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George S. Robinson

MILITARY REQUIREMENTS FOR INTERNATIONAL AIRSPACE: EVOLVING CLAIMS TO EXCLUSIVE USE OF A *RES COMMUNES* NATURAL RESOURCE

GEORGE S. ROBINSON†

Increasing variations in the use of airspace for aeronautical purposes, communications, space activities, and ballistics testing are limiting quite rapidly the availability of this heretofore uncomplicated natural resource. Navigable, and otherwise useable, airspace has become such a high-demand environment for many technologically advanced countries[1] that frequent resort to international airspace for unilateral objectives, previously accommodated within domestic airspace, is becoming increasingly evident. An intricate and subtly shifting pattern of national claims to certain uses of international airspace is evolving which indicates a de facto patchwork of seemingly surreptitious appropriations of such airspace. The appropriations, or claims, often are conflicting in nature and are leading to problems of international law which will become progressively acute as unobstructed airspace decreases proportionately with an increase in its use.

I
ANALOGY OF THE HIGH SEAS

In many respects the evolving control exercised by some states over portions of international airspace is analogous to the comparatively recent national claims to new uses of the high seas permitted by recent discoveries of oceanographic resources, and the advanced technology providing access to them.[2] Claims over portions of the high seas probably were first premised upon sovereignty during the

†Assistant General Counsel of the Smithsonian Institute; LL.B., University of Virginia; LL.M., McGill University; DCL, McGill University.

1. In this respect, England is a large user of international airspace for domestic purposes because it is a technologically advanced country and one with comparatively nominal sovereign airspace. The United States, although possessing a fairly large area of sovereign airspace, finds that resource diminishing rapidly due to its technological advancement and a high proportion of the population participating in various uses of the domestic airspace. Strategic locations of high, but geographically sprawling, population concentrations are forcing both civilian and military airspace users into the international arena.

2. For excellent discussions of the law and new areas of interests in the oceans as economic and political resources, see Griffin, *The Emerging Law of Ocean Space,* 1 The Int'l Lawyer 548-587 (1967); Morris, The North Sea *Continental Shelf: Oil and Gas Legal Problems,* 2 The Int'l Lawyer 191-214 (1968); Ely, *American Policy Options in the Development of Undersea Mineral Resources,* 2 The Int'l Lawyer 215-223 (1968); and Christy, Jr., *A Social Scientist Writes on Economic Criteria for Rules Governing Exploitation of Deep Sea Minerals,* 2 The Int'l Lawyer 224-242 (1968).

Medieval period when maritime-oriented nations such as Venice, England, and Denmark professed exclusive competence over certain areas of the oceans. The first relatively "contemporary" manifestation of this type of claim is found in the Papal Bulls of 1493 which attempted practical distinction between certain Portuguese and Spanish rights by establishing a line of demarcation 100 leagues west of the Azores and Cape Verde Islands. In the latter part of the 16th century the Portuguese and Spanish claims were disputed by Queen Elizabeth I on the principle that, in accordance with the dictates of *jus naturale,* the air and seas were *res communis.*[3]

In 1609, the famous politico-legal argument prepared by the Dutch jurist, Hugo Grotius, entitled *Mare Liberum,*[4] was published anonymously.[5] Essentially, the argument introduced the concept that freedom of the seas was a recognized principle of the law of nations.[6] Subsequent support was given the concept by other jurists and publicists who provided their own variations of rationale to substantiate the principle. Through the ensuing years of maritime commerce, the principle of freedom of the seas was accepted formally by all nations as an integral element in international relations, and as a binding principle of law. Politico-economic expediency and experience gave rise to subsequent modifications of the principle, most of which involved conflicts of jurisdiction over vessels and certain acts committed on the high seas. Recently, the modifications have derived primarily from economic interests in non-maritime resources of the seas and subjacent land masses.[7]

By 1945, President Harry S. Truman formally recognized the technological capacity to exploit the vast submarine resources by extending United States control and jurisdiction over its continental shelf.[8] According to William Griffin,

> [b]y 1958 some 20 states had claimed rights in their continental

3. For an interesting summary of various claims to sovereignty over portions of the seas, *see* Rapport de J.P.A. Francois, Rapporteur special, 17 mars 1950, U.N. Doc. A/CN. 4/17, published in II Yearbook of the Int'l L. Commn. 36-38 (1950).

4. *See* H. Grotius, The Freedom of the Seas (Maggafin transl).

5. It should be noted that Grotius relied heavily upon the principles expounded by Franciscus de Vitoria; *see* Franciscus de Vitoria, De Indis et Der Iure Belli Reflections (Bate transl.; Nys ed. 1917).

6. For a general historical observation of this principle, *see* M. Whiteman, 4 Digest of International Law 501 (1965).

7. Maritime law has evolved to the point where coastal states exercise varying degrees of jurisdiction (from total to enforcement only) over internal waters, territorial seas and the contiguous zones of the high seas. There is no reasonable dispute today regarding the existence of these zones, but their geographic and jurisdictional extent are most emphatically at issue in several instances.

8. Presidential Proclamation No. 2667, 59 Stat. 884.

> shelves varying from special and limited jurisdiction to sovereignty of the shelf and its superjacent high seas. In view of this explosive situation . . . the United Nations decided to take action. [9]

Ultimately, the Eleventh General Assembly of the United Nations approved a proposal by the International Law Commission to hold a conference to consider all aspects of the problem.[10] The Conference convened in Geneva in 1958, realized the extensive range of conflicting maritime interests between states and geopolitical regions, and set about adopting four pertinent conventions involving (1) The Territorial Sea and the Contiguous Zone,[11] (2) The High Seas,[12] (3) Fishing and Conservation of the Living Resources of the High Seas,[13] and (4) The Continental Shelf.[14] For present purposes, it may be said that the conventions covered the traditional division of the oceans into four zones, plus three new areas of interest:

> (1) internal waters, (2) territorial sea, (3) continguous zone (law enforcement) . . . (4) high seas . . . (5) continental shelf, (6) contiguous zone (fisheries), and (7) deep sea bottom.[15]

The conventions resulted in a complex legal fabric designed to resolve conflicting interests caused by a variety of uses of ocean space. To the extent that there has been a formal multinational recognition of these issues, resolution of conflicts within a legal framework is quite likely.[16] Unfortunately, although the circumstances are closely analogous and often interrelated, this does not appear to be the case regarding the increasing variety of uses to

9. Griffin, *supra* note 2, at 549-550.

10. *See* Report of the International Law Commission covering the work of its eighth session, 23 April-4 July 1956.

11. Convention on the Territorial Sea and the Contiguous Zone, Apr. 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639.

12. Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200.

13. Convention on Fishing and Conservation of Living Resources of the High Seas, Apr. 29, 1958, 17 U.S.T. 138, T.I.A.S. No. 5969.

14. Convention on the Continental Shelf, Apr. 29, 1958, 15 U.S.T. 471, T.I.A.S. No. 5578.

15. Griffin, *supra* note 2, at 553.

16. *See* specifically, Article 5 of the Convention dealing with the continental shelf, *supra* note 14. Griffin concludes in *The Emerging Law of Ocean Space, supra* note 2 at 578, that "[i]n most situations an absolute choice between conflicting uses will most likely not be necessary. More likely, the problem will be the reasonable accommodation of specific conflicting uses when all relevant factors are taken into account. The relevant factors would include: (1) The relative economic importance of the conflicting uses to the states concerned. (2) The economic effect of any change on the interested states. (3) The availability of alternative locations. (4) The availability of alternative techniques. (5) The long range benefits or detriments to be derived from a particular solution. For the most part, these factors also may be considered in the resolution of conflicting interests in the use of international airspace. However, for the present, there is a lack of coordinated effort to consider these conflicts in a common forum, especially where military uses are involved.

which international airspace is being subjected; specifically, the uses required by military missions.

At this point, it is important to examine some of the military uses of international airspace in order to define the extent of their incursion upon, and increasing conflict with, civil aeronautical uses of such airspace. Since the United States is one of the largest military users, emphasis is placed upon the activities of that country.

II
"WARNING AREAS" OF THE UNITED STATES

Pursuant to the provisions of the Chicago Convention on International Civil Aviation[17] and the Annexes established by the International Civil Aviation Organization (ICAO),[18] the United States has notified the Organization that it employs the terminologies of "Caution Area" and "Warning Area" as well as the "Prohibited Area" and "Restricted Area" recognized in the ICAO Standards and Recommended Practices.[19] A caution area is defined as

> [a]n area in which there is a visible hazard to flight or navigation *generally equivalent* to the ICAO "danger area." (Emphasis added.)[20]

A warning area is defined as

> [a]n area located more than three nautical miles beyond the shoreline of the United States in which a hazard (generally invisible) to aircraft in flight exists.

By definition, warning areas encompass airspace other than sovereign airspace of the United States, but excluding sovereign airspace of another state in accordance with articles 1 and 2 of the Chicago Convention.[21] Concisely, United States warning areas involve portions only of international airspace and/or the high seas.[22] Gen-

17. Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, T.I.A.S. No. 1591; [hereinafter referred to as the Chicago Convention].

18. ICAO is a United Nations expert organization created by the Chicago Convention; the Annexes encompass, essentially, the Standards and Recommended Practices (SARPs) of the Organization.

19. For definitions of *prohibited* and *restricted* areas, *see* Supp. to Annex 15, 3rd ed., p. 15.

20. The ICAO defines "danger area" as "[a]n airspace of defined dimensions within which activities dangerous to the flight of aircraft may exist at specified times."

21. Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180-1181, T.I.A.S. No. 1591.

22. Part II, Article 26 of the 1956 Report of the International Law Commission on the Law of the Sea, sets forth, in part, the following definition of the high seas:

"Article 26

erally, these areas are depicted cartographically as being used for military activities ranging from test firing of air-to-surface and subsurface rockets, missiles, machine guns and torpedoes, to intensive aerial combat training at supersonic and subsonic speeds.[23] For purposes of determining whether these activities are acceptable according to customary international law or treaties, a glance at the history of such activities in the international arena is helpful.

III
FREEDOM OF THE HIGH SEAS DOCTRINE–INTERNATIONAL RIGHT WITH A RESTRICTIVE USER

C. J. Colombos has stated that although the principle of the freedom of the high seas is universally recognized,

> [i]t does not follow . . . that because no jurisdiction is enjoyed by any State on the high seas, that the community of nations is not entitled to provide, by international agreement, binding rules on the proper use of the sea to the greatest possible advantage of all States and also for the purpose of establishing a legal order in and over it.[24]

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1. The term 'high seas' means all parts of the sea that are not included in the territorial sea . . . or in the internal waters of a State.
2. Waters within the baseline of the territorial sea are considered 'internal waters'."

Report of the International Law Commission covering the work of its eighth session, 23 April-4 July 1956, 11 U.N. GAOR, Supp. 9, at 23-24, U.N. Doc. No. A/3159; II Yearbook of the International Law Commission 253, 277-278 (1956). *See also,* article 1 of the Convention on the High Seas concluded at Geneva in 1958, which states "The term 'high seas' means all parts of the sea that are not included in the territorial sea or in the internal waters of a State." Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312 at 2314, T.I.A.S. No. 5200. *See also* Grotius, De Juri Belli ac Pacis 190-191 (Kelsey transl. 1646 ed); Vattel, Law of Nations 106-110 (Fenwick transl. 1758 ed.).

23. An example composite description on aeronautical and hydrographic charts of U.S. Warning Area activities might appear as follows:

> Air-to-air firing of rockets, missiles and machine guns; air-to-surface and to subsurface firing of rockets, missiles, machine guns, and torpedoes; bombing with all types of ordnance; combat air training at super- and sub-sonic speeds using all altitudes, A.S.W. search and attack, including searchlight and flares; Ground Controlled Intercepts by surface ships; Air-Controlled Intercepts by controlling aircraft; acrobatic training; aircraft test and development; drone launchings and recoveries.

Activities affecting land, seas, and air might include the following:

> *ships*–Rocket, missile, artillery and small arms fire; searchlight and flare operations; surface to subsurface torpedo firing; subsurface to surface firing; subsurface to air firing; *shore installations*–Space launchings; artillery, rocket, missile firing.

24. C. J. Colombos, International Law of the Sea 60 (4th ed. 1959). As will be discussed at a later point, the binding rules of international airspace, as with the high seas, studiously avoid state aircraft by virtue of Article 3 of the Chicago Convention.

From the earliest naval armadas and commercial shipping fleets to the "quarantine" of Cuba in 1962 by the United States,[25] freedom of the high seas as a practical principle of law has withstood innumerable cases involving application of the principle, juridically considered in both domestic and international forums.[26]

The most authoritative contemporary manifestation of the principle can be seen in article 2 of the Geneva Convention of the High Seas of 1958, which provides that:

> The high seas being open to all nations, no State may validly purport to subject any part of them to its sovereignty. Freedom of the high seas is exercised under the conditions laid down by these articles and by the other rules of international law. It comprises, *inter alia,* both for coastal and non-coastal States:
> (1) Freedom of navigation;
> (2) Freedom of fishing;
> (3) Freedom to lay submarine cables and pipelines;
> (4) Freedom to fly over the high seas.

An integral part of this article is that freedom of the seas, as defined, is a qualified right. For all practical purposes, once a right is qualified by recognized conditions, it becomes a *privilege* when exercised within the framework of those conditions. Insofar as the 1958 Convention relates to military activities of a state on, beneath, and above the surface, the right, or privilege, to conduct these activities is subject to observance of certain conditions designed to protect corresponding privileges of other states. In this respect, the important words of article 2, as quoted above, are ". . . no State may *validly purport* to subject any part of . . . (the high seas and superjacent airspace) to its sovereignty." To the extent this Convention is controlling, there can be no acquisition of rights on, below and over the high seas which are tantamount to the exercise of sovereign jurisdiction. Although a legal definition of what constitutes the exercise of sovereign jurisdiction is not essential to the present discussion, the significance of article 2 lies in the real possibility of evolving customary international law which recognizes total de facto military control over portions of airspace without the necessity of attempting to claim sovereign jurisdiction.

25. For a general discussion of military impositions on the use of international airspace, including the United States "quarantine" of Cuba in 1962, *see* F. Fidele, Peacetime Reconnaissance from Airspace and Outer Space: A Study of Defensive Rights in Contemporary International Law (thesis submitted for L.L.M. degree, McGill University, Montreal 1965).

26. M. Whiteman, *supra* note 6, at 501-528, for discussion of cases pertaining to exercise of jurisdiction over the high seas, and uses thereof, by States.

IV
INCREASING USE OF THE HIGH SEAS AND SUPERJACENT AIRSPACE BY THE MILITARY IN TIMES OF PEACE

Since the doctrine of "freedom of the high seas" is respected universally only in times of peace, it is impertinent to evaluate here the merits of various claims to limited or exclusive competence which pivot upon such national security concepts as "self help," "self defense," "self protection," "self preservation," "right of necessity," "special police measures," and "general security." Not only are these terms still highly amorphous, vis-a-vis workable and definitive parameters, but also the very exceptions to the freedom of the high seas doctrine are so numerous as to virtually bury the doctrine itself.[27] Additionally, the nature of peacetime military activities of concern (*e.g.*, essentially those of the nature being executed in United States warning areas) does not encompass the doctrines of "piracy and the right to approach,"[28] "hot pursuit,"[29] "Pacific blockade,"[30] "neutrality,"[31] "self protection,"[32] "air defense identification zones,"[33] "zones of special responsibility,"[34] and the like. Since the earliest times of ocean sailing, it has been recognized that states have not only used the high seas for commercial purposes, but major naval states have also asserted the right to use certain areas (exclusively as well as concurrently) for peaceful military exercises, such as general fleet maneuvers, gunnery practice, etc. Until advanced technology permitted the introduction of aircraft, long-range ballistics and other more sophisticated missiles into the arena of international airspace, scattered naval exercises and limited cannon ranges posed no significant or lasting threat to the rights of other users of the high seas.[35] However, there has been an increase in the

27. *See,* therefore, McDougal and Schlei, *The Hydrogen Bomb Tests in Perspective: Lawful Measures for Security,* 64 Yale L.J. 648, 681 (1955). *See also* generally Higgins & Colombos, International Law of the Sea (2nd ed. 1951).

28. *See* Research in International Law, Harvard Law School, *Part IV–Piracy,* 26 Am. J. Int'l L. Supp. 739-747 (1932). *See also* case of the S.S. "Lotus," [1927] P.C.I.J., Ser. A. No. 9.

29. *See* II Hackworth, Digest of International Law 700-709 (1941); Williams, *The Juridicial Basis of Hot Pursuit,* XX British Yearbook of International Law 83-97.

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

31. 1 Hackworth, Digest of International Law 660-663 (1940), wherein claims of a State are discussed regarding a protective zone wider than 3 nmi. for purposes of enforcing its neutrality laws and regulations.

32. *See* Jennings, *The Caroline and McLeod Cases,* 32 Am. J. Int'l L. 82-99 (1938).

33. *See* McDougal, Lasswell and Vlasic, Law and Public Order in Space 307-310 (1963).

34. *Id.* at 307-311.

35. For a general discussion, *see* McDougal and Burke, The Public Order of the Oceans: A Contemporary International Law of the Sea 592, 754-755, 768-773, 786-787, 788 (1962).

variety of uses to which the seas and superjacent airspace are put. Further, the speed of the vehicles and implements involved has diminished unobstructed international airspace much more dramatically than the exploitation of newly discovered marine and submarine resourses has presented obstacles to comparatively free ocean navigation and other established maritime practices.

During the past few years the degree of weaponry sophistication (speed, lateral and vertical distance capabilities, etc.) has progressed to the point where the need to test such military ordnance (and to attain and maintain proficiency in the use of them), accompanied by the rapid diminution of available domestic airspace, has necessitated almost constant use by the United States, among others, of vast portions of the high seas and superjacent airspace. McDougal and Burke recognized this recent geographical and numerical expansion of peacetime military activites on, under, and over the high seas and observed some of the consequent conflicts of interest with non-military users and some of the corrective measures attempted:

> With the increased range of naval guns and coastal artillery, and the appearance of increasingly dangerous devices of naval warfare, states with extensive naval forces found it necessary to institutionalize some of their peacetime defensive activities in order to minimize conflict between such activities and commercial navigation and fishing. . . .
>
> Naval powers therefore began the practice of conducting their more dangerous maneuvers and defensive activities in circumscribed areas, selected with a view to the least possible interference with navigation and fishing. Mariners throughout the world were advised, through national hydrographic offices and other channels of information relating to navigation, that designated areas would be unsafe for navigation either *indefinitely* or at certain times. (Emphasis added.)[36]

McDougal and Burke additionally note that naval powers such as the United Kingdom, Canada, Australia, and the Soviet Union, as

36. *Id.* at 769. *See also, Recent Developments Affecting the Regime of the High Seas,* address by Legal Adviser Phleger, Department of State, before the American Branch of the International Law Association, New York, N.Y., May 13, 1955, XXXII Department of State Bulletin, 934 (1955), wherein it was stated at 934-935:

> "Freedom of the seas as a principle of international law means that the open sea is not, and cannot be, under the sovereignty of any state. It signifies that in time of peace vessels may not be interfered with on the high seas. To this principle there are certain limited exceptions. Thus, it has long been recognized that a state may suppress piracy. It may seize a vessel flying its flag without authority. The right of hot pursuit is accepted. The enforcement, on the part of coastal states, of revenue and sanitary laws is recognized. Finally, in this modern age, the right of a state, for defense or security purposes, to take *preventive* measures on the high seas is in process of development." [Emphasis added.]

well as the United States, have undertaken to establish various areas of special interest in and over the high seas for the purpose of peacetime military activities.[37]

V
EXCLUSION OF MILITARY USE OF THE HIGH SEAS FROM DEFINITIVE INTERNATIONAL REGULATIONS

At the 1958 Law of the Sea Conference a series of events occurred which indicate an acceptance of internationally unregulated use of the high seas for military maneuvers and related training exercises. The Soviet Union, in order to confine exercise areas at least to some degree, submitted a proposal to amend draft article 27, defining freedom of the seas, by adding the following sentence:

> No naval or air ranges or other combat training areas limiting freedom of navigation may be designated in the high seas near foreign coasts or on international sea routes.[38]

McDougal and Burke note that the Bulgarian representatives asserted that the Soviet proposal was designed to prohibit the designation of military-use areas for extensive periods of time,[39] thereby effectively closing off large portions of the high seas to non-military air and sea navigation. However, the authors went on to conclude that

> [t]his great concern for unobstructed navigation did not seem to move other delegations, and even in its limited form the Soviet proposal attracted very limited support. Thirteen States, however, only four of them from outside the Soviet bloc, supported the measure, and forty-three voted against it. . . .[40]

Obviously, this incident was a confirmation of the principle that all nations are free to use the high seas and superjacent airspace for the purpose of peacetime military maneuvers and training exercises. Unfortunately, it also appears to imply general acceptance that use of such areas did not affect significantly non-participating aircraft and vessels, and did not amount to an unreasonable use. Of course, this may have been true in 1958. At present, however, conditions have changed dramatically, and insofar as the United States is concerned, military uses of international airspace make it extremely difficult, if

37. *See*, therefore, United Kingdom Admiralty Notice to Mariners, Jan. 1, 1954, at 37, 39-40, 67 (United Kingdom), 178 (Yugoslavia, Greece), 187 (Australia), 190 (Venezuela, United States). Soviet Notices to Mariners, Nos. 717, 935, 936 (1947), 2446 (1954).

38. Albania, Bulgaria, Union of Soviet Socialist Republics: Proposal; U.N. Doc. No. A/Conf. 13/C.2/L.32; IV United Nations Conference on the Law of the Sea, Official Records 124, U.N. Doc. No. A/Conf. 13/40.

39. McDougal and Burke, *op cit. supra* note 36.

40. *Id.* at 770-771.

not impossible at times, to provide effective and reasonably safe air navigation services by responsible air traffic control agencies.

At the 1957 Hydrographic Conference a proposal was submitted that would require member states of the IHB to set forth on their respective navigation charts, *inter alia,* all the areas which were "reserved for naval and gunnery practice."[41] Not one member delegation supported the proposal. The delegation of the British Commonwealth emphatically recalled that it

> had always maintained the principle of the freedom of the seas and right of innocent passage, and therefore the absolute necessity to uphold the clear range procedure.[42]

Additionally, while agreeing with the British Commonwealth position, the delegate of the Netherlands observed

> it should be borne in mind that, in the case of naval or gunnery practice, the full responsibility remained with the authorities concerned, while outside territorial boundaries the sea was free and navigation could not be prohibited . . .[43]

Apparently, although the use of international airspace by military aircraft and ordnance is increasing compared to civil uses, there continues to be an inflexibility of military interest in multilateral integration of both civil and military requirements. Further, notwithstanding the remarks of the Netherlands delegation, there is a growing indication that the military will not be held solely liable for accidents involving non-military aircraft which occur in exercise areas. This point will be explored further in the following discussion of steps taken unilaterally by military authorities to inform the public of exercises and maneuvers being conducted on, in, or over the high seas.

VI
UNILATERAL NOTICE TO THE PUBLIC

In the article prepared by J. H. Pender, entitled *Jurisdictional Approaches to Maritime Environments,*[44] it is observed that a principle objective of the British Admiralty Notices to Mariners regarding exercise areas and ordnance testing and practice is to explain that "in

41. *See* J. Pender, *Jurisdictional Approaches to Maritime Environments,* JAG J. 155-157. *See also,* Report of the Proceedings of the 7th International Hydrographic Conference (1957).

42. Report of the Proceedings of the 7th International Hydrographic Conference (1957), at 215.

43. *Id.* at 216.

44. J. Pender, *op. cit. supra* note 41.

view of the responsibility of range authorities to avoid accidents, limits of practice areas will not as a rule be shown on charts." In addition, it is provided that the

> [r]ange Authorities are responsible for ensuring that there should be no risk of damage from falling shell-splinters, bullets, etc., to any vessel which may be in a practice area.[45]

In recognizing the right of states to use the high seas for military maneuvers, free of limiting restrictions, and attempting to avoid any formal pretense to sovereign control, the United States has issued statements of policy confirming its responsibility as a user to avoid accidents (as opposed to avoidance of exercises providing an inherently high-risk accident environment) and denying legal necessity for charting exercise areas. This, of course, is consonant with the rather definitive position taken by the British Commonwealth and the Netherlands at the 1957 International Hydrographic Conference regarding the proposal to chart areas used by the military "for naval and gunnery practice." An example of this type of policy statement is the following extract from a United States Notice to Mariners on "Firing Danger Areas":

> (XXVIII) NOTE–Firing danger areas–Firing and bombing practice takes place either occasionally or regularly in numerous areas established for those purposes along the coast of practically all maritime countries. In view of difficulty in keeping these areas up to date on charts, and since the responsibility to avoid accidents rests with the authorities using the areas for firing or bombing practice, these areas will not as a rule be shown on Oceanographic Office charts. . . .[46]

In the same vein, designation of warning areas by the United States which encompass portions of navigable airspace over the high seas does not reflect any formal legal claim by the United States to jurisdiction over such areas to the exclusion of other states. Ostensibly, graphic depiction of these areas on aeronautical and hydrographic charts is only to provide public notice that activities are being conducted in the areas which may be hazardous to non-participating users under certain conditions. Of course, the United States may *require* coordination and/or permission to enter warning areas as a prerequisite to entering certain areas within its recognized territorial parameters. However, the military professes only to *solicit* or *urge* cooperation from other potential users of these areas which

45. *Id.* at 157.

46. Notice to Mariners, U.S. Coast Guard and U.S. Naval Oceanographic Office, Part 1, No. 1, p. 25 of Jan. 5, 1963.

are graphically depicted as outside United States territorial limits, but the effect often is the same.

It is questionable (1) whether the attitude of soliciting or urging is actually a requirement in view of the practical consequences, and (2) whether *requiring* permission as a prerequisite to entering United States territory is a posture acceptable within the framework of international law in view of the obvious facility of abuse to which it is subject. The United States and other military users of international airspace support their argument of not being responsible on a multinational basis for their pertinent activities (beyond recognition of liability for safe conduct of such activities) by resorting to the Chicago Convention on International Civil Aviation. The efficacy of using this source as support is questionable.

VII
LEGALITY OF THE WARNING AREAS AND THE CHICAGO CONVENTION, 1944

Since most states using international airspace for military maneuvers and practice are members of the International Civil Aviation Organization,[47] it is necessary to determine at this point whether the Chicago Convention or ICAO Annexes set forth any provisions which prohibit or sanction the use for which warning areas are designated. Article 1 of the Convention is a recognition that "every State has complete and exclusive sovereignty over the airspace above its territory." Exercise of this sovereignty, for purposes of the Convention, is limited only slightly by subsequent provisions which provide that any restrictive action by a member state must be applied without distinction as to nationality.[48] Regarding the regulation of civil aviation over the high seas, article 12 of the Convention provides, in part, that:

> Over the high seas, the rules in force shall be those established under this Convention. Each contracting State undertakes to insure the prosecution of all persons violating the regulations applicable.[49]

For purposes of international civil aviation, contracting states are limited in applying the freedom of the high seas principle, as defined

47. The Soviet Union is a very large military user of international airspace, but as of the preparation of this article the formal interest of that country in ICAO membership is in a state of procedural flux.

48. *See* therefore, Articles 9 and 11 of the Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180 at 1182-1183, T.I.A.S. No. 1591.

49. Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180 at 1183, T.I.A.S. No. 1591.

by the 1958 Geneva Convention on the High Seas, by the provisions of the Chicago Convention and the ICAO Annexes. However, article 3(a),[50] in part, excludes state aircraft from the Convention and related "rules in force . . . under this Convention" as they pertain to navigation over the high seas. Further, article 3(d) only requires contracting states to undertake, ". . . when issuing regulations for their State aircraft, that they will have *due regard* for the safety of navigation of civil aircraft." (Emphasis added.) Although it may be assumed that contracting states undertake the responsibility of avoiding, to the most practicable extent, the creation of unreasonable and unwarranted risks to international civil aviation by state aircraft, the phrase "due regard" is extremely subjective at best, and totally unilateral vis-a-vis ultimate interpretation within the parameters of a given situation. Despite sporadic challenges to the contrary, military interests have prevailed and the accepted intent of article 3 is to exempt state aircraft from the Convention provisions, as well as ICAO SARPs, both in domestic operations and those being conducted in international airspace.

"Danger Areas," as defined in the ICAO Annexes and to which the United States has submitted a difference in practice, are not required to be charted, except on instrument approach charts; and only then if such areas affect the procedures depicted thereon.[51] Further, it has been stated that:

> [u]se of this term (Danger Area) is appropriate only when the potential danger to aircraft in flight has not led to the designation of an area as restricted or prohibited. The effect of the creation of the danger area is to caution operators or pilots of aircraft that it is necessary for them to assess the dangers in relation to their responsibility for the safety of their aircraft. . . .[52]

The United States (and quite possibly most other major military users of international airspace) often establishes its version of warning areas on a continuous-use basis. The practical reason for not charting each area anew as it recurrently comes into use is that extensive, but interrupted, use justifies neither recharting for each exercise or series of activities conducted therein, nor even issuance of Notices to Airmen (NOTAMs). Unfortunately, the consequence of

50. *Id.* at 61 Stat. 1181.

51. International Standards and Recommended Practices, Aeronautical Charts, Annex 4 to the Convention on International Civil Aviation, 5th ed.–1961, Chapter 8, Section 8.11–Restricted Airspace and Danger Areas:

> "8.11.1 Prohibited areas, restricted areas, and danger areas which may affect the execution of the procedures *shall* be shown." (Emphasis added.)

52. Aeronautical Information Services, Attachment A to Annex 15 at 17.

this practice is an uninterrupted depiction of these areas on charts, giving the questionable impression to other users and nations that the areas are under the constant use, domination, and control (i.e., de facto) of the United States.

Since states emphatically deny any international requirement for graphic depiction of such areas used for military activities, the apparent reasons for any charting of warning areas is that it assists in facilitating air navigation services and serves as a continuous graphic reference to warn all non-participating aircraft that military maneuvers which may be hazardous are being conducted in a specified area. Since both military and civil users of airspace are generally responsible for ultimate separation of their aircraft from all others, the United States undoubtedly considers the portrayal of warning areas, danger areas, and restricted areas on aeronautical charts as a safety measure *in addition to* the pertinent requirements and recommendations of ICAO. Finally, it is a practice of United States military authorities to issue *instructions, clearances* and advisory information to non-participating aircraft wishing to use such areas, or conflicting portions, in the most expeditious manner available in order to accommodate safely, as well as efficiently, all users of the international airspace involved. Despite the fact that "safely" and "efficiently" are subjective terms which are unilaterally defined by the military authorities, the above argument is the attractive or appealing facet of the practice of graphically depicting warning areas. However, not only is it a double-edged sword in terms of promoting de facto jurisdiction over portions of the high seas and international airspace, it is an argument inherently weak in view of extensive non-military interests in certain of the graphically delineated areas.

CONCLUSIONS

It is not difficult to ascertain from the above discussion that there is strong potential for sovereign realities in U.S. warning areas, and similar areas established by other nations. The practical consequence of graphically depicting the areas, issuing pertinent NOTAMs and publicly describing the activities conducted therein is to exclude the sane man from common use. The speed of aircraft and ordnance used and the "invisible hazard" facets of warning areas effectively denies use to the non-participating public despite the prima facie assumption of responsibility by military authorities for separation of participants and non-participants. It may be true that even continuous-use warning areas may be traversed during periods of light or non-military use at a given time. The *necessity* of having to do this,

however, is an effective unilateral restriction on the use of international or non-sovereign airspace.

In many instances, warning areas amount to exclusive *control* with enforcement of such control being indirect—but every bit as effective as direct—police action. Although states may not "validly purport" sovereignty over the high seas, de facto sovereign control can be acquired without appearing to contravene controlling multilateral conventions and established customary laws. The "invisible hazards" and other high-risk factors to non-participating users of warning areas serve as immediate sanctions forcing acquiesence to military "urgings" and "solicitations" for cooperation. Further, the assumption of responsibility by military authorities to maintain separation is not an assumption of liability. For example, it is difficult to believe that an air traffic controller would clear a commercial aircraft for flight through an active warning area with full knowledge of the acute risk as published by the military authorities. Normally, given the circumstance of unusual risk, the procedure would be for the controller to clear a flight around a warning area. Obviously, the resultant conflicts with economic interests of international commercial aviation may be, and often are, intense.

With the dramatically increasing use of navigable international airspace by both civil and military interests, there must be an increasing cooperative approach to the technological and economic resolution of problems arising from a conflict of those interests. Resolutions unilaterally dictated by military authorities become decreasingly effective and acceptable as international civil aviation increases. At some point in time, resort must be made to a framework of cooperation between civil and military users of international airspace, much in the same vein as the comparatively recent approaches in a maritime environment to similar problems of conflicting interests.

Although more than twenty years of literal interpretation of the Chicago Convention have precipitated some rather inflexible attitudes on the part of the military authorities, there is no reason why a favorable, constructive interpretation of article 3(d) and related provisions cannot be made which at least would permit closer technological cooperation between responsible authorities for a safe, if not altogether efficient, common use of airspace delineated as warning areas. Practical resolution of conflicting political interests may then follow of their own accord in the creation of appropriate multilateral conventions.