RUSSO-JAPONAISE 34-37 (1906); Mandelstam, *La commission internationale d'enquete sur l'incident de la mer du nord*, 12 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 351 (1905).

287. See, e.g., E. POLITOVSKY, FROM LIBAU TO TSUSHIMA: A NARRATIVE OF THE VOYAGE OF ADMIRAL ROJDESTVENSKY'S FLEET TO EASTERN SEAS, INCLUDING A DETAILED ACCOUNT OF THE DOGGER BANK INCIDENT 3-4, 6, 9-16 (F. Godfrey trans. 1906) (Russian naval officer's diary and correspondence).

288. *Commission Report*, *supra* note 286, at 931.

289. *Id.* at 932.

a fleet of neutral English trawlers and inspected them under searchlights without incident. At approximately 1:00 a.m., the final division of the Russian fleet entered the same area. One trawler fired a rocket as a fishing signal, which was mistaken for an attack signal by watch officers on the flagship's bridge.²⁹⁰ Russian lookouts then saw dark shapes on the water. A spotlight was thrown on one distant shape, and the lookouts reportedly saw a torpedo boat bearing down on the flagship at high speed. The fleet commander then gave the order to open fire. He soon realized that at least some of the vessels were harmless fishing boats and ordered his ships not to fire on trawlers, but by then numerous warships were firing at shapes in the dark. Ten to twelve minutes passed before all firing ceased. The Russian gunfire sank one fishing vessel and damaged several others, killing and wounding several fisherman. Still fearing attack, the Russian fleet proceeded without making any investigation or effort at rescue.²⁹¹

These facts are similar to those of the Flight 655 incident. The *Dogger Bank Incident's* generalized fears about torpedo boat attack parallels fears of air attack voiced by the *Vincennes'* crew following the *U.S.S. Stark* incident. The comparison extends as far as "scenario fulfillment," a theory suggested by Navy psychiatric experts in the course of the official Department of Defense investigation as the explanation for the misinterpretation of objective data by *Vincennes* CIC personnel. In the *Dogger Bank Incident*, a torpedo or mine attack was expected due to intelligence reports. A trailing ship incorrectly reported itself to be under attack in a generally tense situation, raising the fleet's expectations of attack yet higher. Russian watch officers then mistook a fishing signal rocket for an attack signal. The problem was further compounded when the lookouts mistook a spotlight trawler for a torpedo boat on a high speed run at the flagship.²⁹² Prior intelligence reports also told the *Vincennes* to expect Iranian military action on the Fourth of July weekend. Furthermore, an F-14 transponder signal was mistakenly attributed to Flight 655 upon takeoff from its Iranian airfield. This mistake was then exacerbated by the misinterpretation of objective data by *Vincennes* CIC personnel who believed that approaching Flight 655 was diving in a manner like an attacking F-14. Both incidents demonstrate that under the high stress of anticipated combat a tendency toward good faith misinterpretation of events (extending to mistaken perception of objective facts) is possible, if not to be expected. In turn, communication of this misinformation within military command structures heightens the sense of danger as mistakes feed on themselves. In both cases

290. *Id.* at 933-34.

291. *Id.* at 934-35.

292. The matter was never resolved with certainty, but the Inquiry Commission also examined the possibility that the perceived torpedo boat was actually a Russian warship viewed end-on at a distance under nighttime conditions and poor visibility. *Id.* at 934.

the commanding officer believed in good faith that his vessel was under imminent danger of attack and consequently gave the order to open fire in what amounted to anticipatory self-defense. In the course of the inquiry Russia argued that in fact torpedo boats had been mixed in among the trawlers, but this assertion was rejected by all members of the Inquiry Commission except its Russian member.²⁹³ Thus, in the view of the Inquiry Commission's majority, the *Dogger Bank Incident* was a pure wartime mistaken self-defense case on the high seas, resulting in the loss of neutral ships and civilian lives.

The Inquiry Commission's role in addressing questions of responsibility and blame was closer in some respects to an international tribunal than that of a simple fact-finding commission.²⁹⁴ Under the related Agreement of Submission, the Inquiry Commission was charged with determining "where the responsibility lies and the degree of blame attaching [to individuals]" for the English losses suffered.²⁹⁵ The character of the inquiry into individual blame was, under the circumstances, more in the nature of a professional disciplinary investigation than one to establish civil or criminal liability.²⁹⁶ The *Commission Report* addressed responsibility and blame questions separately. A majority of the Inquiry Commission concluded that responsibility lay with the Russian fleet commander who opened fire on what he thought was a torpedo boat on a high speed run.²⁹⁷ There had been no torpedo boats present and the fishing fleet had not committed any hostile act so "the opening

293. *Id.* at 934-35.

294. See F. ANDERSON & A. HERSHEY, HANDBOOK FOR THE DIPLOMATIC HISTORY OF EUROPE, ASIA, AND AFRICA 1870-1914, at 297 (1918), citing A. HERSHEY, *supra* note 118, at 240-41.

295. *Commission Report*, *supra* note 286, at 931. See A. HERSHEY, *supra* note 118, at 218-33; R. DE LA PENHA, *supra* note 286, at 49-100 (development of place of responsibility and blame concepts as recorded in diplomatic exchanges).

296. The official French text and English translation of the Agreement of Submission requested that the Inquiry Commission determine both issues of *responsabilité* and the Russian fleet commander's *degré de blâme*, which have different connotations. See *Dogger Bank Incident* (Gr. Brit. v. Russ.), Hague Ct. Rep. (Scott) 411, 614 (Perm. Ct. Arb. 1916). French *responsabilité* in a legal context carries a direct sense of monetary indemnity, while *blâme* connotes the disciplinary or administrative concept of *blâme* (as opposed to the morally based *culpabilité*). The French original of the *Commission Report* does employ *responsabilité*. *Id.* at 612. But it does not employ the term *blâme* in conjunction with the Inquiry Commission's findings, indicating that "leur appréciation ... ne sont dans leur esprit de nature à jeter aucune déconsidération sur la valeur militaire ni sur les sentiments d'humanité." *Id.* at 613. It also indicates that the Russian fleet commander's conduct was morally acceptable and militarily proper (i.e., nonnegligent from a professional point of view). These distinctions are lost in the more ambiguous English terms of "responsibility" and "blame." Based on the drafting history of the Agreement of Submission, "responsibility" may have been originally intended to mean moral responsibility for the trawlers' sinking, but was eventually changed to a more limited definition requiring ultimate causation when considering the factual dispute over the presence of torpedo boats. Responsibility does not in any case appear to have necessarily entailed indemnity, because Russia might have simply chosen to punish miscreant officers, and because indemnity was agreed to as a basic condition for entering into the Agreement of Submission itself.

297. *Commission Report*, *supra* note 286, at 934.

of fire by [the Russian fleet commander] was not justifiable."²⁹⁸ The Inquiry Commission did not, however, assess individual blame.

The interplay between the Inquiry Commission's separate conclusions on individual blame and responsibility merit close attention. The international panel of military experts (drawn from admirals of the American, Austrian, British, French and Russian navies) indicated that the Russian commanding officer was not subject to individual blame, a conclusion premised as much on the idea that accidents under stress of anticipated combat were to be expected as on the idea that the Russian commander had not known that the firing was directed against neutral fishing vessels (and had attempted to halt firing at any trawlers as soon as he discovered fishing vessels were present). The *Commission Report* specifically states that nothing in the incident "cast any discredit upon the military qualities [of the Russian fleet commander or his squadron personnel],"²⁹⁹ thus implying that the independent tribunal did not consider the Russian conduct to be negligent. While contemporary commentators criticized the decision on the grounds that military experts were unsuitable judges of the legal concept of responsibility,³⁰⁰ the decision of the admirals simply reflected military professionals' customary allowance for mistake during the high stress of anticipated combat. The Commission thus functioned as a jury of peers expressing their professional opinion on a question of negligence in lieu of discharging a judicial function.³⁰¹ The Inquiry Commission was convened in large part on account of irreconcilable factual disagreements between Britain and Russia.³⁰² The Russian member argued that torpedo boats actually had been present among the trawlers, and as a result

298. *Id.* at 935. The commissioners also criticized the duration of firing, but unanimously concluded that in the face of continuing uncertainty about the danger of attack there was sufficient justification for the Russian fleet's failure to stop. *Id.* at 396. The duration of firing, under the circumstances, was caused by general night-time battle confusion and preexisting orders that each ship could fire independently on attacking torpedo boats.

299. *Id.* at 936.

300. *See, e.g.,* Mandelstam, *supra* note 286, at 410-11. Mandelstam's generic criticism of military professionals sitting in judgment on questions of sea warfare law is telling, because as a junior Russian jurist he personally participated in the Inquiry.

301. Mandelstam describes the Inquiry Commission's activities as resembling in part those of the investigating judge and in part those of the jury. *Id.* at 405-08. This combination is problematic because if the investigation were viewed as quasi-criminal, it would violate the principle of continental inquisitorial procedure that fact-gathering and fact-finding bodies must be separated. Other contemporary commentators seem to have missed this "jury" aspect completely, indicating only that as non-jurists, the Inquiry Commission members were ill-trained to form any opinion on the legal question of responsibility.

302. The dispute was aggravated by the fact that the Russian fleet remained *incommunicado* for several days while underway toward the Far East. British public opinion was outraged upon hearing that Russian ships directed fire at unarmed fishing vessels (traditionally recognized to be exempt even from capture in time of war). The Russian fleet commander then communicated his version of events, claiming that the fishing vessels intentionally lent cover to a torpedo boat attack. It is understandable that both sides articulated a good faith belief regarding what actually happened. The Russian claim was seen as a particularly cynical attempt to avoid disciplining any Russian officer, following what was either a *casus belli*, if intentional, or at the very least an example of gross incompetence. For a description of contemporary events, see R. DE LA PENHA, *supra* note 286, at 51-54.

belligerent Russia should not be held responsible for neutral English losses. On the other hand, the majority believed that no torpedo boats were present, and so concluded that "the opening of fire . . . was not justifiable."³⁰³ Thus neutral losses occurring in the course of a true engagement between belligerents are considered inevitable accidents of war if they result from belligerent forces firing at each other. By contrast, the Russian ships' good faith misapprehension of attack (whether or not it occurred within the scope of engagement) did not absolve belligerent Russia from responsibility for damage to neutral merchant vessels mistaken for the enemy.

The Inquiry Commission's opinion did not clearly state whether mistake could never exonerate responsibility (an absolute rule), or whether only reasonable mistake could exonerate responsibility. Nonetheless it appears the Inquiry Commission followed an absolute rule that the existence of a mistaken apprehension of attack would not exonerate responsibility.³⁰⁴ Both the French³⁰⁵ and English texts of the *Commission Report* state that opening fire on the trawlers was not "justifiable" (as opposed to not justified).³⁰⁶ The *Commission Report* acknowledged that the Russian fleet commander made a good faith mistake and thus was not individually blameworthy, but still assigned responsibility to him. It would be difficult to imagine more compelling circumstances for finding a "reasonable" mistake in light of the perceived threat and chain of events.³⁰⁷ The only language in the *Commission Report* questioning whether the mistake was reasonable was the statement that the Russian fleet commander's precautions "seemed to be justified" by numerous reports that a torpedo boat attack seemed likely, coupled with third party sightings of unidentified torpedo boats off the Norwegian coast.³⁰⁸ This choice of words may reflect skepticism regarding the reasonableness of torpedo boat attacks in the North Sea.³⁰⁹ The otherwise reasonable military measures

303. *Commission Report*, *supra* note 286, at 935. These differing views of the facts sharply juxtapose the differences in analysis under scope of engagement and misapprehension of attack.

304. *But see* 1 G. SCHWARZENBERGER, INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 639 (1957) (Russian fleet commander's mistake was not reasonable, and hence case and Inquiry Commission's findings essentially involved putting polite diplomatic face on payment of indemnity for negligence). Schwarzenberger leaves open the possibility of nonresponsibility for a reasonable mistake only in theory. His argument ignores the import of the Inquiry Commission's findings and illogically postulates an elaborate conspiracy involving the coordination of senior naval officers from several different countries as members of the Inquiry Commission.

305. *See Dogger Bank Incident (Gr. Brit. v. Russ.)*, Hague Ct. Rep. (Scott) 607, 612 (Perm. Ct. Arb. 1916).

306. *See id.*; *see also Commission Report*, *supra* note 286, at 935.

307. The unintentional discharge of a weapon by what is perceived as an attacking vessel might be the exception. Such a possible mistaken discharge case was mentioned in *The Marianna Flora*, but was rejected there on the facts. *See infra* notes 320-28 and accompanying text.

308. *Commission Report*, *supra* note 286, at 931.

309. Contemporary publicists questioned the possibility, indicating that the entire *Dogger Bank Incident* would be unbelievable had it not occurred. *See, e.g.*, Scott, *supra* note 111, at 9. *See also* J. WHITE, THE DIPLOMACY OF THE RUSSO-JAPANESE WAR 181-82 (1964); E. POLITOVSKY, *supra* note 287, at 4.

based on the initial (unreasonable) fear of attack might render the mistaken self-defense at the end of the causal chain unreasonable. The Inquiry Commission affirmed the commander's "military qualities,"³¹⁰ but did not state that his actions were not negligent on the basis of professional military standards; it specifically found him responsible for the English losses.³¹¹ The *Commission Report* thus narrowly interpreted "mistaken self-defense" under the customary law of sea warfare, placing great weight on the obligations owed neutral merchant ships.³¹²

The second significant maritime precedent, *The Marianna Flora*, dates to a time when piracy was common and was recognized as a violation of the law of nations. Foreign merchant ships were not subject to high seas visitation or capture by the warships of another nation during peacetime.³¹³ Nonetheless, pirate vessels sailed under no flag's protection. Pirate vessels were subject to capture by the warships of all nations at any time.³¹⁴ *The Marianna Flora* case involved mutual mistake on the part of an armed Portuguese merchant ship of the same name and the American warship *Alligator*. Passing on the high seas, each thought the other ship was a pirate vessel. A short naval engagement ensued, characterized as self-defense on each side. The *Alligator* subdued *The Marianna Flora* without loss of life or damage to either vessel, and then communicated with its captain. The American commanding officer, dissatisfied with the explanation that *The Marianna Flora's* original attack was the product of a mistaken belief, seized *The Marianna Flora* and brought it

310. *Commission Report*, *supra* note 286, at 936.

311. Contemporary commentators discussing the Inquiry Commission and its *Commission Report* characterized the entire incident in a manner not flattering to the Russian officers: "[t]here can be little doubt that the firing was due to a state of panic among the Russian officers of the fleet, induced by a fear or belief that they were in great danger of attack by Japanese torpedo boats." F. ANDERSON & A. HERSHEY, *supra* note 294, at 297.

312. The issue is unresolved, and seems to be the import of the Legal Advisor's statements that Iran was at fault by permitting Flight 655 to overfly the dangerous Persian Gulf. *See supra* notes 73-81 and accompanying text.

313. The vessel's home state would view violation of this noninterference rule not only as the unlawful seizure of a private vessel, but also as an affront to the state itself. The rule was strictly observed under normal circumstances because a state's reservation of sole jurisdiction over vessels of its own nationality was an assertion of sovereignty and jurisdiction. Sovereign immunity and agency rules might bar state responsibility, yet the captain of a warship that unjustifiably interfered with a foreign vessel could be held personally liable for damages before an admiralty court in peacetime or a prize court in wartime. The agency problem of imputing a state official's intent to the state itself in connection with an internationally unlawful act underlies early attempts to state an objective theory of state responsibility. *See infra* notes 472-74.

314. For example, using its powers under article I, section 8 of the Constitution, Congress in 1819 outlawed "piratical aggression," and directed the Navy to seize and condemn pirate vessels. Act of March 3, 1819, ch. 77, 2 Stat. 510 (1819) ("An act to protect the commerce of the United States, and punish the crime of piracy"). Piracy on the high seas therefore violated both municipal law as well as international law. An American warship's power to seize and condemn a foreign vessel during peacetime for alleged piracy depended on municipal law. However, since such a seizure would constitute interference on the high seas with a non-American vessel, it would normally only conform to international law if the non-American vessel were ultimately found to have actually engaged in piracy.

to Boston for condemnation. The municipal law condemnation side of the libel was dismissed quickly in the lower courts,³¹⁵ but a counterclaim by *The Marianna Flora* for internationally unlawful attack and seizure was pursued. By the time the case reached the Supreme Court, the libel had been amended to include under defenses separate charges of "hostile aggression" in violation of the law of nations and "piratical aggression" in violation of the municipal anti-piracy statute.

Justice Story, writing for the Court, separately analyzed the attack on *The Marianna Flora* and its subsequent seizure. He indicated that the misidentification underlying *The Marianna Flora's* act of anticipatory self-defense was unreasonable. Nonetheless, the act did not constitute either "piratical aggression" or an act of "hostile aggression" sufficient to justify condemnation of the vessel.³¹⁶ Justice Story reached these conclusions by first analyzing the seizure in terms of the American commander's quandary in evaluating *The Marianna Flora's* attack on the *Alligator*.³¹⁷ The captain's exercise of discretion in detaining the foreign vessel was reasonable, as his act was in good faith and not an act of "gross negligence or malignity . . . [or] a wanton abuse of power,"³¹⁸ which would otherwise justify a damage award. The Court acknowledged that it specifically followed the analogy from prize law under the law of war, which denied liability for wrongful capture of merchant ships if "probable cause" existed for the seizure.³¹⁹ The Court arguably drew upon a general maritime law of nations rule rejecting normal practices limiting belligerent authority beyond the examination of documents.³²⁰

In terms of the modern concepts self-defense and mistake, the *Alligator's* use of force was justifiable in self-defense and in response to *The Marianna Flora's* unreasonable misapprehension of attack. Although the *Alligator* was not authorized under international law to seize *The Marianna Flora* following the naval engagement, recovery of damages would be precluded if the legal injury resulted from the military commander's reasonable but mistaken view of the situation. In the absence of gross negligence, responsibility for damages would not attach. However, the applicability of these principles might be limited because both vessels survived attack without damage or loss of life,

315. *The Marianna Flora's* mistaken albeit intentional attack did not constitute "piratical aggression," on grounds that the requisite subjective intent was absent, and that an otherwise mistaken attack without loss of life or damage was not piracy. 24 U.S. (11 Wheat.) 1, 39.

316. Justice Story considered the concept of "hostile aggression" under the law of nations in a fashion that minimized its importance in the case itself, while preserving its existence for a return to prominence in *The Palmyra*. 25 U.S. (12 Wheat.) 1, 17 (1827).

317. 24 U.S. (11 Wheat.) 1, 44-54. Analysis under contemporary precedents, in contrast, limits belligerent authority over neutral shipping under wartime circumstances to the examination of a neutral ship's papers.

318. *Id.* at 52.

319. *Id.* at 54.

320. See *infra* notes 331-60 and accompanying text.

and the damages sought were essentially for the short period of time during which *The Marianna Flora* was unlawfully detained. Thus, the rule of the case might be limited to situations involving only *de minimis* damage to property and/or no loss of life.³²¹

The *Dogger Bank Incident* and *The Marianna Flora* both involve the mistaken use of force with apparently inconsistent outcomes. The *Commission Report* failed to excuse a reasonable mistake in the *Dogger Bank Incident*, while the Marshall Court reached the opposite result in *The Marianna Flora*. Although early commentators opined that the *Dogger Bank* result was influenced by a contemporary land-based precedent,³²² both cases were resolved by balancing competing self-defense and free passage interests, yet were fit into different maritime rules. *The Marianna Flora* was essentially resolved by analogy to the probable cause concept under prize law, while the *Dogger Bank Incident* was treated as belligerent appropriation on the high seas, foreshadowing neutrals' problems with war zones and similar practices in World War I.³²³ As the U.S. apparently plans to assert a lawful force analysis in the

321. *But cf. The Palmyra*, 25 U.S. (12 Wheat.) 1 (1827) (crew members of *The Palmyra* were killed in engagement, but deaths may have been subject to rules permitting sinking if capture resisted). See *infra* notes 348-356 and accompanying text. If, however, the analogy to the law of capture were extended, it should make no difference whether *The Marianna Flora* had been sunk. This conclusion follows from those prize law cases where seizure of a vessel is unwarranted but occurs on probable cause, and the captured vessel is subsequently lost (i.e., in a storm on the way to port where a prize court would have freed the vessel, but denied damages to it for the reasonable but mistaken seizure). Under these circumstances no damages are payable, but that rule itself is merely an extension of bailment principles. See *infra* note 327. Further, in declining to uphold an indemnity award against *The Alligator* by a lower court (as the Portuguese vessel's own conduct was unreasonable), Justice Story cited English admiralty precedent for the proposition that damages beyond restitution need not be awarded in cases articulating novel rules. 24 U.S. (11 Wheat.) 1, 55-56 (citing Lord Stowell's opinion in *Le Louis*, 165 Eng. Rep. 1464 (Adm. 1817)).

322. See F. SMITH & N. SIBLEY, *supra* note 118, at 313-14. Since the *Waima Incident* and arbitration involving France and Great Britain had apparently received newspaper coverage, the French and English members of the *Dogger Bank Incident* Inquiry Commission most probably had some knowledge of the precedent (although they were naval officers and not international jurists). The senior English legal adviser or accessor, himself a distinguished jurist who had served as an international arbitrator, almost certainly was familiar with the precedent. While it probably will never be known, under the circumstances, it seems very likely that the *Waima Incident* precedent was familiar to Inquiry participants whether or not it influenced the outcome of the *Dogger Bank Incident*. *Id.*

323. Contemporary newspaper reports and British parliamentary declarations imputed to the Russian Baltic Fleet commander statements to the effect that any vessel approaching his fleet too closely would be immediately sunk. See A. HERSHEY, *supra* note 118, at 227, 227-28 n.20. If true, this would expose any and all neutral shipping on the Fleet's voyage to the Far East to belligerent war risks in violation of traditional rules of sea warfare. While these allegations probably go too far, they may have some basis in fact to the extent they are addressed to the problem of permissible use of false flags in naval warfare and fears expressed that a small enemy vessel carrying torpedoes and camouflaged under a neutral flag might approach a warship under this ruse and sink it. See R. DE LA PENHA, *supra* note 286, at 187-93. Since the rules of naval warfare permit the use of false flags subject only to the condition that a belligerent must show its true colors before firing, fear was expressed at the time that a concealed enemy might come within point-blank range before running up his belligerent flag and firing torpedoes. To the extent the Russian fleet feared torpedo boat attack, this might have come as easily under ruse as cover of darkness. See also A. HERSHEY, *supra* note 118, at 243. Contemporary evaluations of Russia's general legal position on these issues were particularly harsh, but they were phrased in terms of the traditional free passage rights of neutral ships in wartime as opposed to concerns generally about the use of force.

Flight 655 proceedings unfettered by free passage concerns, this inquiry turns to a closer examination of the mistaken self-defense precedents, beginning with maritime precedents developing the prize law analogy relied upon in *The Marianna Flora* opinion, and then through land-based precedents.

2. Maritime Precedents: Due Care Under Prize Law and Quasi-War Precedents

The closest analogy to the Flight 655 incident might be found in the older precedents reconciling freedom of the seas and belligerent authority in the treatment of neutral shipping during times of war.³²⁴ Neutral rights and belligerent authority have traditionally existed in an uneasy tension,³²⁵ in which a belligerent's unjustified interference with neutral shipping could give rise to a right of indemnity cognizable before a prize court.³²⁶ Under traditional sea

324. Freedom of the seas precedents attract the attention of commentators writing on self-defense, but they are more often than not misunderstood or mischaracterized due to their peculiar status as maritime cases. See, e.g., Zourek, *La notion de légitime défense en droit international (Dix-septième Commission)*, in 56 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 1, 21 (1975) [hereinafter Zourek, *Légitime défense*]; J. ZOUREK, *L'INTERDICTION DE L'EMPLOI DE LA FORCE EN DROIT INTERNATIONAL* 100 (1974) [hereinafter J. ZOUREK, *L'INTERDICTION*]. Zourek lumps together *The Marianna Flora*, *The Virginius* and *The Mary Lowell* and states generally that they contain a rule of self-defense not recognized in international law, citing as authority the eminent French commentator and sea law expert Gidel. See 1 G. GIDEL, *supra* note 97 at 348-55. Gidel, however, fails to mention *The Marianna Flora* and articulates a probable cause rule. As a technical matter, *The Virginius* and *The Mary Lowell* are necessity cases involving alleged assistance to insurgents, and are based on the issue of a state's power to enforce laws by boarding a foreign-flagged vessel on the high seas during peacetime. Zourek and other commentators neglect the idea that freedom of the high seas underlies these decisions, as well as the fact that *The Marianna Flora* is distinguishable and sets forth a different rule from *The Virginius* or *The Mary Lowell*. See Linnan, *supra* note 73, at 86-87.

325. For commentary discussing this issue, see C. COLOMBOS, *THE INTERNATIONAL LAW OF THE SEA* 753-825 (6th ed. 1967); J. GARNER, *PRIZE LAW*, *supra* note 140; J. HALL, *THE LAW OF NAVAL WARFARE* (1914); H. MARTIN & J. BAKER, *LAWS OF MARITIME WARFARE AFFECTING RIGHTS AND DUTIES OF BELLIGERENTS AS EXISTING ON AUGUST 1, 1914* (1918), reprinted in 8 *THE INQUIRY HANDBOOKS* (1974); C. ROUSSEAU, *supra* note 229, at 276-353, 465-508 (1983); G. SCHRAMM, *DAS PRISENRECHT IN SEINER NEUESTEN GESTALT* (1913); H. WEHBERG, *supra* note 155; Higgins, *Le droit de visite et de capture dans la guerre maritime*, 11 REC. DES COURS 65 (1926-I); Smith, *Le développement moderne des lois de la guerre maritime*, 63 REC. DES COURS 603 (1938-I).

326. Jurisdictional and choice of law issues plague prize law doctrine. Jurisdiction to award damages has generally been recognized by Anglo-American prize courts, but the question of jurisdiction has been more problematic for continental prize courts. See, e.g., J. GARNER, *PRIZE LAW*, *supra* note 140, at 648-49 (1927). Here another complication must be acknowledged: whether prize law as applied by municipal prize courts should be considered international or municipal law. In Great Britain and the United States, prize law is considered international law applied by national tribunals. See C. COLOMBOS, *A TREATISE ON THE LAW OF PRIZE* 18-21 (2d ed. 1940); *The Rapid*, 12 U.S. (8 Cranch) 155, 162 (1814); see also *The Paquete Habana*, 175 U.S. 677, 708 (1900); *The Schooner Adeline and Cargo*, 13 U.S. (9 Cranch) 244, 284 (1815). On the other hand, continental prize courts are typically *ad hoc* tribunals that may be staffed in part by special judges, and in many countries are thought to only apply municipal law in the form of prize ordinances. See C. ROUSSEAU, *supra* note 229, at 326-43 (German and Italian views of prize law as municipal law). However, while municipal prize law in continental countries normally follows national views of international law, a municipal prize court judgment in violation of international law principles would itself constitute an international law violation. Thus, national prize codes must incorporate a provision requiring a "reasonable ground" for capture similar to a "probable cause" requirement. See, e.g., J.

warfare law, belligerents have had the right to visit and search neutral merchant ships on the high seas to determine their neutral character, the particulars of their voyage (i.e., whether they visited an enemy port under blockade), whether they carried contraband cargo or enemy personnel, or whether they were engaged in nonneutral service, causing them to take on enemy character and subjecting the entire ship to seizure.³²⁷ In the nineteenth century, beyond visitation and search, a belligerent normally could restrain a neutral merchant ship's rights of free passage only by formal capture of the vessel for the above reasons.³²⁸ If capture were justified, condemnation by a prize court should

GARNER, PRIZE LAW, *supra* note 140, at 649-52 ("*ausreichende Gründe*" required under art. 8 of German *Prisenordnung* of Sept. 1909). Thus probable cause rules can be characterized as a general international law principle even in decisions of municipal prize courts purporting to apply only municipal law.

327. The early nineteenth century law of high seas capture (*jus belli*) was concerned chiefly with questions of the nationality of a ship and its cargo during periodic wars. Because private enemy property could be seized lawfully, the neutral character and service of a vessel were decisive. The law of visitation, search and capture was premised on a system of inquiry at sea, under circumstances where merchant ships often sailed under false pretenses to avoid seizure by vessels of different nations. Naval vessels and privateers responded in kind by flying false flags, and on occasion impersonating enemy officers during visitation and search. *See, e.g., The Eleanor*, 15 U.S. (2 Wheat.) 345 (1817). Probable cause for seizure consisted largely of the discovery of inconsistent documentation or some other concrete indication that the master's statements regarding the ship, cargo, and voyage were inaccurate. Additional Note on the Principles and Practice in Prize Causes, 15 U.S. (2 Wheat.) app. note 1, at 8-9 (1817). Probable cause was also subject to a determination of degree of suspicion, because a prize court might award restitution of a captured ship, but could also order restitution of the captor's costs and expenses. *See e.g., The Apollon*, 22 U.S. (9 Wheat.) 362, 372-73 (1824); *The Olinde Rodrigues*, 174 U.S. 510, 535-37 (1898). Under these limitations a vessel's capture could be declared and a prize crew charged to take it into a prize court for adjudication. Capture did not normally transfer property rights in the vessel or its cargo, however, and the captor was considered a bailor for purposes of the inward voyage. The captor was not responsible for loss of the vessel as long as the prize crew exercised ordinary diligence in navigation (i.e., absent negligence there was no responsibility for its loss in a storm or to subsequent capture by third parties). *See The George*, 10 F. Cas. 201, 204 (C.C.D. Mass. 1815) (No. 5,328) (Story, J.). Under these circumstances, the probable cause rules were not too draconian in their application because the incorrectly captured vessel was almost invariably either available for restitution, or was lost to causes considered *force majeure* in any case. Subsidiary rules of maritime law compelled captors to send a captured vessel in for prize court adjudication. If the captors sold the ship without reason or delayed in seeking out a prize court, they might later forfeit the prize and be liable for damages.

328. The legal concept of capture is central in the case law, but it was neither decisive in all cases nor consistently applied by the Marshall Court. For example, in *The Eleanor*, the Court faced a claim for a warship's responsibility for the sinking of a merchant ship during visitation and search in inclement weather. *The Eleanor*, 15 U.S. (2 Wheat.) 345 (1817). The American warship had engaged in the ruse of sending a boarding party to the American merchant ship masquerading as British officers, presumably to determine whether the merchant ship was trading with the enemy. The master of the merchant ship with his first mate transferred with its ship's papers to the warship, leaving the merchant ship without its own competent officers. The ruse worked too well, because when the merchant ship threatened to sink the American crew refused to obey the orders of the boarding party in the belief that they were British officers (who presumably were going to seize the vessel anyway). The ship then sank while in the possession of the American warship, but prior to capture. After a somewhat confused examination of the warship's putative duty to install a competent prize crew (under bailment-negligence principles, which duty would presumably attach only following capture), the Court chose to resolve this difficult case on the theory that the master of the merchant ship himself was responsible for the sinking because, when ordered to the warship with "a mate," he chose his first mate, thereby removing the only other ship's officer capable of controlling the crew and working against the admittedly avoidable sinking of the vessel. 15 U.S. (2 Wheat.) 345, 360-61.

follow, but cases arose where grounds for seizure of the vessel or a captor's subsequent conduct were found legally insufficient. Therefore, the captured vessel would be released or its value paid in damages. Beyond restitution of the vessel, however, the issue remained whether an additional indemnity should be paid for the wrongful detention of the vessel and its crew. Responsibility for damages did not arise on the captor's part despite the objective wrong suffered by the detained vessel if there had been probable cause for the capture (under the theory that such interference was a minor inconvenience to be tolerated in war)³²⁹ and minimum standards of prize conduct were followed thereafter.³³⁰ Probable cause principles arguably evidence a general concept of the traditional maritime law of nations proscribing only a warship's threat or use of force if it were an unreasonable violation of a foreign-flagged private vessel's free passage rights.³³¹ The traditional international law duty incum-

A similar stretching of the legal sense of capture occurred in *The Marianna Flora*, 24 U.S. (11 Wheat.) 1 (1826). The Court relied heavily on *The Alligator's* lawful "capture" of *The Marianna Flora* following a mutual mistake, as both ships believed they were defending themselves against pirate attack. The Court opined that counsel did not present any case in which capture was deemed lawful, but that the subsequent bringing in of a captured vessel into prize court was grounds for indemnity (an important basis for applying the probable cause rule to a mistake of law situation). The Court used "capture" as a *jus belli* term of art, however, and as this was a pirate case, the more proper approach arguably was to resolve the case under the rule concerning faulty maritime seizures under municipal law, under which liability could exist despite probable cause. Furthermore, even a *jus belli* capture included the voyage into the prize court against the will of the merchant ship's master as part of the "capture." Under American views, title to the detained ship did not pass until the prize court adjudication itself. *See, e.g., Talbot v. Seaman*, 5 U.S. (1 Cranch) 1, 32 (1801) (title in context of recapture problem). Thus, the Court's reliance on counsels' failure to produce countervailing precedent was illusory, as it relied on a confusion of the plain English sense of "capture" as applied to *The Alligator's* subduing of *The Marianna Flora* (arguably considered a "seizure" in municipal law usage) with the legal meaning of "capture" under *jus belli*. Given the experience in maritime law of various of the Marshall Court, it seems likely that at least some of them were aware of these analytical frailties.

329. This was an express rule of *jus belli* high seas international law, because a different rule applied to responsibility for maritime seizures within a state's jurisdiction (i.e., in its ports or coastal waters, or of a ship sailing under its flag) under municipal revenue or similar laws. Under maritime law a party seized a vessel at its own risk, and probable cause or other exculpatory conditions only applied to excuse an incorrect seizure if so provided by statute. *See, e.g., The Apollon*, 22 U.S. (9 Wheat) 362, 372-76 (1824).

330. Sufficiency of probable cause to warrant excuse from indemnity under prize law has traditionally been found where circumstances exist that would warrant a reasonable suspicion that a neutral merchant vessel is engaged in prohibited trade. *See, e.g., The George*, 10 F. Cas. 201 (C.C.D. Mass. 1815) (No. 5,328) (Story, J.). The case law distinguishes degrees of captor suspicion and sufficiency of evidence offered in rebuttal for purposes of avoiding the payment of indemnity for a vessel's capture. Inadequate evidence required the captor to pay the captured vessel's costs and expenses in a prize condemnation suit, while sufficient evidence left both parties to bear their own costs and expenses, and strong evidence making restitution of a captured vessel or its cargo contingent on payment of the captor's costs and expenses. Requiring strong probable cause to justify the use of armed force translates into a rule requiring a relatively high degree of diligence. *See id.* at 204. At a minimum, policy and logic also commend a high diligence standard in connection with the use of armed force, given the constant potential of a tragic mistake with attendant risks to international peace.

331. This caution is advised in any attempt to broadly extend such a principle under the law of peace as nineteenth century views in particular hotly contested the authority of a foreign warship in peacetime to stop a domestic vessel on the high seas as in the case of *The Virginius*. Piracy was recognized as an exception to this rule, on the reasoning that by common consent of nations any vessel engaging in piracy would be deemed to have forfeited the ability to claim the protection of its flag. *See, e.g., A. RUBIN, THE*

bent on a belligerent warship thus was not an absolute prohibition on interference with neutral vessels' right of passage on the high seas.³³²

There is some indication beyond prize law *per se* that warships asserting neutral rights in the face of belligerent encroachment or otherwise in circumstances of "hostile aggression" were subject to international law duties analogous to those incumbent on belligerents.³³³ This provided the basis for the *Vincennes*' activities protecting nonbelligerent shipping in the Persian Gulf. To the extent this law incorporates prize law's probable cause concept, a neutral warship's international law duties opposing putative hostile aggression might be limited to a reasonableness standard of due care. Exculpation of a warship's reasonable mistake would thus be embedded in the duty itself if the duty related to the use of armed force is seen to be one only of due care.

Due to a felicitous coincidence of jurisdiction and history, the Marshall Court left a rich legacy of prize cases and international law jurisprudence covering maritime seizure and freedom of the seas, shaped from the perspective of a traditionally neutral maritime power.³³⁴ Early Supreme Court prize

LAW OF PIRACY 19-20, 83-84, 109-10 (1988) (63 U.S. Naval War College International Law Studies); 1982 LOS Convention, *supra* note 100, at arts. 103-05. This permitted the possibility of a reasonable mistake. *The Marianna Flora*, for example, arose on the basis of a mistaken belief by the commanding officer of *The Alligator* that *The Marianna Flora* was guilty of "piratical aggression." The other area of the nineteenth century version of international crime involving this problem was the slave trade, but the United States consistently took the position that even here without a treaty agreement a warship could not board a foreign flagged vessel it suspected was engaged in the slave trade. *See, e.g.*, H. WHEATON, ENQUIRY INTO THE VALIDITY OF THE BRITISH CLAIM TO A RIGHT OF VISITATION AND SEARCH OF AMERICAN VESSELS SUSPECTED TO BE ENGAGED IN THE AFRICAN SLAVE-TRADE (1842); *Le Louis*, 165 Eng. Rep. 1464 (Adm. 1817) (Lord Stowell, J.) (foreign vessel allegedly engaged in slave trade would not be subject to visitation by British warships unless such a right was recognized by treaty). The "probable cause" idea was not broadly applied under the law of peace, but was strong enough under the law of sea warfare that Justice Story (himself an authority on admiralty law) considered the analogy most convincing in the few cases where it might be entertained under the law of peace. At the same time, at least one modern continental publicist has apparently mistaken the deep roots of piracy and slave trade exceptions now enshrined in art. 23 of the 1958 LOS Convention and art. 106 of the 1982 LOS Convention, as he views them as evidence of changes in state responsibility. *See* Rauschnig, *Verantwortlichkeit der Staaten für völkerrechts widriges Verhalten*, STAATENVERANTWORTLICHKEIT 7, 49-50, 56, 62 (Conference of Deutsche Gesellschaft für Völkerrecht 1984). His views were not representative of continental publicists and were criticized. *See id.* at 79 (Frowein), 98 (Ziegler), 104-05 (Rudolf). Rauschnig appeared to articulate a "reasonableness" analysis of the variety common in American scholarship. *See supra*, note 291.

332. Elected branches of the U.S. government have occasionally asserted the position that, due to the sanctity of private property, neutral property should be subject to absolutely no interference on the high seas, including the traditionally recognized rights of visit and search. Because this principle was not adopted, the United States originally did not join in the 1856 Declaration of Paris, which specifically regulated neutrality in the maritime sphere. *See* C. SAVAGE, POLICY OF THE UNITED STATES TOWARD MARITIME COMMERCE IN WAR 119-21 (1934); Quigley, *The American Attitude Toward Capture at Sea*, 11 AM. J. INT'L. L. 820 (1917). *See also* Knauth, *Prize Law Reconsidered*, 46 COLUM. L. REV. 69 (1946). This historical position is instructive due to its general rejection by most other countries.

333. *See infra* notes 355-64 and accompanying text.

334. *See, e.g.*, B. ZIEGLER, THE INTERNATIONAL LAW OF JOHN MARSHALL: A STUDY OF FIRST PRINCIPLES 12 (1939). While Chief Justice Marshall entertained his own views and wrote many prize law opinions, Justice Story's prize law opinions are more important to this inquiry, as Justice Story was a recognized authority on admiralty and prize law and wrote both the *Marianna Flora* and *The Palmyra* decisions.

cases recognized the classic *jus belli* probable cause for capture rules, but did not stop there.³³⁵ The breadth of the Marshall Court's use of the probable cause concept is striking and visible in decisions arising out of the so-called French American quasi-war of 1798-1800. This dispute grew out of French treatment of neutral American vessels and cargos during European hostilities following the French Revolution and the abortive XYZ Affair (1797-98).³³⁶ Congress chose not to declare war, but authorized seizure of armed French vessels found on the high seas off the American coast. Thus, in *Talbot v. Seeman*,³³⁷ Chief Justice Marshall found probable cause justifying the seizure of *The Amelia*, a neutral merchant vessel armed for trade in the East Indies.³³⁸ Marshall expressly recognized the special character of this so-called quasi-war (referring to it as a "partial war" as opposed to a "general war"), but indicated that under the law of nations the probable cause seizure rules also applied in this context.³³⁹

Later cases arising under municipal legislation aimed at limiting American trade with France further recognized the applicability of the probable cause principle.³⁴⁰ In *Murray v. The Schooner Charming Betsy*³⁴¹ and *Maley v. Shattuck*,³⁴² Chief Justice Marshall again applied the probable cause concept to seizures of neutral ships under municipal legislation aimed specifically at fraudulent transshipment of American goods and transfer of American vessels to a neutral nationality to avoid the bar on commerce with France.³⁴³ *The*

335. See, e.g., *Jennings v. Carson*, 8 U.S. (4 Cranch) 2, 28-29 (1807); *Del Col v. Arnold*, 3 U.S. (3 Dallas) 333, 334 (1796).

336. Much of the dispute as a technical matter of prize law centered on the French claim to determine a ship's character according to the nationality of its cargo, a claim that confused ideas of nonneutral service with ideas relating to seizure of enemy property. This departed from late 18th century practice under which the nationality of a vessel and its cargo were considered separately when determining what was subject to belligerent condemnation. Belligerents could condemn only the enemy cargo in a neutral vessel, absent some kind of fraudulent concealment. The French position should be understood in conjunction with a further claim, considered by many contemporary jurists to be in violation of the law of nations (and subsequently narrowed by French prize courts themselves), that a cargo consisting only partially of belligerent goods or contraband determined the character of the entire cargo. In practical terms this potentially subjected a neutral ship to condemnation for carrying any belligerent cargo. See *Carrington v. The Merchants' Insurance Co.*, 33 U.S. (8 Peters) 495, 519-20 (1834). The crux of the dispute in American eyes was the depredations committed against neutral American vessels by French privateers. The treatment of neutral shipping was only resolved in 1856, when it was addressed directly in the Declaration of Paris.

337. 5 U.S. (1 Cranch) 1, 31-32 (1801).

338. *Id.* at 31-32. In this case *The Amelia* and the American warship were both neutrals. The American warship was not acting as a belligerent, but rather was asserting neutral rights in much the same sense as the *Vincennes*, which was in the Persian Gulf to protect neutral shipping.

339. *Id.*

340. For discussion of the French incidents, see G. HASKINS & H. JOHNSON, FOUNDATIONS OF POWER: JOHN MARSHALL 1801-15, at 407-37 (1981); *French Indemnity, 1803*, in 5 J. MOORE, INTERNATIONAL ADJUDICATIONS (MODERN SERIES) 149-210; *French Indemnity, 1831*, *id.* at 309-30.

341. 6 U.S. (2 Cranch) 64 (1804).

342. 7 U.S. (3 Cranch) 458 (1806).

343. Marshall noted but did not address the issue in *Little v. Barreme*. *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 179 (1804) (statute allowed specific conduct in question, even if conducted by American vessel).

Schooner Charming Betsy involved the seizure of a neutral vessel recaptured from French privateers, while *Shattuck* involved liability for a neutral vessel wrongfully captured in the misapprehension of its master's French nationality.

Both cases involved the determination of the vessels' neutral character in light of the fact that each vessel was of American origin and had recently been sold to an American-born naturalized subject of neutral Denmark.³⁴⁴ The Supreme Court ignored counsels' arguments that the legislation's municipal character rendered the probable cause concept inapplicable. Instead, the Court applied the logic of *Talbot v. Seeman* and extended the application of the probable cause concept beyond the context of war to the French-American dispute. The significance of this approach can only truly be appreciated in comparison to Justice Story's opinion in *The Apollon*, in which the Court clearly distinguished between the applicability of the probable cause concept to an international law seizure *jus belli* and to a municipal law seizure for violation of revenue laws.³⁴⁵

It is against this background that the applicability of the probable cause concept to seizure of suspected pirate vessels first arose in *The Marianna Flora*.³⁴⁶ The reasonable mistake of the *Alligator*'s commanding officer in seizing *the Marianna Flora* was specifically not decided as a *jus belli* case. *The Marianna Flora* has different roots from *Talbot v. Seeman* and the related French-American dispute cases, which arguably (but mistakenly) could be distinguished as *jus belli* precedents simply involving an undeclared war.³⁴⁷ Rather, *The Marianna Flora* was decided by Justice Story as a novel case concerning freedom of the high seas in peacetime. His opinion went beyond piracy *per se* by addressing not only "piratical aggression," but also the broader issue of maritime "hostile aggression" under the law of nations.

Justice Story formally recapitulated the Marshall Court's systematic view of the applicability of the probable cause concept in *The Palmyra*.³⁴⁸ Decided one year after *The Marianna Flora*, *The Palmyra* also arose under municipal

344. A somewhat delusory argument was made in *Murray v. Schooner Charming Betsy* that the ship might also have been considered an armed French vessel. The Court ignored this argument as it was premised essentially on the presence of a few small sidearms or cutlasses.. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) at 76-77, 121. The ship's owner was the same individual in *Schooner Charming Betsy* and *Maley v. Shattuck*, a naturalized Danish merchant residing on a Danish possession in the Caribbean.

345. 22 U.S. (9 Wheat.) 362, 372-76 (1824).

346. 24 U.S. (11 Wheat.) 1 (1826).

347. This approach would then confront Chief Justice Marshall's characterization of a conflict as a "partial" rather than a "general" war, a characterization that allowed him to apply to an assertion of neutral rights the probable cause rules permissible under the law of war. *See Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 31-32 (1801). As a formal matter, Congress chose not to declare war. *Talbot* was also not a case compelled by American views of the dualism-monism question, under which Congress has the constitutional power to bind American courts to apply municipal law even where it might violate international law obligations. For the Court's acknowledgement of this power, see *The Marianna Flora*, 24 U.S. (11 Wheat.) 1, 40 (1826). Marshall specifically discussed the American measures as a matter of the law of nations.

348. 25 U.S. (12 Wheat.) 1 (1827).

law directing U.S. naval vessels to take action against piracy. *The Palmyra* presented different facts, as the case involved an American warship that had fired first and was not acting in self-defense.³⁴⁹ The Court was thus unable to reason, as it had in *The Marianna Flora*, that because the original seizure was unquestionably lawful, probable cause excused taking the vessel in for adjudication.

At this time, the same basic prize law principles applied to private armed vessels (privateers) operating under a valid letter of marque as were applied to public warships. While a true privateer lawfully enjoyed substantially the same prize law rights of visitation, search and capture as a public warship, that identical behavior would be considered piracy if pursued by an armed private vessel not operating under the sanction of a sovereign's letter of marque. *The Palmyra*, a Spanish privateer, was captured on the high seas by the U.S. warship *Grampus*, following complaints by American merchant vessels alleging that *The Palmyra* had stopped and boarded them. *The Palmyra* was taken in for adjudication under the condemnation provisions of the anti-piracy legislation.³⁵⁰ The lower courts acquitted *The Palmyra* on the piracy charge, and ordered the payment of an indemnity for its seizure.³⁵¹

The Supreme Court opinion described irregularities in *The Palmyra's* conduct of searches, and found that it had been proven below that its crew was guilty of plunder on the American merchant vessels. However, together with significant irregularities on the face of the Spanish letter of marque under which privateer status was claimed, this merely constituted probable cause. The heart of *The Palmyra* opinion concerned whether the probable cause concept could be used to excuse the *Grampus'* conduct in light of apparently conflicting rules under *The Apollon* and *The Marianna Flora* decisions. Opposing counsel argued under *The Apollon* that probable cause excused indemnity only under the laws of sea warfare for belligerent warships' mistaken seizures, or under the municipal seizure rule to the extent recognized by statute and within national jurisdiction, against the position that under *The Marianna Flora*

349. Justice Story noted a lack of detail in the record surrounding the exact circumstances of *The Palmyra's* capture. As a result, he assumed that the American warship must have attempted visitation and search on suspicion of piracy at which point the Spanish vessel refused to be boarded and the engagement began. He found that the warship would have the right to fire on a vessel resisting lawful visitation and search. There is something of a logical leap in this approach, because while the right *jus belli* to fire on neutral merchant vessels attempting escape was well-recognized, firing on vessels eluding visitation and search on suspicion of piracy was not a well-recognized right. See *The Maria*, 165 E.R. 199, 207-09 (1799) (Lord Stowell, J.). For whatever reason, Justice Story placed little emphasis on the resistance element in comparison to the self-defense element in *The Marianna Flora*. 25 U.S. (12 Wheat.) 1, 50-54.

350. 25 U.S. (12 Wheat.) 1, 8 (1827).

351. See *id.* at 2-3. The lower courts split on the decision. The District Court heard the condemnation in admiralty, restored *The Palmyra* to its master, but denied damages against *The Grampus*, while the Circuit Court affirmed restitution of *The Palmyra* and awarded damages for its seizure. By the time the case reached the Supreme Court, *The Palmyra*, as an apparently duly-patented privateer, had been seized on the high seas in contravention of the law of nations, and an indemnity had been ordered paid.

the probable cause concept extended beyond the laws of sea warfare. Significantly, *The Palmyra* went beyond *The Marianna Flora* on its facts.

Justice Story could have distinguished *The Marianna Flora* on its own terms, either on the basis that award of an indemnity was inappropriate in a precedent articulating a novel rule, or because it involved neither loss of life nor significant damage to either vessel. Instead, Justice Story denied that *The Apollon's* categories were exclusive, or that an indemnity should be awarded to *The Palmyra* where probable cause existed.³⁵² He referred to general principles of maritime tort law as well as the basis of "quasi-belligerent rights."³⁵³ Apparently employing capture's technical sense under the *jus belli* law of nations, Justice Story opined that *The Marianna Flora* held "that probable cause was a sufficient excuse for a capture under circumstances of hostile aggression at sea."³⁵⁴ The "hostile aggression" language itself is important, because in *The Marianna Flora* the parties and the Court carefully distinguished between "piratical aggression" as a municipal law statutory concept and "hostile aggression" as an international law concept. As in *The Marianna Flora*, Justice Story called upon *jus belli* capture law in support of his decision, but used it only as an analogy, thus not limiting the holding to the law of war.³⁵⁵

By discussing the issue in terms of hostile aggression on the high seas in lieu of piracy, Justice Story's opinion addressed the probable cause concept in terms of general principles of international law.³⁵⁶ His view of excusing high seas capture with the existence of probable cause is also linked to precedents arising out of the French-American quasi-war of 1798-1800. These

352. *Id.* at 17.

353. *Id.*

354. *Id.* "Capture" under the law of naval warfare technically encompassed not only taking possession of a vessel on the high seas, but also transport of it for prize court adjudication. Justice Story, however, relied on a plain meaning definition of "capture" in *The Marianna Flora*, a definition that arose from his distinction between taking possession of a vessel in self-defense from the act of transport for adjudication. 24 U.S. (11 Wheat.) 1, 50, 54 (1826). Justice Story cannot have intended to use "capture" here in the ordinary sense because, as a product of the peculiar self-defense posture of *The Marianna Flora*, taking possession of *The Marianna Flora* on the high seas was itself simply part of lawful self-defense. Justice Story could not excuse liability for a breach of the law of nations, because the valid exercise of the right of self-defense excluded the possibility that *The Alligator* itself illegally boarded *The Marianna Flora*. The issue was not the lawfulness of the post-engagement visitation and search, but rather the lawfulness of the subsequent act of transporting the vessel for adjudication. "Capture" is also arguably misused here in the sense that it was customary in maritime legal terminology to refer to "capture" as *jus belli* and "seizure" under mere municipal law, as Justice Story does elsewhere in the opinion. 25 U.S. (12 Wheat.) 1, 17 (1827). Given that Justice Story authored both *The Marianna Flora* and *The Palmyra* decisions and was a recognized authority on admiralty and prize law, it seems likely that any ambiguities of terminology serving to extend the law were conscious. This conclusion is reinforced by the fact that the failure to award indemnity in *The Marianna Flora* appeared to rely on the character of the case as precedent enunciating a new rule.

355. 25 U.S. (12 Wheat.) 1, 18 (1827).

356. Justice Story did not treat the case as a piracy problem either under international or municipal law. See A. RUBIN *supra* note 331.

precedents recognized a neutral's power to use armed force to protect itself against a belligerent's unlawful encroachment on freedom of the high seas. This was the *Vincennes'* explicit mission in the Persian Gulf -- to protect neutral shipping from belligerent attack. Justice Story indicated that in cases involving probable cause of "hostile aggression," probable cause would excuse indemnity when nonbelligerent rights were at issue.³⁵⁷ Thus, if *The Palmyra* is still good law, a reasonable mistake on the part of the *Vincennes* should not amount to a breach of its obligations under international law, assuming those obligations are determined by the law of armed conflict at sea.

The Marshall Court jurisprudence recognizes that a neutral warship's international law duties in opposing putative hostile aggression are limited to a standard of due care or diligence, and so indemnity rights presumably would therefore not exist for resulting injury when due diligence was exercised.³⁵⁸ This view dates back to an era when freedom of the high seas was otherwise vehemently asserted. As such, it should be understood both to specify limits on free passage rights and to specify the duty incumbent upon public warships.³⁵⁹ While this discussion of the probable cause principle has drawn on the decisions of a municipal court, support could be sought equally, if less systematically, from state practice and other sources.³⁶⁰ *The Marianna Flora* and *The Palmyra* may well figure in U.S. arguments before the ICJ in the Flight 655 proceedings.³⁶¹ The ICJ would be mistaken to discount such authori-

357. Justice Story's opinion in *The Marianna Flora* recognized that hostile aggression in the context of mistaken self-defense should be given special treatment. 24 U.S. (11 Wheat.) 1, 40 (1826).

358. This is probably a high standard, if judged by Justice Story's remark that *The Palmyra* was a case of "strong" probable cause. 25 U.S. (12 Wheat.) 1, 18 (1827). While Justice Story does not discuss the law of capture under *jus belli* beyond noting the analogy, under *jus belli* differing degrees of probable cause affected whether a captor's costs and expenses should be repaid by the vessel wrongfully captured. See *supra* note 348 and accompanying text.

359. Justice Story contemplated in *The Palmyra* decision that the probable cause/due care rule would apply to armed public vessels, reserving the question of its availability to armed private vessels, which might encompass both privateers and armed merchant vessels. The latter distinction is not important except to the extent that it indicates that this is a state responsibility problem and not simply a matter of marine tort law.

360. The probable cause concept was included in article 23 of the 1958 LOS High Seas Convention. See *supra* note 100, at art.23; 1982 LOS Convention, *supra* note 100, at art. 106. Further, *The Carthage* provides an example of the use of probable cause in international arbitration. The Carthage Case (Fr. v. Italy), Hague Ct. Rep. (Scott) at 329-40 (Perm. Ct. Arb. 1913). *The Carthage* dates from the classic era of sea warfare law and is one of the few voluntary international law arbitrations individually addressing sufficiency of suspicion for wartime high seas capture of a neutral vessel. The decision recognized the probable cause concept under prize law as both justiciable and as part of customary international law. For the related French-Italian international arbitration, see The Manouba Case (Fr. v. Italy), *id.* at 341-53 (prize law is part of customary international law). For a more detailed discussion, see Scelle, *Die Fälle "Carthage," "Manouba," "Tavigliano" in französischer Auffassung*, 1 JAHRBUCH DES VÖLKERRECHTS 544 (1913).

361. Given that *The Marianna Flora* serves as a self-defense "hostile aggression" precedent, its validity could continue under U.N. Charter article 51. *The Palmyra* and other cases concerning protection of neutral rights also serve as precedent for self-defense in the face of hostile aggression, allowing this entire corpus to be reconciled with provisions of the United Nations Charter.

ty solely on the basis that the precedents stem from an American court.³⁶²

Thus far this inquiry has treated probable cause as a concept that delimited permissible interference with free passage on the high seas under circumstances where restitution of a seized neutral vessel was the norm and loss of life the exception. Even following *The Palmyra*, it remains questionable whether the traditional rule was ever considered generally applicable to the outright destruction of an unarmed vessel with serious loss of innocent life.³⁶³ While high seas destruction of captured neutral vessels was not totally unknown under traditional maritime practice,³⁶⁴ the destruction of neutral prizes following the 1856 Declaration of Paris was condoned only in cases of extraordinary necessity, and was still challenged as absolutely impermissible by many states (particularly by the United States, insofar as it periodically supported absolute protection of private property on the high seas). However, the traditional maritime practices supporting this view of probable cause began to break down even as legal regulation of armed conflict gained broad acceptance.³⁶⁵

The practice of unlimited submarine and mine warfare in declared war zones during World War I hastened this decline of traditional maritime practices. These new types of weapons enabled belligerents to sink neutral ships in order to destroy their contraband cargoes, leaving owners of innocent cargo with a separate claim.³⁶⁶ Modern naval warfare's concentration on total inter-

362. However, at least one foreign commentator has claimed that *The Marianna Flora* was wrongly decided and represents a peculiarly American view. See Zourek, *Legitime defense*, *supra* note 324, at 21.

363. Justice Story indicated in dictum that had the fire by the armed private vessel *The Marianna Flora* resulted in deaths, it might have been subject to liability for the individual delicts, but would not be subject to condemnation. He based this opinion on the theory that its misapprehension of attack rendered the injury a less serious violation of international law. 24 U.S. (12 Wheat.) 1, 40 (1826). In some ways this dictum may be inconsistent with *The Palmyra*, but it conforms more closely to the basic pattern of then contemporary prize law, in which a prize court normally could restore a wrongfully captured vessel or the proceeds from its sale in restitution, with further indemnity being substantially punitive in nature and directed against costs and injury caused by a vessel's capture. Cf. *Jecker v. Montgomery*, 54 U.S. (13 Howard) 498, 517-18 (1851) (probable cause becomes material only after restitution is ordered and additional damages are claimed for the injury and expenses sustained from seizure and detention).

364. For views expressed in connection with the first apparent systematic large scale sinkings at the beginning of the twentieth century in the Russo-Japanese War, see A. HERSHEY, *supra* note 118, at 136-59; C. LEROUX, *LE DROIT INTERNATIONAL PENDANT LA GUERRE MARITIME RUSSO-JAPONAISE* 145-62 (1911); F. SMITH & N. SIBLEY, *supra* note 118, at 164-90; S. TAKAHASHI, *INTERNATIONAL LAW APPLIED TO THE RUSSO-JAPANESE WAR WITH THE DECISIONS OF THE JAPANESE PRIZE COURTS* 310-36 (1908). See also F. SMITH, *THE DESTRUCTION OF MERCHANT SHIPS UNDER INTERNATIONAL LAW* 70-101 (1917) (post-Russo-Japanese War developments in form of 1909 London Naval Declaration and early World War I practices).

365. A specific exception was made under the 1909 London Declaration for military necessity, altering the traditional view that sinking a neutral ship was *per se* illegal. See 3 C. HYDE, *supra* note 94, at 2030-36.

366. See, e.g., C. COLOMBOS, *supra* note 325, at 273-76; J. GARNER, *PRIZE LAW*, *supra* note 140, at 656-60. Analogous questions arose during World War I concerning the question of indemnification for neutral vessels that had been ordered without cause by belligerent warships to detour to a specified port for visitation and search. See Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War (1909), *reprinted in* 33 AM. J. INT'L L. SUPP. 175, 588-89 (1939) (commentary to art. 61). In fact,

diction of commerce to destroy an enemy's capacity to wage war has also affected neutral shipping. State practice seems to subject neutral ships to the threat of sinking in situations combining military necessity and probable cause. Given the nature of submarine warfare, the element of military necessity was usually present, shifting the focus of the modern debate concerning permissible acts to issues of defining declared war zones and unlimited submarine warfare.³⁶⁷ While national naval manuals might advise special caution or require military necessity before sinking a neutral prize,³⁶⁸ in a practical sense the parameters of traditional capture rules now delimit permissible destruction. Whether or not desirable and subject to the argument that traditional principles of sea warfare law still apply the development of modern warfare arguably has transformed the probable cause concept into a rule of permissible destruction.

3. *Land-Based Precedents: An Absolute Duty Under Modern Principles of Armed Conflict*

Land-based mistaken use of force precedents are more recent than their maritime law corollaries. From the ICJ's perspective, however, the law of armed conflict under article 89 of the Chicago Convention presents the question whether these precedents articulate a general law of armed conflict applicable to incidents occurring at sea. The latest land-based precedents were decided under restrictions on the use of armed force articulated during the League of Nations period, directly comparable to legal principles based on the U.N. Charter.

Four pre-World War II land-based incidents are relevant to mistaken apprehension of attack or preemptive attack in mistaken self-defense: the 1893 *Waima Incident* involving French attack on an encampment of British colonial forces mistaken for a marauding tribe;³⁶⁹ the 1914 *Mazuia Incident* involving German attack on a neutral Portuguese colonial outpost;³⁷⁰ the 1925 *Greco-Bulgarian Frontier Incident* involving a territorial incursion into Bulgaria

belligerent practice in ordering deviation for vessel searches predates World War I, as does precedent for indemnification if there is no colorable ground for deviation. *See id.* at 577-85. World War I saw wide-spread employment of the practice. This diversion, not characterized as a capture, was necessary to the implementation of recognized rights of visitation and search due to danger from the enemy along with the increasing impracticality of examining an entire ship's cargo at sea as vessels grew in size. Such a detour could be a costly and time-consuming endeavor carried out without any prior indication of violation of neutral obligations.

367. *See, e.g.*, Fenrick, *supra* note 18, at 96-109; Levie, *supra* note 18, at 736-39 (including roundtable commentary on Levie paper).

368. *See, e.g.*, 1955 LAW OF NAVAL WARFARE, *supra* note 105, § 503(e).

369. *See* 94 BRIT. & FOREIGN ST. PAPERS 1900-1901, at 37 (1904) (arbitral convention between Great Britain and France); 95 BRIT. & FOREIGN ST. PAPERS 1901-1902, at 136 (1905) (arbitral award).

370. *Domnages Colonies Portugaises (Port. v. Germ.)* 2 R. INT'L ARB. AWARDS 1013, 1017-19 (1928) [hereinafter *Mazuia Incident*].

following the killing of two border guards;³⁷¹ and the 1931 *Mukden Incident* involving Japanese military attacks in Manchuria.³⁷² They bridge the gap from the earlier law of mistaken attack, as the decisions in the earlier *Waima* and *Mazuia Incidents* are couched in those terms, whereas the decisions in the *Greco-Bulgarian Frontier* and *Mukden Incidents* both involved the League of Nations.³⁷³ While the concept of probable cause in maritime law might limit the use of armed force only to a duty of due care, these land-based precedents support an absolute duty limiting the use of force, under which even a reasonable mistake is no excuse.

The 1893 *Waima Incident* involved a clash between French and British forces, who unbeknownst to each other were both engaged in punitive expeditions against the same marauding tribe along the Sierra Leone border.³⁷⁴ The French commander, leading a force of 1,230 Africans came upon the British encampment of 650 colonial police and Indian troops at night and apparently mistook the British officers in white campaign dress for Arabs commanding a raiding force.³⁷⁵ As the French force silently approached, British sentinels fired to rouse the sleeping British troops and a pitched battle ensued. Three British officers and numerous other troops were killed or wounded.³⁷⁶ When the French and British governments failed to reach agreement on the amount payable in reparation, the matter was consigned by bilateral convention to arbitration by a Belgian diplomat.

Responsibility for the *Waima Incident* was arguably conceded *ex ante* by France, because the bilateral arbitration agreement only assigned to the arbitrator the task of fixing the amount of indemnity.³⁷⁷ The arbitrator indicated

371. *Report of the Commission of Enquiry into the Incidents on the Frontier Between Bulgaria and Greece*, League of Nations Doc. C.727.M.270 (1925), reprinted in *id.* at 196-210; *Report to the Seventh Assembly of the League on the Work of the Council, on the Work of the Secretariat and on the Measures Taken to Execute the Decisions of the Assembly*, League of Nations Doc. A.6. (1926), reprinted in LEAGUE OF NATIONS O.J. SPEC. SUPP. 44, 152, 179-84 (1926) [hereinafter *Seventh Assembly Report*]. For a description and analysis of the incident, see generally J. BARROS, *THE LEAGUE OF NATIONS AND THE GREAT POWERS: THE GREEK-BULGARIAN INCIDENT*, 1925 (1970).

372. See, e.g., C. LIANG, *THE SINISTER FACE OF THE MUKDEN INCIDENT* 10-44 (1969); Hiroharu, *The Manchurian Incident, 1931, and Toshihiko, The Extension of Hostilities, 1931-1932*, in *JAPAN ERUPTS: THE LONDON NAVAL CONFERENCE AND THE MANCHURIAN INCIDENT, 1928-1932* 139-230, 241-335 (J. Morley ed. 1984); T. YOSHIIHASHI, *CONSPIRACY AT MUKDEN: THE RISE OF THE JAPANESE MILITARY* 1-6, 151-218 (1963).

373. For the relevant League of Nations actions, see *Minutes of the Thirty-Sixth (Extraordinary) Session of the Council, October 26-30, 1925*, 6 LEAGUE OF NATIONS O.J. 1695-1718, at 7 (1925); *Thirty-Seventh Session of the Council, December 7-16, 1925*, 7 LEAGUE OF NATIONS O.J. 108-18, 172-77 (1926).

374. See sources cited *supra* note 369. See also F. SMITH & N. SIBLEY, *supra* note 118, at 312-14 (providing factual detail not found in arbitral award).

375. F. SMITH & N. SIBLEY, *supra* note 118, at 312-13.

376. As indicated by early twentieth century commentators discussing the *Waima Incident* and *The Marianna Flora* in the context of precedents for the *Dogger Bank Incident*, the *Waima Incident* does substantially represent a land-based twin of *The Marianna Flora*'s mutually mistaken self-defense. See, e.g., A. HERSHEY, *supra* note 118, at 2441-42 n.59; F. SMITH & N. SIBLEY, *supra* note 118, at 314.

377. 94 BRIT. & FOREIGN ST. PAPERS 37 (1900-01).

that the French commander had acted in good faith,³⁷⁸ and noted that territorial principles were not at stake, since the incident occurred in an area where the boundaries between British and French colonial territory were not yet fixed.³⁷⁹ Despite the fact that France apparently conceded responsibility through acceptance of the terms of the arbitration agreement, the arbitrator considered the exculpating mistake problem independently,³⁸⁰ and articulated reasons for awarding an indemnity in terms of responsibility principles.

France claimed that any indemnity obligation should be limited to the value of the annuities owed to the families of the two deceased military officers, apparently the only compensation mandated by British law. However, the arbitrator found that municipal law treatment of the losses incurred was not material,³⁸¹ and instead indicated that by finding France responsible for the incident it was liable for all British injuries. As a result, France's indemnity obligation included compensation for all casualties, whether struck by French or British fire, because they would not have occurred but for the mistaken French attack.³⁸² In short, once past the issue whether the entire incident should be considered as a noncompensable, fortuitous event in legal terms, the arbitrator found France liable for all British injuries arising out of the incident. This result, preceding the *Dogger Bank Incident*, seems essentially inconsistent with *The Marianna Flora* line of precedent.³⁸³

The *Mazuia Incident*, which also resulted in liability for mistaken self-defense, arose in connection with August 1914 rumors in the colonial territory of German East Africa (present day Tanzania) that hitherto neutral Portugal had declared war on Germany.³⁸⁴ The governor of German East Africa de-

378. 95 BRIT. & FOREIGN ST. PAPERS 138 (1901-02). The reasonableness of the officer's conduct is open to interpretation, because the French commander himself was mortally wounded in the attack and the arbitrator's finding evaluated the factual circumstances as follows:

Dans leur ensemble, les circonstances autorisent à penser que, sans prévoir la présence possible d'une troupe Anglaise, l'officier Français, dont la bonne foi n'est pas contestée, a cédé avant tout à la préoccupation d'atteindre et de disperser les bandes de [the marauding tribe] qui par leur jonction pouvaient menacer la sécurité des possessions Françaises.

Id. Regarding the French claim that British sentinels had fired first (in lieu of first inquiring who constituted the large body of men coming upon the British encampment), the arbitrator simply indicated that in the face of an apparent enemy the sentinels could fire to wake their sleeping troops.

379. *Id.* at 137.

380. After setting forth the facts and party positions, the arbitrator stated that:

Nous concluons de cet exposé que, dans l'appréciation des responsabilités, une certaine part doit être faite à un malheureux concours de circonstances qui a amené une rencontre entre deux expéditions opérant à l'insu l'une de l'autre contre un ennemi commun; mais si la responsabilité du Gouvernement Français est atténuée par ce fait, la réparation n'en doit pas moins se régler dans un large esprit d'équité.

94 BRIT. & FOREIGN ST. PAPERS 138 (1900-01).

381. *Id.*

382. *Id.* at 138-39.

383. *The Marianna Flora* might be distinguished on the grounds that it ended fortuitously without death or injury, but this fails to account for succeeding precedent such as *The Palmyra*. This inconsistency supports the conclusion that the substantive outcome of arbitration in the *Waima Incident* may have influenced that in the *Dogger Bank Incident*.

384. *Mazuia Incident*, *supra* note 370.

manded a clarification from Portuguese authorities in colonial Mozambique, pending receipt of which German frontier outposts were ordered to refrain from hostile action. However, the restraint order did not reach a small German outpost at Sasabara, located close to the Portuguese outpost at Mazuia, being separated only by the river forming the border between the two colonies. The commander at Sasabara believed his post to be threatened by imminent Portuguese attack and ordered a preemptive attack, which succeeded in capturing the Portuguese post at Mazuia. The Portuguese commander and one civilian were killed, arms and ammunition were seized, and the post was put to the torch.³⁸⁵

In post-World War I arbitration, Germany did not contest basic responsibility for the incident, and the arbitration was limited to an amount of indemnity based on responsibility "admitted in principle."³⁸⁶ Nonetheless, the arbitral findings specifically included language discussing responsibility in terms of mistaken anticipatory self-defense.³⁸⁷ As the arbitration applied principles of customary international law, it would have precluded responsibility if mistaken self-defense did not constitute a violation of a primary international law obligation.³⁸⁸ The arbitrator may also have believed the mistake unreasonable, however, and thus not reached the question of exoneration for reasonable mistake.³⁸⁹

The 1925 *Greco-Bulgarian Frontier Incident* also addressed mistaken self-defense in the context of an unlawful territorial incursion. The situation evolved out of a minor border incident at a remote frontier post, in which a Greek border sentry was shot and soon thereafter a Greek officer was also shot while advancing under a flag of truce to recover the sentry's body.³⁹⁰ The Greek frontier post was evacuated as a result of the continued firing, and word of the initial incident was sent to political authorities on both sides of the border. The Bulgarian government initially did not consider the matter to be very serious, given the history of minor frontier incidents in the Balkans. As

385. The German colonial government acknowledged the mistake at the time, and opened a criminal investigation against the Sasabara commander under municipal law. The investigation was terminated with a finding of no criminal liability, however, and Portugal declined to accept a German offer of restitution of arms and ammunition. The arbitral findings declared the termination "non-lieu," without specifying the grounds. *Id.* Presumably the mistake of fact (whether Portugal was in fact at war with Germany) must have excused the commander under municipal law, for there is no other visible explanation for the failure to prosecute the unjustified killing of two individuals and to compensate for the substantial property damage.

386. *Id.* at 1017.

387. *Id.* ("Se croyant menace d'une attaque portugaise [the German commander of Sasabara] voulut la prévenir.")

388. *Id.* at 1016.

389. The significance of the holding on state responsibility remains a subject of debate. See 2 G. SCHWARZENBERGER, *supra* note 304, at 31 (*Mazuia Incident* as evidence that there is no concept of mistaken self-defense under international law). *But see* R. GABORIT, *supra* note 286, at 34-39 (in apparent analogy to municipal criminal law self-defense principles, asserted in analyzing *Dogger Bank Incident* that mistaken self-defense should excuse responsibility).

390. See Seventh Assembly Report, *supra* note 371, at 182; J. BARROS, *supra* note 371, at 2 n.3.

a result of confusion on the Greek side, however, military communications between the frontier and Athens incorrectly indicated that Bulgarian troops in battalion strength had crossed into Greek territory and established positions in the mountainous terrain.³⁹¹

As firing continued at the border the next day, the Greek government vociferously asserted that Bulgarian troops continued to occupy Greek territory in force.³⁹² The crisis escalated quickly with the dispatch of two Greek army corps into Bulgaria on a broad front, penetrating to a depth of several kilometers.³⁹³ Within days of the initial incident Bulgaria appealed to the League of Nations, claiming that Greece was in violation of articles 10 and 11 of the League Covenant.³⁹⁴

Following a cease-fire, the League of Nations empaneled a Commission of Inquiry.³⁹⁵ The Commission concluded that the entire incident originated in a quarrel between individual Greek and Bulgarian sentries. The mistaken information of a Bulgarian invasion caused the Greek retaliation, which was meant to be a "policing operation" without intent to permanently acquire Bulgarian territory.³⁹⁶

The British Foreign Secretary, as rapporteur in the dispute, presented the Inquiry Commission's Report to the League Council, opposing Greece's significant military response to the minor nature of the frontier incident:

[E]ven if [the information concerning battalion strength Bulgarian entrenchments just inside Greek territory] had been accurate, the Greek Government would not have been justified in directing the military operations which it caused to be undertaken . . . We believe that all the Members of the Council will share our view in favor of the broad principle that where territory is violated without sufficient cause reparation is due, even if at the time of the occurrence it was believed by the party committing the act of violation that circumstances justified the action.³⁹⁷

The Council adopted the Commission's Report and required Greece to pay an indemnity. The Report did not allow the Greek government's good faith mistaken belief in a Bulgarian invasion and its non-premeditated commitment

391. *Id.*

392. *Id.* at 11-13.

393. Accounts differ, but the largest claims involved a 30 kilometer front with penetration to a depth of 10 kilometers, and bombardment of at least one civilian town beyond the occupied territory. *Id.* at 18. As Bulgaria was essentially demilitarized under the Treaty of Neuilly, it was no military match for Greece. As a result, the Bulgarian government ordered its troops to withdraw from the border areas and to avoid engagements with the advancing Greek troops, and made repeated offers to submit the entire incident to an impartial inquiry. *Id.* at 19.

394. Covenant of the League of Nations, 1 Hudson 1, 13 AM. J. INT'L L. SUPP. 128 (1919).

395. Greek troops evacuated Bulgarian territory ten days after the shooting began. J. BARROS, *supra* note 371, at 84. See also I. BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 140-41 (1963) [hereinafter I. BROWNLIE, USE OF FORCE].

396. I. BROWNLIE, USE OF FORCE, *supra* note 395, at 141.

397. 6 LEAGUE OF NATIONS O.J. 173 (1926) (Council Meeting of December 14, 1925), reprinted in *Seventh Assembly Report*, *supra* note 371, at 184. The repetition of this statement in the context of a report to the Assembly on the Council's activities provides evidence of contemporaries' consciousness of its importance as the enunciation of a general principle.

of military forces to exonerate violation of restrictions on the use of force. While military miscommunication of a Bulgarian invasion, compounded by the failure of Greek governmental authorities to confirm the rumor, may have rendered Greece's misapprehension of attack "unreasonable," the Report's statement of principle was couched in absolute terms. No mistake, even a reasonable one, would exonerate unlawful territorial incursion. The *Greco-Bulgarian Frontier Incident* is a single precedent, but it evidences state practice of broader acceptance concerning the misapprehension of attack and the violation of primary international law obligations relating to the use of force.³⁹⁸

The League of Nations also refused to permit a claim of mistaken self-defense to exonerate violations of the Covenant's restraints on the use of force in the 1931 *Mukden Incident*, which unleashed events that resulted in the Japanese control of Manchuria.³⁹⁹ In response to the apparent bombing of Japanese-owned rail lines, local Japanese army units present in China under foreign treaty rights attacked a Chinese garrison at nearby Mukden and occupied the city, asserting that the occupation was necessary to protect Japanese nationals and property. China appealed to the League of Nations and claimed that Japanese actions violated article 10 of the League Covenant. The League's Investigatory Commission evaluated the Japanese claim that its army's behavior in the immediate aftermath of the apparent bombing constituted self-defense. The Commission's Report, eventually adopted by the League Assembly, rejected the Japanese claim. It noted, however, that the Japanese officers acting on the spot "may have thought they were acting in self-defense."⁴⁰⁰ The League went beyond the analysis in the *Greco-Bulgarian Frontier Incident*, which was limited to an assessment of misunderstandings at the governmental level, to reach the mistaken beliefs of individual officers as in the *Dogger Bank*, *Waima* and *Mazuia Incidents* under prior law.⁴⁰¹

398. Greece paid reparations. One commentator has noted that the British Foreign Secretary's statement to the Council made no mention of "faute or negligence as a requirement although this would seem to be a condition of responsibility if general concepts of law are to be relied upon." I. BROWNLIE, *USE OF FORCE*, *supra* note 395, at 141.

399. See C. LIANG *supra* note 372; Hirohara, *supra* note 372. See also, M. CAMERON, T. MAHONEY & G. MCREYNOLDS, *CHINA, JAPAN AND THE POWERS: A HISTORY OF THE MODERN FAR EAST* 449-55 (2d ed. 1960).

400. See D. BOWETT, *SELF-DEFENCE IN INTERNATIONAL LAW* 32-33 (1958). With the benefit of the Tokyo War Crimes Trials 1946-1948 and access to archives, it now seems that even the original mysterious explosion damaging the South Manchurian Railway near Mukden was a planned provocation of an officers' clique within the Japanese Kwangtung Army. The killing of three Chinese soldiers from adjacent barracks as the purported bombers and occupation of Mukden to forestall anti-Japanese activity were therefore factually not acts of good faith mistaken self-defense.

401. Precedent in this area is not limited to misapprehension of attack and mistaken self-defense concepts. Additional precedent involves mistaken belligerent attack on neutral vessels or territory in the midst of hostilities. For mistaken bombings of neutrals during the First and Second World Wars, see A. VANDENBOSCH, *supra* note 155, at 81 (Dutch territory); J. GARNER, *PRIZE LAW*, *supra* note 140, at 472-73, 477; "Force Majeure" and "Fortuitous Event" as Circumstances Precluding Wrongfulness: *Survey of*

C. *Special Difficulties of Mistake Analysis: Broad Self-Judging Views, Anticipatory Self-Defense, Military Necessity, and Force Majeure*

The special concerns of mistake analysis require treatment of several distinct legal issues intertwined in a practical sense. First, the claim is often advanced in connection with a natural law-based self-preservation view that a state's good faith claim of self-defense is not open to any examination because a state's right of self-preservation would be imperfect if subject to another's potential review. Second, a related question exists whether anticipatory self-defense has survived under U.N. Charter restrictions and whether "mistaken" self-defense qualifies at all as self-defense for purposes of the lawful use of force. Third, questions may be raised whether the concept of "military necessity" as a subcategory of general necessity principles under international law overcomes apparent limitations of the self-defense concept. Fourth, under older views war itself was considered *force majeure* and all related losses noncompensable, raising questions when under modern law such destruction should be deemed a noncompensable war loss. These four issues are intertwined in the Flight 655 incident: 1) if anticipatory self-defense were unlawful, the *Vincennes* would have been prevented from firing on Flight 655; 2) if the United States claim of self-defense is not open to examination by other states, its good faith claim of self-defense in the Flight 655 incident should preclude review by the ICJ; 3) even were the self-defense concept subject to restraint, a broad view of military necessity might overcome its apparent limitations; and 4) regardless of any apparent breach of a primary obligation

State Practice, International Judicial Decisions and Doctrine, [1978] 1 Y.B. INT'L L. COMM'N 61, 66-71, U.N. Doc. A/CN.4/315/part 2/1978 [hereinafter *Force Majeure Report*], at 126 (San Marino territory); *id.* at 125-26 (Yugoslavian territory). Incidents involving mistaken belligerent attacks on neutral warships also provide examples, particularly those that occurred in connection with Japanese military operations surrounding Nanking's capture in the so-called Sino-Japanese Incident of 1937. See generally M. BRICE, *THE ROYAL NAVY AND THE SINO-JAPANESE INCIDENT 1937-1941* (1973); H. DARBY, *THE PANAY INCIDENT: PRELUDE TO PEARL HARBOR* (1969); M. KOGINOS, *THE PANAY INCIDENT: PRELUDE TO WAR* (1967); Bouchard, *Accidents and Crises: Panay, Liberty and Stark*, 41 NAVAL WAR C. REV. 87 (Fall 1988). The most recent examples include the 1967 Israeli high seas attack on the *U.S.S. Liberty*, and the 1987 Iraqi high seas attack on the *U.S.S. Stark*. See Nash, *Contemporary Practice of the United States Relating to International Law—Claims Settlement Agreements*, 75 AM. J. INT'L L. 363, 368 (1981) (final settlement of claim achieved in 1980); *Agreement on Compensation in the U.S.S. Stark Incident*, 28 I.L.M. 644 (1989). These examples did not solely involve the mistaken use of force, because neutral governments believed that the attacks were either intentional or in gross disregard of the protection owed to neutrals. The incidents were usually resolved on the diplomatic level, following expressions of regret, payment of a compensatory indemnity calculated solely on the basis of death or personal injury and property damage, and provision of assurances that such incidents would not be repeated. The volatile political nature and negotiated outcome of many of these incidents makes it difficult to assign legal precedential value to them with any degree of certainty. Any indemnities paid were arguably of an *ex gratia* nature to smooth over political conflict, rather than to discharge a legal obligation. In many cases the character of the indemnity negotiated was not stipulated as a legal matter, although in at least one of the World War II cases of mistaken bombing of neutral territory, it appears the neutral government agreed that the payments were *ex gratia*.

on the *Vincennes* part, responsibility would not lie if Flight 655's downing were characterized as an accident of war covered by *force majeure*.

1. *Self-Preservation and the Problem of Self-Judging Claims*

American views of the international law self-defense concept undoubtedly stand under strong natural law influence. This view of an "inherent" right, reaching back to Grotius and beyond,⁴⁰² posits that the right of self-preservation is paramount. Under a broad view of necessity, it puts the state fighting for its continued existence beyond otherwise binding international law restraints. However, such a system has never been effective in state practice because it is fundamentally inconsistent with the idea of sovereign equality. If one state had an absolute right of self-preservation, other states would perforce have a corresponding obligation to suffer any and all of its acts that otherwise objectively violate their rights.⁴⁰³ Such a system breaks down as soon as reciprocity is asserted.⁴⁰⁴

American views of self-defense under international law follow the *Caroline* precedent, involving an 1837 British attack carried out on U.S. territory against the steamship transport of Canadian insurgents. In a famous diplomatic exchange, Secretary of State Webster articulated the rule that self-defense was permissible only if the elements of proportionality, necessity and immediacy were satisfied.⁴⁰⁵ Webster's assertion of limitations on claimed British rights

402. H. GROTIUS, *THE LAW OF WAR AND PEACE* 172-173 (1646) (Carnegie Endowment trans. 1925). Grotius may be regarded as its modern source, but in fact its roots go back through the doctrine of just war to ancient authors. See Zourek, *Legitimate defense*, *supra* note 324, at 10-17.

403. There has been little support for modern attempts to articulate the claim that a state is legally required to submit to the illegal acts of a second state claiming necessity. See, e.g., Zourek, *Legitimate defense*, *supra* note 324, at 67 (criticizing Strupp).

404. Continental commentators also have suggested a hierarchy of rights in which one state's self-preservation concerns overcome other states' lesser rights, but this jurisprudential approach has generally been rejected. See de Visscher, *supra* note 184, at 87-93. The hierarchy-of-values approach is preserved in some continental views of justification and excuse under municipal criminal law. See, e.g., H. JESCHECK, *LEHRBUCH DES STRAFRECHTS* 317 (4th ed. 1988) (noting *Kollisionstheorie*); P. BOCKELMANN, *HEGELS NOTSTANDSLEHRE* 21-69 (1935). This analogy does not hold for international law at least with regard to the use of force. The depth of its rejection becomes clear when it is considered that the original background for article 10 of the League of Nations Covenant and its successor in article 2(4) of the U.N. Charter included the World War I violation of neutral Belgium's territorial integrity, which was claimed by much of contemporary German scholarship to be less important than Germany's interest in attacking France through Belgium. See de Visscher, *supra*, at 184.

405. The British incursion on U.S. territory would be permissible only if it could show: [N]ecessity of self-defense, instant overwhelming, leaving no choice of means, and no moment of deliberation. It shall be for [Britain] to show, also, that the local authorities of Canada, even supposing the necessity of the moment authorized them to enter the territories of The United States at all, did nothing unreasonable or excessive, since the act, justified by the necessity of self-defense, must be limited by that necessity, and kept clearly within it.

Letter of Secretary of State Webster to British Envoy Fox, April 24, 1841, 29 BRIT. & FOREIGN ST. PAPERS, 1840-1841, at 1129, 1138 (1857). See also Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT'L. L. 82 (1938).

make the entire proceeding inconsistent with the extreme position that mere assertion of core self-preservation interests automatically frees a state from otherwise binding international law obligations. That view, which holds that American views of international law unreservedly support a state's claimed sole ability to judge its own self-defense measures, is incorrect.⁴⁰⁶ Furthermore, the ICJ's apparent rejection of such arguments in the *Nicaragua Case* makes it doubtful that they would meet with success in the *Flight 655* proceedings.

2. *The Legality of Anticipatory Self-Defense*

The issue whether a warship in the *Vincennes*' situation can legally act in anticipatory self-defense is usually framed in terms of the question whether it is constrained to absorb an enemy's first blow or whether it can act to preempt an attack.⁴⁰⁷ Whether or not an attack will occur is a matter of conjecture until the attacker's weapons are launched. The practical consequence of waiting for their launch may be to force absorption of the first blow. However, given the speed and destructive range of even modest weapons, modern technology forces an anticipatory response. This dilemma is commonly addressed either through a broad legal definition of attack, pushing its commencement back into the preparatory stages, or on an operational level by drawing inferences about an aircraft's or a vessel's intentions as "hostile" or "friendly" based upon its behavior short of launching weapons.⁴⁰⁸ On the other hand, misapprehension of attack cases are essentially foreclosed to the extent an attacker actually must first fire before self-defense becomes lawful.

The *Caroline* precedent is commonly accepted as authority for the legality of anticipatory self-defense under American views of international law. However, this precedent has been called into question under certain views of modern international law's restraints on the use of armed force, commonly as a result of a narrow textual analysis of U.N. Charter article 51, which is linked to a special doctrinal gloss on the self-defense concept itself.⁴⁰⁹ Once the possibility of anticipatory self-defense is admitted, it becomes relatively easy in many cases to meet subsidiary requirements for self-defense such as proportionality, necessity, and immediacy under the *Caroline* test.

406. See Linnan, *supra* note 73, at 85-89.

407. See, e.g., Bunn, *International Law and the Use of Force in Peacetime: Do U.S. Ships Have to Take the First Hit?*, 39 NAVAL WAR C. REV. 69 (May-June 1986).

408. Under a threat analysis and disregarding line-drawing issues such as whether switching on targeting radar already constitutes weapons use, this would not present a substantial mistake problem despite the fact that the peremptory act of self-defense may have taken place early enough so that it remains unclear whether the aircraft would have launched weapons.

409. See Linnan, *supra* note 73, at 68-74 (discussing debate).

Although the character and proper interpretation of U.N. Charter article 51 is the subject of sharp debate,⁴¹⁰ anticipatory self-defense should be allowed under the Charter to the extent it was permissible under the customary law in force at the time of its adoption. This follows from the view that article 51 is essentially a procedural provision relating to regional security arrangements rather than an independent locus of textual interpretation for the self-defense concept.⁴¹¹ Evidence of the permissibility of anticipatory self-defense under customary law is to be found in judgments of the war crimes tribunals in the wake of World War II. For example, the Nuremberg tribunal accepted the existence of anticipatory self-defense in theory, as it considered defense arguments that self-defense excused the German invasion of neutral Norway to forestall its impending British military occupation.⁴¹² The Netherlands' claim of anticipatory self-defense also was recognized at the Tokyo trials when it declared war against Japan in the immediate aftermath of Pearl Harbor in anticipation of attack, but in advance of Japanese hostile action against Dutch territory.⁴¹³

The fact that anticipatory self-defense is normally lawful does not entail the conclusion that a misapprehension of attack case must necessarily fit under that rule. Mistaken self-defense should not be considered self-defense for purposes of justifying the use of armed force under modern ideas restricting its employment.⁴¹⁴ This is true for several reasons. First, viewed under the *Caroline* test criteria, the element of necessity will always be lacking. Second, older precedents implicitly reject the concept of putative self-defense.⁴¹⁵ Third, the rejection of this approach is maintained under modern law's restrictions on the use of force.⁴¹⁶ However, it is important to note that putative self-defense under a good faith mistake is generically unsuited to categorization as an act of aggression on the level of either individual military personnel or of a state. It is debatable whether the aggression concept generally incorporates an intent element, but its positive absence under these circumstances seems decisive. With a view toward maintaining international peace, the exercise of putative self-defense with resulting injury is generally better resolved under

410. Commentators disagree whether article 51 permits anticipatory self-defense. Compare I. BROWNLIE, *USE OF FORCE*, *supra* note 395, at 495 (armed force is only lawful in response to armed attack) with D. BOWETT, *supra* note 400, at 46-55 (article 51 preserving preexisting customary law of self-defense).

411. See Linnan *supra* note 73, at 77-84.

412. Defense counsel argued but lost this argument, because it failed to meet collateral requirements for the application of the self-defense concept. See *id.* at 75-76.

413. See M. MCDUGAL & F. FELICIANO, *supra* note 284, at 231-32.

414. While the issue is directly addressed by few publicists, even strong adherents to customary law views of self-defense should reject the idea of any putative self-defense doctrine. See 2 G. SCHWARZENBERGER, *supra* note 304, at 31 (citing *Mazuis Incident*). But see R. GABORIT, *supra* note 286, at 35 (no responsibility should attach to reasonable mistake).

415. See *supra* notes 376-96 and accompanying text.

416. See *supra* notes 397-408 and accompanying text.

compensatory state responsibility principles rather than under aggression or similar principles.

3. *Military Necessity*

The concept of military necessity is sometimes taken to justify extraordinary action in warfare, and thus is relevant to the Flight 655 incident. The military necessity concept has been used inconsistently over time in a variety of settings.⁴¹⁷ Older law often characterized war generally as *vis major* and a state of necessity beyond law, but this broad approach has fallen into disfavor with the development of the modern law of warfare.⁴¹⁸

Under a view predating turn of the century treaty codification of the laws of warfare, but espoused by German scholarship in World War I,⁴¹⁹ necessity in war could place military operations beyond the reach of prohibitions under the laws of warfare (the controversial idea *Kriegsraison geht vor Kriegsmanier*).⁴²⁰ This inquiry has already noted U.S. rejection of a general necessity position asserted by Germany in support of war zones, mining and submarine warfare during World War I.⁴²¹ However, the idea of military exigency displacing even seemingly absolute prohibitions under the laws of warfare was generally rejected in the war crimes trials following World War II. These included, for example, rejection of military exigencies as a justification for killing prisoners of war to avoid detection when encircled by the

417. See generally B. RODICK, *THE DOCTRINE OF NECESSITY IN INTERNATIONAL LAW* 58-96 (1928); Downey, *The Law of War and Military Necessity*, 47 AM. J. INT'L L. 251 (1953); Dunbar, *Military Necessity in War Crimes Trials*, 1953 BRIT. Y.B. INT'L L. 442; Similar considerations were already in evidence during World War I. See de Visscher, *supra* note 84. But the broader scope of the concept applied older *force majeure* ideas which arguably belong in a discussion of military operations *per se* as precursors of modern humanitarian principles implicit in an approach such as that under the Lieber Code, See B. RODICK, *supra* note 474. This combined approach is also visible in commentators following the older terminology of the "necessities of war." See, e.g., 2 G. SCHWARZENBERGER, *supra* note 304, at 128-36.

418. Our inquiry will subsequently touch on one traditional usage (the "imperious necessity of war," derived from Vattel), reflecting the concept of *force majeure* as applied to noncombatant losses incidental to hostilities. See *infra* notes 510-49 and accompanying text. The law of land warfare provides that civilian lives and property should be protected to the greatest extent possible. Beyond unintended destruction, however, within the scope of engagement, the fortuitous event concept also seems to encompass the authority to take measures directed against noncombatants necessary to attack or defense *per se* directed against belligerents. Beyond the scope of engagement, limited precedent exists in situations resembling municipal law's public necessity permitting destruction of neutral civilian property if necessary to the prosecution of acts of war (such as the burning of dwellings feared to harbor disease, following its outbreak among troops quartered nearby during wartime. 6 R. INT'L ARB. AWARDS 25 (1913). The modern understanding of military necessity, however, has abandoned these older categories embedded in surviving law for a more general approach to the question whether the laws of warfare themselves may be displaced by general necessity arguments.

419. At one point in time, the broad view was also current in the United States. Despite the tenor of the Lieber Code in reviewing Civil War damages claims, the Supreme Court pursued in dicta very broad views of military necessity encapsulated in the older view *salus populi suprema lex*. See *United States v. Pacific Railroad*, 120 U.S. 227, 233-34 (1887).

420. See De Visscher, *supra* note 84.

421. See *supra* notes 139-57.

enemy, or machine-gunning survivors from a torpedoed vessel to obliterate signs of a submarine's passage.⁴²²

Under the surviving narrow approach, military necessity permits only the choice among measures allowed by the laws of warfare. American views reaching back to the Lieber Code, issued in the Civil War,⁴²³ defined the bounds of military necessity as follows: "[m]ilitary necessity, as understood by modern civilized nations, consists in the necessity of those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war."⁴²⁴

The Lieber Code recognized that the ultimate purpose of warfare was the return to peace; the speedy destruction of the enemy and his fighting capacity were considered means to this end.⁴²⁵ Nonetheless, restrictions under humanitarian principles imposed the duty to avoid measures in warfare more destructive than necessary (involving proportionality as under *jus in bello*). The reference to "lawful measures according to the modern law and usages of war"⁴²⁶ incorporated a more specific list of permissible and prohibited activities.⁴²⁷ While questions may remain concerning whether a particular activity is prohibited, this view seems to have entered international law under the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land,⁴²⁸ and has been maintained under modern American views.⁴²⁹ Regarding sea warfare law, military necessity -- as formulated in the 1955 *Law of Naval Warfare* and the 1989 *Annotated Commander's Handbook* -- approaches limitations imposed by the *Caroline* test requirements of necessity and proportionality.⁴³⁰ The same absence of necessity negating any concept of putative self-

422. See Dunbar, *supra* note 417 (citing cases). See also I. DE LUPIS, *THE LAW OF WAR* 335-37 (1987); C. ROUSSEAU, *supra* note 229, at 176; 1989 *Annotated Commander's Handbook*, *supra* note 18, at 5-4 n.5; 1955 *LAW OF NAVAL WARFARE*, *supra* note 105, § 220a.

423. *Instructions for the Government of Armies of the United States in the Field* (1863), reprinted in UNITED STATES NAVAL WAR COLLEGE, *INTERNATIONAL LAW DISCUSSIONS*, 1903, at 115 (1904) [hereinafter Lieber Code]. The Lieber Code was promulgated to regulate the Union Army, and constituted the first well-known formulation of the laws of land warfare for use by the individual soldier. The Lieber Code served as a model for the early Hague Conventions.

424. *Id.* at art. 14. The abandonment of older views that war knew no bounds is also visible in art. 30. Views on reprisals are evident in arts. 27-28. See *id.* at arts. 27-28, 30.

425. *Id.* at art. 29.

426. *Id.* at art. 14.

427. *Id.* at arts. 15-30.

428. Article 22 provides "[t]he right of belligerents to adopt means of injuring the enemy is not unlimited." 1907 Hague Convention IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, at art. 22. Article 23g states that "it is especially forbidden . . . to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war." *Id.* at art. 23g. These articles prohibit wanton destruction.

429. See 1989 *Annotated Commander's Handbook*, *supra* note 18, at 5-4 to 5-5 n.5; 1955 *LAW OF NAVAL WARFARE*, *supra* note 105, § 200; 1976 *LAW OF AIR WARFARE*, *supra* note 198, at 1-5, 1-6.

430. Section 220(a) provides:

The principle of military necessity permits a belligerent to apply only that degree and kind of regulated force, not otherwise prohibited by the laws of war, required for the partial or complete submission of the enemy with the least possible expenditure of time, life, and physical resources.

defense also serves under American views of international law to exclude application of military necessity concepts in the *Vincennes*' situation.

4. Force Majeure and Self-Defense: Exceptions to Primary Obligations

General principles of international law may operate to render apparent violations of primary obligations not wrongful, as in the case of events characterized as *force majeure*. Under older views, war itself was considered *force majeure*. A *force majeure* characterization, despite any alleged violation of international law obligations by the *Vincennes*, might thus excuse the United States from legal responsibility.⁴³¹ Upon closer examination, recent state practice treating noncombatant losses in warfare arguably contains two distinct varieties of *force majeure* analysis. The first focuses on the law of war and application of *force majeure* to military operations that indirectly cause non-combatant deaths or property destruction. This view excusing unintended injury to noncombatants on the battlefield is the lineal descendent of the older approach. The second focuses on the fortuitous event concept as part of *force majeure*, raising the possibility that even intentional injury to noncombatants under misapprehension of attack might be excused.

War itself is characterized as *vis major* in older law, or alternatively in more modern precedents its resulting losses are characterized as "inevitable accidents."⁴³² Under either formulation, the losses suffered are due to the location of civilians and their property within a narrowly delimited battle zone. The application of the concept is actually determined by the physical dimensions of the battle, because collateral doctrines exist specifying that property or lives taken outside of the immediate area of the battle normally will be viewed either as unlawful "wanton destruction," or as the compensable taking of property. Traditionally, this law is clearest in its application to neutral civilians caught up in land warfare, but its principles are arguably behind the modern international humanitarian law rules generally limiting attacks on civilians and civilian targets.⁴³³ This inquiry refers to this application of *force*

1955 *Law of Naval Warfare*, *supra* note 105, § 220(a).

431. As a concept of international law, *force majeure* contains elements of the common law's familiar act of God (*vis major* under Roman law) as well as the less familiar doctrine of fortuitous event (in the sense of inevitable accident, *casus fortuitous* under Roman law). Fortuitous event is included specifically in article 31 of the Draft Code. A variety of doctrinal distinctions have been offered over time and terminology has not been consistently applied by publicists or in state practice on a historical basis. *See e.g.*, *Force Majeure Report*, *supra* note 401, at 66-71.

432. American and British commentators tend to use "act of war" terminology, acknowledging that not all such acts of war are noncompensable, while continental commentators tend to use the "inevitable accident" terminology. These terminological differences are probably insignificant because the categories and factual precedents have common origins.

433. *See, e.g.*, 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1125 U.N.T.S. 3-608 (1979), reprinted in DOCUMENTS ON THE LAWS OF WAR, *supra* note 111, at 415-16, art. 51; 1978 *Red Cross*

majeure principles to armed conflict as a "scope of engagement" doctrine. Despite recent confusion over the legal basis for reimbursement of war damage claims,⁴³⁴ the older law articulating *force majeure* principles has not been displaced and is the basis for delimiting the scope of engagement.

Customary law does distinguish between noncompensable war losses and compensable war claims on the basis of the scope of engagement. This distinction is important because the exact demarcation of the engagement determines whether the damage was "incidental" to combat, and thus uncompensable under a *force majeure* or necessity analysis. Not surprisingly, the "incidental" concept is visible in the Legal Adviser's testimony, although applied in a technically incorrect and overbroad fashion.⁴³⁵ The ultimate issue depends in part on whether the downing of Flight 655 should be understood as occurring within the confines of the substantially contemporaneous surface engagement (the speedboat attack) or as a legally severable event. If considered legally part of the speedboat engagement disregarding the complication that the *Vincennes* intentionally fired on it, the likely answer is that Flight 655's downing would be deemed incidental and an inevitable accident. On the other hand, if the *Vincennes*' firing at Flight 655 is severed from the speedboat engagement the mistaken self-defense problem must be confronted squarely.

A scope of engagement approach characterizes incidental civilian losses in the course of an engagement between belligerents as "inevitable accidents of war." The question is what meaning is assigned to the open-ended concept "incidental." The law of war has employed varying terminology in connection with the loss of neutral lives or property. In more recent times, however, the "inevitable accident" rationale has been restricted to the narrowly drawn geographic battlefield and loss of property not otherwise appropriated by the belligerents.⁴³⁶ Since the late nineteenth century, neutral losses outside the battlefield have not been viewed invariably as "inevitable accidents," and

Fundamental Rules of International Humanitarian Law Applicable in Armed Conflicts, reprinted in *id.* at 470.

434. See *infra* notes 540-46 and accompanying text.

435. A similar overbreadth may account for the claim that the downing of Flight 655 does not require compensation because "[i]t is generally accepted that injuries done to civilians in a combat zone are not legally required to be compensated by the state that causes the injury." Maier, *Ex Gratia Payments and the Iranian Airline Tragedy*, 83 AM. J. INT'L L. 325, 327 (1989). The reference to a "combat zone" does not provide guidance although it appears to contemplate inclusion of an entire theater of operations. The scope of engagement term refers to where this line of demarcation is drawn, the focus in this inquiry is on the legality of the use of force itself against Flight 655. This inquiry employs neutral terminology in using "scope of engagement" as descriptive in an area where there is no accepted legal term of art.

436. One must include bombarded towns in the definition of "battlefield," since related claims for neutral losses were more often raised when such bombardments were permitted by then current ideas of the law of war, which distinguishes between "defended" and "open" towns). See *supra* notes 532-49 and accompanying text.

indemnity of right (as opposed to *ex gratia*) has been granted in specific circumstances.⁴³⁷

The implicit distinction underlying the definition of incidental losses reaches back to Vattel's eighteenth century attempt to articulate indemnity rules for war losses recompensable by a state to its own citizens.⁴³⁸ Vattel first distinguished between losses caused by a state and those caused by its enemy, with no indemnity payable for losses caused by the enemy. Finer distinctions were drawn concerning losses caused by the state. Indemnity was recognized for losses caused by the state's own voluntary and deliberate action by way of precaution or strategy essentially on a takings theory.⁴³⁹ However, no indemnity was payable for accidents of war in combat operations, to the extent they might be considered unintentional.⁴⁴⁰ These natural law principles regarding inevitable accident⁴⁴¹ were originally oriented more toward what modern views consider municipal law and were applied by municipal courts,⁴⁴² only entering modern state practice more slowly toward the end of the nineteenth century.⁴⁴³ While they touch on allowable military operations resulting in neutral losses,⁴⁴⁴ our interest here is in their limitations on recovery, which

437. See e.g., E. BORCHARD, STATE INSOLVENCY AND FOREIGN BONDHOLDERS 255-62 (1951).

438. 2 E. DE VATEL, THE LAW OF NATIONS; OR PRINCIPLES OF THE LAW OF NATURE: APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS, Bk. III, § 232 (J. Coote ed. 1760). Vattel himself was trying to make sense out of a division of commentators reaching back to Grotius.

439. For example, occupation of land or a building for a fortified position, or destruction of crops to deny food to the enemy. *Id.*

440. For example, the destruction caused by artillery in retaking a town from the enemy. *Id.*

441. The term is sometimes referred to as the "imperious necessity of war," which may confuse true unintentional damage from poorly-aimed fire with well-aimed fire under military necessity rationales as where the enemy must be attacked on neutral property.

442. France has followed this approach since the eighteenth century, as have other continental nations. E. BORCHARD, *supra* note 437, at 247-48. In the United States, Vattel's ideas were considered by the Supreme Court in damages cases arising out of the Civil War. In *United States v. Pacific Railroad*, for example, the Court paid lip service to Vattel, but then articulated a very broad definition of military necessity. *United States v. Pacific Railroad*, 120 U.S. 227, 234-35 (1887). In dictum, the Court expressed the view that the destruction of privately-owned railway bridges to impede the enemy's progress was an uncompensable necessity of war. This definition was inconsistent with Vattel's position that the destruction of crops to deny them to the enemy, for example, is compensable under a takings rationale. The opinion interestingly discusses three other attempts to obtain indemnity for war damages that follow Vattel more closely in spirit and bear evidence of the deep roots of the distinction between noncompensable war losses and compensable damages. *Id.* at 235-39; see *infra* notes 525-30 and accompanying text.

443. During much of the nineteenth century, international law generally provided that a neutral civilian residing in a belligerent's territory assumed the risk of wartime devastation to the same degree as did belligerent civilians. The United States adopted this view during the Civil War, and Great Britain followed suit when determining not to support the claims of British subjects for property destroyed in France during the Franco-Prussian War. Nonetheless, a distinction was drawn between neutral's property destroyed in the direct prosecution of a war versus apparently wanton damages away from the battlefield as a matter of equity rather than right. See 2 F. WHARTON, *supra* note 193, at 586-87. The assumption of risk view did not encompass positive violations of the laws of war, which were themselves vague and unsettled. Neutral property rights did not receive generally accepted protection until the 1856 Declaration of Paris under the law of maritime warfare, rather than under land warfare principles.

444. It would be possible to pursue delineation of the scope of battle additionally through examining what constitutes "post-battle" wanton destruction, but that would require a general review of military manuals and court-martial records of various nations, which is beyond the scope of this inquiry.

indirectly define the scope of the engagement as the boundary of *force majeure*.⁴⁴⁵

The congressional treatment of war damages, dating as far back as the Revolutionary War, demonstrates the concept of the scope of engagement and proper interpretation of incidental, noncompensable war losses under American law.⁴⁴⁶ For example, the House of Representatives denied a compensation petition for the 1776 burning of a house by order of an American general who sought to dislodge British troops on the basis that such general ravages of war were never compensated.⁴⁴⁷ The House of Representatives declined another compensation petition for inundation of a Louisiana plantation during the War of 1812, when an American general purposefully breached a levee to hinder British troops from advancing on New Orleans.⁴⁴⁸ By contrast, the Civil War Senate was inclined to grant the compensation petition of a loyal citizen when his house, located in a Union state within rifleshot of a fort, was destroyed by order of the fort commander to prevent its use for sniping during Confederate attacks.⁴⁴⁹ Throughout the Civil War period claims for compensation for any losses inflicted in the course of military operations on foreign property located in the Confederacy were generally denied on the theory that foreigners through residency assumed risks identical to those of belligerent civilians.⁴⁵⁰ However, as seen above, on the municipal law side, a different view was sometimes taken toward civilian losses incurred during Confederate incursions on Union territory.⁴⁵¹ Eventually, the broader traditional view that the ravages of war were generally uncompensable gave way to a distinction paralleling Vattel, holding uncompensable only those damages incidental to actual combat.

445. Neutral losses even on the battlefield must be unintentional for the *force majeure* principle to apply, as demonstrated by two cases decided by the same arbitrator following a Peruvian civil war. In 1894, an Italian citizen was apparently killed by government fire when impressed by insurgents to bear a flag of truce during a lull in an engagement. *Cresceri Case (Italy v. Peru)*, 15 R. INT'L ARB. AWARDS 449, 449-52 (1901). The government was held responsible for his death due to the negligence of its forces, despite a failure to prove that his death resulted from aimed government fire. In rendering a decision, the arbitrator indicated that "the armed conflict . . . cannot be regarded as a pitched battle in the course of which persons foreign to the struggle might have been struck accidentally [and neutral civilians were not encouraged to take shelter in advance]." *Id.* at 451. In the same insurrection, however, an Italian citizen was killed by government fire from outside while within his residence's courtyard. *Piola Case (Italy v. Peru)*, *id.* at 444-45. Responsibility was denied on the grounds that the death was unintentional under the circumstances and constituted a fortuitous accident (recognizing *force majeure* by implication). *Id.*

446. For the history of American treatment of war claims, see generally REPORT OF WAR CLAIMS COMMISSION H.R. Doc. No. 580, 81st Cong., 2d Sess. vii-viii, 8-13 (1950) [hereinafter WCC REPORT]; WAR CLAIMS ARISING OUT OF WORLD WAR II, H.R. Doc. No. 67, 83rd Cong., 1st Sess. 62-91 (1953) [hereinafter WCC SUPPLEMENTARY REPORT].

447. See *United States v. Pacific Railroad*, 120 U.S. 227, 235-36 (1887) (Frothingham claim).

448. See *id.* at 236 (Villiers claim).

449. See *id.* at 236-39 (Best claim, eventually rejected under presidential veto as inviting other costly claims and on grounds that such claims had been paid in the past only on an *ex gratia* basis — an assertion about the voluntary nature of payment that Vattel would not dispute).

450. See *supra* note 443.

451. See, e.g., *United States v. Pacific Railroad*, 120 U.S. 227, 236-39 (1887) (congressional treatment of Best claim).

The older views changed visibly with the development of diplomatic protection practice under the due diligence principle in the protection of aliens.⁴⁵² The development of state practice concerning the scope of engagement appears to find its modern roots in nineteenth century insurrection precedents, particularly in state views expressed in connection with aliens' losses in fighting between government and rebel forces. Insurrection cases often deal on the facts with war losses inflicted by government forces in the course of military operations and so address the *force majeure* issue separately from due diligence concerns.

Thus, in the 1881 suppression of an insurrection at Sfax, Tunisia, following bombardment of the city, certain Italian-owned buildings were occupied by French troops.⁴⁵³ The Italian government protested that this violated treaty provisions for the protection of Italian property, to which the French responded that the infringement arose in a case of *force majeure* since the acts were part of the military operation restoring governmental authority in the insurgent town. Italy rejected the *force majeure* characterization on the ground that the bombardment itself had already completely dislodged the insurgents and thus presumably the battle was over. Similarly, in arbitration relating to a 1902 Venezuelan insurrection an Italian citizen was granted compensation for battle damage to his house resulting from insurgent fire when government forces established a position in front of the house.⁴⁵⁴ In language paralleling Vattel's original "takings" rationale, the award found that by establishing their position the government troops removed any damage from characterization as an incidental result of war.

The distinction between treatment of incidental losses within the scope of battle and losses from general military operations is evident in an arbitration decision concerning loss of American property in a 1901 Venezuelan insurrection.⁴⁵⁵ The property in question involved a single telephone office and the telephone lines throughout a city. Two different claims were raised. First, the government originally took possession of the telephone office and used the lines to assist military operations against the rebels. The property suffered damage in subsequent attacks by the revolutionaries directed against the building occupied by government troops. Second, telephone lines in the city were exposed to damage by a subsequent government naval bombardment of

452. Once closer examination of loss of foreign property in the course of military operations became necessary, the *force majeure* doctrine defining the limits of inevitable accident of war seems to go back to French practice and indirectly to Vattel. Earlier incidents may include reference to *force majeure*, but they seem to mean something different as they appear to encompass practically any effects of military operations not precluded under what were then more loosely defined laws of war.

453. See *Force Majeure Report*, *supra* note 401, at 113.

454. *Petrocelli Case (Italy v. Venez.)*, 15 R. INT'L. ARB. AWARDS 444 (1903).

455. *American Electric and Manufacturing Company Case (U.S. v. Venez.)*, 9 R. INT'L ARB. AWARDS 145, 145-46 (1903).

the city. Compensation for war damage was granted in the former but not in the latter case based on the following reasoning:

The general principles of international law which establish the non-responsibility of the government for damages suffered by neutral property owing to imperious necessities of military operations within the radius of . . . operations, or as a consequence of the damages of a battle, incidentally caused by the means of destruction employed in the war which are not disapproved by the law of nations, are well known.

Nevertheless, the said principles likewise have their limitations [as] when the destruction of the neutral property is due to the previous and deliberate occupation by the Government for the public benefit or as being essential for the success of military operations . . . With reference to [damages to telephone lines in the naval bombardment], these being the incidental and necessary consequences of a legitimate act of war on the part of the government's men-of-war, it is therefore disallowed.⁴⁵⁶

The localized nature of the scope of battle is recognizable again in arbitration following a Philippines insurrection. The arbitrator denied indemnity for damage to a British-owned pumping station, incurred when the American forces shelled revolutionaries who were dug in approximately fifty yards on each side of the station.⁴⁵⁷ The damage was deemed "incident" to military operations because it did not reach beyond what operations necessarily involved.⁴⁵⁸ By the end of World War I, the locational focus of an "act of war" was advanced by the U.S. Department of State itself in an exchange with Italy pursuing claims of an American citizen whose house, allegedly located miles from the Austrian-Italian front, was razed for military purposes.⁴⁵⁹ Italy

456. *Id.* at 146-47.

457. Luzon Sugar Refining Co. Ltd. (Gr. Brit. v. U.S.) (1926), Nielson's Rep. 596, reprinted in 5 DIGEST OF INTERNATIONAL LAW 696 (G. Hackworth ed. 1943).

458. Limiting excusable damage to the requirements of a reasonable military operation acts as a check on "wanton" destruction and appears often in opposition to military necessity. Compare Shattuck Claim (United States/Mexico 1868), 4 J. MOORE, *supra* note 75, at 3668, with Force Majeure Report, *supra* note 401, at 106-07 (British-Belgian exchange of views concerning the 1830 Antwerp bombardment in the course of a Belgian insurrection), and *id.* at 124 (British Law Officers' opinion on losses in the 1879-1884 Chilean-Peruvian War). However, this limitation does not go to the scope of engagement but rather, the problem of acts in violation of the laws of war itself. See also Samoan Claims Decision (U.S. & Gr. Brit. v. Ger.) (1910), MALLOY 1589, 1591, reprinted in 5 DIGEST OF INTERNATIONAL LAW, *supra* note 457, at 694.

459. *In re. Joseph Faletich* (U.S. v. Italy) (1929), reprinted in 5 DIGEST OF INTERNATIONAL LAW, *supra* note 457, at 697-99. The State Department employed the term "act of war" "as that term is used to indicate acts for which no liability attaches." *Id.* at 697. It denied on the facts that the razing could constitute a military operation "equivalent to an act of war," or that it was lost "in the track of war as that term is understood in international practice, or that its destruction was warranted as a police measure." *Id.* at 698. "Act of war" was understood by contemporaries as "an act of defense or attack against the enemy." The reference to "in the track of war" is to both the traditional lawful exception for damages to private property resulting from troop movements (traditionally field damage). See 2 L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 414 (H. Lauterpacht 7th ed. 1952). For a more figurative reference to battlefield location, see *J. Dania Bembelista* (Neth. V. Venez.) (1904), Ralston's Rep. 900-01, reprinted in 5 DIGEST OF INTERNATIONAL LAW, *supra* note 457, at 697-99. See also E. BORCHARD, *supra* note 437, at 255-62. The reference to "police measures" is an allusion to actions combatting disease or similar hazards. See *The William Hardman* (Gr. Brit. v. U.S.), 6 R. INT'L ARB. AWARDS 25 (1913) (destruction of alien's property under necessity rationale permissible to avoid spread of disease among soldiers, and

essentially argued that all damages incurred in military activities were noncompensable until the U.S. challenged its interpretation of an act of war precluding a right of indemnity.⁴⁶⁰

This customary law has been overtaken in twentieth century practice through the insertion of special war reparations clauses in treaties ending hostilities, in part based on the concept of war guilt.⁴⁶¹ Under such treaties, the defeated states were forced to make payments indemnifying foreigners' personal losses merely on the basis that they were causally related to the war and occurred in the defeated state's territory. These arrangements thus abandoned the existing distinction between noncompensable war losses incurred incidental to hostilities, and compensable losses incurred outside the scope of engagement. American views of the applicable customary international law rule have not changed, however, based upon the post-World War II proceedings of the War Claims Commission.

The American War Claims Commission's statutory mandate included the definition of a compensable war claim.⁴⁶² In 1950, it proposed a preliminary definition tied to the established customary law distinction.⁴⁶³ Citing American international law sources,⁴⁶⁴ one element of a compensable war claim was to be "that such loss, injury or damage must be the result of action not normally incident to the conduct of hostilities."⁴⁶⁵ In 1953, the War Claims Commission noted problems with the application of this definition to a war in which attacks on civilian targets were common. It went on to opine that its statutory mandate was generally to provide compensation for all war damages, consistent with existing treaty practice.⁴⁶⁶ However, the Commission itself both recognized the American international law view of the abiding customary law, and indicated that its adoption of a broader standard was due to municipal

thus not an act of war).

460. 5 DIGEST OF INTERNATIONAL LAW, *supra* note 457, at 698. It should be noted that the State Department used at least one insurrection case in discussing the regular war problem here, a recognition of their applicability.

461. See R. LILlich & B. WESTON, INTERNATIONAL CLAIMS: THEIR SETTLEMENT BY LUMP SUM AGREEMENTS 116, 122-25, 133-38, 159-60 (1975).

462. See War Claims Act of 1948, Pub. L. No. 80-896, 62 Stat. 1240 (1948), as interpreted in H.R. Rep. No. 976, 80th Cong., 1st Sess., at 4 (1947).

463. See WCC REPORT, *supra* note 446, at 5-6.

464. *Id.* at 6 n.9.

465. WCC REPORT, *supra* note 446, at 6.

466. See WCC SUPPLEMENTARY REPORT, *supra* note 446, at 113-15. See also Fraleigh, *Compensation for War Damage to American Property in Allied Countries*, 41 AM. J. INT'L L. 748, 749-50 (1947). Based upon the change in treaty practice, some commentators appear to have reached the conclusion that distinctions under the older customary law have lost their force. See R. LILlich & B. WESTON, *supra* note 461, at 204-05; R. LILlich & G. CHRISTENSON, INTERNATIONAL CLAIMS: THEIR PREPARATION AND PRESENTATION 66-67 (1962). This view is understandable because commentators were most interested in contemporary claims practice under the treaties. Our interest in these customary law distinctions, however, goes back to its source in doctrinal views of war as necessity or *force majeure*.

law concerns.⁴⁶⁷ Thus the distinction between *force majeure* war losses and compensable war claims still survives, and provides the limits to the scope of engagement standard.

Advances in modern weaponry do not require a change in this standard. Naval doctrine in the form of the "bubble" concept is linked to a threat analysis imputing hostile intent to a trespasser, and does not describe the same limits as the geographic battlefield for purposes of determining the scope of engagement. On a simplistic level, the two should be separated to avoid confusing naval policy or tactics with legal doctrine. More substantially, however, Persian Gulf events preceding the downing of Flight 655 demonstrate their incompatibility. While naval orders in the form of the differing rules of engagement applicable during the *Stark* and *Vincennes* incidents are presumably still classified, there is some evidence of their content in the form of the 1984 and 1987 NOTAMs giving warning of the potential for defensive measures by U.S. warships. In effect, the apparent final defensive zone for aircraft visible in the 1984 NOTAM was the area described by a circle with a radius of five nautical miles around warships, extending 2,000 feet into the air.⁴⁶⁸ However, missiles were fired at the *U.S.S. Stark* from a distance of over twenty nautical miles,⁴⁶⁹ and the 1987 NOTAM no longer specified any nominal defensive zone. While the rules of engagement may contain more detailed distance indications concerning imputation of hostile intent that were not announced in the 1987 NOTAM for military reasons, the *Vincennes* was already cleared to fire missiles at a distance of twenty nautical miles.⁴⁷⁰ Given the weapons technology problem and the anticipatory self-defense concept and assuming the scope of a naval engagement automatically extended upwards and outward to the range of weapons that might be launched against combatants from outside the immediate area of hostilities, there would be no practical limits to the scope of engagement. The expansive scope of the operational ideas underlying the 1987 NOTAM is implicit in its direction that

467. The War Claims Commission did admit that historical American practice in the war claims area was mixed. See WCC SUPPLEMENTARY REPORT, *supra* note 446, at 90, which is certainly accurate through the Civil War. Following the insurrection cases in the late nineteenth century, however, the distinction drawn between war losses and war claims was followed and the War Claims Commission accepted it as the American view. The resolution of what are compensable war damages retains its relevance and presumably may next be addressed in the context of Iraq's responsibility for war damages in Kuwait (recalled under U.N. Security Council Resolution 674, 649 and accepted in principle by Iraq under U.N. Security Council Resolution 687, U.N. Doc. S/RES/687 (1991) (Lexis, Nexis Library, Wires File)). Here the issue is whether a general conflict in violation of prohibitions on aggressive war leads to responsibility for all resulting damage, or whether the older law of war rules, distinguishing between incidental and other combat damage, applies. See sources cited *supra* note 518.

468. See *supra* note 6 and accompanying text.

469. See *supra* note 7 and accompanying text.

470. See *supra* note 36 and accompanying text. The increased difficulty of these problems following developments in modern weapons technology is discussed above in the context of anticipatory self-defense and the problem of absorbing the first blow.

civil aircraft monitor IAD or MAD frequencies over the entire Gulf. Fixing the scope of engagement at the limits of potential weapons that might be used would swallow up any legal rule.

The downing of Flight 655 did not occur within the scope of engagement, understood as the confines of the battlefield derived from precedent. The destruction of Flight 655 was therefore not "incidental" to the concurrent surface engagement, and thus the resulting damage cannot be excused under *force majeure*. To argue that Flight 655 entered the scope of engagement when it was mistakenly identified at a distance as an Iranian F-14 on an attack run, confuses misapprehension of attack with the scope of engagement and ignores the fact that it was traveling within an international civil air corridor. The downing of Flight 655 should not be deemed lawful merely because the *Vincennes*' commanding officer reasonably mistook the situation as presenting an integrated surface and air attack.

Reconceptualizing the incident as a mistake problem does not excuse the *Vincennes* from liability. While there is no international law doctrine of mistake as such, the mistake problem probably lies doctrinally closest to the fortuitous event concept under *force majeure* (Roman law's *casus fortuitous*). If under a scope of engagement approach war itself is *vis major* and consequent losses are noncompensable, should injury caused by a misapprehension of attack also be noncompensable? The outcomes in the *Dogger Bank*, *Waima*, *Mazuia* and *Mukden Incidents*, involving responsibility for the unlawful use of force against individuals, demonstrate that under normal circumstances injuries caused by an act of putative self-defense are not viewed as inevitable accidents of war precluding a finding of violation of the primary obligation.⁴⁷¹ The liability question in these precedents did not turn on whether the mistakes in question were viewed as reasonable or unreasonable. Thus, regardless of the reasonableness of the *Vincennes*' mistake, the downing of Flight 655 cannot be considered a noncompensable fortuitous event.

VI. THE SECONDARY OBLIGATION OF STATE RESPONSIBILITY

Establishing the secondary obligation of state responsibility presents its own complications in five distinct areas: 1) the ILC Draft Code including its proposed criminalization of state responsibility; 2) the doctrinal dispute over the subjective or objective basis of state responsibility (the Roman law roots of *culpa* and mistake); 3) the ICJ judges' problem in deciding the Flight 655 incident, as illuminated by the *Corfu Channel Case*; 4) the interplay of the attribution problem with the subjective or objective basis of state responsibility

471. The result is arguably the same in the 1925 *Greco-Bulgarian Frontier Incident*, but there the case may be treated as a territorial invasion case, raising further complications.

(linking an individual's act to a state); and 5) the twentieth century development of indemnity for the unlawful or mistaken use of force.

A. *Criminalization and the Perception Gap Between American Views and the ILC Draft Code*

Iran claimed before the ICAO Council that the downing of Flight 655 was a criminal act entailing state responsibility under international law.⁴⁷² Iran's application to the ICJ alleges that the actions by the United States amounted to a criminal violation of the Montreal Convention.⁴⁷³ If the American jurisdictional challenge to the Montreal Convention claim succeeds or if the Iranian substantive argument fails, Iran's logical recourse would be to argue that the ILC's Draft Code recognizes the criminalization of unlawful force under general principles of state responsibility. American scholarship has remained skeptical of the ILC's Draft Code project since the 1950s,⁴⁷⁴ when the ILC abandoned the substantive American view of state responsibility⁴⁷⁵ keyed to the protection of aliens in favor of a more abstract articulation of secondary obligations.⁴⁷⁶ This skepticism has clouded understanding of the functioning

472. See Iranian ICJ Application, *supra* note 1, at 6.

473. Montreal Convention, *supra* note 60.

474. American commentators generally believe that Rapporteur Ago's views are simply too abstract to attract much attention, and so by inference should exercise little or no influence on development of the law. See, e.g., Lillich, *The Current Status of the Law of State Responsibility for Injuries to Aliens*, in INTERNATIONAL LAW OF STATE RESPONSIBILITIES FOR INJURIES TO ALIENS 21 (R. Lillich ed. 1983). Ago's views have also been criticized by continental commentators. See, e.g., STAATENVERANTWORTLICHKEIT 13, 83-84, 87-88, 94-95, 99, 108, 113-114 (1984) (1983 Deutsche Gesellschaft für Völkerrecht) (critical comments on Ago's theories of international crime and effects of breach on third party states, and departure from decentralized nature of international law system); Zemanek, *Schuld- und Erfolgshaftung im Entwurf der Völkerrechts Kommission über Staatenverantwortlichkeit: Zugleich Bemerkungen zum Prozess der Kodifikation in Rahmen der Vereinten Nationen*, FESTSCHRIFT FÜR RUDOLF BINDSCHEDLER: BOTSCHAFTER, PROFESSOR DR. IUR, ZUM 65. GEBURTSTAG AM. 8. JULI 1980 315 (1980); Marek, *Criminalising State Responsibility*, 14 REVUE BELGE DE DROIT INTERNATIONAL 466 (1978-79). However, the attractiveness of certain of the Rapporteur's views on political grounds to some states, the Rapporteur's stature as an ICJ member, and the fact that these views in effect have the ILC imprimatur make them potentially quite influential. Another work makes the point that the Rapporteur's views have been criticized by continental publicists, but implies that the dearth of Anglo-American discussion concerning Ago's ideas is merely the result of language barriers whereas it is more likely a problem of fundamentally different views of international law. See Simma, *Grundfragen der Staatenverantwortlichkeit in der Arbeit der International Law Commission*, 24 ARCHIV DES VÖLKERRECHTS 357, 364 n.22 (1986).

475. See Lillich, *supra* note 474, at 20-21; Lillich, *Duties of States Regarding the Civil Rights of Aliens*, 3 REC. DES COURS 329, 379 (1978). This tendency has also been noted by non-American commentators. See, e.g., Simma, *supra* note 474, at 363-64.

476. See e.g., Lillich, *supra* note 474, at 1-60. *The Restatement Second* dedicated its entire Part IV to the topic of "Responsibility of States for Injuries to Aliens." In the introductory notes to Part IV, it notes simply that its coverage is directed solely at that class of state conduct that involves the exercise of territorial jurisdiction. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES 497-98 (1962) [hereinafter RESTATEMENT SECOND]. It also governed other violations of international law in peacetime, while it excluded wartime injuries. However, the *Restatement Third* posits that the older law of state responsibility relating to injury to aliens has largely been displaced in practice by human rights law. See RESTATEMENT THIRD, *supra* note 74.

of the Draft Code, making difficult any assessment of its application to the Flight 655 incident.⁴⁷⁷

The Draft Code and its official commentary were strongly influenced by the continental legal science views of Roberto Ago, ILC Special Rapporteur for the Draft Code from 1963 to 1980.⁴⁷⁸ Ago's attempt to define the theoretical aspects of state responsibility as pure secondary rules is the most recent product of the ILC's deliberations in this area.⁴⁷⁹ Because Ago is a current member of the ICJ, the Draft Code may play a role in the eventual disposition of the Flight 655 incident. But even if the Draft Code were a codification of existing law, which it emphatically is not,⁴⁸⁰ it would be incorrect to apply its provisions on international crime to a situation involving the mistaken use of force.

477. The doctrinal views of state responsibility expressed in some of the *Corfu Channel Case* opinions, are close to the view of objective responsibility underlying the *Restatement Second*. However, it is unlikely that the current *Restatement Third* view, which maintains that traditional state responsibility ideas have been largely displaced by human rights law, would find ready acceptance before the ICJ.

478. See Tsutsui, *A Turning Point for the Theory of Self-Defence: In Relation to an Article Proposed by the ILC Draft Convention Concerning "State Responsibility,"* 80 KOKUSAIHÖ GAIKÖ ZASSI 1 (293), 111-12 (403-404) (1981). The views concerning self-defense and necessity found in the official commentary are of Ago and not those of the ILC, as evidenced by the ILC's decision that its opinions concerning the role of necessity and self-defense under the U.N. Charter could only be determined by proper U.N. organs, not by the ILC.

479. Concepts of state responsibility have played an important role in the development of the Draft Code. State responsibility for injury to aliens was the subject of attempted codification efforts as early as the 1930 Hague Codification Conference. See *Bases of Discussion for the Conference Drawn Up by the Preparatory Committee*, League of Nations Doc. C.75.M.69.1929.V., reprinted in 2 LEAGUE OF NATIONS CONFERENCE FOR THE CODIFICATION OF INTERNATIONAL LAW 1930, at 423-702 (Rosenne ed. 1975). This League of Nations codification effort generally failed due to a lack of consensus among states regarding the substance of duties owed to aliens, rehearsing the modern division of state opinion on this subject. For a general history of early codification efforts in the state responsibility area, see García-Amador, *International Responsibility*, [1956] 2 Y.B. INT'L L. COMM. 173, 176-80, U.N. Doc. A/CN.4/96. In the 1950s, state responsibility for injury to aliens was again one of the earliest subjects of ILC codification efforts. García-Amador as Special Rapporteur approached state responsibility law from the traditional viewpoint of the protection of aliens. His views that international minimum standards were the basis for protection of aliens were not acceptable to other segments of the international community. Lillich, *supra* note 474, at 17-19. These views did underlie the development of the United Nations human rights movement, and the approach of the *Restatement Third*, but it is questionable whether most other states are now more ready to accept this legal position than was the case in the 1950s and 1960s. See *supra* note 455 and accompanying text.

As a result, the ILC in 1963 appointed Ago as Special Rapporteur, with a mandate to codify the theoretical aspects of state responsibility as secondary rules of international law under the new Draft Code, abandoning efforts to reach agreement on primary obligations. See Lillich, *supra* note 474 at 19-20. These views have persisted in the Draft Code beyond Ago's tenure as Special Rapporteur. Riphagen succeeded Ago as Special Rapporteur in 1980, working on part II of the Draft Code without changing its overall direction. His chief contribution was his realization, made despite Ago's approach and the mandate of the ILC, that not all primary rules should be viewed equally when devising secondary rules upon which to premise responsibility upon breach of the primary rule. See Simma, *supra* note 474, at 386-87. While this view is more practical than Ago's vision, it does not avoid and may exacerbate the problems created by the Draft Code's approach that defines state responsibility essentially as anything beyond the determination of the duty to pay indemnities.

480. See *infra* note 540.

The more problematic aspects of the Draft Code involve its "international crime" provisions and the issue of whether the *Vincennes*' use of force against Flight 655 was lawful. Ago's employment of distinct concepts of international "crimes" and "delicts" under part I, article 19 of the Draft Code and related provisions have been sharply criticized.⁴⁸¹ Some commentators have disagreed with the "criminalization" of state responsibility because they assert the entire doctrine is incompatible with the demands of substantive criminal law, arguing that a state's actions cannot be assessed using principles developed for flesh-and-blood individuals.⁴⁸² More sophisticated criticisms perceive an attempt to treat substantive categories beyond state aggression (e.g., genocide, apartheid, and massive pollution) as an uncontrollable new source of international law.⁴⁸³ Meanwhile, Socialist commentators have approached the issue of "criminalization" not as an attempt to criminalize the law, but as an intellectual shorthand to distinguish certain serious international law breaches from lesser ones for purposes of establishing enforcement mechanisms beyond the U.N. collective security system.⁴⁸⁴ Under Anglo-American views of international law, state responsibility should concern itself only with questions of indemnity.⁴⁸⁵ In short, the criminalization concept is neither part of customary law, nor has its introduction in the Draft Code found general acceptance.

Iran's attempt to preserve its ICAO council claim of a criminal act before the ICJ might be based further on a characterization of the *Vincennes*' destruction of Flight 655 as "state terrorism" -- a concept employed more often in political than in legal discourse. The primary shortcoming of Iran's position under this approach would be that criminal liability, if any, presumably requires that the *Vincennes* knew at the time it fired that the unidentified aircraft was a civilian airliner.⁴⁸⁶

481. See, e.g., sources cited *supra* note 474.

482. See, e.g., Gilbert, *The Criminal Responsibility of States*, 39 INT'L & COMP. L.Q. 345 (1990).

483. See e.g., Marek, *supra* note 474.

484. See, e.g., Oeser, *Völkerrechtsverletzungen und völkerrechtliche Verantwortlichkeit*, in VÖLKERR-
ECHT GRUNDRIß 233-34 (E. Oeser & W. Poeggel eds. 1988); Mohr, *The ILC's Distinction Between
"International Crimes" and "International Delicts" and its Implications*, in UNITED NATIONS CODIFICATION
OF STATE RESPONSIBILITY 115 (M. Spinedi & B. Simma eds. 1987); Graefrath & Mohr, *Völkerrechtliche
und strafrechtliche Verantwortlichkeit für internationale Verbrechen*, 35 STAAT UND RECHT 29, 33-34
(1986).

485. See, e.g., I I. BROWNLIE, SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY 32-3 (1983)
[hereinafter I. BROWNLIE, STATE RESPONSIBILITY].

486. The Iranian assertion, that the American failure to accept liability or to pay compensation violated the Montreal Convention, presents several subsidiary legal problems. Article 1 of the Montreal Convention criminalizes only intentional in-service destruction of civilian aircraft. See *supra* note 62, at art. 1. If following the *ICAO Report*, the U.S. admits that the *Vincennes* shot down Flight 655 in the mistaken but good faith belief that it was an F-14 aircraft, mistake then becomes the relevant issue. The ICJ must then determine whether the Convention requires merely a general intention to destroy an aircraft (so long as it turns out to be a civilian aircraft) or an intention to destroy an aircraft with knowledge of its civilian nature. The Iranian position also faces the issue of self-defense since article 1 criminalizes an individual's destruction of an aircraft only if the offense is committed "unlawfully." To the extent self-defense, necessity and similar international law principles exculpate the action of the *Vincennes*, those actions could not be

B. Objective Versus Subjective Basis of State Responsibility

At the core of doctrinal disputes concerning state responsibility lies the issue of whether it arises automatically upon the unexcused breach of a primary international law obligation (referred to as responsibility on an objective basis),⁴⁸⁷ or whether the presence of the additional element of fault is required (called fault or *culpa*, following Roman law and modern civil law usage, as responsibility on a subjective basis).⁴⁸⁸ Even the terms of this dispute are foreign to Anglo-American jurists, however, because its categories

considered unlawful or "wrongful."

487. The current intellectual distance between American views of international law and the ILC's Draft Code promulgated under Ago's direction is so great that it appears unclear whether there is nominally much common ground for scholarly discussion. At one time, however, the two views were not so far apart. The 1930 Hague Codification Conference attempted to confirm the subjective basis of liability, by tying it to private law *respondet superior* theories under the French Civil Code. See Borchard, *Government Responsibility in Tort: VII*, 28 COLUM. L. REV. 577, 518-19 (1928) [hereinafter *Governmental Responsibility*]. American views of state responsibility, on the other hand, were formed through precedents for injury to aliens by private parties. Here, under due diligence and similar analyses, the difference between an official's negligence in failing to protect foreigners (a fault analysis) and a breach of duty analysis based on a standard of reasonable efforts, but no absolute guaranty of protection (an objective analysis), were regarded as functionally indistinguishable. See *Fifth Report on State Responsibility*, [1960] 2 Y.B. INT'L L. COMM'N 61-63, U.N. Doc. A/CN.4/125 [hereinafter *Fifth Report on State Responsibility*]; H. LAUTERPACHT, PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW 138-41 (1927). The American perspective thus rejected the subjective view of "wrongful" in favor of an analysis equating a "wrongful act" with the breach of an international legal obligation, thereby effectively adopting an objective approach. See Borchard, *supra*, at 224-27. For an example of this objective approach, see *Harvard Draft Convention on the Responsibility of States*, reprinted in 23 AM. J. INT'L L. 131 SUPP. (1929) [hereinafter 1929 *Draft Convention on the Responsibility of States*] (shaped subsequent American views of state responsibility). This Draft Convention is phrased largely in terms of duties of states, while the operative language of its article 7 provides that "[a] state is responsible if an injury to an alien results from the wrongful act or omission." *Id.* at 157. The commentary indicates that "wrongful" is understood in terms of a failure "to accord to the alien that protection which is owed to him by international law." *Id.*

The *Restatement Second* addressed the issue of wrongfulness specifically in the context of conduct causing injury to an alien. RESTATEMENT SECOND, *supra* note 476. It defined wrongfulness in terms of a departure from the "international standard of justice" or a violation of an international agreement, using an objective view of responsibility. Similarly, it speaks in terms of violations of rights, referring to developing human rights law, which it notes now overlaps and supplements the older law of responsibility for injury to aliens. *Id.* at 144-45. In deciding the Flight 655 incident, however, some ICJ judges may be receptive to addressing state responsibility in terms of a subjective analysis, as evidenced by many of the judges' opinions in the *Corfu Channel Case*. See *infra* notes 501-25 and accompanying text.

488. The traditional formulation of subjectively-based state responsibility also requires injury and attribution of the act to the state. Rapporteur Ago omitted the requirement of injury from the Draft Code that defines a wrongful act of a state as conduct attributable to a state that is in breach of its international obligations. Part I, art. 3 of Draft Articles on State Responsibility, Adopted by the International Law Commission on First Reading. *Report of the ILC on the Work of Its Thirty-Second Session*, [1980] 2 Y.B. INT'L L. COMM. 30 (part 2), U.N. Doc. No. A/35/101. Article 1 already provides that every internationally wrongful act of a state entails its international responsibility. While injury beyond mere "legal injury" in the form of the breach itself has traditionally been required under state responsibility principles, commentators have noted Ago's interest in expanding state responsibility beyond traditional ideas of reparation and indemnity to derive a method for enforcing substantive international law that may have led him to dispose of the injury requirement. See Tanzi, *Is Damage a Distinct Condition for the Existence of an Internationally Wrongful Act?*, in UNITED NATIONS CODIFICATION OF STATE RESPONSIBILITY 1 (M. Spinedi & B. Simma eds. 1987). This dilution may simply be a means to permit nations to collectively pursue violations of so-called *erga omnes* norms committed against third nations as actually affecting all nations.

and reasoning are distant from the common-law tradition. Understanding the Roman law roots of the *culpa* concept is not a sure guide to the subjective basis of state responsibility, but it does shed some light on the confusing array of doctrinal views expressed in this area.⁴⁸⁹

The original form of delictual action under Roman civil law was narrowly confined to instances of wrongful damage to property caused by a direct personal act, the elements of which included the act itself, its illegality, and the consequent damages.⁴⁹⁰ In the course of Praetorian development, however, claims of indirect causation were permitted under related forms of action.⁴⁹¹ While illegality in the form of wrongfulness (*iniuria*) was essentially assumed under the original form of action, the action's extension to indirect causation led to distinctions in the form of *dolus* (intent) and *culpa* (negligence).⁴⁹² *Dolus* was assumed in a direct causation case involving a positive act as long as the actor had legal capacity (i.e., was neither insane nor a child).⁴⁹³ On the other hand, the concept of *culpa* came to be recognized as the basis of liability in indirect causation cases involving unintentional harm (e.g., situations that included the omission and neglect of legal duty). In time, the Roman law concept of *culpa* in some situations took on an additional meaning that equated it to wrongfulness (*iniuria*).⁴⁹⁴ This separate and broader meaning of *culpa* as unjustified wrongfulness characterized certain acts or omissions as unlawful, as opposed to those acts that might be *prima facie* unlawful but not wrongful, as in the case of inflicting injury in self-defense.

In categorical terms, Roman law distinguished sharply between acts (where intent or *dolus* was assumed) and omissions (where *culpa* was needed for liability). Modern commentators' views of state responsibility based on fault maintain these categories, tending to distinguish sharply between act and omission cases. Thus, some publicists maintain that *culpa* is required for a state to be responsible for its organs' behavior under an omissions analysis (typically through the failure to control private parties' behavior that is injurious to another state's protected interests), but not in "act" cases.⁴⁹⁵ Others

489. See Force Majeure Report, *supra* note 401, at 188-201 (categorized list of commentators); I. VON MÜNCH, DAS VÖLKERRECHTLICHE DELIKT IN DER MODERNEN ENTWICKLUNG DER VÖLKERRECHTS-GEMEINSCHAFT 152-69 (1963); H. LAUTERPACHT, *supra* note 487, at 134-43. See also Bedjaoui, *Responsibility of States: Fault and Strict Liability*, 10 ENCYCLOPEDIA OF PUB. INT'L L. 358 (1987).

490. The *lex Aquilia* was an older statutory provision originally covering damages to property (*damnum iniuria datum*), which developed in a fashion somewhat analogous to the development of trespass on the case. See P. VAN WARMELO, AN INTRODUCTION TO THE PRINCIPLES OF ROMAN CIVIL LAW 214-19 (1976). In that sense, Roman law *culpa* is analogous to negligence under trespass on the case. The *actio legis Aquiliae* was originally tied to the idea *damnum corpore corpori datum*. *Id.* at 214-15.

491. Such related forms of action include the *actio in factum* or the *actio utilis*. *Id.* at 215-16.

492. *Id.* at 216-17.

493. *Id.* at 216.

494. *Id.* at 217-18.

495. See K. STRUPP, DAS VÖLKERRECHTLICHE DELIKT (1920) (paralleling older *dolus* versus *culpa* distinctions); See Schlochauer, *Die Entwicklung des völkerrechtlichen Deliktsrechts*, 16 ARCHIV DES

argue that *culpa* is a requirement for any finding of state responsibility.⁴⁹⁶ The broader meaning of *culpa*, equating it with *injuria* as unjustified wrongfulness, survives even in nominally neutral formulations of state-responsibility principles, such as those of the ILC Draft Code, where articles 29-34 set forth circumstances precluding wrongfulness (such as consent, *force majeure*, self-defense, and so forth).⁴⁹⁷ Although few modern proponents of fault-based state responsibility would equate their concept of fault directly to the Roman law standard, its basic conceptual framework remains.

Whether *culpa* is required to find state responsibility (the objective versus subjective question), the concept of *culpa* fits into the broader context of the assessment of responsibility for injury to protected interests. The structure of international law continues to be influenced by the Roman law categories. Roman law juxtaposed negligence (in the sense of the broadest degree of *culpa*)⁴⁹⁸ with *casus* (accident or fortuitous event, constituting part of the *force majeure* concept).⁴⁹⁹ An approach to state responsibility adopting the subjective basis view will tend toward a practical universe of injury parallel to Roman law by use of the concepts of *dolus*, *culpa* (both in the sense of negligence and unjustified wrongfulness), *casus*, and *vis major* (as the other half of the *force majeure* concept). This inquiry has already touched upon *casus* and *vis major* in connection with the *force majeure* characterization of noncompensable war losses. Even if one postulates responsibility on an objective basis for the unlawful use of force, *culpa* lives on under older precedents in terms of its definition of the boundary of *casus* (fortuitous event), which is recognized to exclude state responsibility under modern law.⁵⁰⁰

VÖLKERRECHTS 239, 248-56 (1975) (distinguishing primary and secondary delictual acts based upon act versus omission distinction). *But see* I. BROWNLIE, STATE RESPONSIBILITY, *supra* note 485, at 42-43.

496. *See, e.g.*, H. LAUTERPACHT, *supra* note 487, at 134-43 (1970).

497. This follows the mixing of *culpa* with *injuria* in the sense of wrongful behavior as opposed to *prima facie* unlawful behavior that is justified in fact. The structure of this portion of the Draft Code is among Special Rapporteur Ago's legacies. Article 35, which reserves the possibility of compensation in all cases except self-defense and countermeasures (e.g., reprisals), was added as a result of ILC discussions of his draft. If the availability of either self-defense or necessity were proven in the case of Flight 655, the Draft Code would preclude characterization of that act as "wrongful." In Ago's eyes, preclusion of wrongfulness would not necessarily exclude liability in either case, although upon revision the Draft Code, in recognition of self-defense's special character, eventually came to exclude liability. *See* U.N. Doc. A/CN.4/318/Add.5-7, A/CN.4/328/Add.1-4, [1980] 1 Y.B. INT'L L. COMM. 190.

498. Late Roman law defined different degrees of negligence, the broadest degree being *culpa levis in abstracto* (analogous to the *pater familias* standard in state responsibility doctrine, requiring the utmost diligence). In precedents and commentary following a subjective approach, however, some argue that the proper degree is the narrower *culpa levis in concreto* (analogous to the *diligentia quam in suis rebus adhibet* standard in state responsibility doctrine, the level of care which a person would exercise in the conduct of his own affairs). *See* P. VAN WARMELO, *supra* note 490, at 246-48. Exploring these details is beyond the scope of this article, as no position is taken on the broader question of whether state responsibility principles are best organized on an objective or subjective basis.

499. *Id.* at 216-17.

500. *Cf.* B. CHENG, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS 226-32 (1953) ("fault" is equivalent to "unlawful" under objective analysis, but noting under *vis major* that unintentional acts evade responsibility). While Cheng made an analogous connection in trying

For those who espouse fault-based views of state responsibility, some approaches to *culpa* may result in denial of state responsibility in cases involving reasonable mistake. These differing views are visible in the *Corfu Channel Case*.⁵⁰¹

C. Objective Versus Subjective Responsibility in the Corfu Channel Case

The *Corfu Channel Case* is important as the only prior ICJ precedent addressing the basis of state responsibility in detail. The opinions of individual judges embody different views of state responsibility and raise the possibility of different outcomes in the context of the mistaken use of force. Beyond illuminating the issue of the objective versus subjective basis of state responsibility, the *Corfu Channel Case* also offers insight into the decisional process the judges will likely follow in considering the Flight 655 problem. The ICJ will be required to resolve the competing sources of the obligation problem in determining the content and nature of the duty applicable to the *Vincennes*. This decision will be difficult, given the view that international law is made only by its subjects and not by judges.

The *Corfu Channel Case* involved the alleged responsibility of Albania for damage to foreign warships which struck mines in Albanian territorial waters.⁵⁰² Albania had contested over a period of time the legality of foreign ships' passage through the Corfu Channel, bordering an area in which Greece, technically at war with Albania, claimed portions of Albanian territory. Albanian coastal batteries fired toward two British warships making the first passage through the channel.⁵⁰³ Britain informed Albania by diplomatic note that shore battery-fire would be returned in the future. Orders then were issued for four warships to traverse the strait to retest the Albanian response.⁵⁰⁴ Prior to this second passage, however, unknown parties had mined the straits. Two British warships struck mines, suffering significant damage and loss of life. Subsequently, the British Navy visited the strait a third time to gather evidence. The incident presented the ICJ with the question of the exact nature of Albanian involvement with, or responsibility for, the minefield in its territorial

to establish limits to state responsibility if traditional ideas of fault were applied, he considered only the *vis major* portion of *force majeure*, neglecting its *casus* or fortuitous event branch. *Id.* While this might be attributable to differences in terminology, his examples demonstrate that he does not consider *casus*.

501. *Corfu Channel Case* (U.K. v. Alb.), 1949 I.C.J. 1 [hereinafter *Corfu Channel Case*].

502. In addition to the basic issue of Albanian responsibility for the mine damage, the case presented substantial questions dealing with the law of straits and territorial waters, and the threat or use of force within another state's jurisdiction. See Linnan, *supra* note 73, at 95-99. This inquiry does not treat the question whether the assertion by British warships of disputed innocent passage rights was permissible, or whether it constituted a violation of Albanian territory.

503. *Corfu Channel Case*, 1949 I.C.J. at 27.

504. *Id.* at 27-28.

waters given that it apparently lacked the technical capacity to perform the mining operations.

Britain argued the case on alternative grounds: either Albania laid the minefield that damaged British warships (or was guilty by complicity of asking a third state, arguably Yugoslavia, to lay the mines), or Albania had knowledge of the location of the mines in its territorial waters by virtue of its coastal watch and failed to give warning.⁵⁰⁵ Assuming *arguendo* that fault were required, these alternate theories incorporated very different conceptions of its nature. Under the first alternative, fault borders on malicious, willful intent as a psychological concept (equivalent to *dolus*). The second alternative was more open to interpretation, because if Albania had not participated in laying the mines, it was responsible for the injury only if a duty to warn could be inferred (an inference that the ICJ eventually made based on humanitarian principles of law). Britain argued that Albania's failure to warn was "willful," implying a psychological state close to the first alternative. However, if responsibility for failure to warn were based on the simple omission of a warning (rather than a conscious decision not to warn based on a malicious desire that the warships be destroyed), the element of fault could at most be linked to knowledge of the mines' whereabouts and to *culpa*. This use of *culpa* might not equate in substance to "negligence" in the sense of municipal torts law. Instead, it is similar to the Roman law sense of failure to honor a duty, which is wrongful *per se*.

The ICJ rejected Britain's first alternative due to inadequate proof, but found Albania responsible under the second in finding both knowledge of the mines and a duty to warn. The ICJ relied for its findings on circumstantial evidence that Albania's coastal watch must have observed the mining activity close to shore and on Albania's apparent lack of concern following the mine explosions, suggested that Albania knew of the minefield in advance. The ICJ applied a control-based evidentiary presumption. Since the mining had occurred in Albanian territorial waters, Albania was effectively responsible for disproving that it had knowledge of what had occurred within its own territory. The ICJ's opinion provoked a number of sharp dissents, sharing the view that the evidence of Albania's knowledge of the mines was insufficient. The dissents argued that the ICJ wrongly imposed an objective risk-based responsibility in the form of absolute liability, simply because the mines were found in Albanian waters. The merits of the insufficient proof issue, however, are not as important as the expression of views on fault-based liability.

505. See I. CHUNG, LEGAL PROBLEMS INVOLVED IN THE CORFU CHANNEL INCIDENT 156-57 (1959).

Language in the ICJ's opinion, stating that the mere existence of the minefield in Albanian waters was insufficient for liability,⁵⁰⁶ has been taken by some commentators as evidence of the ICJ's view that state responsibility is subjectively based,⁵⁰⁷ while others are more circumspect in divining the rationale of the ICJ's finding of responsibility.⁵⁰⁸ Still others argue that a more attractive fact pattern for objective responsibility can hardly be found than one involving a minefield, and that the ICJ's failure to articulate an objective standard is proof of its adherence to the subjective view.⁵⁰⁹ For purposes of the mistake problem, the different *Corfu Channel Case* opinions illustrate the problem of reconciling various ideas of fault with elements of knowledge. Thus, one leading commentator postulated that the ICJ's requirement of actual knowledge cannot be fault in the sense of *dolus* or *culpa*. Otherwise, a reasonable but mistaken belief on Albania's part that the third party that laid the mines would notify shipping might excuse Albania from responsibility.⁵¹⁰ The contemplated situation is difficult to imagine,⁵¹¹ but raises the issue of the exact content of "fault" in terms directly applicable to the mistake problem posed by the Flight 655 incident. Traditional approaches in state responsibility law may view *culpa* as a psychological concept,⁵¹² while other, arguably more modern views, simply equate *culpa* to the breach of an obligation.⁵¹³

Among the dissenting opinions, Judges Ecer and Krylov appeared to adhere to the traditional view of *culpa* and *dolus*. Judge Ecer indicated that, despite injury to another state, responsibility would not lie if an act were "committed neither willfully and maliciously nor with culpable negligence."⁵¹⁴ Judge

506. The ICJ stated that:

It is clear that knowledge of the minelaying cannot be imputed to the Albanian Government by reason merely of the fact that a minefield discovered in Albanian territorial waters caused the explosions of which the British warships were victims . . . This fact, by itself and apart from other circumstances, neither involves *prima facie* responsibility nor shifts the burden of proof.

Corfu Channel Case, 1949 I.C.J. at 18.

507. See, e.g., 1 L. OPPENHEIM, *supra* note 459, at 343.

508. See, e.g., *Fifth Report on State Responsibility*, *supra* note 487, at 63 (García-Amador, whether actual knowledge of mines should be considered *culpa* was matter of interpretation); I. CHUNG, *supra* note 505, at 164-65 (language of ICJ's opinion could be interpreted to apply to only this particular case or more generally to evidentiary problems).

509. See Hostie, *The Corfu Channel Case and International Liability of States*, in LIBER AMICORUM OF CONGRATULATIONS TO ALGOT BAGGE 89, 92-94 (1956). But see I. CHUNG, *supra* note 505, at 164-66 (criticizing Hostie for mixing idea of absolute or strict liability with objective responsibility).

510. I G. SCHWARZENBERGER, *supra* note 304, at 633. See also I. CHUNG, *supra* note 505, at 166-67.

511. It is unclear why Albania would accept third party mining of its own territorial waters unless the task were performed at its request.

512. The distinction ties in part into attribution questions. See *Force Majeure Report*, *supra* note 401, at 195; *infra* notes 531-37 and accompanying text (discussion of attribution problem for individual officials' misdeeds and related shift in state responsibility doctrine from agency to organ concepts).

513. A pure modernity inference is misleading, as this sense of fault is essentially the alternate Roman law meaning of *culpa* as *iniuria* or wrongfulness itself. See *supra* note 425 and accompanying text.

514. *Corfu Channel Case*, 1949 I.C.J. at 127-28, citing L. OPPENHEIM & H. LAUTERPACHT, *THE INTERNATIONAL LAW* 311 (1948).

Krylov opined that the notion of *culpa* need not be used identically as in Roman law or contemporary civil or criminal law,⁵¹⁵ but he paralleled Judge Ecer's view that for responsibility to lie an act must be either willful and malicious or culpably negligent.⁵¹⁶ Carrying these two judges' views to their logical conclusion, responsibility might not lie for the downing of Flight 655 so long as the mistake of the *Vincennes*' commanding officer were reasonable.

In a more scholarly opinion, Judge Azevedo examined shortcomings of both the objective and subjective approaches to state responsibility, and concluded that *culpa* in this instance equated to knowledge of the mines⁵¹⁷ and thus Albania was responsible under international law.⁵¹⁸ His opinion questioned whether objective views tying responsibility to a simple breach of an obligation were actually distinct from fault-based concepts,⁵¹⁹ arguing that the changing nature of *culpa* reflected the common moral basis of objective and subjective views. Instead, Judge Azevedo distinguished between *culpa* in contractual breach (where under the civil law simple failure to honor an obligation constitutes *culpa* unless some adequate external cause can be demonstrated) and delictual *culpa* (where under the civil law some psychological state has traditionally been required).⁵²⁰ Stressing the moral elements of culpability and the somewhat hypothetical aspects of community conscience, Judge Azevedo characterized fault in the following fashion:

The notion of *culpa* is always changing and undergoing a slow process of evolution; moving away from the classical elements of imprudence and negligence, it tends to draw nearer to the system of objective responsibility; and this has led certain present day authors to deny that *culpa* is definitely separate, in regard to a theory based solely on risk. By departing from the notions of choice and of vigilance, we arrive, in practice, at a fusion of the solutions suggested by contractual *culpa* and delictual *culpa*.⁵²¹

While this language in Judge Azevedo's opinion might be viewed as postulating a convergence of subjective and objective views of responsibility, it is more properly understood as accepting fault as a morally based concept, while acknowledging the dilemma of a truly objective system of responsibility.

If objective responsibility posits the existence of obligations against which one must measure a breach, the argument runs that such an approach will suffer from centrifugal tendencies. The obligations will tend either to a proliferation of fixed rules (and as a corollary to the view that state responsibility will attach only if the duty were known in advance), or to a situation in which tribunals will be forced to make *ad hoc* decisions in violation of the basic

515. Corfu Channel Case, 1949 I.C.J. at 71.

516. *Id.* at 72, citing L. OPPENHEIM & H. LAUTERPACHT, THE INTERNATIONAL LAW 311 (1948).

517. *Id.* at 93.

518. *Id.* at 94.

519. *Id.* at 82.

520. *Id.* at 84-85.

521. *Id.* at 85-86.

international law concept that only its subjects can make international law.⁵²² Facing this dilemma, Judge Azevedo concluded that any theory of state responsibility that focused exclusively on the breach of hypothetical duties would ultimately fail.⁵²³ Under the particular circumstances of the case, however, Judge Azevedo viewed Albania's knowledge and the egregious nature of a minefield's existence in peacetime to be sufficient grounds to characterize its failure to give warning as morally blameworthy. Failure to act on knowledge itself constituted morally blameworthy behavior, even if the traditional elements of *dolus* and *culpa* emphasized in the opinions of Judges Ecer and Krylov were absent.

The downing of a civil airliner evokes a sense of moral outrage every bit as strong as the sinking of ships by a minefield. However, the prerequisite for *culpa* in the minefield situation was knowledge itself, since Albania was not held liable simply because the minefield was located in its territorial waters. The *Vincennes* possessed no such knowledge, as it fired in mistaken self-defense. This might not be decisive unless either *culpa* were considered still to be a psychological concept (favoring nonresponsibility), or the mistaken use of force against an unidentified aircraft were viewed as morally blameworthy (favoring responsibility). However, Flight 655 was misidentified as an attacking Iranian F-14. A moral view of mistake seems to push the misidentification problem toward a distinction between reasonable and unreasonable mistake. Yet such a distinction is not apparent in the more modern mistaken use of force precedents already reviewed.⁵²⁴

Judge Azevedo's hesitancy in deciding the *Corfu Channel Case* under a direct moral blameworthiness approach to fault is easily understood in terms of its unsuitability for judicial development. It hardly supplies principled guidance to tribunals in deciding future cases. This difficulty can be overcome to the extent some precedent exists concerning rules of primary obligation in related areas. Judges may then consult these primary rules for guidance on the fault question itself. For example, in the *Corfu Channel Case*, judges referred to the 1907 Hague Convention (VIII), which required the warning of minefields (even though it technically applies only to wartime mining and only to the state actually laying the mines).⁵²⁵ In the Flight 655 case, the ICJ presumably would examine the closest pre-existing primary obligations, requiring a choice between different sources of the putative duty. Under such a jurisprudential approach the ICJ would determine fault and thus articulate a new rule of secondary obligation with reference to the closest preexisting primary rules. This process exemplifies Judge Azevedo's belief that subjective and objective

522. *Id.* at 82-84 (acknowledging Ago as original source of these arguments).

523. *Id.*

524. See *supra* notes 413-49 and accompanying text.

525. *Corfu Channel Case*, 1949 I.C.J. at 22 (elementary considerations of humanity compelled notice).

concepts of state responsibility merge in practice. When applied to the Flight 655 incident, this approach might lead to the conclusion that the *Vincennes'* actions did not involve "fault," even if the *culpa* concept were admitted to no longer address intent, knowledge, or negligence in the sense of a psychological state.⁵²⁶ This would be the case if misidentification due to a reasonable mistake were treated as not morally blameworthy, or if the precedents of *The Marianna Flora* and *The Palmyra* (and related probable cause rules) were extended from the maritime to the aviation context as embodying the closest preexisting rules of primary obligation.

In his dissent, Judge Badawi Pasha refused to consider either complicity or knowledge on Albania's part on the basis that neither had been adequately proven.⁵²⁷ However, he went on to review Albanian conduct in terms of whether fault existed in the form of a violation of legal duty that caused the explosion, despite the stipulation of Britain's counsel that absent knowledge responsibility was not possible.⁵²⁸ Judge Badawi Pasha rejected what he

526. See I. CHUNG, *supra* note 505, at 167-68. Chung is literally correct in stating that Judge Azevedo did not "clearly indicate the exact meaning attributed to the term 'fault.'" *Id.* at 167. But he missed the substance of Judge Azevedo's approach, which was concerned more with how a judge might decide an individual case than with espousing a modern formulation of *culpa* to serve in the theoretical debate. See also B. CHENG, *supra* note 500, at 231 n.231-32, n.44 (criticizing Judge Azevedo's concept of fault for ambiguity). Cheng interpreted Judge Azevedo's opinion as attempting to apply a system of objective responsibility based on risk without abandoning the theory of subjective responsibility based on intention and negligence. *Id.*

527. *Corfu Channel Case*, 1949 I.C.J. at 64-65.

528. *Id.* at 65. Judge Badawi Pasha's opinion is doctrinally ambiguous, insofar as it refers to both establishing the international obligation ("[i]l faut donc établir une obligation internationale à la charge de l'Albanie dont le manquement lui serait imputable et serait la cause de l'explosion") ([its violation] "[r]este à savoir si, indépendamment de la connivence ou de la connaissance, il n'existe pas à la charge de l'Albanie une faute quelconque qui aurait causé l'explosion et sur laquelle serait éventuellement fondée sa responsabilité internationale pour le dommage subi"). *Id.* The ambiguity lies in whether the judge intended to profess an objective formulation of state responsibility, resulting from the violation of an obligation, without regard to fault, or whether he espoused a subjective theory to indicate that fault in modern terms goes beyond the traditional formulations of willful, malicious, or culpably negligent behavior, as in the case of unjustified wrongfulness. Cheng argues that Judge Badawi Pasha expressly based international responsibility on the principle of fault. B. CHENG, *supra* note 500, at 231-32 n.44. But his opinion is better understood as avoiding the theoretical basis of responsibility completely. The use of "*faute*" in the official French version of the opinion is not a clear use of it in a technical legal sense. The other dissenting opinions employ the *culpa* concept when addressing subjective responsibility. One might expect a judicial opinion that carefully stipulates exactly what areas it considers to have acknowledged a new approach to subjective responsibility, if that were intended.

Other commentators note that Cheng's approach to fault is eclectic. See *Fifth Report on State Responsibility*, *supra* note 487. While Brownlie praises Cheng's analysis as particularly helpful, he adopts an objective view of state responsibility and considers the *Corfu Channel Case* itself to be a matter of "individuality of issues." I. BROWNLIE, *supra* note 485, at 39 n.22, 47-48. He characterizes as "more or less vacuous" many commentators' usage of *culpa* or *faute* to describe a breach of legal duty or an unlawful act. *Id.* at 42. By equating wrongfulness with fault, Cheng actually brought himself close to a modern continental legal science analysis. It is unclear whether Brownlie is not fully aware of the role of *culpa* in modern continental approaches, or whether he is fully aware of its import and simply rejects it as inappropriate in addressing state responsibility. If the latter, Brownlie opined that "[s]tate responsibility as a matter of law is, and in principle should be, limited to the obligation to make reparation, to compensate." *Id.* at 33.

termed the municipal law concept of objective responsibility based on risk (strict liability in modern terms), but completely avoided employment of the *culpa* concept in conjunction with "fault." Instead, his concept of the wrongful act was phrased purely in terms of the violation of an international legal obligation. Under this approach, reference is necessary to the particular obligation to determine if it incorporates an intent element. Judge Badawi Pasha's concept of state responsibility, if applied to the Flight 655 mistake problem, would require the ICJ to determine what international law obligations were applicable to the *Vincennes*. If its obligations were limited to due care in the use of armed force, a finding of reasonable mistake would not result in state responsibility. If, however, its obligations were defined in terms of the lawful use of force, mistake -- reasonable or otherwise -- would not matter. Responsibility would lie unless the *Vincennes*' activities could be brought within the coverage of self-defense, necessity, or similar exceptions at the level of the primary obligation. Resolving the competing source of duty problem is thus even more pressing under such an objective approach, as opposed to the extension of traditional approaches to *culpa* as applied by Judge Azevedo.

The *Corfu Channel Case* opinions do not provide sure guidance for resolving the Flight 655 incident. It should now be clear that simple characterization of the theoretical basis of state responsibility as either objective or subjective does not determine by itself the legal outcome of the mistake problem. Under either an objective responsibility analysis or a nominally fault-based responsibility analysis equating *culpa* with violation of a legal duty,⁵²⁹ the exact characterization of the international law obligations binding the *Vincennes* will determine the outcome. If a more traditional view of *culpa* or *dolus* were followed, a subjective responsibility analysis should exclude responsibility for the downing of Flight 655 if the *Vincennes*' mistake is deemed to have been reasonable. Under more modern views of *culpa* as "fault" not amounting to a psychological state, the specification that a subjective responsibility analysis applies still does not determine the outcome of the mistake problem. In practical terms, judges will be compelled to address the questions of fault and of ill-defined international law duties together, if not actually as different aspects of the same problem unless clear and undisputed precedents specifically cover challenged state conduct. Individual judges will work toward resolution of the

529. This is considered the more modern view in nominally fault-based positivist systems of municipal or international law, as opposed to treating *culpa* as a matter of psychological state. See, e.g., I. CHUNG, *supra* note 505, at 167-68, citing H. KELSEN, *GENERAL THEORY OF LAW AND STATE* 66 (1949). It is not correct, however, to equate the objective view of state responsibility with the "wrongfulness" analysis by finding *culpa* in the violation of the duty. While the result might be the same under either view in the Flight 655 case, the distinctions lie in collateral areas, such as permissible countermeasures. See Maelanczuk, *Countermeasures and Self-Defense as Circumstances Precluding Wrongfulness in the International Law Commission's Draft Article on State Responsibility*, in UNITED NATIONS CODIFICATION OF STATE RESPONSIBILITIES 197, 202 n.13 (M. Spinedi & B. Simma eds. 1987). See also Simma, *supra* note 474, at 382 (suggesting these developments).

Flight 655 case through a thicket of doctrinal controversy and jurisprudential restraints on their role in articulating the law.

D. *The Historical Development of Attribution and the Objective Versus Subjective Basis Problem*

States act through human beings, and state responsibility under modern views requires attribution of an individual's act to a state. This aspect of state responsibility reaches beyond the doctrinal origins of its objective versus subjective basis. Prior to the twentieth century, however, the attribution step itself was often lacking in unlawful use of force cases involving violation of the laws of war by individual soldiers.⁵³⁰ Attribution of the misbehaving acts of lesser officials to the state traditionally was problematic, insofar as officials' duties were presumed to include adherence to law, including international law.⁵³¹ Historically, public law doctrine as applied under international law did not recognize vicarious liability on any basis analogous to the private law concept of *respondeat superior*. State responsibility could only be inferred under the much-criticized legal fiction that senior state bodies could be culpable for their appointment and lax supervision of incapable or misbehaving lesser officials (under *culpa in eligendo* or *culpa in custodiendo*).⁵³² These problems

530. The theoretical responsibility of all community members for a single member's violation of protected rights was recognized under views of international law preceding Grotius. See *Fifth Report on State Responsibility*, *supra* note 487, at 61. By abandoning this concept, the foundations were laid for the development of individual-liability principles and the necessity for attribution doctrines. On a formal level this amounts to a return to Grotius' abandonment of older Germanic principles of collective responsibility (*Sippenhaftung*) in favor of Roman law-based fault. See Schlochauer, *supra* note 495, at 254. In the modern context, individual liability principles and the problem of attribution are visible in dealing with a state's responsibility both for the misdeeds of its nationals' and the actions of its misbehaving officials.

531. Traditionally, outrages inflicted in violation of the laws of war have not been viewed as a matter of state responsibility; instead they have been treated separately, due to the special nature of war. See, e.g., Green, *The Law of Armed Conflict and the Enforcement of International Criminal Law*, 22 CANADIAN Y.B. INT'L L. 3, 6-9 (1984). Indemnity for violation of the rules of war was effectively not required because the behavior of miscreant soldiers was rarely technically attributable to their state. The traditional response to proven violations of the laws of war, therefore, was direct punishment by the belligerent state of both its own as well as enemy soldiers who violated the laws of war. *Id.* at 8-17. The 1907 Hague Convention (IV) changed the law, however, rendering soldiers' violations of the laws of war imputable to their state, thereby raising the general question of state responsibility and indemnity in the modern context. 1907 Hague Convention (IV) Concerning the Laws and Customs of War on Land at art. 3, *reprinted in* DOCUMENTS ON THE LAWS OF WAR, *supra* note 111.

532. *Culpa in eligendo* posited state negligence in failing to appoint competent officers, whereas *culpa in custodiendo* involved the failure to exercise proper supervision. See *Governmental Responsibility*, *supra* note 487, at 584-91. Borchard opined that governmental liability for civil servants' misdeeds appeared to be on the increase in continental legal systems. *Id.* at 593. But he contemplated the adoption of a *respondeat superior* or similar theory beyond existing European public and private law distinctions. Instead, municipal law developed a system under which an official's misbehavior was the direct basis for his state's liability vis-à-vis the injured party, with the state retaining regress rights against its official in certain cases. See, e.g., GRUNDGESETZ (GG) art. 34 (W. Ger.); BGB § 839 (W. Ger. Municipal Code). The distinction is important because the state would have available to it the same defenses as the official. Some commentators suggest that state liability under international law is therefore derivative in a similar manner, implying that a private-law mistake analysis could be applied to the actions of the *Vincennes'* commanding officer.

were finally acted on at the turn of the century at the 1930 Hague Conference for the Codification of International Law.⁵³³ Formally abandoning an agency concept, the new approach posited that a state acted through its "organs," considered to be an integral part of the state itself, thereby neatly sidestepping the attribution of an individual official's misdeeds in a way that substantially replicated the effect of *respondeat superior* under private law.⁵³⁴ However, this created an additional complication under subjective views, since "fault" might now be considered as either involving the psychological condition of an individual official, or as a more philosophical concept applicable to the organ's "wrongful" act as juridical construct (paralleling the dual meanings of *culpa* as negligence and unjustified wrongfulness under Roman law). This overlay of doctrinal confusion helps explain the divergent views of the basis of state responsibility visible in the *Corfu Channel Case*, which, given the mistake problem, may still influence the ICJ in the Flight 655 proceedings.

Views positing the primacy of municipal law under a sovereignty analysis face another problem. If an official's acts were in violation of international law obligations, but were either in conformity with municipal law or compelled by it, where could "fault" be localized to impose liability under a subjective analysis?⁵³⁵ New objective approaches to state responsibility resolved this problem by eliminating the fault requirement. This objective approach focused on the violation of a duty imposed by international law at the primary level, coupled with developing attribution principles.⁵³⁶ The above examination of

However, since the 1930 Hague Conference, state responsibility rules recognizing attribution to a state for injuries caused by its agent have essentially followed a *respondeat superior* theory.

533. *Preliminary Documents of the Conference for the Codification of International Law*, CONFERENCE FOR THE CODIFICATION OF INTERNATIONAL LAW (1930), reprinted in AM. J. INT'L L. 1 SUPP. (1930). See Borchard, *Theoretical Aspects of the International Responsibility of States*, 1 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 223 (1929). See generally *Basis of Discussion for the Conference Drawn Up by the Preparatory Committee: Volume II – Responsibility of States for Damage Caused in Their Territory to the Person or Property of Foreigners*, League Doc. No. C.75 M.69 1929 V (1929), reprinted in 2 LEAGUE OF NATIONS CONFERENCE FOR THE CODIFICATION OF INTERNATIONAL LAW [1930] 423-702 (S. Rosenne ed. 1975) (preparatory materials for conference); *Acts of the Conference for the Codification of International Law IV (Minutes of the Third Committee)*, League of Nations Doc. No. C.351(c) M.145(c) 1930 V (1930), reprinted in 4 LEAGUE OF NATIONS CONFERENCE FOR THE CODIFICATION OF INTERNATIONAL LAW [1930] 1482-1504 (S. Rosenne ed. 1975) (comments regarding theoretical basis of state responsibility).

534. See *Governmental Responsibility*, supra note 487, at 518-19 (discussing Gierke's theory).

535. The doctrinal bridge to modern objective views of state responsibility is based upon the work of Triepel, and was extended by Anzilotti, who dealt with officials' behavior under dualistic conceptions of international law. See, e.g., Ago, *La colpa nell'illecito internazionale*, 3 SCRITTI GIURIDICI IN ONORE DI SANTI ROMANO 206 (1940), reprinted in *Force Majeure Report*, supra note 401, at 190-93 (English translation); Ago, *Le délit international*, 2 REC. DES COURS 415 (1939).

536. There are adherents to both subjective and objective doctrinal views of state responsibility among international law commentators. See *Force Majeure Report*, supra note 401, at 193-94 (listing adherents of fault-based and objective responsibility views). Most Anglo-American and socialist commentators adhere to the objective view, although there are exceptions. See, e.g., Steiniger, *Die allgemeinen Voraussetzungen der völkerrechtlichen Verantwortlichkeit der Staaten*, 22 WISSENSCHAFTLICHE ZEITSCHRIFT DER HUMBOLDT-UNIVERSITÄT ZU BERLIN 439, 443 (1973) (D.B. Levin's characterization of fault in Marxist-Leninist terms as collective will of predominant class). The fundamental differences of opinion in this group are

the individual opinions in the *Corfu Channel Case*, however, demonstrates the dead end nature of this doctrinal approach to the mistake problem in the Flight 655 case. Instead, the ICJ will presumably be relegated to state practice and the jurisprudential approaches discussed above.

E. *Twentieth Century Development of Indemnity for Unlawful or Mistaken Use of Force*

Twentieth century precedents reveal the development of a practice requiring reparations for the use of armed force considered to breach international law obligations. Such a practice, in light of related precedents involving the mistaken use of armed force, points toward the general imposition of state responsibility for the unlawful use of force on an objective basis. Thus, regardless of the implications of the general debate concerning the subjective

in the formulation of the primary international law duties that trigger objective responsibility. Continental commentators, on the other hand, predominantly advocate a fault-based approach to state responsibility. These proponents employ the term "fault" not as a psychological concept applicable to an individual official, but as a referent to the philosophical concept of a "wrongful act." State responsibility would thus in theory be similar to doctrinal views of individual responsibility in municipal criminal law, permitting cross-fertilization (acknowledged or otherwise).

It is somewhat misleading, however, to speak in monolithic terms of continental legal science, particularly since the post-World War II continental scholars are more interested in state practice and precedents than some of the more doctrinally oriented pre-World War II scholars. Ago, who served as Rapporteur during the crucial period of the Draft Code's creation, belonged to the prewar generation, while more contemporary scholars decry the fact that the Draft Code would entail a departure from traditional international law, and the possibility of enforcing international law through the United Nations system. However, their analysis of the proper scope of state responsibility law shares Ago's basic approach. For example, both readily rely upon municipal law parallels, such as the justification and excuse doctrines, in developing consistent views of such problems as the treatment of the exclusion of wrongfulness under the Draft Code. Such an approach entails integrating the parallel ILC project of considering state responsibility for lawful acts. This results from the fact that, except for self-defense, article 35 of the Draft Code does not explicitly deny compensation even where the act was lawful. This concept of liability without illegality has been the subject of sharp criticism, which is consistent with the quasi-torts compensation approach that characterizes the Anglo-American view of state responsibility. See I. BROWNIE, *supra* note 485, at 49-50. Regarding the general question of national schools of international law, see *Comparative Approaches to the Theory of International Law*, 1980 PROC. OF THE AM. SOC'Y OF INT'L L. 152, 154-57 (1986) (remarks of Brownlie); Lauterpacht, *The So-Called Anglo-American and Continental Schools of Thought in International Law*, 12 BRIT. Y.B. INT'L L. 31 (1931).

versus objective basis of state responsibility,⁵³⁷ international arbitral and judicial proceedings concerning the unlawful use of armed force have rarely considered *culpa* to be necessary for state responsibility. Under this view, the breach of primary international obligations should result in the imposition of a duty of reparation directly upon the breaching state without the interposition of additional requirements.

The 1902 Samoan Arbitration, conducted by the King of Sweden under a trilateral arbitration convention with Germany, Great Britain, and the United States, is among the earliest modern international proceedings to find state responsibility and to impose a duty of reparation.⁵³⁸ Samoa was administered at the time under the Berlin Treaty of 1889 by a resident council of three consuls, one from each foreign power, in conjunction with an indigenous king. Under the treaty consular actions were to be taken unanimously, yet an atmosphere of mutual distrust existed among the foreign communities and when civil war broke out, the German Consul refused British and American requests to use warships against the rebellious native faction.⁵³⁹ Unilateral military

537. Older American international law commentary on state responsibility doctrine shows a full appreciation for the objective versus subjective debate. *See, e.g.*, Borchard, *supra* note 533. For other leading American works, see A. FREEMAN, *THE INTERNATIONAL RESPONSIBILITY OF STATES FOR DENIAL OF JUSTICE* (1938); F. DUNN, *THE PROTECTION OF NATIONALS* (1932); C. EAGLETON, *THE RESPONSIBILITY OF STATES IN INTERNATIONAL LAW* (1928). American views of state responsibility derived from the perceived connection between diplomatic protection and injury to aliens. Insofar as older precedents purport to follow Grotius and his followers, there is basis for the claim that traditional practice supports the subjective view (although the precedents speak more of "wrongful acts" than fault). However, more recent arbitral tribunal precedents, particularly those between the World Wars that involved United States claims of injury to aliens, arguably follow an objective theory of state responsibility. *See* 1 G. SCHWARZENBERGER, *supra* note 304, at 637-41 (reviewing different cases). Schwarzenberger noted a predisposition to *culpa* doctrine in older cases, noting that between 1919 and 1939 the pendulum seemed to swing in the other direction. *Id.* at 634.

538. *See* 91 BRIT. & FOREIGN ST. PAPERS 1898-1899, at 78, 79 (1902) [hereinafter Samoan Arbitration Agreement] (Convention between Great Britain, Germany, and the United States of America, relating to the settlement of certain claims in Samoa by arbitration) (submitting to binding arbitration "[a]ll claims put forward by [signatories' nationals] for compensation on account of losses which they allege they have suffered in consequence of unwarranted military action, if this be shown to have occurred, on the part of British, German or American officers"). For the arbitrator's decision, see 95 BRIT. & FOREIGN ST. PAPERS 1901-1902, at 164 (1905) [hereinafter Samoan Arbitration Decision].

The Samoan trilateral arbitration convention accompanied the colonial partition of the islands in 1899, under the Convention between Great Britain, Germany, and the United States of America, for the Adjustment of Questions relating to Samoa. 91 BRIT. & FOREIGN ST. PAPERS 1898-1899, at 75 (1902). For the related Convention and Declaration between Great Britain and Germany for the Settlement of the Samoan and other Questions, see 91 BRIT. & FOREIGN ST. PAPERS 1898-1899, at 75 (1902). *See generally* J. Thacker, *The Partition of Samoa* (Univ. of South Carolina Ph.D. dissertation 1966); G. RYDEN, *THE FOREIGN POLICY OF THE UNITED STATES IN RELATION TO SAMOA* (1933); 1 J. MOORE, *supra* note 200, 536-54 (1906) (expanded factual background pieced together from various government sources). The partition occurred due to the inadequacies of the tripartite condominium administration of the islands as neutral territories under the Berlin Treaty of 1889. *See Final Act of the Conference on the Affairs of Samoa*, 81 BRIT. & FOREIGN ST. PAPERS 1888-1889, at 1058 (1901) [hereinafter Berlin Treaty of 1889].

539. Commercial interests and property were largely in the hands of the German colonial community, so it suffered disproportionately in the ensuing hostilities. While prospective partition served to resolve political problems within the tripartite arrangement, the arbitration concerning "unwarranted military action . . . in conformity with the principles of international law or considerations of equity" was agreed upon

action took place, however, and damage occurred both in the course of British and American naval bombardments and as a result of the actions of armed landing parties and native factions armed by foreign officers.

The arbitrator's decision turned on the interpretive question whether Great Britain and the United States could take unilateral action affecting control of the islands by supporting one indigenous faction over another. The decision was thus grounded in the tripartite cooperative arrangement, rather than on modern principles restraining the use of armed force or intervention concerns.⁵⁴⁰ Nonetheless, the arbitrator found that under the circumstances property losses could not be considered *force majeure*,⁵⁴¹ as he determined the British and American military action to be unwarranted, and also held the two states financially responsible for the property losses.⁵⁴² The military action was effectively treated as falling outside the law of civil or international war.⁵⁴³

Various early twentieth century bilateral claims arbitrations between European states and the United States on the one hand and South and Central American states on the other relating to injury to aliens or their property during insurrections, indirectly evidence the development of indemnity obligations for the unlawful use of force.⁵⁴⁴ Violence by unsuccessful revolutionaries against foreigners was not attributable to the state as a matter of substantive international law. Instead, the failure to exercise due diligence, or a denial of justice in suitable cases, served as the premise for a finding of state responsibility. Indemnity obligations arose from a state's failure to protect, rather than from its unlawful use of force.⁵⁴⁵ However, the *force majeure* character of injury incurred during an engagement between government and revolutionary forces would normally preclude a finding of state responsibility for injury to

in the face of strong public sentiment during the crisis precipitating partition. Samoan Arbitration Agreement, *supra* note 538, at 79.

540. Samoan Arbitration Decision, *supra* note 538, at 166-67.

541. *Id.* at 168. The arbitrator also indicated that factional fighting among the Samoans did not necessitate the military action taken to protect foreign lives and property, which ultimately served to exacerbate hostilities. *Id.* at 168-69.

542. *Id.* at 169-70. In lieu of returning the matter to arbitration for determination of indemnities owed in individual circumstances, Great Britain and the United States each agreed to pay half of the amounts owed to German nationals. Disputes arose as to whether responsibility extended to damages inflicted by Samoans armed by the foreign military, or only to those losses inflicted directly by the foreign military. The German claims were eventually settled on the basis of a negotiated lump sum payment, and separate arrangements were made for compensation of British and American nationals by their respective governments. *See J. Thacker, supra* note 538.

543. The Samoan Arbitration Agreement did not require the arbitrator to consider attribution of individual officers' actions to their respective governments. Samoan Arbitration Agreement, *supra* note 538.

544. *See supra* notes 533-35 and accompanying text.

545. The wanton destruction of foreign life or property by government troops combatting insurrections in violation of the laws of war might theoretically subject the state to liability, but due to then applicable laws of attribution, the conduct would probably not have been attributed to the state without an officer's involvement.

aliens, whether such damage was caused by government soldiers or under successorship principles, by successful revolutionary forces.⁵⁴⁶ To the extent injuries to aliens were compensated more generously, such compensation was offered *ex gratia* under special treaty terms.⁵⁴⁷

Important changes began under the Hague movement to codify the laws of war. The 1907 Hague Convention (IV) Concerning the Laws and Customs of War on Land would normally depart from contemporary attribution principles⁵⁴⁸ by requiring state responsibility for miscreant soldiers' behavior on a simple *respondeat superior* basis,⁵⁴⁹ and specifically contemplated the award of compensation for such a breach. The Hague Conferences of 1899 and 1907 could not, however, resolve differences among participating states concerning the belligerent treatment of neutral shipping. As a result, the British Government convened the London Naval Conference. The consequent 1909 Declaration of London contained the essentials of an international prize code.⁵⁵⁰

The Declaration of London focused in part on compensation for the unlawful use of force in restraint of a neutral's free passage rights. This is evident in articles providing for indemnity in the case of a capture without good reason,⁵⁵¹ and in a requirement of direct indemnity where municipal law concerns impeded the proposed realization of the Declaration's substantive prize law.⁵⁵² The basic thrust of the Declaration was to separate the rights of belligerents from those of neutrals, such that incursions on neutral free passage rights in a manner not consistent with traditional maritime law might be permissible, although a duty of compensation would be required. As previously noted, however, the Declaration never entered into force. Nonetheless, it is possible to distinguish the broad agreement which existed concerning the

546. This would also be true under related necessities of war rationales. *See supra* notes 488-519 and accompanying text. *See also* notes 488-519 and accompanying text.

547. This was expressly the case, for example, under the revolutionary claims provisions of the related bilateral agreements with Mexico, which established the claims commissions. *See, e.g.,* A. FELLER, THE MEXICAN CLAIMS COMMISSION 1923-1934: A STUDY IN THE LAW AND PROCEDURE OF INTERNATIONAL TRIBUNALS 222 (1935).

548. *See supra* note 111 and accompanying text.

549. Article 3 of the 1907 Hague Convention (IV) provides:

A belligerent party which violates the provisions of the said [laws of land warfare under the Convention] shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.

1907 Hague Convention (IV) Concerning the Laws and Customs of War on Land, at art. 3, reprinted in DOCUMENTS ON THE LAWS OF WAR, *supra* note 111, at 46.

550. Declaration of London, Feb. 26, 1909, reprinted in THE DECLARATION OF LONDON, 1909: OFFICIAL DOCUMENTS (J. Scott ed. 1919) [hereinafter Declaration of London].

551. For example, article 64 essentially applied a probable cause standard without using the term. *See General Report on the Declaration Presented to the Naval Conference on Behalf of its Drafting Committee*, reprinted in UNITED STATES NAVAL WAR COLLEGE, INTERNATIONAL LAW TOPICS 1909, at 149 (1910). Articles 52-53 provide damages in lieu of restitution in cases of unwarranted capture and destruction of a neutral prize (even where sufficient probable cause existed). *Id.* at 117. Neutral prizes might still be destroyed essentially on military necessity grounds, but only at the captor's peril.

552. Such a provision was included in the Final Protocol. *Id.*

compensatory aspect of the Hague Convention (XII) and the Declaration from the disagreement over particular substantive rules, the breach of which would result in imposition of an indemnity obligation. As a result, on the eve of World War I, an international law compensatory obligation for undue wartime interference with neutral free passage rights was recognized *de lege ferenda*.⁵⁵³

The development under modern international law of general restraints on the use of armed force began with the 1919 League of Nations Covenant. Mistaken attack in relation to indemnity for unlawful use of force is evident already in dual aspects of the 1925 *Greco-Bulgarian Frontier Incident*. As previously discussed, the League Council was faced with resolving a dangerous on-going confrontation involving a Greek military invasion of Bulgarian territory.⁵⁵⁴ In the initial Council meeting Briand, as president, noted that the hostilities were continuing and that there were significant disputes about their factual basis, distinguishing between the urgent task of bringing hostilities to an end versus the need for "ascertaining the facts and responsibilities, and if necessary fixing the amount of reparation due."⁵⁵⁵ When the cessation of hostilities was confirmed three days later, the Council recalled Briand's original distinction and appointed a Commission of Inquiry empowered to fix responsibility and to determine indemnity.⁵⁵⁶ The Council's rapporteur stressed, in delivering the report, that as a general principle compensation should be paid for the violation of territory without sufficient cause, even where the offending state's action was premised on a mistake.⁵⁵⁷ Damages were allowed for personal injury and death as well as property losses, which included moral and material damages, thereby rendering it an award for more than purely economic loss.⁵⁵⁸

By accepting and adopting the report despite the rapporteur's indications that Greece might have acted under good faith mistake, the League Council required Greece to pay an indemnity without apparent attention to *culpa*.⁵⁵⁹ While this precedent alone constitutes evidence of international law under state practice, the Council's action takes on additional significance in conjunction

553. A compensatory duty may have existed against offending ship captains under traditional prize law, but under old concepts their unlawful acts would not be attributed to their states.

554. See *supra* notes 436-46 and accompanying text.

555. Council Meeting of Oct. 26, 1925, 6 LEAGUE OF NATIONS O.J. 1697, 1697-98 (1925).

556. Council Meeting of Oct. 29, *id.* at 1712-13. British Foreign Secretary Austin Chamberlain as Rapporteur specifically recalled Briand's dual purpose language to the Council, and presented a resolution embodying the particular charge on the state responsibility question. *Id.* at 1711-13. Following the adoption of this resolution, the Bulgarian representative present assented to the determination of any indemnities to be paid, while the Greek representative indicated that his government would accept any decision taken by the Council. *Id.* at 1713.

557. See *supra* note 444 and accompanying text.

558. See *Seventh Assembly Report*, *supra* note 371, at 182.

559. See I. BROWNLEE, STATE RESPONSIBILITY, *supra* note 485, at 141.

with the rapporteur's expressed view of the law. It constitutes a relatively straightforward assertion of state responsibility on an objective basis for the unlawful use of armed force in connection with territorial invasion. Here the older law's disregard of misapprehension of attack or mistaken self-defense is carried over into the general restrictions on the use of force.⁵⁶⁰

Following the 1925 *Greco-Bulgarian Frontier Incident*, long-running disagreements within the League of Nations concerning enforcement and the legal versus moral nature of obligations under the League Covenant particularly under article 10, complicate any views of the state practice during this period. Arbitral and judicial precedents from the post-World War II period dealing with the unlawful use of armed force are relatively rare, possibly due to the highly politicized nature of such incidents as well as typical state reservations to ICJ jurisdiction. Such disputes usually have been settled by negotiation to avoid political friction, as in the case of the mistaken Israeli attack on the *U.S.S. Liberty*, or have not been resolved, as in the case of the Soviet downing of Korean Airlines Flight KE 007.⁵⁶¹

In addition to the *Corfu Channel Case*,⁵⁶² two ICJ cases have confronted the indemnity question in the context of the unlawful use of armed force. In the *Hostages Case*, the ICJ analyzed the seizure of the U.S. embassy and the taking of various diplomats hostage by Iranian militants in terms of a violation of diplomatic immunity.⁵⁶³ The ICJ concerned itself with modern treaty law, but to the extent diplomatic facilities and persons traditionally are considered extraterritorial, a violent attack upon them by armed militants arguably approaches armed band activity directed against the foreign state. In addition to its order directing Iran to release American diplomats and to vacate the premises enjoying diplomatic or consular immunities, the ICJ imposed an obligation on Iran to make reparations, the form and amount to be settled subsequently by the ICJ, absent the parties' agreement. Shortly after the ICJ's

560. War guilt provisions of the peace treaties ending both World Wars and related agreements addressing the mechanics of compensating war claims have obscured general reparations principles relating to the unlawful use of force. They tended to impose a pattern of compensation beyond the requirements of customary law, under which preparation for war-related losses of Allied nationals typically was provided for simply on the basis of causation and property location in enemy territory. See *supra* notes 512-19 and accompanying text. It seems unwise, however, to derive new principles of customary law on the basis of peace treaties more reflective of political realities than of legal principles. The political as opposed to the legal nature of these arrangements is born out by the fact that the defeated powers also agreed not to press their own nationals' compensable claims for war losses inflicted by the Allied powers.

561. Cases before military or other municipal tribunals involving allegations of misconduct by individual soldiers in warfare are not relevant here, as such proceedings are generally criminal in nature and thus not helpful on reparations and indemnity issues.

562. *Corfu Channel Case*, 1949 I.C.J. 1, 27. The ICJ did find that the British naval presence in force on the third passage to gather evidence of the mines constituted an unlawful manifestation of warships in Albanian territorial waters. Whether the British naval presence was regarded as merely an unlawful threat to use force, or constituted an actual unlawful use of force, the ICJ simply declared the behavior unlawful without imposing an indemnity obligation. *Id.*

563. *Hostage Case*, 1980 I.C.J. 3.

opinion was delivered, the United States withdrew its claims against Iran before the ICJ.⁵⁶⁴ For that reason, the ICJ never articulated the appropriate nature of reparations. However, by virtue of its opinion distinguishing prospective respect for diplomatic immunities from past injury, the ICJ appeared ready to award indemnity in the case.

The *Nicaragua Case* is the ICJ's latest pronouncement in the area of self-defense and the unlawful use of force.⁵⁶⁵ The ICJ characterized the acts attributable to the United States -- the unlawful supply of weapons and financial support to the contras -- largely as acts of intervention rather than as the unlawful use of force. However, the ICJ's opinion also covered mining operations to impede maritime trade, allegedly carried out by foreign nationals in littoral areas at the behest of the United States. The ICJ formally attributed the mining to the United States, and cited the *Corfu Channel Case* for the proposition that the United States' breach of international law obligations lay in its failure to give notice of the mines. The ICJ included this mining activity among the grounds giving rise to a duty of the United States to make reparations.

Yet in portraying the case as an intervention problem, the ICJ failed to appreciate the significance of attributing the mining to the United States (as opposed to the *Corfu Channel Case*, in which neither Albania's participation nor complicity in the mining itself could be adequately proven). Mines are weapons of naval warfare. Their placement in the path of foreign merchant vessels should be considered equivalent to the use of armed force. While it may be argued that the ICJ's basic decision on collective self-defense principles was incorrect and thus the use of armed force by the United States was lawful, it is disingenuous not to acknowledge the true nature of the mining activity. If the ICJ otherwise meant to infer that the mining itself was not unlawful (i.e., the sole fault was failure to give notice), this reasoning leads to the untenable position that the peacetime mining of foreign waters is lawful as long as notice is given.⁵⁶⁶

Taken in this light, the portion of the *Nicaragua Case* relating to mining indicates that indemnity obligations arise in naval warfare from the unlawful use of force under modern views of general restraints on its employment. This

564. Declaration of Algeria, 20 I.L.M. 223, 227 (1981).

565. *Nicaragua Case*, 1986 I.C.J. 4. The decision has been criticized by many commentators. See e.g., Linnan, *supra* note 73, at 98-108.

566. It seems difficult to argue that sowing explosive devices in navigable foreign waters for the express purpose of impeding shipping does not constitute the use of armed force. The ICJ's opinion finds some indication that the size of devices may have been large enough to inflict damage, but not necessarily large enough to sink ocean-going ships. However, the choice of smaller weapons to interfere with but not destroy merchant shipping is essentially a tactical decision rather than one that changes the legal nature of the activity. Under the circumstances, the ICJ's lapse of legal analysis in this entire area can only be understood as accompanying its more general problems with the *Nicaragua Case*. See Linnan, *supra* note 73, at 98-108.

position is not controversial, since a consensus exists that the rule of the 1907 Hague Convention (IV) imposing responsibility on a state for misdeeds of its armed forces in land warfare has entered customary law and now extends to sea warfare.⁵⁶⁷ Most recently, in a resolution addressing Iraq's attempted annexation of Kuwait, the Security Council indicated that Iraq would be "liable [under international law] for any loss, damage or injury arising in regard to Kuwait and third states, and their nationals and corporations, as a result of the invasion and illegal occupation of Kuwait."⁵⁶⁸ The Security Council clearly contemplated that a duty of indemnity attaches to the unlawful use of armed force, both for breaches of the humanitarian rules of armed conflict and for the use of unlawful armed force itself. As in the 1925 *Greco-Bulgarian Frontier Incident*, neither the Security Council in the Kuwait crisis nor the ICJ in the *Nicaragua Case* appeared to condition state responsibility on a showing of *culpa*. Instead, state responsibility was imposed on an objective basis.

The uniform application of the objective approach to liability for the unlawful mistaken use of force by a state is demonstrated in the *Waima*, *Mazuia* and *Dogger Bank Incidents* despite differences in the general areas of the applicable laws. While the *Waima Incident* involved a clash between the forces of the two states, it was not a law of war precedent. Both the *Mazuia* and *Dogger Bank Incidents* involved belligerents' mistaken attacks on neutrals. They differed insofar as the former required the application of land while the latter involved maritime warfare legal principles; but mistake relieved responsibility in neither case. In terms of the law's development, however, the chronological order of the precedents may be of comparatively more importance than the particular body of law applied. Arbitration of the *Waima Incident* came first, and contemporaries expressed the view that this precedent indirectly may have affected the outcome of the *Dogger Bank Incident*.⁵⁶⁹

Since the assessment of the 1925 *Greco-Bulgarian Frontier Incident*, violations of legal restrictions on the use of force usually involve two aspects. First, they involve the more openly political problem of bringing on-going hostilities to an expeditious end. Second, they involve issues of responsibility for the injury caused by the hostilities -- legal issues that are more often than not compromised expressly or implicitly on political grounds. Yet, since the Permanent International Court of Justice's decision in the *Chorzow Factory Case*,⁵⁷⁰ full reparation as a matter of law may be expected for any state's breach of its international law obligations. Judicial determination of the nature

567. See e.g., 1955 LAW OF NAVAL WARFARE, *supra* note 105, § 3-03 n.4.

568. S.C. Res. 674, U.N. Doc. S/RES/674, 29 I.L.M. 1561-63 (1990). See also S.C. Res. 687, U.N. Doc. S/RES/687 (1991) (LEXIS, Nexis library, Wires File).

569. See *supra* note 322 and accompanying text.

570. *Chorzow Factory Case* (Ger. v. Pol.), 1927 P.C.I.J. (ser. A) No. 9, at 21 (July 26); 1928 P.C.I.J. (ser. A) No. 17, at 29 (Sept. 13).

and amount of required reparations remains problematic, but this is more a function of problems with dispute resolution mechanisms than with applicable substantive law. While indemnity is not inevitable in cases of unlawful force, on balance these twentieth century state responsibility precedents reveal both a tendency to impose responsibility on an objective basis, without requiring *culpa*, and a duty of reparation imposed normally in the form of indemnity.

VII. RECONCILIATION OF PRIMARY USE OF FORCE AND SECONDARY STATE RESPONSIBILITY ANALYSIS WITH EXTENSION OF PRINCIPLES TO TERRITORIAL OVERFLIGHT

This inquiry concludes that it is best to apply an objective state responsibility approach under the modern use of force law to the Flight 655 incident, an approach that is found mostly in territorial invasion and general law of warfare precedents. While conceptual differences exist between the high seas as *res nullius* in traditional terms and an invaded state's territory, these differences are not significant enough to warrant distinguishing between naval and land warfare situations in determining which modern rule to apply to mistaken self-defense. The same approach may apply to the more common situation of the downing of unauthorized civilian aircraft over a state's territory.

A. Sources of the Duty

The scope of the duty governing the *Vincennes*' downing of Flight 655 can be sought in existing lines of precedent that also provide a basis for evaluating the positions of the prospective state litigants with regard to the applicable substantive law. The ICJ could employ at least five alternative sources of law to dispose of the Flight 655 incident: 1) treaty-based international civil aviation law; 2) traditional freedom of the seas principles; 3) self-defense and similar principles under the U.N. Charter as the modern equivalent of *jus ad bellum*; 4) restraints under the largely customary law of air and sea warfare as the modern equivalent of *jus in bello*; or 5) fundamental human rights principles.

In the sphere of treaty-based international civil aviation law, the Iranian ICJ Application invokes duties in support of air safety under the Chicago Convention and, to a lesser extent, the Montreal Convention. Whereas some argue that this body of treaty law contains an absolute duty not to use weapons against civil aircraft in flight, others claim that the Chicago and Montreal Conventions do not displace a state's rights of self-defense and necessity under the U.N. Charter. Based upon states' views expressed before the ICAO, it appears that the duty not to use weapons against civil aircraft in flight is subject to the right lawfully to employ armed force under the U.N. Charter. Article 89 does not fully suspend the Chicago Convention in case of war, but

incorporates and refocuses attention on the law governing the conduct of hostilities by a process of *renvoi*. This specific invocation of law of armed conflict principles, which incorporates their own protections for noncombatants, militates against the separate application of human rights principles under current views of the law.

Traditional freedom of the seas principles and the combatants' duties to respect them appear in two contexts. First, they underlie portions of the customary law of air and sea warfare, in particular the rules governing treatment of neutral vessels and aircraft by combatants. Second, these principles form the implicit legal basis for U.S. policy in the Persian Gulf asserting general protection against unwarranted belligerent interference with neutral shipping. A hidden tension exists between these two because belligerent and neutral rights exist in a balance. It is difficult to deny benefitting neutral warships or military aircraft to those of belligerents. Under traditional ideas of the appropriate balance, last appearing in the 1939 Draft Convention on Neutral Rights, responsibility would lie with the United States for the downing of Flight 655 unless it were demonstrated that the *Vincennes*' warnings were received or the aircraft had been destroyed within the scope of the surface engagement. It is unclear whether this approach, which builds on traditional maritime law and the 1923 Hague Radio and Aerial Warfare Rules, still dominates the international community's views of the applicable law. Limited evidence indicates that this may be the case in connection with recommendation 2.6/1.⁵⁷¹ The apparent U.S. position, whether cast as the American view of international law or as naval policy and ship defense doctrine since World War II, does not connect neutral rights with free passage principles in the overflight of naval operations. The lack of this connection has serious implications for the freedom of the seas, and in particular for the free passage for oil tankers.

There is a broader debate on the legality of armed forces, which the ICJ must address in the Flight 655 proceedings. The permissible scope of self-defense commonly arises in connection with U.N. Charter articles 2(4) and 51, and different national views of international law. This inquiry takes the position that lawful self-defense under the Charter should be construed according to a restrictive view of customary law. Even assuming that the use of armed force is generally permissible under the Charter, secondary questions with respect to its unlawfulness may arise in particular situations. On this level much of the so-called traditional law of war survives, together with the application of general principles such as *force majeure* and necessity. Under traditional views of armed conflict, the loss of Flight 655 would be non-compensable were it destroyed within the scope of the *Vincennes*' surface engagement.

571. See *supra* notes 65-69 and accompanying text.

The customary law of air and sea warfare combines neutral free passage rights with a combatant's right the use force. The older laws of free passage, visible in article 30 of the 1923 Hague Aerial Warfare Rules and article 102 of the 1939 Draft Convention on Neutral Rights, is applicable to Flight 655. Under official American views, however, these rules have been displaced by a necessary force analysis purporting to comply with the law of armed conflict. The few available land-based precedents concerning use of armed force under misapprehension of attack seem to contemplate an absolute duty. By contrast, the idea that the use of force in sea warfare is subject only to a duty of due care, as opposed to responsibility attaching to even a reasonable mistake, follows principles of probable cause that were analogized from precedents such as *The Marianna Flora* and *The Palmyra*. However, these precedents, tied specifically to the law of the sea, are out of step with modern international law and with U.S. views concerning the use of armed force.

The choice of law for Flight 655 incident can be reduced to whether a special rule should be recognized for naval warfare law on the basis of older precedents, or whether the more modern mistake rule largely articulated in land-based incidents, with the notable exception of the *Dogger Bank Incident*, should also apply to sea warfare. Overall, the better view seems to be that the general rule recognizing state responsibility in cases of the mistaken use of armed force should apply equally to incidents at sea as well as on land. The position of states before the ICAO that international civil aviation law's treaty-based safety undertakings are qualified by states' rights under the U.N. Charter, implies that these limitations arise directly out of restrictive views of the use of armed force under modern international law. Regardless whether similar principles survive on a customary law basis under the law of the sea, states' opinion indicate that for purposes of civil aviation law the general approach to the lawful use of force applies. Older maritime precedents, apparently excusing reasonable mistake in connection with the forcible seizure of foreign flagged vessels, deal with duties applicable under freedom of the high seas, rather than as restrictions on the use of armed force *per se*. In the case of noncombatant aircraft overflights of naval operations, the United States applies a lawful force analysis rather than free passage principles.

Five general policy considerations favor application of a uniform rule imposing objective responsibility for mistaken self-defense under principles governing the lawful use of force against civil aircraft. First, restrictions on the lawful use of force under modern international law favor its application to both land and sea cases. Second, no compelling reason exists for differentiating aircraft downings over water from those occurring over a state's territory. Third, it would be difficult to administer any rule attempting to distinguish between reasonable and unreasonable mistaken self-defense. Given high stress levels in anticipation of combat, a tendency to make mistakes should be

expected. This psychological predisposition is evident in both the *Dogger Bank Incident* and in the misinterpretation of objective data from Flight 655 by *Vincennes* CIC personnel. Under these circumstances either the distinction between reasonable and unreasonable mistakes would be arbitrary, or the rule would gravitate toward the position that mistakes under stress are reasonable *per se* and so state responsibility should never be recognized in cases of mistaken self-defense. Fourth, any rule avoiding state responsibility in an obvious case of mistaken self-defense would result in efforts to restrict the scope of permissible self-defense. On a long-term basis, it is preferable to admit responsibility in tragic accident cases to preserve the scope of legitimate self-defense where needed. Finally, it is unclear why the innocent airline and its passengers should bear the risk of destruction while apparently adhering to international civil aviation norms and regulations. Claims that shifting the risk of liability to the airline would help avoid tragic accidents are misguided, because they are based on the false assumption that the general danger faced by civil aircraft in a war theater does not sufficiently encourage parties to minimize the risks.

A final issue concerns whether imposing state responsibility for mistaken self-defense would change the behavior of military personnel faced with an apparent hostile threat. In other words, will imposition of state responsibility in the *Vincennes* situation encourage more *U.S.S. Stark*-type incidents? This should not be the case, unless one assumes that military commanders would change their reactions to a perceived threat. States will continue to direct their armed forces to give priority to self-protection where appropriate. In high speed multiple threat environments, military personnel will be compelled to act on imperfect information, as did the commander of the *Vincennes*. This situation may render mistaken self-defense reasonable, but that characterization is a matter of military policy rather than one possessing legal significance. Presumably, states will continue to monitor for their own purposes whether mistaken self-defense in individual instances is reasonable or involves negligence on the part of military personnel. If state responsibility were recognized under a theory that mistaken self-defense does not satisfy the legal requirements of self-defense, any situation involving the mistaken use of armed force situation would be unsuited to the imposition of international law sanctions on individuals.

B. Legal Analysis of the Flight 655 Incident

Our inquiry returns now to the Legal Adviser's original position stated in his congressional testimony, which can be subdivided into three different types of legal claims. The first, touching on the operation of the aircraft, implicates principles of free passage and regulatory competence. The second views the

causal relationship between the Iranian speedboat attack and the downing of Flight 655 as precluding claims. The third focuses on the particular situation of the *Vincennes* and its use of force.

1. *American Claims of Iranian Control over the Operation of Flight 655*

In his congressional testimony the Legal Adviser stated that "[Iran] also should not have allowed a passenger airline [sic] to fly over a battle zone -- especially not unless it was equipped and prepared to respond to our Navy's repeated warnings."⁵⁷² For these purposes, this inquiry assumes that the Legal Adviser intended his statement to be an assertion of Iran's international legal obligations under an omission analysis.⁵⁷³ Based upon similar language in the report issued after the official Department of Defense inquiry,⁵⁷⁴ the position stated by the Legal Adviser may be explored in the form of three related claims that assume the violation of an as yet unspecified duty. First, Iran knew of the ongoing surface engagement between the Revolutionary Guard speedboats and the *Vincennes*, but nonetheless permitted Flight 655's overflight. Second, Iran was negligent in permitting overflight by an airliner unequipped and unprepared to respond to the *Vincennes*' repeated warnings. Third and more generally, Iran was irresponsible in permitting Flight 655 to overfly the Persian Gulf at a relatively low altitude during a period of general hostilities.

Regarding the first claim, the facts surrounding the Flight 655 incident should be recalled. The Legal Adviser's statement implies that Iran's knowledge of the *Vincennes*' surface engagement supports a claim of an assumption of risk or a violation of a duty in knowingly permitting Flight 655 to overfly the area of combat. However, the surface engagement commenced on July 3, 1988 at 9:43 a.m. Flight 655 took off from Bandar Abbas at 9:47 a.m. and was shot down at 9:54 a.m. Given the short time, it seems unrealistic even to discuss shared responsibility unless there was prior Iranian knowledge of pending hostilities. Imputing advance knowledge is unjustified because it

572. See *supra* note 72 and accompanying text.

573. See RESTATEMENT THIRD, *supra* note 73, § 207.

574. The *DOD Report* concluded that:

Iran must share the responsibility for the tragedy by hazarding one of their civilian airliners by allowing it to fly a relatively [sic] low altitude air route in close proximity to hostilities that had been ongoing [sic] for several hours, and where [Iranian Revolutionary Guard] boats were actively engaged in armed conflict with U.S. Naval vessels.

DOD Report, *supra* note 6, at E-46. In contrast to the Legal Adviser's position, this sentiment does not as clearly state a legal as opposed to a political position. However, it provides the rationale that buttresses the Legal Adviser's general inference that Iran violated some duty in permitting Flight 655 to fly over the Persian Gulf. Otherwise, it still remains unclear what international legal duty Iran might be deemed to have violated in permitting Flight 655 to cross the Persian Gulf on A59, which is a recognized international air corridor.

analyzes the situation in a fashion that is only reasonable with the benefit of hindsight. The succession of events supporting prior knowledge presumably included: 1) the U.S. policy of providing protection to all neutral vessels as declared on April 29, 1988;⁵⁷⁵ 2) the *Montgomery's* July 2, 1988, single warning shot encouraging an Iranian gunboat to cease harassment of a neutral vessel;⁵⁷⁶ 3) the July 3, 1988, dispatch of the *Montgomery* and *Vincennes* shortly after 7:00 a.m. to investigate alleged Iranian gunboat attacks on neutral shipping;⁵⁷⁷ and 4) the Iranian fire directed toward the *Vincennes'* helicopter at approximately 9:15 a.m., which drew the *Vincennes* and *Montgomery* to the scene of the surface engagement.

Prior to July 2, the United States had never acted on the April 29 declaration of protection for neutral shipping. On July 3, U.S. naval forces actively pursued alleged Iranian attacks on neutral shipping but without significant contact prior to the artillery fire around the *Vincennes'* helicopter at approximately 9:15 a.m. It is unclear whether that Iranian fire was directed at the U.S. helicopter or was meant to warn it off,⁵⁷⁸ in which case the Iranian speedboats would not have expected a response in the form of the surface engagement thirty minutes later. The maximum warning time of the pending engagement was thirty minutes. This assumes Iran believed that an immediate armed response would be forthcoming, which had not always been the case in prior instances when it had fired around U.S. naval vessels during the Iran-Iraq War. Further, any such expectation on the part of the Iranian crew would have required communication with military authorities ashore and in turn their warning of Iranian civilian air traffic control in time to reach Flight 655. The *ICAO Report* indicated that Iran had an alert system for warning civil aircraft to avoid areas where hostilities were expected, but that no such alert was in place on July 3.⁵⁷⁹ In view of these facts, any inferences of prior Iranian knowledge of the surface engagement are sufficiently weak to make it unrealistic to fault Iran for the failure to issue a warning advising civil air traffic to avoid the area.

The claim that Iran should not have allowed Flight 655 to overfly the combat area unless it were equipped and prepared to respond to U.S. Navy warnings is directed at the operation of the aircraft. Flight 655 was equipped with radios capable of receiving IAD frequency warnings and was operating under an Iran Air directive requiring that the IAD frequency be monitored at

575. See *supra* note 18 and accompanying text.

576. See *supra* note 21 and accompanying text.

577. See *supra* note 24 and accompanying text. The *Montgomery* reported hearing radio questioning of merchant ships in the area followed by numerous explosions from the north at 7:11 a.m., but no request for help from a merchant ship was forthcoming. *DOD Report*, *supra* note 6, at E-26. At 7:12 a.m., the *Vincennes* was ordered North, closer to the *Montgomery*, to investigate these reports. *Id.*

578. See Carlson Letter, *supra* note 48, at 92.

579. See *supra* note 29 and accompanying text.

all times over the Persian Gulf. Absent recovery of Flight 655's flight recorder, it remains impossible to determine whether Flight 655 complied with and failed to recognize the challenges directed at it, or whether in the crucial moments both of Flight 655's radios were tuned to other frequencies. In any event the challenges issued to Flight 655 were not unambiguous. Failing any indication that Flight 655 received and consciously disregarded the warnings, the question becomes the issue of residual risk and then which party, either the combatant warship or the overflying civilian airliner, should bear the risk that a warning will not be received.

Since the Legal Adviser's inference of fault focuses on the equipment and operation of a civil airliner, the question presented is whether Iran really controlled these matters or whether they were determined by international civil aviation law. Under the Chicago Convention, if Flight 655 had been operating over the high seas, the only mandatory civil aviation rules would have been the ICAO Rules of the Air. In that case, ICAO and not Iranian regulations would have controlled Flight 655's equipment and operation at the time it was shot down. Since Flight 655 was downed over an international strait, a strong argument can be made that Iran similarly lacked general regulatory power over international aviation in overflight under the transit passage regime, which the United States accepts as part of customary law. Even assuming that transit passage concepts do not apply and Flight 655 had been shot down within Iranian territorial waters that are beyond the Rules' mandatory coverage, the ICAO itself encourages uniform regulation. It would seem unrealistic to expect special rules for Iran, despite Iran's legal power to set operating regulations under those circumstances. The *ICAO Report* stressed that the Flight 655 communications equipment did not malfunction and that the crew did not commit any blatant mistakes. However, at crucial moments, various reciprocal incompatibilities of equipment and procedures impeded normal communication between the *Vincennes*, Flight 655, and the responsible air traffic controllers.⁵⁸⁰

In short, Flight 655 complied with ICAO regulations. The *ICAO Report* suggested, parallel to recommendation 2.6/1,⁵⁸¹ that military equipment and communications monitoring be adapted to the civil aviation system and that the military in the area be in contact with local air traffic control centers to track and identify civilian aircraft.⁵⁸² This presents a problem in a war the-

580. The only shared radio frequency on which some of the *Vincennes*' requests for identification were transmitted was the general aviation distress frequency 121.5 Mhz (IAD). Although civilian and military forces regularly use different frequencies, Flight 655 was directed by Iran Air to monitor the IAD frequency when flying over the Gulf. Even if it had been monitoring a common frequency, the *ICAO Report* indicates that the *Vincennes*' requests were in such a form that the Flight 655 crew probably could not have identified them.

581. See *supra* note 63 and accompanying text.

582. Safety Recommendation 4.1, *ICAO Report*, *supra* note 6, at 26.

ater where cooperation among combatants or politically antagonistic parties can hardly be expected.⁵⁸³ However, as the responsible regulatory authority under international law, the ICAO may promulgate the applicable rules with a view toward preserving its general overflight regulations. Given the general recognition that only compliance with mandatory ICAO rules is required, the *ICAO Report's* "recommendation" for civil and military cooperation is merely hortatory. In any case, it would be difficult for it ever to achieve higher status, since most suggestions are directed at the conduct and equipment of military forces rather than the civil aircraft in overflight, thereby raising questions of regulatory competence and contradicting article 89 of the Chicago Convention.

The claim that Iran had an independent duty to prevent Flight 655's overflight of a "battle zone" is tenuous because of the previously noted problems in attributing to Iran timely knowledge of the ongoing *Vincennes* engagement. Were the actions of the Revolutionary Guard speedboats not legally attributable to Iran, or were the United States to encounter difficulties satisfying the evidentiary burden concerning these irregularities, it would be even more difficult to credit Iran with such knowledge. Even ignoring the issue of Iranian knowledge, traditional free passage ideas underlying the 1923 Hague Radio and Aerial Warfare Rules and the 1939 Draft Convention on Neutral Rights include the duty to warn civilian aircraft to avoid battle zones and to place the risk of a failed communication on the combatant.

To the extent that the Legal Adviser intended the term "battle zone" to be understood broadly as a war zone concept, finding fault with Iran permitting Flight 655's general transit over a war zone on a recognized international aviation route is an extraordinarily broad assertion. It would represent a marked departure from the traditional American rejection of war or exclusionary zones and of the argument that civilian traffic on (or here over) international waters is present at its own peril. Taken to an extreme, such a position might effectively close international air routes over broad geographic areas, which would neither be in the interest of the United States nor reflect a reasonable balance of civil aviation law and the rights of combatants.

Finally, the U.S. argument in faulting Iran for the operation of Flight 655 is inconsistent with its prior positions in cases involving the downing of aircraft by other countries. In 1955, an El Al airliner whose passengers included American citizens strayed over Bulgarian territory and was shot down by Bulgarian air defense forces.⁵⁸⁴ The United States condemned the Bulgarian action, asserting a breach of international obligations in downing a civilian airliner and demanding reparations. It vigorously rejected Bulgarian arguments

583. Since it believed Flight 655 to be an F-14 aircraft that had taken off from a mixed use airfield, the *Vincennes* might have feared a false civil aircraft identification as a *ruse de guerre* in a true attack situation.

584. See *supra* note 262.

that the apparent navigational error of the El Al aircraft diminished Bulgaria's responsibility in any way.⁵⁸⁵ Even were there an identifiable international law obligation that Iran neglected by permitting the overflight of Flight 655, it would be difficult to distinguish Iran's supposed neglect of its duty from the El Al flight's navigational error. An analogous argument can be made from the U.S. position concerning Soviet responsibility for the 1983 downing of Flight KE 007.

2. *American Claims of Iranian Involvement in the Downing of Flight 655*

One recalls again the Legal Adviser's congressional testimony that "[t]he Government of Iran should not have allowed gunboats to attack our vessels and aircraft."⁵⁸⁶ The Legal Adviser's statement amounts to a "but-for" argument that the destruction of Flight 655 would not have occurred absent the speedboat attack on the *Vincennes*. Assuming *arguendo* that the speedboat attack entailed a violation of Iran's international law obligations, should Flight 655's destruction be attributed to Iran because it would not have occurred but for the speedboat attack linked to Iran's own violation of its international law obligations?

Iran's violation of its obligations might lie alternatively in a failure to exercise due care in preventing its territory from being used to launch attacks by armed bands, or in the direct attribution to Iran of an unlawful armed speedboat attack on the *Vincennes*. In the first case, some publicists might reject the self-caused loss argument by distinguishing the fact that Iran's behavior constituted an omission, while the U.S. behavior involved a positive act.⁵⁸⁷ To the extent an international law duty is breached involving the use of armed force, however, it is immaterial whether the breach is affected by an act or omission. Instead, it should be recognized that the downing of Flight 655 raises concerns analogous to those faced under municipal delictual law in conjunction with assigning liability for foreseeable injuries subsequently caused by a secondary independent tortfeasor. Under a plain language interpretation, it arguably was foreseeable on Iran's part that some civil vessel or aircraft might be damaged or destroyed in hostile actions involving the speedboat attacks tolerated or organized by Iran.

"But for" causation theories are suspect even under municipal delictual law, so any analogous argument in international law should be subject to close examination. The question must also be asked whether the special nature of

585. See Briggs, *United States v. Bulgaria: Domestic Jurisdiction and Sovereign Determination of Legal Irresponsibility*, MÉLANGES OFFERTS À HENRI ROLIN 13, 14-15 (1964).

586. See *supra* note 72 and accompanying text.

587. See *supra* note 495 and accompanying text.

states in international law precludes a foreseeability-type analysis, assigning responsibility for another state's behavior.

The attribution approach of modern international law, which requires an individual's act to be imputed as a condition for state responsibility, seemingly militates against recognizing responsibility for the act of another independent state. The traditional rejection of *respondeat superior* as the basis for state responsibility casts doubt on any vicarious assignment of responsibility. However, the available precedent is less clear. On the one hand, common sense and numerous cases incorporating the principle of individual responsibility indicate that a state may only be held responsible for the acts of others in exceptional circumstances.⁵⁸⁸ "But for" causation here would be deemed insufficient, as in the 1926 *Mendel Case*,⁵⁸⁹ in which the German-American Mixed Claims Commission declined to award compensation literally permitted under the Treaty of Versailles against Germany based on the principle of individual responsibility.

On the other hand, omissions cases by nature involve injury at the hands of a third party. Here we recall the Legal Adviser's apparent view that the speedboat attack on the *Vincennes* was tied to Iran under an omissions analysis. Drawing on the *Alabama* arbitration,⁵⁹⁰ one could argue that, had the speedboat attack resulted in the sinking of the *Vincennes*, reparations for Iran's breach of its obligations would include compensation for the loss of the *Vincennes*. This would involve Iranian liability for damages resulting from the acts of armed bands whose acts are not expressly attributable to Iran. Although the attacks of the Confederate raider on shipping were also not formally attributable to Great Britain in the *Alabama* precedent, Britain was found responsible for violating its obligations as a neutral party in permitting the raider to be outfitted in British shipyards. In the context of Flight 655, Iran's obligations attaching to territorial sovereignty would be equivalent to Britain's obligations as a neutral since the mistaken downing of a civilian aircraft in defending against the speedboat attack is no less foreseeable than the sinking of merchant ships by the *Alabama* as a foreign raider. Permitting recovery for these injuries attaches liability for the acts of a foreign state under an implicit foreseeability analysis.

Given the general rule of individual state responsibility, the mere foreseeability of harm to innocent parties resulting from the response of one state to the breach of international law obligations by another cannot be sufficient to create responsibility for the acts of the other state. However, strict adherence to the rule of individual state responsibility may be misplaced when the state that failed to observe its international law obligations caused the injurious

588. See, e.g., B. CHENG, *supra* note 500, at 208-14.

589. See *id.* at 211-12.

590. See *supra* note 77.

behavior. One approach might differentiate between injury to the interests of an uninvolved third state and injury to the interests of that state whose unlawful act or omission led to the foreseeable injury, based upon the concept that an uninvolved state could not avoid the injury. Another approach might examine the question whether the unlawful acts or omissions of the two states are qualitatively different. Yet in the present case the use of armed force was effectively connected to the behavior of both states and any such balancing would be subjective.

While there is no formulaic answer,⁵⁹¹ in the case of Flight 655 it appears preferable to maintain the general rule of individual state responsibility. Given the inherent danger involved in any use of armed force, it seems wisest to choose the approach that encourages states to be most conservative even in its lawful use. This appears more likely if states remain responsible for the results of their use of armed force,⁵⁹² even where its usage is causally related to another state's violation of its international law obligations.⁵⁹³ Under this view, the United States would be responsible for the downing of Flight 655 even if the speedboat attack were attributable to Iran as a matter of international law. However, this would not foreclose a claim against Iran based on the injury suffered by the United States as a result of a speedboat attack attributable to Iran or Iran's failure to use due care in preventing armed bands from misusing Iranian territory as a base for attacks on neutral shipping in international waters.⁵⁹⁴

3. American Claims of Necessary Force and Reasonable Mistake

While the analysis articulated in the Legal Adviser's congressional testimony speaks of the downing of Flight 655 as involving "lawful force," it also

591. Continental theorists have made preliminary attempts to establish consistent rules under varying causal patterns in connection with a determination of when to deny the illicit nature or wrongfulness of a state's conduct. See, e.g., Salmon, *Les circonstances excluant l'illicéité*, *RESPONSABILITÉ INTERNATIONALE* 89, 208-25 (P. Weil ed. 1987) (category entitled "La faute de la victime fait suite causalement à l'acte illicéité"); B. BOLLECKER-STERN, *LE PREJUDICE DANS LA THEORIE DE LA RESPONSABILITÉ INTERNATIONALE* (1973); J. PERSONNAZ, *LA REPARATION DU PREJUDICE EN DROIT INTERNATIONAL PUBLIC* (1939). While the collection and categorization of precedents is useful, it is doubtful whether analytic rules of any greater predictive value than the foreseeability or proximate causation rules of municipal tort law can be derived from such an analysis.

592. This is subject to the caveat that other international law principles could apply, such as the noncompensability of war losses within the scope of an otherwise lawful engagement. Therefore, mere responsibility will not automatically lead to state responsibility for reparations.

593. Cf. *Waima Incident*, *supra* note 369 (France would be held liable even for death and wounding of British soldiers by their own gunfire once France was held responsible for causing incident).

594. Here the largely consensual nature of the ICJ's jurisdiction might create difficulties, since jurisdiction over the Flight 655 incident arises out of civil aviation treaty law. In addition, once the ICJ asserts jurisdiction over an isolated incident, the criticized state may seek to expand the controversy to encompass general relations between the two states. In this fashion, Iran tried to expand the issues before the ICJ in the *Hostage Case* by introducing a long list of grievances relating to U.S.-Iranian relations during the Shah's reign.

draws upon prior expressions of naval policy and U.S. government views of international law in arguing that under a "necessary force" rationale a neutral aircraft is at risk of destruction if it fails to follow the command of a combatant warship to change course.⁵⁹⁵ While ambiguous, the asserted analysis on its face claims legitimacy under the traditional laws of warfare.

However, this justification is inaccurate in its assertion that reasonable mistake in the exercise of putative self-defense will not lead to state responsibility. As such, it confuses the question of whether a mistake is reasonable with the issue of whether a state is responsible for any injury resulting from the mistake. Although the character of the mistake may be important for a state in determining whether to take disciplinary action against its responsible military officers, the negligence question has been separated from legality and state responsibility issues ever since the *Dogger Bank Incident*.⁵⁹⁶

This inquiry has attempted to demonstrate that traditional law evaluated responsibility for the loss of innocent life or property under one of two unrelated analyses: 1) principles governing the uncompensated destruction of the property of neutrals, and 2) principles governing responsibility for the use of force under misapprehension of attack. Modern precedents in the area of mistaken self-defense do not differentiate between reasonable and unreasonable mistakes. Since the United States argues the destruction of Flight 655 to be "incidental" to the surface engagement of the *Vincennes*, it would treat the downing as a noncompensable war loss. Despite Iranian claims before the U.N. Security Council and the ICAO Council that the *Vincennes* knowingly shot down a civilian airliner, the facts do not support this claim. Both the official Department of Defense and the neutral ICAO investigations concluded that Flight 655 was shot down when it was mistaken for an Iranian military aircraft manifesting hostile intentions against the *Vincennes*. This sharp disagreement on the facts may have carried over into a faulty legal conviction that state responsibility would not attach to Flight 655's destruction if only the mistake were reasonable.⁵⁹⁷

Viewing the events of July 3, 1988 through the eyes of the *Vincennes*' commander, his ship was caught up in a surface engagement with Iranian Revolutionary Guard speedboats. His mistake was in extending the engagement to an aerial one when faced with an Iranian P-3 aircraft claiming to be engaged

595. This is already apparent in the 1941 *Tentative Instructions for the Navy*, but becomes more strongly expressed in the 1955 *Law of Naval Warfare* and the 1989 *Annotated Commander's Handbook*. See *supra* notes 207-11, 220-34 and accompanying text.

596. Cf. cases cited *supra* note 101.

597. To the extent the Flight 655 incident has been discussed in the sophisticated military press, there is evidence of a muted debate conducted in terms of whether the *Vincennes*' actions were reasonable. See sources cited *supra* note 48. The Department of Defense investigation concluded that the actions of the *Vincennes*' commanding officer were taken within the parameters of the rules of engagement. See *supra* note 251. This question, however, obscures the international law issue.

in a routine search mission but exhibiting "targeting behavior," and an unidentified aircraft bearing down directly on the *Vincennes* and the *Montgomery* and behaving as though it were an attacking F-14 aircraft. Since he misconceived the tactical situation, later analysis should not rely on his error to extend the scope of the existing surface action.⁵⁹⁸ Under these circumstances, Flight 655 was destroyed outside of the scope of the surface engagement that defines the traditional limits of noncompensable damage and under circumstances not rendering it a fortuitous event under international law. Absent justification for self-defense and the use of force, the United States will fail to make a showing necessary to prove that its actions were lawful under the U.N. Charter, which qualifies obligations under international civil aviation law not to use weapons against civilian aircraft. Subject to offset under related claims against Iran, the United States violated international civil aviation principles under the Chicago Convention and related customary law, with the result that it owes appropriate reparation for its breach of international obligations.

C. *Uniform Rules Over Land and Sea*

The above analysis of the Flight 655 incident treats separately its destruction under traditional ideas of incidental war damage and the use of armed force in situations of mistaken self-defense. Incidental damage ideas are holdovers under *force majeure* and necessity principles from the older law of war and should not apply to the typical unauthorized peacetime overflight of a state's territory by a foreign civilian airliner. However, if the downing of an aircraft over international waters can be analyzed doctrinally as mistaken self-defense, and therefore as an unlawful use of force problem without regard to freedom of the seas principles or special rules of airspace jurisdiction under the Chicago Convention, the analysis should also apply to the downing of civilian airliners over land. As a formal matter, the Chicago Convention and related law prohibiting the use of weapons against a civil airliner would apply, subject to a state's rights under the U.N. Charter.

There are two potential difficulties with the application of the unlawful use of force analysis. First, states and publicists adhering to a textualist view of self-defense under U.N. Charter articles 2(4) and 51 will have difficulty applying an international law self-defense concept within their state's borders. They may agree that protective measures taken on the high seas are governed by self-defense principles. Despite state practice in ICJ proceedings and before the ICAO relating to aircraft downings, publicists espousing these views tend to argue that the downing of civil aircraft over a state's territory is more

598. The mistake is not necessarily personal in nature, because the officer in question presumably followed the still classified rules of engagement imputing hostile intent. *Id.*

properly characterized as a human rights problem. Beyond Flight 655's posture as a limited conflict incident, this position distinguishes between the Flight 655 and Flight KE 007 situations on the basis that the prohibition on the use of armed force under the U.N. Charter does not bind a state within its own borders.⁵⁹⁹ It turns on issues of Charter interpretation, which as this inquiry indicated favors the customary law approach under a restrictive self-preservation rationale. Second, the objection may be raised that any application of such principles would invade matters essentially within the domestic jurisdiction of a state under article 2(7).⁶⁰⁰ Yet this position misconstrues article 2(7), which bars only U.N. actions as opposed to specifying what matters are beyond international law; it also ignores modern human rights principles and traditional state responsibility law that protect aliens within a state's borders. Technical arguments based on civil aviation treaty law could claim that a state's power to regulate the airspace over its territory does not necessarily imply that the airspace is part of its territory.⁶⁰¹ Those favoring a human rights analysis might also argue that the same result would be reached regardless of whether human rights or self-defense principles were to govern these situations. However, this viewpoint does not consider the unsettled nature of human rights law,⁶⁰² which cannot supply ready rules to govern state conduct and would abandon the traditional focus of air law on regulating aircraft rather than passengers.

Neither of the two potential difficulties mentioned above is compelling, and self-defense would provide a uniform approach benefitting international civil aviation. Both objections ignore the fact that the issues exist largely beyond the U.N. Charter, as generally regulated by international civil aviation treaties and related law. As witnessed by the views of states expressed before the ICAO, international civil aviation law and the Chicago Convention both establish the general rule that weapons may not be used against civil airliners,

599. See, e.g., DIE GRENZEN DES VÖLKERRECHTLICHEN GEWALTVERBOTS, *supra* note 267, at 67-68 (Hailbronner paper); see also ICAO Extraordinary Assembly, *supra* note 256, at 25-26, 35, 37, 72 (statements of delegates of the USSR, Bulgaria, Cuba, and Vietnam, stressing ideas of national sovereignty over territorial airspace). In this context, the reaction of various states to humanitarian intervention assisting Kurds in Iraq does not appear promising. See S.C. Res. 688, U.N. Doc. S/RES/688 (1991) (LEXIS, Nexis library, Wires File); Security Council Demands Iraq End Repression of Civilians, Xinhua Gen. Overseas News Serv., Apr. 5, 1991 (LEXIS, Nexis library, Wires file); Soviet Foreign Ministry Press Centre Briefing on Current International Affairs, Fed. Information Systems Corp., Apr. 12, 1991, (LEXIS, Nexis library, Wires file).

600. See sources cited *infra* note 603.

601. The formal question whether the territorial airspace regime would follow the free passage analogy of the high seas or the strict sovereignty analysis of land territory was definitively resolved in article 1 of the 1919 Paris Convention and later adopted in article 1 of the Chicago Convention. Goedhuis, *supra* note 88, at 214. Despite the sovereignty formulation, however, some free passage rights might be inferred based on linguistic arguments. See, e.g., *id.* at 209-10. The full assertion of sovereignty also might be challenged under the abuse of rights doctrine. See, e.g., J. BENTZIEN, *supra* note 255, at 9-11.

602. The chief benefit of a human rights analysis is that it might encompass foreign and domestic aircraft as well as persons. Therefore, it might provide the basis for applying the rules of self-defense.

subject to limitations under U.N. Charter provisions. However, it does not appear that the Chicago Convention intended to surrender ultimate safety concerns by granting a state control of aircraft in the airspace above its territory. The acknowledged ability of a state to promulgate airspace regulations and to punish deviations simply does not equal its ability to destroy aircraft without legally sufficient cause. Under these circumstances, international law will at least prevent destruction of a foreign airliner when it would be disproportionate to the harm caused by a violation of airspace regulations.⁶⁰³ The disproportionate character of the destruction is not determined by whether airspace regulations were actually violated, but rather focuses on the basis on which these regulations were disobeyed. Satisfaction of the high standard of self-defense as generally governing restrictive modern views of the use of force should be required before denying state responsibility in cases where a foreign civil airliner is destroyed.

The final question involves how a state should react to an aircraft creating a potential self-defense situation when it ignores attempts to be contacted or when it fails to follow instructions. Partly as a result of the Flight 655 incident, the ICAO has proposed that belligerents should cooperate more fully with local air traffic control and has already issued guidelines under annex 2 to govern interception of civil aircraft. Both proposals generally assume that an aircraft is responsive to external communications. However, the ICAO's regulatory competence to govern more than the operation of the civil aircraft is questionable.⁶⁰⁴ Thus, a state's reaction to a nonresponsive civil aircraft is not governed by current civil aviation treaty law. Under self-defense principles, it may be difficult for a state to prove the requisite necessity and proportionality when an aircraft does not respond to radio challenges and absent recovery of the flight recorder, as with Flight 655. Concerns about receipt of warnings with a reasonable time to react may be addressed by a rebuttable presumption that any warning given was inadequate or not received. A state could then prove either under a preponderance of the evidence standard that an adequate warning was actually received in a timely fashion, or under a clear and convincing evidence standard that constructive receipt of an adequate and timely warning should be inferred. Under such a formulation, mere transmission of warnings should not be viewed as minimally sufficient unless given on frequencies that, under the applicable civil aviation regime, must be monitored at that time by the aircraft. Further, the warning should be sufficiently specific and directed at the particular aircraft in a form reasonably recognizable by its crew in

603. This approach has been suggested by Cheng, *supra* note 109, 259, at 71-72 (general principle that use of deadly force against an alien for a minor violation of a state's municipal law violates international law). See also ICAO Extraordinary Assembly, *supra* note 256, at 29 (British delegate's references to arbitral decisions of U.S./Mexico Claims Commission in 1920s and *I'm Alone* case).

604. See *supra* notes 268-74 and accompanying text.

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considering relevant factors such as the number of surrounding aircraft and their distances to the challenged aircraft. ICAO-recommended formulations would satisfy such a standard. Even if there is no absolute liability for the downing of a civilian aircraft over any territory, the interests at stake justify assigning a high burden of proof to the party denying state responsibility by pleading self-defense under modern use of force law.

The focal point of the proposed standard is that mistaken self-defense does not excuse the use of armed force. Since a state's alleged exercise of self-defense under international law is not self-judging, its conduct in shooting down unauthorized civilian aircraft within its airspace should be subject to review, and indemnity should be imposed in the case of mistaken self-defense.

