AN ANALYSIS OF STATE RESPONSIBILITY FOR THE CHINESE-AMERICAN AIRPLANE COLLISION INCIDENT

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In this Note, Margaret Lewis revisits the Chinese-American air-crash incident of 2001 to evaluate the claims made by each nation that the other acted in violation of international law. After assembling the relevant laws that would have been applied if the matter were resolved in an international tribunal, Lewis concludes that the United States was not in contravention of any of them. She does, however, suggest that it would be best if the two countries formulated "rules of the road" to reduce the probability of repeat accidents and to avoid protracted disputes over international law like those witnessed in the instant case.

INTRODUCTION

On the morning of April 1, 2001, a U.S. Navy EP-3 surveillance plane and a People's Liberation Army F-8 jet collided over the South China Sea.[1] As this highly publicized "April 1 Incident" played out in the weeks following, the governments of the United States and the People's Republic of China (China) both used the rhetoric of international law to bolster their respective positions. The EP-3 was dismantled and returned to the United States three months later, yet the two countries' competing claims over legal responsibility for the April 1 Incident were never brought before a court or tribunal, and the two sides have not reached a negotiated agreement.

This diplomatic debacle provides a fascinating real-world example of the law of state responsibility—a timely subject given the recent completion by the United Nations International Law Commission (ILC)[2] of its Articles on Responsibility of States for Internationally

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1 See Contemporary Practice of the United States Relating to International Law, 95 Am. J. Int'l L. 626, 630-33 (Sean D. Murphy, ed., 2001) (presenting overview of April 1 Incident); infra Part I.

2 Created in 1947, the International Law Commission (ILC) is composed of thirty-four eminent international law scholars who serve in individual capacities but are nominated and elected by governments. See The Work of the International Law Commission at 6-24,

Wrongful Acts (ILC Articles).[3] The ILC Articles do not set forth the specific substantive obligations that are in force among States. For such "primary rules," States must look to customary international law and their obligations under treaties.[4] Instead, the ILC Articles focus on the circumstances in which a State will be held responsible for violation of a primary rule and the legal consequences that flow from the assignment of such responsibility.[5] In other words, the ILC Articles serve as a framework of "secondary rules" that are used to evaluate whether the breach of a primary rule constitutes a wrongful act which gives rise to legal responsibility and, if so, the forms of reparations that must be provided.[6]

The task of determining what, if any, primary rules were breached in connection with the April 1 Incident is complicated due to ambiguities in the applicable legal rules and the lack of hard evidence of what actually occurred in the air that morning.[7] China claimed that

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U.N. Sales No. E.95.V.6 (5th ed. 1996) (describing ILC's organization, program, and methods of operation). The ILC is entrusted with the codification of international law—i.e., "the more precise formulation and systematization of rules of international law in fields where there already has been extensive State practice"—and its progressive development—i.e., "the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States." Statute of the International Law Commission, art. 15, U.N. Doc. A/CN.4/4/Rev.2, U.N. Sales No. E.82.V.8 (1982), available at http://www.un.org/law/ilc/texts/statueng.htm (last visited June 22, 2002).

[3] G.A. Res. 56/83, U.N. GAOR, 56th Sess., Annex, Supp. No. 10, U.N. Doc. A/Res/56/83 (2001), http://www.un.org/law/cod/sixth/56/english/a_res_56_83e.pdf [hereinafter ILC Articles]. For the commentaries to the ILC Articles, see Report of the International Law Commission, Fifty-Third Session, U.N. GAOR, 56th Sess., Supp. No. 10, at 59-365, U.N. Doc. A/56/10 (2001), http://www.un.org/law/ilc/reports/2001/2001report.htm (last visited June 22, 2002) [hereinafter ILC Commentaries].

[4] See ILC Articles, supra note 3, art. 12 ("There is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character."); see also Peter Malanczuk, Akehurst's Modern Introduction to International Law 254 (7th ed. 1997). Two elements must be fulfilled for the conduct of a State to constitute an internationally wrongful act under the ILC Articles: The conduct must be attributable to the State under international law and must constitute a breach of an international obligation. ILC Articles, supra note 3, art. 2. Here, the attributability requirement was satisfied because the actors in the April 1 Incident were serving in their official capacities as military personnel and hence were considered organs of their governments. See id. art. 4 (titled "Conduct of organs of a State"). Part II infra addresses whether there was a breach of an international obligation.

[5] See generally ILC Commentaries, supra note 3.

[6] The ILC Articles are not a binding instrument; rather, the General Assembly merely took note of them—as recommended by the ILC—and sometime may take action to codify them. See ILC Articles, supra note 3, para. 2. Despite this caveat, the ILC Articles have force as an expression of customary international law. See 1 Arthur Watts, The International Law Commission 1949-1999, at 15 (1999) ("[T]he Commission's influence is as a material source of international law, and in that sense it has a role as part of a process which is in the realm of law-making.").

[7] See infra Part II (analyzing claims of China and United States).

the United States was responsible for violating China's rights over its exclusive economic zone (EEZ)[8]—a zone recognized under international law as stretching 200 miles from a State's coastline within which the coastal State has preferential economic rights.[9] China further claimed that the United States undermined a bilateral accord on preventing dangerous maritime military activities and infringed China's sovereignty by entering Chinese territorial airspace and landing on Hainan Island without authorization.[10] China demanded that the United States apologize and accept full responsibility for the incident[11]—a remedy which would constitute reparations in the form of "satisfaction" under the ILC Articles.[12]

The United States rebutted these claims by asserting that it was exercising its legal right to fly over China's EEZ,[13] the Chinese pilot was flying in an unsafe manner,[14] and the EP-3's intrusion into Chinese territory was excused by distress.[15] The United States contended that China's boarding of the EP-3 and detention of its crew violated the United States's right to sovereign immunity.[16] However, this issue

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[8] Press Release, Ministry of Foreign Affairs of the P.R.C., Spokesman Zhu Bangzao Gives Full Account of the Collision Between US and Chinese Military Planes (Apr. 4, 2001), http://www.fmprc.gov.cn/eng/9576.html [hereinafter April 4 Press Release].

[9] See infra notes 59-65 and accompanying text (explaining zones recognized under law of sea).

[10] April 4 Press Release, supra note 8.

[11] E.g., Christopher Drew, Old Tactics May Pull the Rug From the U.S. Claim to Plane, N.Y. Times, Apr. 4, 2001, at A1 (reporting President Jiang Zemin's statement that United States should bear full responsibility).

[12] See ILC Articles, supra note 3, art. 37, para. 2 (explaining that satisfaction encompasses "an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality").

[13] See infra notes 96-98 and accompanying text.

[14] See infra notes 133-37 and accompanying text.

[15] See infra notes 154-60160 and accompanying text.

[16] On the day of the incident, the Commander in Chief of the U.S. Pacific Command, Admiral Dennis C. Blair, publicly registered his objection that "military aircraft of all countries in situations like this, have sovereign immunity. That is no other country can go aboard them or keep them." Adm. Dennis C. Blair, Commander in Chief, U.S. Pac. Command, Remarks at Press Conference on U.S. and Chinese Aircraft Incident (Apr. 1, 2001), http://www.pacom.mil/speeches/sst2001/010401blairplane.html [hereinafter Blair Conference]. The day after the crew returned home, Secretary of Defense Rumsfeld echoed the complaint that "in similar situations, nations have not detained crews and they have not kept aircraft." Donald Rumsfeld, Sec'y of Def., Presentation at Briefing on EP-3 Collision (Apr. 13, 2001), http://www.defenselink.mil/news/Apr2001/t04132001_t0413ep3.html [hereinafter Rumsfeld Briefing]; see also H.R. 2507, 107th Cong. § I(a)(3) (2001) (finding that detention of crew was "in clear violation of international rules governing the treatment of these personnel"); Michael Bourbonniere & Louis Haeck, Military Aircraft and International Law: Chicago Opus, 66 J. Air L. & Com. 885, 892 (2001) ("[F]oreign officials may not board a state or military aircraft without the consent of the commander."). But see Marc Lacey, Whose Plane Is It, Anyway?, N.Y. Times, Apr. 8, 2001, § 4, at 6 (noting ambiguous status of EP-3 under international law); Zhu Qing, US Has No Reason to Raise

was relegated to the periphery with the United States effectively abandoning the matter once the crew, and later the plane, were returned.

This Note will argue that the United States's actions did not give rise to any legal responsibility under the ILC Articles, and, thus, the United States was not obligated to provide reparations. Accordingly, the United States's decision to provide a carefully crafted quasi-apology in the form of a letter was an appropriate response.[17]

Legal responsibility aside, both governments should be credited for reaching a politically shrewd and expedient resolution to the crisis that allowed the bilateral relationship to go forward relatively unscathed. However, given the ambiguities in the legal regime governing military activities at sea—as well as the increasing frequency of encounters due to the United States's confrontational maneuvers and China's growing military might—this Note will argue that the United States and China should establish specific, practical procedures to be used when their military forces encounter each other—so-called "rules of the road"—to lessen the chance of future incidents.[18]

The April 1 Incident, while itself no longer a focus of U.S.-China relations, underscores the tension that continues to exist between the two countries over the scope of their respective military activities in East Asia. Moreover, if another incident were to occur, the two governments most likely would once again invoke arguments based in international law to justify their positions. This Note, therefore, presents an in-depth analysis of the relevant legal norms in order to provide guidance for the resolution of future disputes.

Part I will summarize the sequence of events that occurred on April 1 and in the weeks that followed. Based on this background, Part II will analyze China's claims and conclude that the April 1 Inci-

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Demand, China Daily, Apr. 4, 2001, 2001 WL 7481678 (quoting Chinese Foreign Ministry spokesperson that EP-3 did not have immunity because it had entered China illegally).

There is little doubt as to what the United States would have done had it been in China's position. The Editorial Desk of the *New York Times* speculated that "Washington would not hesitate to look over an important piece of Chinese military equipment that showed up on American soil." Delicate Passage with China, N.Y. Times, Apr. 3, 2001, at A18; see also Drew, supra note 11 (reporting Pentagon's past rejections of States' appeals for return of military equipment including 1976 defection by Soviet MIG pilot but noting possible distinction due to delivery by defecting pilot); id. (reporting acknowledgment by United States that attempt in 1970s to raise sunken Soviet submarine from bottom of Pacific constituted theft).

17 See Letter from Joseph W. Prueher, Ambassador to China, to Tang Jiaxuan, Chinese Minister of Foreign Affairs (Apr. 11, 2001), http://www.whitehouse.gov/news/releases/2001/04/20010411-1.html [hereinafter April 11 Letter]; see also Envoy's Letter to Beijing, N.Y. Times, Apr. 12, 2001, at A13.

18 See infra Part IV (discussing future of bilateral relations).

dent did not give rise to any legal responsibility. Part III will argue that the incident was correctly resolved without the United States accepting any legal responsibility. Finally, Part IV will look to the future of bilateral relations and warn that preventative measures are needed to lessen the chance of inadvertent military clashes.

I
THE APRIL 1 INCIDENT

On the morning of April 1, 2001, a U.S. EP-3[19] was conducting a routine reconnaissance and surveillance mission over China's EEZ in the South China Sea.[20] Two Chinese F-8s[21] were trailing the EP-3 and monitoring its activities. Tensions had escalated in recent months as near-misses—such as an incident in December 2000 where a Chinese jet and an American surveillance plane came within several meters of each other[22]—had prompted the United States to lodge complaints with the Chinese government.[23] For its part, China had formally protested the surveillance flights.[24]

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[19] The EP-3 is a four-engined turboprop plane which is the Navy's only land-based signals intelligence reconnaissance aircraft. U.S. Navy Fact File, EP-3E (Aries II), at http://www.chinfo.navy.mil/navpalib/factfile/aircraft/air-ep3e.html (last visited Mar. 30, 2002) (providing technical specifications and photo); see also infra note 132 (describing technical capabilities of EP-3).

[20] See, e.g., David Shambaugh, No Easy Way Forward with China, N.Y. Times, Apr. 3, 2001, at A19 (explaining that EP-3 aircraft regularly patrol Chinese coastline and have done so "for much of the past half-century").

[21] The F-8 (Chinese designation J-8) is a single-seat twin-engined fighter jet. See J-8 (Jian-8 Fighter Aircraft 8)/F-8, at http://www.fas.org/man/dod-101/sys/ac/row/j-8.html (last visited Mar. 30, 2002) (providing technical specifications and photo on Federation of American Scientists web site).

[22] Greg Torode, Sides "Knew Risk of Close Encounters," S. China Morning Post, Apr. 6, 2001, at 7.

[23] Secretary Rumsfeld explained that the United States, in late December 2000, raised concerns with China regarding behavior of its aircrafts. Rumsfeld Briefing, supra note 16. He then showed a videotape taken on January 24, 2001, by the crew of an EP-3. The two-and-a-half minute tape featured a Chinese fighter aircraft flying just off the EP-3's left wing, with the pilot's head and gestures clearly distinguishable. Rumsfeld narrated:

> Look at the plane's mushy behavior. You can see he's flying at a very slow speed for a fighter aircraft. (Radio dialogue.) Those planes are not designed to fly at 250 knots. (Radio dialogue.) You notice, there's a propeller; you can see how close it was, and you can see the angle of attack on the fighter aircraft. He's trying to fly much slower than he's supposed to be flying, and as a result his nose is kind of–(inaudible).

Id.; Videotape (U.S. Navy File Footage, Jan. 24, 2001), at http://www.defenselink.mil/briefings/F-8_with_audioLAN.ram.

[24] See Torode, supra note 22 (reporting that China had made objections through ASEAN Regional Forum on security). See generally David C. Unger, Get Ready for ARF, N.Y. Times, Apr. 4, 1994, at A14 (reporting creation of Forum—in which both China and United States participate—to encourage avoidance of military conflicts in East Asia).

The game of cat-and-mouse went awry when shortly after 9:00 AM the EP-3 and one of the F-8s collided approximately seventy nautical miles southeast of Hainan Island.[25] The F-8 sustained heavy damage and broke apart in the sky; the pilot, Wang Wei, ejected from the plane but was never found.[26] The other Chinese F-8 returned safely to Chinese territory.[27] In the minutes after the collision, the EP-3 crew worked frantically both to stabilize the plane and to destroy high-tech military equipment on board.[28] Severely damaged, the EP-3 headed toward Lingshui Airport on Hainan Island, where it made an emergency landing.[29]

Upon landing, Chinese officials approached the EP-3 and took the twenty-four crewmembers into custody.[30] China lodged a "solemn representation and protest" with the U.S. government on April 1 and again on April 2.[31] Meanwhile, China held the crew for two days before allowing them to meet with U.S. officials.[32]

After eleven days of political maneuvering, culminating in the delivery of a letter stating that the United States was "very sorry" for the loss of the Chinese pilot and his plane and for entering Chinese airspace and landing without verbal clearance,[33] the crewmembers left

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25 See Press Release, Ministry of Foreign Affairs of the P.R.C., Spokesman on Chinese Military Airplane Bumped by a U.S. Military Surveillance Plane (Apr. 1, 2001), http://www.fmprc.gov.cn/eng/9519.html (last visited Mar. 30, 2002); see also Blair Conference, supra note 16. Hainan Island is the southernmost province of China.

26 See Erik Eckholm, Angry Beijing Denounces Washington's Reports That Its Pilot Caused the Collision, N.Y. Times, Apr. 15, 2001, § 1, at 10 (reporting China's decision to call off search thirteen days after collision).

27 April 4 Press Release, supra note 8.

28 See Dateline NBC: Born to Fly (NBC television broadcast, Nov. 18, 2001), http://www.msnbc.com/news/658892.asp (interviewing Navy Lieutenant Shane Osborn, the pilot of the downed EP-3, and discussing how the crew destroyed the computers with hatchet—"sort of the Fred Flintstone version of deprogramming"). But cf. Thom Shanker, Some Papers on Downed Spy Plane Were Not Destroyed, N.Y. Times, May 16, 2001, at A8 (reporting that Bush administration now assumes that Chinese gained "useful information" including documents left on board).

29 See, e.g., Elisabeth Rosenthal & David E. Sanger, U.S. Plane in China After It Collides with Chinese Jet, N.Y. Times, Apr. 2, 2001, at A1.

30 See David E. Sanger, Bush Is Demanding a 'Prompt' Return of Plane and Crew, N.Y. Times, Apr. 3, 2001, at A1 (reporting that last transmission by EP-3 crew suggested that Chinese military were about to board EP-3).

31 April 4 Press Release, supra note 8; see also ILC Articles, supra note 3, art. 43 ("An injured State which invokes the responsibility of another State shall give notice of its claim to that State.").

32 See Erik Eckholm, U.S. Envoy Has Tried to Bridge Gap, N.Y. Times, Apr. 3, 2001, at A9 (quoting U.S. Ambassador to China, Joseph W. Prueher, that holding EP-3 crew incommunicado for over thirty-two hours "is inexplicable and unacceptable and of grave concern to the senior leaders in the United States government"); see also Craig S. Smith, U.S. Officials Meet with 24 Still Detained with Aircraft, N.Y. Times, Apr. 4, 2001, at A10.

33 April 11 Letter, supra note 17.

Hainan Island for the United States on April 12, 2001.[34] The disassembled EP-3 was returned to the United States several months later.[35]

II
COMPETING CLAIMS: THE ALLEGED BREACHES OF INTERNATIONAL LAW

The events on April 1 gave rise to diametric arguments from the United States and Chinese governments—arguments motivated by deep-seated, competing political goals. The United States's vehement denial that it violated international law by flying the EP-3 over China's EEZ has its roots in a longstanding fear of "creeping jurisdiction"—the threat that States gradually will expand their territorial claims, and, if not objected to, these expanded claims eventually may gain credence under international law.[36] This fear has been addressed

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[34] See Press Release, Ministry of Foreign Affairs of the P.R.C., Tang Jiaxuan Receives a Letter from the US Government Saying "Very Sorry" to the Chinese People (Apr. 11, 2001), http://www.fmprc.gov.cn/eng/9700.html (last visited Mar. 30, 2002) [hereinafter Tang Press Release] (explaining that release of EP-3 crew was done out of "humanitarian considerations").

[35] See Sandra I. Erwin, Recovered EP-3 Could Be Rebuilt in Eight Months, Nat'l Def., Oct. 1, 2001, 2001 WL 8941664 (detailing recovery work done by Lockheed Martin in June and July 2001); Contracts, M2 Presswire, May 22, 2002, 2002 WL 19043995 (reporting contract for Lockheed Martin to complete repairs on EP-3 by January 2003).

China subsequently requested one million dollars for plane-related expenses and lodging for the detained EP-3 crew. In response, the United States offered approximately $34,000 to cover "a couple days" of the crew's stay. China Rejects Offer by U.S. to Cover Spy-Plane Costs, Asian Wall St. J., Aug. 13, 2001, at 3; see also Press Release, Ministry of Foreign Affairs of the P.R.C., Spokesperson on the Payment Issue Related to the April 1 Incident (Aug. 18, 2001), http://www.fmprc.gov.cn/eng/16929.html (rejecting United States's offer of payment). The issue has yet to be resolved. See Remarks of Foreign Ministry Spokesperson at Press Conference (Apr. 2, 2002), http://www.fmprc.gov.cn/chn/27833.html (stating that China's position on its demand for compensation has not changed).

[36] See William S. Cohen, Sec'y of Def., Annual Report to the President and the Congress, 2001, app. H, http://www.defenselink.mil/execsec/adr2001/adr2001.pdf [hereinafter 2001 Defense Report] ("[Freedom of Navigation a]ssertions communicate that the U.S. does not acquiescence [sic] to the excessive maritime claims of other nations and thereby prevent them from becoming accepted as the international norm."); George Galdorisi, The United Nations Convention on the Law of the Sea: A National Security Perspective, 89 Am. J. Int'l L. 208, 211 (1995) ("The Navy and Air Force are seriously concerned about erosion of the freedom of movement . . . ."); see also infra note 200 and accompanying text (explaining potential effect of apology by United States on freedom of navigation in EEZs). See generally 2 D.P. O'Connell, The International Law of the Sea 38-44 (I.A. Shearer ed., 1984) (discussing significance of protest in law of sea). But see Restatement (Third) of Foreign Relations Law of the United States § 521 n.2 (1987) [hereinafter Restatement (Third)] (stating that United States has established special defense and identification zones that extend up to several hundred miles from its coast in which entering pilots must report promptly and provide specified information).

over several decades through the Freedom of Navigation (FON) program, which uses diplomatic protests and military maneuvers to challenge territorial claims.[37] Since the April 1 Incident, the United States has been unwavering in defense of its freedom to conduct surveillance flights,[38] which it sees as securing its national interests.[39]

In tension with the United States's emphasis on the freedom to conduct military activities is China's concern for protecting its national sovereignty.[40] With historical roots in the unjust treatment of China by imperialist powers,[41] concern for China's sovereignty was evident following the April 1 Incident both in the response of the Chi-

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[37] See Steven A. Rose, Naval Activity in the EEZ—Troubled Waters Ahead?, 39 Naval L. Rev. 67, 85-90 (1990) (noting that United States has averaged thirty to forty Freedom of Navigation (FON) challenges per year since 1979 and that one purpose of FON program is "to challenge excessive EEZ claims that impair military activities"); 2001 Defense Report, supra note 36, app. H, tbl.H-1 (listing fifteen countries towards which United States conducted FON operational assertions in 2000).

[38] See Jane Perlez, Powell Warns of Damage to Ties as Crisis Drags On, N.Y. Times, Apr. 9, 2001, at A10 (reporting Powell's statement that United States does not intend to give up reconnaissance work over international waters because it is deemed essential to national security).

[39] See The NewsHour with Jim Lehrer: Eyes on China (PBS television broadcast, Apr. 12, 2001), http://www.pbs.org/newshour/bb/asia/jan-june01/eyeson_04-12.html (quoting National Security Advisor Condoleezza Rice as saying, "We are not going to do anything to undermine our broad national security strategies."); see also Fiscal 2003 Defense Authorization: Pacific, European Commands, Before the House Armed Serv. Comm., 107th Cong. (2002) (statement of Dennis C. Blair, U.S. Navy Commander in Chief, U.S. Pac. Command), 2002 WL 25100422 [hereinafter Blair Statement] ("The demand for precise and timely intelligence has never been greater."); Dep't of Def., Quadrennial Defense Review Report (Sept. 30, 2001), at 37 ("U.S. defense strategy and doctrine are increasingly dependent upon information and decision superiority. . . . Demands on intelligence capabilities are certain to grow.").

[40] This concern was clear following the April 1 Incident, with the Chinese government describing the EP-3's intrusion into Chinese airspace as a "gross encroachment upon China's sovereignty." See April 4 Press Release, supra note 8; Li Qin, U.S. Seriously Violates International Law, Xinhua News Agency, Apr. 15, 2001, translated in U.S. Dep't of Commerce, World News Connection, 2001 WL 19265374 ("[U.S. military] activities constitute . . . provocation to Chinese national sovereignty.").

[41] See Nation to Remember Defeat, S. China Morning Post, Apr. 25, 2001, at 8, 2001 WL 19305209 (reporting designation by Chinese government of anniversary of Boxer Protocol—1901 treaty in which China effectively surrendered control of territory to eight invading countries—as "National Defense Education Day" and describing Chinese government's designation of pilot Wang Wei as "Guardian of Territorial Airspace and Sea").

nese public[42] and the frequent references to U.S. "hegemony" in the Chinese press.[43]

When responding to the April 1 Incident, China essentially argued that legal responsibility attached to the United States at three separate points in time: when the EP-3 (A) flew over China's EEZ,[44] (B) collided with the F-8,[45] and (C) entered Chinese territorial airspace.[46] These three points correspond to China's three major claims: The United States (A) violated China's rights over its EEZ under the law of the sea, (B) undermined an agreement between the United States and China on preventing dangerous maritime military activities, and (C) violated China's sovereignty.[47] Each claim will be examined in turn, and this Part will argue that the United States did not incur any legal responsibility in connection with these claims.

A. The EP-3's Flight over China's EEZ

Despite disagreement over the extent to which a State may conduct military maneuvers within another State's EEZ, China's first claim lacks convincing support under current international law.[48] This Part will explain the law behind China's protest of the EP-3's flight,[49] discuss China's interpretation of the relevant primary rules as they apply to the April 1 Incident,[50] and conclude that the United States's view is the more tenable.[51]

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42 The Chinese government demanded that the United States "provide convincing explanations to the Chinese people." Tang Press Release, supra note 34; see also Elisabeth Rosenthal, Beijing Steps up Its War of Words over Air Collision, N.Y. Times, Apr. 5, 2001, at A1 (attributing China's "hardening position" to "growing sense of concern, even outrage, among many citizens here"). But see id. (observing that "some Chinese dismissed the angry rhetoric on both sides as normal behavior in the arena of international politics"). As for the American public's reaction, see Joseph Kahn, Standoff Brings Calls to Boycott Chinese Goods, N.Y. Times, Apr. 11, 2001, at A1 (reporting calls by consumers for K-Mart to quit doing business in China and campaign by plumbing union urging boycott of Chinese goods).

43 See, e.g., Ni Siyi & Yu Zheng, Chinese Experts Say Hegemonic Ways Will Not Help at All in Resolving Sino-US Problems, Xinhua News Agency, Apr. 19, 2001, translated in U.S. Dep't of Commerce, World News Connection, 2001 WL 19777868 (describing handling of incident as "essential reflection of the US Government's vigorous pursuit of hegemony and power politics"); Syrian Daily Criticizes U.S. Hegemony over Plane Collision Standoff, Xinhua News Agency, Apr. 10, 2001, 2001 WL 19009453; U.S. Hegemony Condemned in Cambodia, Xinhua News Agency, Apr. 8, 2001, 2001 WL 19105424.

44 See infra Part II.A.

45 See infra Part II.B.

46 See infra Part II.C.

47 See April 4 Press Release, supra note 8.

48 See infra notes 99-118 and accompanying text.

49 See infra Part II.A.1.

50 See infra Part II.A.2.

51 See infra Part II.A.3.

Although this Part concludes that such surveillance flights are legal, it recognizes that they are provocative.[52] The United States takes a much more aggressive stance than most countries when it comes to asserting its right to conduct military activities in other States' EEZs.[53] In large part this is due to the fact that, unlike countries that can only project their military strength as far from their shores as half a tank of gasoline will take their aircraft, the United States has the aircraft carriers, foreign military bases, and superior technology to extend its forces virtually anywhere in the world.[54]

1. The Law of the Sea and the Law of the Air

The law of the sea is the principal source of the primary rules that apply to the legality of the EP-3's flight. It may not be immediately apparent that the law of the sea bears on an incident involving an airplane, yet the norms governing the seas are fundamental to determining States' rights to operate aircraft above them.[55] The analysis is complicated, however, by both the lack of clear legal rules applicable to military aircraft[56] and the fact that the United States is not a party

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[52] See Rose, supra note 37, at 87 ("The line between firmness and public pushiness—between assertion of rights and the appearance of superpower bullying—lies primarily in the eye of the beholder."); see also George Gilboy & Eric Heginbotham, China's Coming Transformation, Foreign Aff., July-Aug. 2001, at 26 (warning that U.S. surveillance close to Chinese borders "may not violate international law, but . . . has created an image of a hostile United States without commensurate gains for American security interests").

[53] Asked whether other countries conduct these sorts of flights, Rear Admiral Eric McVadon replied, "Well, maybe the ones that are important, the Soviet Union and China, both conduct these things." The NewsHour with Jim Lehrer: Eyes on China, supra note 39; see also Christopher Drew, Listening, Looking: Old Methods Still Work, N.Y. Times, Apr. 14, 2001, at A6 (reporting printing by EP-3 officer in mid-1990s of business cards with unofficial motto: "In God we trust. All others we monitor."). But see Rumsfeld Briefing, supra note 16 ("At least six countries fly reconnaissance missions in Asia, including China.").

[54] See, e.g., Greg Torode, A Lot of Plane Speaking to Do, S. China Morning Post, Apr. 15, 2001, at 9 (reporting an American intelligence source as saying, "When it comes to hard-boiled military intelligence, you might say it is a case of all being fair in love and war."). Recent increases in China's military capabilities raise the question whether China will conduct more provocative military activities in the future. See infra note 207 and accompanying text.

[55] See Kay Hailbronner, Freedom of the Air and the Convention on the Law of the Sea, 77 Am. J. Int'l L. 490, 493 (1983) (arguing that law of sea regime "is obviously of paramount importance to the freedom of the air above the oceans").

[56] For example, a prominent treaty on aircrafts is not expressly applicable due to the EP-3's status as a military aircraft. See Convention on International Civil Aviation, Dec. 7, 1944, art. 3(a), 61 Stat. 1180, 1181, 15 U.N.T.S. 295, 298 (providing that Convention "shall not be applicable to state aircraft"), reprinted in ICAO Doc. 7300/6 (6th ed. 1980); id. art. 3(b) ("Aircraft used in military, customs and police services shall be deemed to be state aircraft."). However, both China and the United States voted in favor of a resolution of the International Civil Aviation Organization (ICAO) calling for national regulations to ensure that state aircraft operating over the high seas shall comply with the Convention's

to the preeminent treaty on the law of the sea, the 1982 United Nations Convention on the Law of the Sea (UNCLOS).[57] This Part concludes, however, that the provisions in UNCLOS implicated by the April 1 Incident are nonetheless applicable to the United States as customary international law.[58]

Under UNCLOS, waters off of a State's coastline are divided into several zones—territorial sea, contiguous zone, EEZ, and the high seas[59]—over which the coastal State is authorized to exercise increasingly less control.[60] This same basic principle applies to the airspace above these zones: Article 87 provides all aircraft with the freedom to fly over the high seas,[61] and Article 58 extends this power, with certain limitations, to a State's EEZ.[62] Within its EEZ, which may extend to 200 nautical miles[63] (inclusive of the territorial sea and contiguous zone),[64] a State has sovereign rights and jurisdiction over specified ec-

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rules of the air to the extent practicable. ICAO Assembly, 32d Sess., app. P, at A32-14, para. 2 (1998), available at http://www.icao.int/icao/en/assembl/a32/resolutions.pdf.

57 United Nations Convention on the Law of the Sea, Dec. 10, 1982, 21 I.L.M. 1261 (entered into force Nov. 16, 1994) [hereinafter UNCLOS]; see Table Recapitulating the Status of the Convention and of the Related Agreements, at http://www.un.org/Depts/los/reference_files/status2002.pdf (last updated May 30, 2002). China acceded to UNCLOS on June 7, 1996. Id. The United States has failed to ratify UNCLOS despite having it signed and transmitted to Congress in 1994. See 140 Cong. Rec. S14467-70 (daily ed. Oct. 6, 1994).

58 See infra notes 79-81 and accompanying text.

59 See 2 Ctr. for Oceans Law and Policy, Univ. of Va., United Nations Convention on the Law of the Sea 1982, A Commentary 491 (Stya N. Nandan & Shabtai Rosenne eds., 1993) ("One of the principal successes of the [conference creating UNCLOS] was agreement on the question of limits for different maritime zones . . . ."); R.R. Churchill & A.V. Lowe, The Law of the Sea 30 (3d ed. 1999) (diagramming maritime zones under UNCLOS).

60 UNCLOS, supra note 57, art. 2, 21 I.L.M. at 1272 (providing sovereignty of coastal State extends to territorial sea); id. art. 33, 21 I.L.M. at 1276 (limiting exercise of coastal State control over contiguous zone to extent necessary to prevent and punish infringement within territorial sea of specified laws and regulations); id. art. 56, 21 I.L.M. at 1280 (limiting coastal State's sovereign and jurisdictional rights in its EEZ to specified economic related activities); id. art. 87, 21 I.L.M. at 1286 (providing that "high seas are open to all States").

61 Id. art. 87, 21 I.L.M. at 1286 (entitled "Freedom of the High Seas").

62 Id. art. 58, 21 I.L.M. at 1280 ("In the [EEZ], all States . . . enjoy . . . the freedoms referred to in article 87 of navigation and overflight . . . and other internationally lawful uses of the sea related to these freedoms . . . ."); see also 2 Ctr. for Oceans Law and Policy, supra note 59, at 491 (explaining that UNCLOS Part V regarding EEZs "preserves the rights, duties and freedoms of other States . . . in particular as regards navigation and overflight"). Article 90 provides that freedom of navigation applies to the right to "sail ships." UNCLOS, supra note 57, art. 90, 21 I.L.M. at 1287. Although there is no analogous article defining freedom of overflight, logic demands that it applies to the right to fly aircraft.

63 UNCLOS, supra note 57, art. 57, 21 I.L.M. at 1280.

64 See id. arts. 3, 33, 21 I.L.M. at 1272, 1276 (providing that State's territorial sea may not exceed twelve nautical miles from baselines and contiguous zone may not extend be-

onomic activities—most relating to natural resources.[65] Although UNCLOS sets forth the rights and duties of aircraft passing over straits that connect parts of the high seas or EEZs,[66] it does not specify rules for aircraft flying over EEZs.[67]

The United States has signed UNCLOS but has not ratified it and thus is not a party.[68] This means that the rights and obligations contained in UNCLOS are not directly binding on the United States,[69] but this does not necessarily mean that these obligations and rights are not applicable to the United States. Specifically, parts or the whole of UNCLOS may apply through the force of customary international law.[70]

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yond twenty-four nautical miles from same baselines); id. art. 55, 21 I.L.M. at 1280 (defining EEZ as area beyond and adjacent to territorial sea).

[65] Id. art. 56, 21 I.L.M. at 1280 (granting coastal State sovereign rights for purpose of exploring, exploiting, conserving, and managing natural resources as well as jurisdiction with regard to, *inter alia*, establishing structures and protection of marine environment); M/V "SAIGA" (No. 2) (St. Vincent v. Guinea), Int'l Trib. for the Law of the Sea, paras. 39-40 & 40 n.33 (July 1, 1999) (separate opinion of Judge Laing) (providing extensive evidence of intended function of EEZ as focused on natural resources), http://www.itlos.org/start2_en.html.

[66] See UNCLOS, supra note 57, arts. 37, 39, 21 I.L.M. at 1276, 1277.

[67] This "gap" was addressed in a report by the ICAO. According to the ICAO's reasoning, considering that UNCLOS provides aircraft with freedom of overflight over EEZs as well as the high seas, the lack of overflight rules for EEZs implies that the drafters may have assumed that the high-seas rules of the air apply. ICAO, United Nations Convention on the Law of the Sea, Implications, If Any, for the Application of the Chicago Convention, Its Annexes and Other International Air Law Instruments, U.N. Doc. c-WP/8077 (1985), reprinted in 1985 Int'l Orgs. and the Law of the Sea, Documentary Y.B. 1985 (Neth. Inst. for the Law of the Sea) 311, paras. 30-31. The report goes on to note that the United Nations Secretariat reached the same conclusion—albeit through slightly different reasoning—and to support the Secretariat's argument as "convincing." Id. para. 32 (reasoning that UNCLOS grants coastal State rights over water resources but grants no right to regulate air traffic over those waters). Also see Tommy T.B. Koh, The Exclusive Economic Zone, 30 Malaya L. Rev. 1 (1988) (arguing that freedom of overflight in EEZs is qualitatively identical to that in high seas), reprinted in Law of the Sea 155, 186 (Hugo Caminos ed., 2001).

[68] Initial U.S. objections to provisions regarding deep seabed mining, see Proclamation No. 5030, 48 Fed. Reg. 10605 (Mar. 10, 1983) [hereinafter 1983 Reagan Statement], were resolved by the Agreement Relating to the Implementation of Part XI of the Convention on the Law of the Sea of December 10, 1982, G.A. Res. 48/263, U.N. GAOR, 48th Sess., Supp. No. 49A, at 7, U.N. Doc. A/48/49/Add.1 (1994), http://www.un.org/documents/ga/res/48/a48r263.htm. Despite calls by members of Congress for ratification, the Senate has yet to give its consent. See 142 Cong. Rec. S9473-75 (daily ed. Aug. 2, 1996) (statement of Sen. Pell) (urging ratification of UNCLOS).

[69] See Vienna Convention on the Law of Treaties, May 23, 1969, art. 34, 1155 U.N.T.S. 331 [hereinafter Vienna Convention] ("A treaty does not create either obligations or rights for a third State without its consent."). But see id. art. 18 (providing that States that have signed but not yet ratified treaty are obliged to refrain from acts which would defeat object and purpose of treaty unless intention is clear not to become party).

[70] See id. art. 38 ("Nothing in articles 34 to 37 precludes a rule set forth in a treaty from becoming binding upon a third State as a customary rule of international law . . . .").

The task of discerning what, if any, provisions of UNCLOS bind the United States by way of customary law is complicated as there is no clear legal demarcation between rights and obligations imposed by custom and those solely imposed by consensual treaties.[71] In addition, customary international law is not static. Even if parts of UNCLOS were seen as progressive development[72] at the time of drafting (1973-1982) or when it went into force (1994), it is possible that these provisions have ripened into customary law in the intervening years.[73]

Interestingly, despite the emphasis on UNCLOS in the wake of the April 1 Incident, neither the United States nor China drew attention to the fact that the United States is not a party.[74] Moreover, the United States has repeatedly asserted that UNCLOS's provisions on overflight merely codify customary law.[75] However, China and the United States's attitudes towards UNCLOS are not dispositive of its status as customary international law.

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71 See Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 92-97 paras. 172-82 (June 27) (noting that even if customary law and treaty rule are identical, customary rule still has existence of its own).

72 See supra note 2 (defining progressive development).

73 The President of the UNCLOS drafting conference expressed the widely held view that the EEZ regime was progressive development. Statement by Tommy T.B. Koh, A Constitution for the Oceans, in 1 Ctr. for Oceans Law and Policy, Univ. of Va., United Nations Convention on the Law of the Sea 1982, A Commentary 491 (Myron H. Nordquist ed., 1993) ("The argument that [UNCLOS] codifies customary law or reflects existing international practice is factually incorrect and legally insupportable."). However, by 2001, ninety-three States had declared EEZs of 200 miles, with several others defining EEZs based on coordinates of points. Oceans and the Law of the Sea: Report of the Secretary-General, U.N. G.A., 56th Sess., Annex 2, Agenda Item 42, U.N. Doc. A/56/58 (2001), http://www.un.org/Depts/los/general_assembly/general_assembly_reports.htm; 2 Ctr. for Oceans Law and Policy, supra note 59, at 509 ("The [EEZ], once a revolutionary idea with few supporters, is now widely considered to be a part of general international law.").

74 For example, the Chinese government tacitly addressed the United States's lack of ratification by referring to the provisions of UNCLOS "and general international law." April 4 Press Release, supra note 8. See Li, supra note 40 ("Even the non-signatory countries should also abide by [UNCLOS's rules on EEZs] because it is confirmed by international judicial practice.").

75 See, e.g., 1983 Reagan Statement, supra note 68 (announcing that United States would act in accordance with UNCLOS's provisions on overflight and proclaiming establishment of 200-mile EEZ); Proclamation No. 7219, 64 Fed. Reg. 48701 (Aug. 8, 1999) (affirming that freedom of overflight is preserved within contiguous zones "[i]n accordance with international law, reflected in the applicable provisions of [UNCLOS]"). But see 142 Cong. Rec. S9473-75 (daily ed. Aug. 2, 1996) (statement of Sen. Pell) (cautioning that not all governments and scholars agree that rights in UNCLOS are protected by customary law); id. (noting Pell's credentials as delegate at law of sea negotiations). A cynical view is that the United States government does not believe that UNCLOS merely codifies customary law. Rather, by asserting as much, the United States can claim the rights it likes—by incorporating them into domestic law—while not being formally bound as a party (a pick-and-choose strategy not available to UNCLOS parties due to its prohibition on reservations). See UNCLOS, supra note 57, art. 309, 21 I.L.M. 1261, 1327; infra note 88.

Two elements must be fulfilled for a norm to attain the status of customary international law: the State practice must be widespread, and there must be a conviction among States that a legal obligation to act in a certain manner does indeed exist (*opinio juris*).[76] It is often difficult, however, to know whether both elements are satisfied.[77] The *opinio juris* element is particularly tricky as it requires a subjective inquiry into what States believe or intend by their actions.[78]

Despite this uncertainty, a number of provisions of UNCLOS are undoubtedly applicable to the United States as customary law—for example, the right to establish a 200-mile EEZ has been found by the International Court of Justice (ICJ)[79] to apply to nonparties.[80] Less clear is whether the rights and obligations within an EEZ under customary law are coterminous with those under UNCLOS.[81] However,

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[76] See Military and Paramilitary Activities, 1986 I.C.J. at 97 para. 183.

[77] The importance of widespread acceptance is evinced by the Statute of the ICJ, which sets forth the sources of international law that the court shall apply in settling disputes; these sources include, *inter alia*, international conventions; "international custom, as evidence of a general practice accepted as law." Statute of the International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1055; see also Malanczuk, supra note 4, at 42 (quoting Restatement (Third), supra note 36, § 102 cmt. b and explaining that practice can be general without being universal if widely accepted by States particularly involved). As of September 27, 2002, 138 countries had ratified UNCLOS, leaving thirty coastal States as nonparties. See Chronological Lists of Ratifications of, Accessions and Successions to the Convention and the Related Agreements, at http://www.un.org/Depts/los/reference_files/chronological_lists_ of_ratifications.htm (last updated Sept. 27, 2002).

The ICJ recognized in the *North Sea Continental Shelf* case that "very widespread and representative participation [in a convention] might suffice of itself . . . [for] a conventional rule [to] be considered [ ] a general rule of international law." North Sea Continental Shelf (F.R.G. v. Den.; F.R.G. v. Neth.), 1969 I.C.J. 3, 43 para. 73 (Feb. 20) (holding that number of ratifications and accessions was insufficient in instant case). But see id. at 44-45 para. 76 (inference of rule's status as customary law cannot be inferred from application of convention by its parties and basis of nonparty States' actions "must remain entirely speculative").

[78] See Malanczuk, supra note 4, at 39-44.

[79] See Continental Shelf (Libya v. Malta), 1985 I.C.J. 13, 33 para. 34 (June 3) ("It is in the Court's view incontestable that . . . the institution of the [EEZ], with its rule on entitlement by reason of distance, is shown by the practice of States to have become part of customary law . . . ."); see also Military and Paramilitary Activities, 1986 I.C.J. at 97 para. 182, 111-12 para. 214 (citing UNCLOS as basis for finding that freedom of navigation is "guaranteed" in EEZs despite being decided on basis of customary law).

[80] See Restatement (Third), supra note 36, § 514 cmt. a (stating that EEZ has been "effectively established as customary law"); Churchill & Lowe, supra note 59, at 161 (positing that most commentators agree that EEZ became part of customary law long before UNCLOS entered into force).

[81] See Hugo Caminos, The Law of the Sea Convention, Customary International Law, and the Role of Law Within the International Community, in The Developing Order of the Oceans: Law of the Sea Institute Eighteenth Annual Conference 475, 476 (Robert B. Krueger & Stefan A. Riesenfeld eds., 1985) (explaining that United States proclaimed its EEZ after "elaborate study" to determine its status as customary law but noting that emerging concept of EEZs "does not appear to be the same [EEZ] as Part V of [UNCLOS]").

for both the sake of simplicity and because such a finding is likely, this Note proceeds from the position that the provisions in UNCLOS would apply verbatim to the United States.

2. *China's View*

China alleged that the United States violated China's rights over its EEZ by overrunning the scope of "free over-flight."[82] Although the EEZ is focused on economic rights, Article 58 further provides that when exercising their rights in another State's EEZ, "States shall have due regard to the rights and duties of the coastal State."[83] It is this "due regard" requirement that China used to support its argument that the EP-3's flight was in violation of international law.[84]

In a statement made when ratifying UNCLOS, China declared that it "shall enjoy sovereign rights and jurisdiction over an [EEZ] of 200 nautical miles."[85] This statement did not qualify China's rights as being limited to economic rights within the zone,[86] implying that China takes a broad view of the scope of its rights within its EEZ.[87] Declarations and statements made by other States when signing, ratifying, or acceding to UNCLOS[88] demonstrate that several States support China's interpretation.[89] Bangladesh, Brazil, India, Malaysia,

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[82] April 4 Press Release, supra note 8.

[83] UNCLOS, supra note 57, art. 58, 21 I.L.M. 1261, 1280.

[84] See April 4 Press Release, supra note 8.

[85] Oceans and the Law of the Sea, Declarations and Statements, at http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm (last visited Mar. 30, 2002) [hereinafter UNCLOS Declarations]. The Exclusive Economic Zone and Continental Shelf Act of the People's Republic of China, adopted on June 26, 1998, http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/chn_1998_eez_act.pdf, provides more particulars as to China's claimed rights over resources within its EEZ, but Article 1 reiterates the broad statement that China has "sovereign rights and jurisdiction" over its EEZ. Id. art. 1. But see ILC Commentaries, supra note 3, art. 3, para. 1 ("[T]he characterization of a given act as internationally wrongful is independent of its characterization as lawful under the internal law of the State concerned.").

[86] See supra note 65 (describing natural-resource-focused rights granted to coastal State under UNCLOS).

[87] See Karby Leggett et al., Behind the Standoff: China's Dated View of its Own Territory, Asian Wall St. J., Apr. 9, 2001, at 1 ("[China's borders] are being pushed out by questionable interpretations of international treaties. Beijing asserts, for example, that it controls the airspace over the water to which it has an economic claim."); see also 2 Ctr. for Oceans Law and Policy, supra note 59, at 557 (noting proposal of China during UNCLOS drafting that States "observe the relevant laws and regulations of the coastal State").

[88] Declarations are allowed by Article 310 provided that they "do not purport to exclude or to modify the legal effect of the provisions of [UNCLOS] in their application to that State." UNCLOS, supra note 57, art. 310, 21 I.L.M. at 1327. But see Article 309 which provides that no reservations, aside from those expressly permitted by UNCLOS, are allowed. Id. art. 309, 21 I.L.M. at 1327.

[89] See Robert L. Friedheim, Negotiating the New Ocean Regime 103-11 (1993) (noting threat to right of navigation in EEZs during UNCLOS negotiations); J. Ashley Roach &

Pakistan, and Uruguay all made statements asserting that UNCLOS does not authorize other States to carry out military maneuvers in an EEZ without first obtaining the consent of the coastal State.[90] Importantly, these interpretive declarations help clarify the understanding of the treaty, but they do not have legal effect: Declaring States do not have the legal right to require other States to obtain prior authorization for military activities within their EEZs.[91]

Commentators[92] also have expressed support for China's interpretation of the "due regard" requirement[93] and have pointed to UN-

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Robert W. Smith, United States Responses to Excessive Maritime Claims 409-14 (2d ed. 1996) (describing perceived "excessive claims" by States that restrict foreign military activities within EEZs).

90 UNCLOS Declarations, supra note 85 (declaring China's sovereignty and jurisdiction over its EEZ). One justification for this stance is that military exercises may harm living marine resources or endanger installations. See 2 Ctr. for Oceans Law and Policy, supra note 59, at 564. But see Hailbronner, supra note 55, at 512 ("The exercise of far-reaching environmental authority might impose significant limitations on the freedoms of navigation and overflight.").

91 See supra note 88. A "reservation" "purports to exclude or to modify the legal effect of certain provisions of the treaty" whereas an interpretative declaration "purports to specify or clarify the meaning or scope attributed by the declarant to a treaty." Report of the International Law Commission, Fifty-Third Session, U.N. GAOR, 56th Sess., Supp. No. 10, at 455-57, U.N. Doc. A/56/10 (2001). The character of a statement as a reservation or an interpretative declaration is determined by its purported legal effect. Id.

The United Nations has provided little guidance as to its view of the various declarations regarding military maneuvers. A General Assembly resolution called upon States to ensure that any declarations or statements "were in conformity" with UNCLOS and, otherwise, to withdraw any "that were not in conformity." Oceans and the Law of the Sea: Report of the Secretary-General, Oct. 5, 2001, para. 13, U.N. Doc. A/56/58/Add.1, http://www.un.org/Depts/los/general_assembly/documents/56_58_add1_English.pdf. No action by parties has been reported since this gentle reprimand. Id.

92 The Statute of the ICJ, supra note 77, permits the court to apply "the teaching of the most highly qualified publicists" when deciding disputes. See Malanczuk, supra note 4, at 51 ("[L]earned writings can be evidence of customary law . . . ."). Although academic writings are recognized as evidence of international law, their weight must be viewed in light of the authors' reputations. Moreover, given the politically charged atmosphere, one could be skeptical about the impartiality of the writers interpreting international law.

93 See, e.g., Churchill & Lowe, supra note 59, at 427 (discussing differing views of States on issue of military maneuvers in EEZs and noting that "it is not clear whether such activities as exercises involving weapons testing are included within those freedoms"); Tullio Scovazzi, Coastal State Practice in the Exclusive Economic Zone: The Right of Foreign States to Use this Zone, in The Law of the Sea: What Lies Ahead?, Proceedings of the 20th Annual Conference of the Law of the Sea 310, 319 (Thomas A. Clingan, Jr. ed., 1986) ("[W]hile a simple naval maneuver could be considered as . . . falling within Article 58 of [UNCLOS] . . . [it] would be more difficult to sustain [this argument for] extended exercises with weapons."); Shao Zongwei & Liu Li, United States Regret Positive but Not Enough, China Daily, Apr. 6, 2001 (arguing that EP-3's flight "does not accord with the definitions of overflight in [UNCLOS]"); Zhu, supra note 16 (same).

CLOS's prohibition on the threat or use of force against other States[94] as grounds for prohibiting military activities.[95]

3. *The United States's View*

Not surprisingly, the United States disputes China's argument that "due regard" precludes surveillance flights over "international airspace,"[96] which according to the United States includes airspace over EEZs.[97] United States Navy guidelines recognize the "due regard" requirement when operating within another State's EEZ, but their interpretation is that military surveillance flights do not conflict with the need to have consideration for the rights of the coastal State.[98] As discussed below, the weight of authority supports this position.

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[94] See UNCLOS, supra note 57, art. 301, 21 I.L.M. 1261, 1326 ("Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State . . . ."); see also U.N. Charter art. 2, para. 4 (stating principle against use of force); Malanczuk, supra note 4, at 309 (explaining that prohibition on use of force is applicable to all states through customary international law).

UNCLOS further provides that "[t]he high seas shall be reserved for peaceful purposes," UNCLOS, supra note 57, art. 88, 21 I.L.M. at 1287, which applies to the EEZ through a cross-reference in the text of Article 58. See 3 Ctr. for Oceans Law and Policy, Univ. of Va., United Nations Convention on the Law of the Sea 1982, A Commentary 92 (Shabtai Rosenne & Louis B. Sohn eds., 1993). But see id. at 91 ("Generally, [UNCLOS] does not exclude military uses of the high seas that are consistent with the United Nations Charter and with other rules of international law (cf. article 301)."); Tullio Treves, Military Installations, Structures, and Devices on the Seabed, 74 Am. J. Int'l L. 808, 815-19 (1980) (discussing meaning of "peaceful purposes" and concluding that "military activities in themselves cannot be considered not peaceful").

[95] See Li, supra note 40 (arguing, in article from official Chinese news agency, that EP-3's flight contravened Article 301 of UNCLOS).

[96] Jasper Becker & Greg Torode, Jiang Firm on Apology Demand, Hopes Fade for Swift End to Spy Plane Crisis Amid Deadlock Over Admission of Blame, S. China Morning Post, Apr. 5, 2001, at 1 (reporting Ari Fleischer, Bush Administration Press Secretary, as saying, "International law is very clear and is observed around the world. The United States—as do all nations—has the right to operate over international airspace.").

[97] See U.S. Navy, The Commander's Handbook on the Law of Naval Operations, Naval Warfare Publication 1-14M, ch. 1.5 (1997), http://www.cpf.navy.mil/pages/legal/nwp%201-14/nwptoc.htm [hereinafter Naval Handbook] ("For operational purposes, international waters include all ocean areas *not* subject to the territorial sovereignty of any nation . . . . International waters include [EEZs]."); see also ICAO, supra note 67, para. 33 ("[A]s a consequence of Articles 58 and 87 of UNCLOS, the Rules of the Air applying over the EEZ are to be identical with those applying over the high seas.").

[98] Naval Handbook, supra note 97, ch. 2.5.2 ("Military aircraft may engage in flight operations, including . . . surveillance and intelligence gathering . . . . All such activities must be conducted with due regard for the rights of other nations and the safety of other aircraft and of vessels."); id. ch. 2.4.2 (explaining that due to freedom of overflight "the existence of an [EEZ] in an area of naval operations need not, of itself, be of operational concern to the naval commander"); see also Commentary Attached to the Letter of Submittal of the Secretary of State to the President (Sept. 23, 1994), [hereinafter Secretary of State Commentary] ("Under [Article 58], all States have the right to conduct military activ-

First, declarations made by other UNCLOS parties concur with the United States's view.[99] Germany, Italy, the Netherlands, and the United Kingdom all contend that the rights of the coastal State over its EEZ do not include the right to prohibit military maneuvers.[100] Moreover, the position that military activities are permitted within another State's EEZ has been widely affirmed by commentators[101] and has been noted in United Nations documents.[102]

Freedom to conduct surveillance flights also finds implicit support in the text of UNCLOS. To begin with, the EEZ is by name an *economic* zone: The article setting forth the rights, jurisdiction, and duties of the coastal State in its EEZ does not mention military or security interests.[103] In fact, UNCLOS provides that aircraft enjoy the freedom to fly over foreign States' EEZs.[104] Relatedly, Judge Laing

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ities within the EEZ, but may only do so consistently with the obligation to have due regard to coastal State resources and other rights . . . ."), reprinted in Roach & Smith, supra note 89, app. 7 at 565.

99 Cf. supra notes 88-91 and accompanying text.

100 UNCLOS Declarations, supra note 85. When forwarding UNCLOS to the Senate in 1994, the Department of State asserted that "[m]ilitary activities, such as . . . intelligence collection . . . are recognized historic high seas uses that are preserved by article 58 [of UNCLOS]." Secretary of State Commentary, supra note 98, at 565.

101 An authoritative commentary to UNCLOS only states that there has been "[s]ome doubt" as to the lawfulness of military activities in other States' EEZs with the focus on activities involving weapons for practice purposes. 2 Ctr. for Oceans Law and Policy, supra note 59, at 564 ("A few States have taken the position that some military activities are not protected within the [EEZ]."); see also Restatement (Third), supra note 36, § 514 cmt. d (stating rights of States with respect to operation of aircraft in other States' EEZs "are both qualitatively and quantitatively the same as the rights recognized by international law for all states on the high seas"); Bourbonniere & Haeck, supra note 16, at 957 ("Freedom of overflight presupposes a latitude or scope of action of movement and operation. Military operations necessarily implies for aircraft, among other things . . . intelligence activities . . . ."); Hailbronner, supra note 55, at 506 (opining that Article 58 includes right to use airspace for military purposes); Budislav Vukas, Military Uses of the Sea and the United Nations Law of the Sea Convention, in Law of the Sea 453, 462-64 (Hugo Caminos ed., 2001) (reasoning based on drafting history of Article 58 that military activities are permitted in other States' EEZs).

102 See U.N. Div. for Ocean Affairs and the Law of the Sea, Practice of States at the Time of Entry into Force of the United Nations Convention on the Law of the Sea at 133, U.N. Sales No. E.94.V.13 (1994) (opining that bilateral agreements between Soviet Union and other States indicate that freedom to conduct military operations is included among high seas freedoms applicable to EEZs); see also Churchill & Lowe, supra note 59, at 430 (same); infra notes 212-17 and accompanying text (describing bilateral agreements).

103 UNCLOS, supra note 57, art. 56, 21 I.L.M. 1261, 1280. But see Ni & Yu, supra note 43 (quoting researcher at Chinese Academy of Social Sciences that within EEZ foreign aircraft "cannot engage in activities that harm the sovereignty, security, or national interests of the coastal states").

104 UNCLOS, supra note 57, art. 58, 21 I.L.M. at 1280; see supra note 67 (interpreting UNCLOS as applying high-seas rules of the air to EEZs).

of the International Tribunal for the Law of the Sea[105] has concluded that the institution of the EEZ "has not diminished the well-established freedom of navigation."[106] Judge Laing's finding is supported by an UNCLOS provision, which requires that the coastal State (here China), in exercising its rights over its EEZ, "shall have due regard to the rights and duties of other States."[107] This language does not grant the coastal State exclusive rights but rather demands reciprocity.[108]

In addition, ICJ precedent supports the United States's claim that actions other than mere diplomatic protests—such as flying aircraft over another State's EEZ—may be used to assert its rights under the law of the sea.[109] In the *Corfu Channel* case,[110] the ICJ upheld the legality of two passages by British warships through the Corfu Channel.[111] Importantly, the legality of the second passage was upheld in part on the basis that the act was designed to affirm the United Kingdom's right to innocent passage through a strait used for international navigation. That right had been "unjustly denied" by Albania when it blocked the British ships the previous May.[112]

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105 See UNCLOS, supra note 57, art. 287, 21 I.L.M. at 1323 (stating that States may choose International Tribunal for Law of Sea, as established by Annex VI to UNCLOS, as means for settlement of disputes).

106 See M/V "SAIGA" (No. 2) (St. Vincent v. Guinea) Int'l Trib. for the Law of the Sea, para. 53 (July 1, 1999) (separate opinion of Judge Laing), http://www.itlos.org/start2_en.html. Judge Laing writes that his analysis "implies that the incidents of freedom of navigation . . . include navigational activities associated with equal economic access and opportunity to benefit economically, including through trade." Id. para. 34. Although Judge Laing's analysis directly addresses the freedom of navigation, which applies to ships, see id. para. 33, his analysis applies to the corresponding freedom of overflight, which is listed with freedom of navigation under Article 87 of UNCLOS regarding freedom of the high seas. See id. para. 32; see also supra note 62 (explaining difference between navigation and overflight).

107 UNCLOS, supra note 57, art. 56, 21 I.L.M. at 1280.

108 See 2 Ctr. for Oceans Law and Policy, supra note 59, at 543 (explaining significance of UNCLOS provision as "it balances the rights, jurisdiction and duties of" coastal State and other States).

109 See supra note 37 and accompanying text (describing FON operations).

110 Corfu Channel Case, 1949 I.C.J. 4 (Apr. 9). The case involved the passage of British warships through the Corfu Channel on three occasions in 1946: in May when two ships were fired upon, id. at 27; in October when two ships struck Albanian mines, id at 12-13; and in November when the British ships conducted a minesweeping operation, id. at 32-33; see id. at 22-23 (imputing knowledge of mine laying to Albanian government and finding Albania liable for explosions). The ICJ upheld two of the three passages as legal.

111 Id. at 29-30 (concluding that May passage did not violate sovereignty of Albania); id. at 32 (concluding same for October 22). But see id. at 34-35 (concluding that November minesweeping did violate sovereignty of Albania).

112 Id. at 30; see D.G. Stephens, The Impact of the 1982 Law of the Sea Convention on the Conduct of Peacetime Naval/Military Operations, 29 Cal. W. Int'l L.J. 283, 296 (1999) (interpreting ICJ decision as allowing that "a level of force might well accompany the realization of [navigational] rights in circumstances where those rights are unlawfully denied").

ICJ precedent further rebuts the contention that surveillance flights, like those conducted by the EP-3, constitute an unlawful threat or use of force.[113] The ICJ considered allegations by Nicaragua that maneuvers by American warships off its coasts violated customary international law[114] by "form[ing] part of a general and sustained policy of force intended to intimidate [the Nicaraguan government]."[115] The court rejected this claim, unconvinced that the maneuvers breached the principle against "use of force."[116] This conclusion has been read as support for the legality of conducting naval maneuvers outside of a State's territorial sea.[117] In this regard, it is relevant that the EP-3 reportedly had no traditional defensive, or for that matter offensive, capabilities,[118] thus diminishing the possibility that its flight could plausibly be deemed a threat or use of force.

Considering this ICJ precedent, the text of UNCLOS, and those secondary sources that support military activities, the weight of authority favors the United States's view that the EP-3's flight over China's EEZ was permitted under international law.

B. The Collision

China also contended that legal responsibility attached to the United States when the planes collided. The United States and Chinese governments agree that China has a right to monitor aircraft op-

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113 See supra note 94 and accompanying text.

114 Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, 97 para. 182 (June 27) (explaining case would be decided using customary international law).

115 Id. at 53 para. 92.

116 Id. at 118 para. 227 (stating unlawfulness of "recourse to either the threat or the use of force against the territorial integrity or political independence of any State"); see id. at 98-105 paras. 187-200 (discussing principle against use of force).

Although not found liable for the maneuvers, the United States had flouted international law by covertly directing the mining of Nicaraguan harbors. See David Rogers, U.S. Role in Mining Nicaraguan Harbors Reportedly is Larger Than First Thought, Wall St. J., Apr. 6, 1984, at 6 (reporting Central Intelligence Agency involvement in mining operation).

117 Stephens, supra note 112, at 299 ("Significantly, the court did not accept this particular claim [that the United States's maneuvers constituted a threat to use force] and instead recognized that such maneuvers did not possess the requisite threat of the use of force." (footnotes omitted)); see also Churchill & Lowe, supra note 59, at 430-31 ("[UNCLOS, including Article 301, is not] generally understood to forbid anything other than aggressive actions at sea. Certainly the major naval powers do not regard any of these articles as imposing restraints upon routine naval operations." (footnote omitted)); supra note 94 (explaining that "peaceful purposes" requirement in UNCLOS does not exclude all military uses).

118 See Rumsfeld Briefing, supra note 16 (commenting that EP-3 had no defensive capabilities). Some may argue, however, that such active intelligence gathering is a defensive or even offensive capability.

erating over its EEZ, but the countries diverge as to who was responsible for what went wrong with this monitoring on April 1.[119]

As characterized by the Chinese government, the collision was caused when "the United States plane suddenly veered at a wide angle towards the Chinese planes."[120] According to the Chinese pilot who was not hit, the F-8s were about 1300 feet from the EP-3 before it swerved.[121] The actions of the planes' pilots are relevant to the determination of reparations under the ILC Articles because "account shall be taken of the contribution to the injury by wilful or negligent action or omission of the injured State."[122] Therefore, even in the improbable event that the EP-3 did cause the collision by veering into the F-8,[123] China's claim would be weakened if the Chinese pilot was flying in a negligent manner.[124]

Specifically, China alleged that the EP-3's actions constituted a breach of a bilateral "consensus on avoiding dangerous military ac-

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119 Compare April 4 Press Release, supra note 8 ("[It was] proper and in accordance with international law for Chinese military fighters to follow and monitor the U.S. military surveillance plane within airspace over China's exclusive economic waters."), with Blair Conference, supra note 16 ("The routine operations that the United States conducts with military aircraft off the China coast are routinely intercepted by Chinese aircraft.").

120 April 4 Press Release, supra note 8. The Chinese government declared that "facts have clearly shown that it was the United States plane that rammed into and destroyed the Chinese plane." Press Release, China's Solemn Position on the US Military Reconnaissance Plane Ramming Into and Destroying a Chinese Military Plane (Apr. 3, 2001), http://www.fmprc.gov.cn/eng/9607.html; see also Erik Eckholm, China Faults U.S. in Incident; Suggests Release of Crew Hinges on Official Apology, N.Y. Times, Apr. 4, 2001, at A1 (recounting President Jiang's statement that China had "full evidence" that EP-3 caused collision); Elisabeth Rosenthal, U.S.-China Collision Talks End with Need for More Talk, N.Y. Times, Apr. 20, 2001, at A8 (reporting that Chinese produced evidence that demonstrated pattern of unsafe flying by American pilots and proved that EP-3 rammed F-8). But see Erik Eckholm, U.S. Says Spy Crew Wiped Out Secrets in Frantic Landing, N.Y. Times, Apr. 14, 2001, at A1 [hereinafter Eckholm, Frantic Landing] (quoting U.S. official's statement that "it appeared 'very possible' that the Chinese military had misinformed Beijing about the nature of the collision").

121 David E. Sanger & Craig S. Smith, Bush and Jiang Exchange Drafts of a Letter Stating U.S. Regrets, N.Y. Times, Apr. 7, 2001, at A1 (describing interview on Chinese television with pilot).

122 ILC Articles, supra note 3, art. 39. Intent is generally not a necessary ingredient of a wrongful act: "[I]t is only the act of the State that matters, independently of any intention." ILC Commentaries, supra note 3, art. 2, para. 10. An exception to this general rule arises in the case of contribution to the injury where wilful or negligent action or omission is considered. See id. art. 39.

123 See infra notes 130-36 and accompanying text.

124 See ILC Commentaries, supra note 3, art. 39, para. 5 (defining negligent actions or omissions as those "which manifest a lack of due care on the part of the victim of the breach for his or her own property or rights").

tions on the sea."[125] This agreement, according to China, was expressed in the Military Maritime Consultative Agreement (MMCA).[126] But the MMCA, reportedly created to improve communications after a 1994 incident where a Chinese submarine and jets followed a U.S. aircraft carrier,[127] not only lacks teeth—it barely has gums.[128] The MMCA does not provide concrete rules that Chinese and American pilots must follow. Rather, it merely sets forth a general framework to facilitate discussions and encourages both sides to talk in good faith.[129] China asks too much of the MMCA's insubstantial powers by invoking it as grounds for the United States to accept legal responsibility.

Secretary of Defense Donald Rumsfeld countered the accusation that the EP-3 "suddenly veered" by explaining that the EP-3 was "on autopilot, and it did not deviate from a straight and level path until it had been hit by the Chinese fighter aircraft."[130] The EP-3 com-

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125 Zheng Yi, Hegemonism Is Intolerable by Laws and Principles, People's Liberation Army Daily, Apr. 8, 2001, translated in U.S. Dep't of Commerce, World News Connection, 2001 WL 18841681; see also April 4 Press Release, supra note 8.

126 Although not mentioned by name, the April 4 Press Release presumably refers to the Military Maritime Consultative Agreement (MMCA). See Agreement Between the Department of Defense of the United States of America and the Ministry of National Defense of the People's Republic of China on Establishing a Consultation Mechanism to Strengthen Military Maritime Safety, Jan. 19, 1998, http://www.fas.org/nuke/control/sea/text/us-china.pdf (last visited Mar. 30, 2002) [hereinafter MMCA]. The MMCA provides for a consultative process to promote safety in naval and air operations and promote common understanding "in accordance with international law, including the principles and regimes reflected in [UNCLOS]." Id. art. I.

127 See Torode, supra note 22.

128 The MMCA provides that any disagreement concerning interpretation or implementation "shall be resolved by consultation between the Parties"—a somewhat humorous provision considering that the only action called for by the MMCA in the first place is consultations. MMCA, supra note 126, art. VIII; Torode, supra note 22 (noting that MMCA "paved the way for future talks but did not stipulate actual 'rules of the road'").

The MMCA had received little attention prior to the April 1 Incident. See Jane Perlex & David E. Sanger, Bush Aides Saying Some Hope Is Seen to End Standoff, N.Y. Times, Apr. 6, 2001, at A1 (describing MMCA as "obscure 1998 pact" under which officials had "met only infrequently, and usually at a relatively low level"). The two sides met outside the auspices of the MMCA following the return of the EP-3's crew, but it appeared little was agreed on other than the need to talk again. Rosenthal, supra note 120. Meetings were held in September 2001 under the auspices of the MMCA, see China, U.S. Conclude Military Maritime Consultative Agreement Meeting in Guam, World News Connection, Sept. 15, 2001, 2001 WL 27856429, and again in April 2002, see US-China Military Cooperation Very Positive—US Pacific Commander in Chief, Xinhua News Agency, Apr. 18, 2002, 2002 WL 17174628. Despite being described as "very positive," little of substance appears to have been achieved during these meetings. See id.

129 See MMCA, supra note 126, arts. I-II.

130 Rumsfeld Briefing, supra note 16; see also Marc Lacey & Steven Lee Myers, With Crew in U.S., Bush Sharpens Tone Toward China, N.Y. Times, Apr. 13, 2001, at A1 (reporting President Bush as saying, "From all the evidence we have seen, the United States

mander, Navy Lieutenant Shane Osborn, stated that the observable sudden turn, far from being the cause of the accident, was actually a result of the collision.[131] These explanations comport with the technical capabilities of the "lumbering," as it is often described, EP-3.[132]

In addition to denying any aggressive flying tactics on the part of the EP-3's pilot, the United States contended that the F-8's pilot was flying in an unsafe manner.[133] The United States did not contend that the Chinese pilot intended the collision, but there were allegations that his actions were at a minimum harassing.[134] Despite claims that the F-8s maintained a distance of 1300 feet,[135] the EP-3 crew gave accounts that the F-8 made two passes within three to five feet of the

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aircraft was operating in international airspace, in full accordance with all laws, procedures and regulations and did nothing to cause the accident.").

131 Remarks by Navy Lt. Shane Osborn at EP-3 Mission Commander's Press Conference (Apr. 14, 2001), http://usinfo.state.gov/regional/ea/uschina/ourpilot.htm [hereinafter EP-3 Commander].

132 See, e.g., Rosenthal & Sanger, supra note 29 ("[T]he EP-3 is a lumbering, slow-moving propeller plane that is significantly less maneuverable than a fighter aircraft."); William Safire, The Politics of Apology, N.Y. Times, Apr. 5, 2001, at A21 ("Lumbering along [the EP-3] was being buzzed, shadowed and harassed by a couple of Chinese F-8 fighter jets . . . ."); see also John Keefe, A Tale of 'Two Very Sorries' Redux, Far E. Econ. Rev., Mar. 21, 2002, at 30 (quoting statement of Ambassador Prueher, former Navy pilot, that China's account of collision was "physically impossible"); Michael Milde, Aeronautical Incidents and International Law, Air & Space L., Fall 2001, at 13 (opining that collision may have occurred due to miscalculation of speed by F-8 pilot because EP-3's low loitering speed at that time was close to F-8's stalling speed).

The United States defended the EP-3's flight pattern based on customary flight procedures. Admiral Blair recited the general rule of the sky: "The faster more maneuverable aircraft has the obligation to stay out of the way of the slower aircraft." Blair Conference, supra note 16. Defense Secretary Rumsfeld was a little more sardonic: "[G]oing off autopilot and manually flying the aircraft in some way to try to avoid a jet fighter, it seems to me is not a particularly brilliant idea." Rumsfeld Briefing, supra note 16; see also Steven Lee Myers & Christopher Drew, Chinese Pilot Reveled in Risk, Pentagon Says, N.Y. Times, Apr. 6, 2001, at A1 (reporting Pentagon official's statement that F-8 was not following "established international practices of intercepting foreign aircraft"). But see Steven Lee Myers, U.S. Tape Is Said to Show Reckless Flying by Chinese, N.Y. Times, Apr. 14, 2001, at A6 (noting that practices for military pilots flying during peacetime "are not explicitly codified").

133 See H.R. 2507, 107th Cong. § I(a)(6) (2001) ("The accident was caused by reckless action by a Chinese pilot with a long, documented history of taking overly aggressive actions . . . ."); Rumsfeld Briefing, supra note 16 ("It is clear that the [Chinese] pilot intended to harass the [EP-3].").

134 Regarding the intentions of the deceased Chinese pilot, Rumsfeld quipped: "You've got to know that no pilot intentionally takes his horizontal stabilizer and sticks it in the propeller of an EP-3." Rumsfeld Briefing, supra note 16. The commander of the EP-3 remarked: "No pilot is going to put himself intentionally in an out-of-control flight and have his plane ripped apart and have to eject, obviously. Was it harassing? Yes." EP-3 Commander, supra note 131.

135 See supra note 121 and accompanying text.

EP-3 before colliding on the third pass.[136] This is persuasive in view of the Chinese pilot's alleged history of risky maneuvers.[137]

Given the lack of an impartial observer, it is impossible to state conclusively who was at fault, if indeed fault rests with either party. Nonetheless, the technical capabilities of the planes and available accounts of the pilots' behavior strongly support the United States's position.[138]

C. *The Intrusion by the EP-3 into Chinese Territory*

The third point at which the United States might have incurred legal responsibility was when the EP-3 entered Chinese territorial airspace.[139] The Chinese government argued that the EP-3's unautho-

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136 The F-8 clipped the EP-3's propeller after three close approaches, causing the Chinese aircraft to break apart as debris ripped off the nose cone of the EP-3. John Kifner, A Warm, If Quick, Heroes' Welcome, Then on to Long Hours with Debriefing Teams, N.Y. Times, Apr. 13, 2001, at A10.

While close flying is common in military situations, it is not normal between airplanes from different countries' forces that are dissimilar and that are not coordinating their movements after preflight briefing. In addition to problems due to straightforward pilot errors, serious problems also can occur due to airflow between the airplanes. See, e.g., Fed. Aviation Admin., Aeronautical Info. Manual, ch. 7, § 3 (2000), http://www.faa.gov/ATPUBS/AIM/index.htm (Feb. 21, 2002) (describing tornado-like wind patterns called vortices, which trail off wing tips whenever aircraft generate lift, that can induce severe rolls when encountered by other aircraft). Vortices created by large, heavy, clean (i.e., gear and flaps up), and slow airplanes—all characteristics of the EP-3 at the time of the incident—are especially strong. See id. Another possibility is that the F-8's wing literally overlapped with the EP-3's creating a partial vacuum that sucked the wings together causing them to collide. Nancy Gibbs & Michael Duffy, Bush's Big Test, Time, Apr. 16, 2001, at 24 (suggesting that this so-called Venturi effect may have caused collision).

137 See Karby Leggett, Was Missing Chinese Pilot a Risk Taker?, Wall St. J., Apr. 6, 2001, at A11 (reporting statement in Chinese newspaper that "Mr. Wang got close enough to a U.S. plane during a 1999 encounter to see that its pilots were wearing Christmas hats"); Elisabeth Rosenthal & David E. Sanger, After Rancorous Start, U.S. and China Resume Talks, N.Y. Times, Apr. 19, 2001, at A6 (showing Department of Defense photo taken by American pilot of Wang Wei holding up paper with his email address).

138 Moreover, even if the EP-3 was deemed to be at fault for veering into the F-8 and thus causing the collision, it would not change the analysis of the legality of the EP-3's flight over China's EEZ. See supra Part II.A. Specifically, if the EP-3 negligently veered into the F-8, the veering would be the wrongful act that caused the injury, i.e., destruction of the F-8 and death of Wang Wei. In such a case, China would have a strong claim that the United States provide reparations for these injuries. Cf. infra note 178 (discussing use of *ex gratia* payment to settle dispute over United States's bombing of Chinese Embassy in Yugoslavia). If however, a tribunal found that the United States's wrongful act was entering the EEZ in the first place, the impact of the judgment is much broader and more significant. The judgment would require making an interpretation of UNCLOS that affects freedom of movement over EEZs, and the resolution likely would include the curtailment of United States surveillance flights. See infra note 200 and accompanying text (noting United States's awareness that apology could lead to limitations on future flights).

139 A State has exclusive sovereignty over the airspace above its territorial sea. UNCLOS, supra note 57, art. 2, 21 I.L.M. 1261, 1272; see also Military and Paramilitary Activi-

rized territorial intrusion and landing on Hainan Island violated international law.[140] The intrusion of a military aircraft into a foreign State's airspace has led to volatile results in the past, such as the infamous incident where a United States U-2 spy plane was shot down over Soviet territory in 1960.[141] But commentators vary as to the appropriate response to such an intrusion.[142]

There is no doubt that the EP-3 flew over China's territorial sea and landed in its territory; the question is whether the intrusion was justified by distress. The ability of the United States to invoke distress as a defense turns on China's contention that it did not receive notice as prescribed by international law.[143]

Customary law—with roots in the humanitarian obligation to preserve life[144]—supports an aircraft's right to land on foreign soil when necessitated by distress.[145] This right has long been recognized by the

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ties (Nicar. v. U.S.), 1986 I.C.J. 14, at 111 para. 212 (June 27) (affirming State's right to sovereignty over its territorial sea and airspace above as "firmly established and longstanding tenets of customary international law"). China has expressly claimed this right. See The Law of the Territorial Sea and the Contiguous Zone of the People's Republic of China, art. 3, adopted on Feb. 25, 1992, reprinted in U.N., Law of the Sea Bulletin, No. 21, Aug. 1992, at 24-27, http://www.un.org/Depts/los/general_assembly/documents/A56_58.pdf (codifying twelve-mile territorial sea); id. art. 12 (restricting when foreign aircraft may enter airspace above China's territorial sea).

140 April 4 Press Release, supra note 8.

141 See Eric Edward Geiser, The Fog of Peace: The Use of Weapons Against Aircraft in Flight During Peacetime, 4 J. Int'l Legal Stud. 187, 189-91 (1998) (describing U-2 incident).

142 See Ian Brownlie, Principles of Public International Law 117 (5th ed. 1998) ("Aerial trespass may be met with appropriate measures of prevention, but does not normally justify instant attack with the object of destroying the trespasser."); Malanczuk, supra note 4, at 199 (endorsing flexible approach as "probably" still accurate statement of law in regard to military aircraft: "In its efforts to control the movements of intruding aircraft the territorial sovereign must not expose the aircraft and its occupants to unnecessary or unreasonably great danger . . . in relation to the reasonably apprehended harmfulness of the intrusion") (quoting Oliver J. Lissitzyn in 47 Am. J. Int'l L. 559, 586 (1953)); Malcolm N. Shaw, International Law 380 (4th ed. 1997) (explaining that though self-defense argument is stronger with military aircraft than civilian, "it is questionable whether the need for a prior warning has been dispensed with"). But see Geiser, supra note 141, at 211 (arguing that State practice indicates that right to use force in response to armed attack "includes the right to use such force in response to non-violent military activities such as aerial intelligence gathering").

143 See infra notes 152-60 and accompanying text.

144 See Bourbonniere & Haeck, supra note 16, at 948 ("The overflight of sovereign territory by a state aircraft can be justified by reasons of distress . . . . Elementary considerations of humanity not only prevent the use of force in such situations, but also override claims of violation of sovereign airspace."). Cf. Corfu Channel, 1949 I.C.J. 4, 22 (Apr 9) (basing requirement of Albania to warn ships of minefield "on certain general and well-recognized principles, namely: elementary consideration of humanity, even more exacting in peace than in war").

145 See ILC Commentaries, supra note 3, art. 24, para. 2 & n.386 ("In practice, cases of distress have mostly involved aircraft or ships entering State territory under stress of weather or following mechanical or navigational failure."); see also id. art. 24, para. 5 (not-

United States government[146] and also finds support in the ILC Articles.[147] The United States has a persuasive argument that the EP-3's intrusion was excused because the ILC Articles "[preclude] the wrongfulness of conduct adopted by the State agent [here, the EP-3 pilot] in circumstances where the agent had no other reasonable way of saving life."[148] The EP-3 was severely damaged, foreclosing other options such as parachuting out,[149] and its location was far from an

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ing provision in UNCLOS that ships may stop and anchor in cases of distress). But see Jiao Xiaoyang, US Attitude Arrogant, Irresponsible, China Daily, Apr. 24, 2001, 2001 WL 7481990 (quoting Chinese law professor as saying, "International law stipulates that only civil aircraft can make an emergency landing in a foreign country without permission. Obviously military planes do not have the right, unless they get permission."); Michael N. Schmitt, Clipped Wings: Effective and Legal No-Fly Zone Rules of Engagement, 20 Loy. L.A. Int'l & Comp. L.J. 727, 785 & n.166 (1998) (noting that "right of military aircraft to claim force majeure entry is unsettled").

146 See Naval Handbook, supra note 97, ch. 2.5.1 (explaining under "National Airspace" section that "[a]ircraft in distress . . . should be allowed entry and emergency landing rights"). Cf. Secretary of State Commentary, supra note 98, at 552 (stating that recognition of State's right to sovereignty in its internal waters is "[s]ubject to ancient customs regarding the entry of ships in danger or distress (*force majeure*)").

147 See supra note 145; see also James Crawford, Special Rapporteur, Second Report on State Responsibility, Int'l L. Comm'n, 51st Sess., addendum 2, para. 223, U.N. Doc. A/CN.4/498/Add.2 (1999) ("[C]ircumstances precluding 'wrongfulness' operate like general defences or excuses in national legal systems."). Two of the circumstances are relevant to the April 1 Incident: *force majeure* and distress. See ILC Articles, supra note 3, arts. 23, 24. Duress seems to be the stronger justification considering the threat to the EP-3 crew's lives and the fact that the EP-3 pilot acted voluntarily in landing on Hainan Island. See ILC Commentaries, supra note 3, art. 24, para. 1 (distinguishing distress from *force majeure* on basis that person acts voluntarily even though "choice is effectively nullified by the situation of peril"). See also Crawford, supra, para. 252 (discussing cases of *force majeure* in regard to damaged State aircraft). The other four circumstances are consent (Article 20), self-defence (Article 21), countermeasures (Article 22), and necessity (Article 25). ILC Articles, supra note 3.

148 ILC Commentaries, supra note 3, art. 24, para. 1. The ILC Articles explain that distress is not applicable if the situation of distress is due to the conduct of the State invoking it or if the act "is likely to create a comparable or greater peril." ILC Articles, supra note 3, art. 24, para. 2. Consequently, the United States could not claim distress if the EP-3 caused the collision, see supra Part II.B, or the landing was deemed to be at least a comparable peril to the other options.

149 See William Claiborne & Thomas E. Ricks, Returning Crew Tells of Collision; Debriefings Reveal a Nearly Fatal Dive, Wash. Post, Apr. 13, 2001, at A1 (explaining that following drop of 5000 to 8000 feet, parachutes were useless "because they couldn't have gotten out, anyway"); Eckholm, Frantic Landing, supra note 120 (describing choice of EP-3 pilot as "to try a dangerous landing at sea, to have the crew bail out, or to attempt to land at the nearest field, in China"); John Kifner, Navy Pilot Thought His Plane Was Doomed After Collision, N.Y. Times, Apr. 15, 2001, § 1, at 10 (explaining EP-3 pilot's decision not to bail out).

authorized landing area.[150] Entering Chinese airspace seemingly was the only feasible way of saving the crewmembers' lives.[151]

Even if a situation of distress exists, however, the State or its agent must comply with "the requirement to notify arrival to the relevant authorities."[152] China claimed that they received no radio communications whatsoever from the EP-3.[153]

Once again the United States tells a different story. At a press conference following his return to the United States, the commander of the EP-3 affirmed that "[w]e made at least 15 mayday calls."[154] He admitted though that he could not verify whether the signals were actually received.[155]

Radio communications aside, information relayed by the pilot of the other Chinese F-8[156] and the EP-3's flight pattern evinced an in-

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150 James Dao, China's Shadowing Had Annoyed U.S., N.Y. Times, Apr. 1, 2001, at A1 (quoting Pentagon official as saying, "If [the EP-3 pilot] thought he could get to Hong Kong or the Philippines or anywhere else, I'm sure he would have taken the opportunity.").

151 See Peter Felstead, 'Inside' Account Further Exonerates EP-3 Pilot, Jane's Def. Weekly, May 18, 2001, at http://www.janes.com/regional_news/americas/news/misc/ep3_010518_1_n.shtml ("The option of ditching, given the level of damage the aircraft had sustained and the tenuous degree of control maintained, would almost certainly have led to a number of the 24 crewmembers losing their lives.").

152 ILC Commentaries, supra note 3, art. 24, para. 8 & n.396.

153 The Chinese government's April 4 Press Release, supra note 8, asserted that the EP-3 "did not issue any request or notice to the Chinese side to enter Chinese airspace or land on Chinese territory during the whole process." A U.S. diplomat offered a more *diplomatic* account of what might have happened, suggesting that "[i]t could be [the Chinese] weren't monitoring the guard [radio] frequencies." Eckholm, Frantic Landing, supra note 120.

154 EP-3 Commander, supra note 131; see also April 11 Letter, supra note 17 ("[O]ur severely crippled aircraft made an emergency landing after following international emergency procedures.").

155 EP-3 Commander, supra note 131; see also April 4 Press Release, supra note 8 ("Facts show that after the collision the [EP-3] had the time and technical ability to issue such a request or notice, however the United States plane failed to do so."). But see Rumsfeld Briefing, supra note 16 (explaining that due to noise level from damaged fuselage crew "really could not be aware as to whether or not their distress signals had been acknowledged"); Michael Janofsky, Navy Crew's Ordeal of Terror and Tedium, N.Y. Times, Apr. 16, 2001, at A9 (reporting that noise inside EP-3 might have prevented Chinese authorities from hearing mayday calls).

156 Reports indicate the other F-8 landed at 9:23 AM and the EP-3 landed at 9:33 AM, suggesting that the F-8 pilot would have alerted Chinese authorities of the incident and damage to the EP-3 in the intervening minutes. See April 4 Press Release, supra note 8 (reporting landing time). As Secretary Rumsfeld noted: "The other Chinese fighter aircraft was in close proximity to the [EP-3]. One would assume they were in contact with their airfield." Rumsfeld Briefing, supra note 16; see also Sanger & Smith, supra note 121 (describing interview on Chinese television with pilot of other F-8 in which Chinese pilot stated that he circled over Wang Wei's descending parachute and returned to base).

tent to make an emergency landing.[157] The large party waiting for the EP-3 at the Hainan airstrip corroborates that the Chinese authorities knew that the EP-3 was on its way in.[158] Considering the circumstances—the efforts of the EP-3's crew to notify Chinese authorities[159] and the Chinese government's apparent awareness of the emergency—it seems excessively strict and contrary to underlying humanitarian principles to reject the United States's claim of distress as technically invalid due to a lack of verbal clearance.[160]

D. Competing Views: A Summation

The ILC Commentaries emphasize that "the [ILC Articles] deal only with the responsibility for conduct which is internationally wrongful."[161] This Note concludes that the United States's conduct was not wrongful under international law: The EP-3's flight over China's EEZ did not violate current international law; even in the unlikely event that the EP-3 veered into the F-8, a violation of the spirit of the feeble MMCA would not give rise to legal responsibility; and international law supports excusing the intrusion into Chinese territory due to distress.

As a final note, the Chinese Foreign Ministry raised additional allegations of misbehavior on the part of the United States: The

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157 See Rumsfeld Briefing, supra note 16 ("[The EP-3] made a 270-degree turn, so that everyone on the ground and in the air would be aware that they were in distress and making an emergency landing."). In further defense of the landing, Secretary Rumsfeld offered examples of military reconnaissance planes landing on other States' territory "without permission and because of some sort of emergency." Id.

158 Secretary Rumsfeld surmised: "When [the EP-3] landed, they were greeted with armed troops, so I suspect that the people at the airfield knew they were coming." Id.; see also Eckholm, Frantic Landing, supra note 120 (reporting that runway appeared to have been cleared for EP-3's arrival and EP-3 was immediately surrounded by armed soldiers); Janofsky, supra note 155 (recounting that after landing Chinese offered EP-3 crew water and cigarettes and "told us not to worry").

159 ILC Commentaries, supra note 3, art. 24, para. 8 & n.396 (explaining "good-faith" effort requirement).

160 See supra note 144. But see ILC Commentaries, supra note 3, ch. V, para. 8 (affirming that onus is on State to justify or excuse its conduct and commenting that "it is often the case that only that State is fully aware of the facts which might excuse its nonperformance").

As with the discussion of the collision, see supra note 138, the legality of the EP-3's intrusion into Chinese territory does not change the analysis regarding the legality of the EP-3's preceding flight over China's EEZ: These are two distinct inquiries. Thus, even if the territorial intrusion was not justified due to distress, it only follows that the United States would be liable for injuries caused by its wrongful entry into Chinese territory. This likely would take the form of an apology for violating China's sovereignty without any reference to the larger issue of the EP-3's flight over China's EEZ. See infra note 175 (noting use of satisfaction for nonmaterial injuries including violations of sovereignty).

161 ILC Commentaries, supra note 3, para. 4.

United States "has displayed an arrogant air, used lame arguments, confounded right and wrong, and made groundless accusations against China."[162] But if conceit and faulty logic were grounds for invoking the responsibility of a State under international law, more than a few States would find themselves inundated with legal claims.

III
RESOLUTION OF THE APRIL 1 INCIDENT

If, as this Note has argued, the United States did not incur any legal responsibility, it follows that the United States was under no obligation to provide reparations.[163] Even so, the Chinese government termed the EP-3's actions "a gross encroachment upon China's sovereignty" and called upon the United States to "apologize to the Chinese side and bear all the responsibilities arising from the incident."[164]

But, can the United States's letter be taken as an admission of culpability?[165] This Part will describe the process by which the April 1 Incident was resolved[166] and conclude that the United States's letter expressing that it was sorry for the incident did not constitute an admission of any legal responsibility.[167]

It must be recognized at the outset that concluding that the United States was not under a legal obligation to provide reparations does not mean that it was not under political pressure to do so. Of course, both governments were balancing intense domestic and foreign pressures.[168]

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162 Powell: "We regret" Chinese Pilot's Loss (Apr. 4, 2001), at http://www.cnn.com/2001/WORLD/asiapcf/east/04/04/china.aircollision.12/index.html.

163 If an internationally wrongful act is committed and injury results therefrom, then the responsible State is under an obligation to make "full reparation for the injury." ILC Articles, supra note 3, art. 31, para. 1. Full reparation may be composed of a combination of restitution, compensation, and satisfaction. See id. art. 34. The injury need not be physical damage, for "[i]njury includes any damage, whether material or moral, caused by the internationally wrongful act of a State." Id. art. 31, para. 2; see also 2662nd Meeting. of the Int'l Law Comm'n, at 11 (Aug. 17, 2000) (statement of Giorgio Gaja, Chairman, Drafting Committee) (on file with the *New York University Law Review*) [hereinafter Gaja Statement] ("'Moral' damage may be taken to include . . . the broader notion of injury which some may call 'legal injury' to the States."); James Crawford, Special Rapporteur, Third Report on State Responsibility, Int'l L. Comm'n, 52nd Sess., addendum 1, para. 181, U.N. Doc. A/CN.4/507/Add.1 (2000), http://www.un.org/law/ilc/sessions/52/english/507add1e.pdf (using "a brief violation of its territorial integrity by aircraft" as example of per se injury where no actual material loss is suffered).

164 April 4 Press Release, supra note 8.

165 See infra notes 182, 187-89 and accompanying text (describing contents of April 11 Letter).

166 See infra Part III.A.

167 See infra Part III.B.

168 See, e.g., 'Public Outrage' Prevents Spy Plane Return (May 9, 2001), at http://www.cnn.com/2001/US/05/09/china.us.plane.04/index.html (last visited June 22, 2002)

On China's side, reports revealed that the military wanted to take a more aggressive stance than the central government; there were even reports that the army contemplated putting the EP-3 crew on trial.[169] The government's rhetoric also evinced a keen awareness of the need to placate the Chinese public's desire to stand up to the United States.[170] This was particularly evident in China's demand that the EP-3 be disassembled rather than simply flown out.[171]

On the United States's side, the military's aggressive rhetoric prompted the President to cause Secretary Rumsfeld to be "muzzled during the State Department's delicate talks."[172] Hard-line sentiments also were expressed by members of Congress.[173] In addition, the Bush administration's ability to handle the various domestic and foreign pressures was complicated by the lack of high-ranking experts on China.[174]

("[The Chinese] Foreign Ministry has been asked to strike a balance between asserting national sovereignty and dignity [and] avoiding inordinately hostile stances against the U.S.").

169 See Perlez, supra note 38. The *New York Times* Editorial Desk wondered whether President Jiang "may feel he cannot afford to look weak to senior generals" given the pending decision as to who will be his successor. Delicate Passage with China, supra note 16; see also Elisabeth Rosenthal, Many Voices for Beijing, N.Y. Times, Apr. 10, 2001, at A1 (reporting that Jiang is likely to try to retain position overseeing army after stepping down as Communist Party chief in 2002). Fortunately, moderate voices prevailed. See Gilboy & Heginbotham, supra note 52, at 26 ("Having struggled for 20 years to curb the army's role in domestic policy, [China's] civilian leaders would be loath to invite the resurgence of military influence that would accompany a descent into cold war.").

170 See supra notes 40-43 and accompanying text.

171 See Editorial, The EP Comes Home, Wash. Times, July 5, 2001, at A18; see also Mark Landler, China Said to Fear Reaction If Plane Is Released, N.Y. Times, May 10, 2001, at A11 (reporting statement by Chinese official that allowing EP-3 to be flown back "will further hurt the dignity and sentiments of the Chinese people"); see also Erik Eckholm, China Agrees to Return Partly Dismantled Spy Plane as Cargo, N.Y. Times, May 29, 2001, at A8 (observing plan to dismantle EP-3 and fly it out in commercial cargo planes).

172 Torode, supra note 54; see David E. Sanger & Steven Lee Myers, How Bush Had to Calm Hawks in Devising a Response to China, N.Y. Times, Apr. 13, 2001, at A1 (describing how Bush restrained Rumsfeld from having public role); cf. Rumsfeld Briefing, supra note 16 (taking place on April 13, one day after crew returned home).

173 Representative Hyde, Chairperson of the House International Relations Committee, termed the EP-3 crew "hostages." Beyond Hainan, Economist, Apr. 14, 2001. Senator Helms warned that any payment "could very well send a message of weakness to the dictators in Beijing." Pauline Jelinek, U.S., China in New Stalemate, Associated Press, Aug. 14, 2001, 2001 WL 26179413. See also Alison Mitchell, Anti-China Coalition in Congress Is Emboldened, N.Y. Times, Apr. 5, 2001, at A1 (reporting increased willingness of Congress to consider selling more extensive weapons to Taiwan following incident); Alison Mitchell, Tempers Are Cooling, but a Cloud Remains, N.Y. Times, Apr. 12, 2001, at A14 (reporting wary attitude of Congress towards China despite end of standoff).

174 See Elisabeth Rosenthal, China's Bonus: Attention, and Respect, N.Y. Times, Apr. 12, 2001, at A13 (noting that lack of China experts served as handicap); see also Gibbs &

A. *The April 11 Letter*

China's primary demand was that the United States apologize and accept full responsibility for the incident—an act which would constitute reparations in the form of satisfaction under the ILC Articles.[175] Furthermore, although China did not request restitution,[176] it did raise claims for compensation,[177] which have yet to be resolved.[178] China also demanded assurances that such surveillance flights would not be repeated.[179]

On April 4, 2001, Secretary of State Powell stated that "[w]e regret" the loss of the life of the Chinese pilot.[180] This was viewed by

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Duffy, supra note 136 (reporting concern for Bush's lack of foreign policy experience and quoting West Wing official's statement that "God, I hope he is talking to his father").

175 See ILC Articles, supra note 3, art. 37, para. 2 (providing that satisfaction can take form of acknowledgement of breach, expression of regret, formal apology, or another appropriate modality); ILC Commentaries, supra note 3, art. 37, para. 4 & nn.616-17 (describing examples of satisfaction given for nonmaterial injury including violations of sovereignty or territorial integrity and attacks on ships or aircraft).

176 Restitution requires a State "to re-establish the situation which existed before the wrongful act was committed" provided it is not "materially impossible" or "involve[s] a burden out of all proportion to the benefit deriving from restitution instead of compensation." ILC Articles, supra note 3, art. 35. Although the United States could pay damages to compensate for the lost plane, it is not feasible to reassemble the demolished F-8, and there is no way to bring the pilot back to life. Seemingly the only tangible damage that could practicably be remedied would be wear and tear on the runway. See Erwin, supra note 35 (noting China's concern about "potential damage that [cargo plane removing EP-3 parts] could inflict on the runway").

177 See ILC Articles, supra note 3, art. 36, para. 1 ("The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.").

178 See supra note 35 (describing debate). In order to avoid the perception of having accepted responsibility, any monetary settlement by the United States likely would be in the form of an *ex gratia* payment. See ILC Commentaries, supra note 3, art. 36, para. 6 & n.556 (explaining common practice for States to reach negotiated agreements for compensation on without-prejudice (*ex gratia*) basis); id. art. 36, para. 12 & n.566 (noting that *ex gratia* payment was used in settling dispute over United States's bombing of Chinese Embassy in Yugoslavia). See generally Marian Nash Leich, The Downing of Iran Air Flight 655: Denial of Liability: Ex Gratia Compensation on a Humanitarian Basis, 83 Am. J. Int'l L. 319, 322 (1989) (discussing precedents for *ex gratia* payments by United States and other States including 1954 shooting down of Cathay Pacific plane by China).

179 Press Release, Spokesperson on the Letter from the US Government Saying "Very Sorry" to the Chinese People (Apr. 11, 2001), http://www.fmprc.gov.cn/eng/9702.html (last visited Mar. 30, 2002) ("We demand that the United States . . . stop sending aircraft to the vicinity of China's coast for reconnaissance activities . . . ."); see ILC Articles, supra note 3, art. 30 (requiring "appropriate assurances and guarantees of non-repetition, if circumstances so require"). The United States resumed flights near China several weeks after the incident. See Thom Shanker, U.S. Resumes Its Spy Flights Close to China, N.Y. Times, May 8, 2001, at A1.

180 David E. Sanger & Jane Perlez, Powell Offers China Aides Outline for Standoff's End, N.Y. Times, Apr. 5, 2001, at A10.

China as a positive yet insufficient gesture.[181] Then, on April 11, the United States delivered a letter to the Chinese government (April 11 Letter),[182] which prompted China to agree to the release of the EP-3's crew.[183]

Why did the April 11 Letter succeed in securing the crew's release when the statement on April 4 had failed? In the words of one reporter, "The United States made an expression of regret over the loss of the Chinese pilot and then agonised over its stance, eventually moving to 'sorry' and 'very sorry' and 'very sorry with whipped-cream and a cherry on top.'"[184] The whipped-cream and cherry in the April 11 Letter was not meant to be an acceptance of legal responsibility.[185] Rather, English wording that could be creatively manipulated when translated into Chinese made the sundae palatable to Beijing.[186]

In the April 11 Letter, the United States expressed its "sincere regret" for the loss of the Chinese pilot and aircraft and further stated that it was "very sorry" for the loss.[187] The letter admitted that the entry into Chinese airspace lacked verbal clearance,[188] but asserted that, according to the United States's information, the EP-3 made an

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181 See Shao & Liu, supra note 93 (quoting Chinese Foreign Ministry spokesperson as saying, "[T]he United States must assume total responsibility and make a full apology."); see also Erik Eckholm, U.S. Envoy Meets Chinese Foreign Minister as Negotiations on Plane's Crew Continue, N.Y. Times, Apr. 6, 2001, at A10 (quoting spokesperson that Secretary Powell's statement was "a step in the right direction").

182 See April 11 Letter, supra note 17. The letter was addressed to the Chinese Foreign Minister and signed by Ambassador Prueher, who was succeeded by Clark Randt on July 23, 2001. Craig S. Smith, U.S. Envoy Takes Up Chinese Post, Seeking to Clear Up Cloudy Ties, N.Y. Times, July 23, 2001, at A9.

183 See David E. Sanger & Steven Lee Myers, Delicate Diplomatic Dance Ends Bush's First Crisis, N.Y. Times, Apr. 12, 2001, at A1 (reporting release).

184 William Kazer, Sanjiu Gives Words, Actions Their Very Own Meaning, S. China Morning Post, Sept. 6, 2001, at 3. See generally Keefe, supra note 132 (providing detailed personal account of letter-drafting process).

185 See Perlez, supra note 38 (quoting Secretary Powell as saying, "We are being asked to accept responsibility. And that we have not done, can't do, and therefore won't apologize for that.").

186 See Craig S. Smith, U.S. and China Look for a Way to Say 'Sorry,' N.Y. Times, Apr. 9, 2001, at A1 (explaining various Chinese translations of "regret" and "apology" and noting that China's ambassador to United States once served as translator for "intentionally ambiguous language of the three joint communiqués that define the United States-China relationship"); see also Sanger & Smith, supra note 121 (describing debates over language).

187 April 11 Letter, supra note 17.

188 Id.; see Erik Eckholm, Chinese Claim a Moral Victory, Describing a Much Bigger Battle, N.Y. Times, Apr. 12, 2001, at A1 (noting that lack of verbal clearance was fairly easy to concede "because it was technically true").

"emergency landing after following international emergency procedures."[189]

Perhaps the most notable aspect of the April 11 Letter was what it did not say: The word "apology" is nowhere to be found in the text. Crucially, the United States government only provided the Chinese government with an English version.[190] The United States Embassy in Beijing released a Chinese version which translated "very sorry" as an expression of condolences without acceptance of responsibility.[191] The Chinese version released by the Chinese government, however, used a translation which means to express deep regrets or an apology.[192]

Consequently, primarily those people in China who speak English and have access to the Internet or foreign news publications—albeit not an insignificant number of people nowadays—knew that the English version did not contain the word "apology."[193]

B. Saying "Sorry" Without Accepting Legal Responsibility

Not only did the United States avoid an explicit acceptance of legal responsibility by not making an "acknowledgement of the breach,"[194] but the April 11 Letter in fact constitutes neither of the

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189 April 11 Letter, supra note 17. Furthermore, the United States only agreed to hold a meeting to discuss the incident and took the innocuous step of "acknowledg[ing]" China's intention to raise the issue of future reconnaissance missions. Id.; see also supra note 179 and accompanying text.

190 See Press Release, U.S. Dep't of State, Office of the Spokesman, Question Taken at April 11, 2001 Press Briefing (Apr. 12, 2001) ("The English text is the authoritative and only text provided to the Chinese side by the United States.").

191 Eckholm, supra note 188 (explaining that "very sorry" for loss of pilot was translated as "*feichang wanxi*" (expression of sorrowful condolences) and "very sorry" for emergency landing as "*feichang baoqian*" (expression of being sorry without acceptance of responsibility)).

192 Reportedly, the Chinese government translated "very sorry" as "*shenbiao qianyi*"—literally, a deep expression of apology or regret. John Pomfret, Resolving Crisis Was a Matter of Interpretation, Wash. Post, Apr. 12, 2001, at A1; see also Eckholm, supra note 188.

193 Elisabeth Rosenthal, Beijing Declares Victory but Chat Rooms Are Skeptical, N.Y. Times, Apr. 13, 2001, at A11 (reporting reading of English version by Chinese over Internet and student dissatisfaction with lack of "a real apology"). Non-English speakers also may have learned of the lack of an "apology" through Chinese news sources reporting information from the foreign press. See Morning Edition: Role of Internet and Satellite Television in China (NPR radio broadcast, Jan. 14, 2002), 2002 WL 3186761 (explaining that "Chinese journalists routinely end-run the [official Xinhua news] agency by translating foreign news directly off the Internet").

194 See ILC Articles, supra note 3, art. 37, para 2. The Chinese government indicated their understanding that the April 11 Letter did not amount to an acknowledgement that the EP-3's flight was wrongful: At a press conference following receipt of the letter, Chinese officials emphasized that "the battle is not over" and reiterated China's demand that the United States stop surveillance flights off its coast. Eckholm, supra note 188.

ILC Articles' other two main modalities for satisfaction (i.e., "an expression of regret" or "a formal apology").[195]

On its face, the April 11 Letter appears to be satisfaction in the form of an expression of regret.[196] However, the letter does not express regret for an injury caused by a wrongful act.[197] Rather, the "regret" is akin to a mere general expression of condolences.[198] Due to this lack of a link between the expression of regret and a breach of international law, the April 11 Letter does not fulfill the definition of satisfaction.

The United States adamantly refused to provide a formal apology because of concerns that it might be construed as an admission of responsibility for committing an internationally wrongful act.[199] The United States reasonably feared that apologizing for flying over China's EEZ could influence the evolving primary rules regarding the scope of activities that are permitted within a foreign State's EEZ.[200]

IV
THE FUTURE OF BILATERAL RELATIONS

In the end, China accepted the United States's statement that it was "very sorry," the EP-3 and its crew were returned, stalled business

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195 ILC Articles, supra note 3, art. 37, para. 2. Article 37 further allows for "another appropriate modality," but the letter does not fit any of the given examples. See ILC Commentaries, supra note 3, art. 37, para. 5 ("The forms of satisfaction listed in the article are no more than examples.").

196 April 11 Letter, supra note 17 ("Both President Bush and Secretary of State Powell have expressed their sincere regret . . . ."); see ILC Commentaries, supra note 3, art. 37, para. 7 ("[Expressions of regret or apologies] may be given verbally or in writing by an appropriate official or even the head of State.").

197 See [TS] ILC Articles, supra note 3, art. 37, para. 1 ("The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation."). "Sincere regret" was not used in regard to the EP-3's emergency landing. April 11 Letter, supra note 17; see also Sanger & Myers, supra note 183 (quoting Secretary Powell as saying, "[The EP-3 pilot] landed without permission . . . and we're very sorry—but we're glad he did.").

198 Sanger & Meyers, supra note 183 (quoting Secretary Powell as saying, "The death of anyone diminishes us all in some way.").

199 Secretary Powell succinctly stated the United States's uncompromising position: "To apologize would have suggested that we have done something wrong or accepted responsibility for having done something wrong. And we did not do anything wrong. Therefore it's not possible to apologize." Philip P. Pan & John Pomfret, American Crew Heads Home; China Accepts Letter of Regret, Wash. Post, Apr. 12, 2001, at A1.

200 See Charles Hutzler, U.S., China Search for Right Words, Asian Wall St. J., Apr. 11, 2001, at 1 (quoting Professor Andrew Nathan of Columbia University as saying, "What is at stake here are norms—norms about whether it's all right for the U.S. to conduct electronic spying activities close to China's coast."); Jiao, supra note 145 (quoting Chinese law professor as saying, "It is very unlikely the United States will apologize for the incident because it is reluctant to give up such flights in the future.").

deals were resumed,[201] and tensions subsided.[202] The effort to move past the incident was largely a result of an appreciation of the two countries' interdependence[203] as well as the United States's "war against terrorism."[204]

Even if both sides are now willing to adopt the tactful view that the April 1 Incident was an "accident" comparable to two people bumping into each other on the street, the problem is that the street is only going to get more crowded.[205] Indeed, the probability of inadvertent military clashes is likely to increase due to the United States's staunch commitment to maintaining its military presence in East

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201 See Zach Coleman, China Gives Airlines Approval to Buy 36 Jets from Boeing, Asian Wall St. J., Aug. 8, 2001, at 1 (reporting that approval of Boeing deal prompted one industry consultant to remark, "This makes Colin Powell the salesman of the year for Boeing"); see also Elisabeth Bumiller, Bush Says U.S. and China Want to See Koreas Unified, N.Y. Times, Feb. 21, 2002, at A8 (interpreting China's lack of protest to finding bugging devices in Boeing 767 outfitted in United States for President Jiang as sign that Chinese wanted to keep tensions at minimum).

202 See October 16 Remarks by President Bush in Roundtable Interview with Asian Editors, U.S. Newswire, Oct. 17, 2001, 2001 WL 28753117 (quoting President Bush as saying, "It turned out to be a much more peaceful resolution than a lot of people in the world thought was possible."); see also China Ignores Anniversary of Spy Plane Incident, Agence France-Press, Apr. 1, 2002, 2002 WL 2375265 (noting lack of mention of anniversary of incident in even "ultra-patriotic" Chinese newspapers); Erik Eckholm, China's Heir Apparent Wins Cordial Reception from Bush, N.Y. Times, May 2, 2002, at A17 (reporting on "friendly meetings" with Bush administration officials during visit by Hu Jintao, President Jiang's anticipated heir).

203 After the return of the crew, the Editorial Desk of the *New York Times* stressed the powerful unifying force of mutual economic interests. Editorial, China and the United States, N.Y. Times, Apr. 15, 2001, § 4, at 10; see also, e.g., David Shambaugh, Facing Reality in China Policy, Foreign Aff., Jan.-Feb. 2001, at 50 ("The United States and China are linked by an extensive web of cultural, societal, scientific, and commercial ties that bind the two nations together through countless daily human interactions.").

204 See FY 2003 Appropriations: Hearing Before the Senate Appropriations Subcomm. on Foreign Operations, Exp. Fin., and Related Programs, 107th Cong., Apr. 24, 2002 (statement of Colin L. Powell, Secretary of State), 2002 WL 2012943 ("[I]n the over seven months since [September 11], China has helped in the war against terrorism."); Transcript of White House Background Briefing on Meetings Between President Bush, Presidents of China, Korea, U.S. Newswire, Oct. 19, 2001, 2001 WL 28753225 (commenting that China had sealed its border with Afghanistan); see also Erik Eckholm, U.S.-China Tensions Ease Before Bush Trip, N.Y. Times, Feb. 19, 2002, at A8 (explaining China's support for United States as stemming from own interests against Muslim extremism as well as improving bilateral ties).

205 See Myers, supra note 132 (reporting that pace of surveillance and frequency of interceptions had picked up since fall 2000).

Asia,[206] coupled with China's growing military strength and its ability to project that strength greater distances from its mainland.[207]

Given the often glacial pace at which international law develops,[208] as well as the ambiguities of international law that permit a variety of conflicting interpretations, China and the United States should adopt pragmatic measures to deal with encounters between their military forces.[209] The vague, three-page MMCA is a wholly inadequate instrument,[210] and, given the preference of both sides to resolve the April 1 Incident through political channels, guidance will not be forthcoming in the form of a judgment of a court or tribunal. Consequently, the most promising way to avoid a repeat of the April 1 Incident is for China and the United States to produce an agreement that sets forth specific, practical procedures to be used when their military forces encounter each other. The countries should also formalize

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206 See 2001 Defense Report, supra note 36, at 14 ("The United States is committed to maintaining significant and highly capable forces in East Asia and the Pacific Rim."); Michael R. Gordon, Pentagon Review Puts Emphasis on Long-Range Arms in Pacific, N.Y. Times, May 17, 2001, at A1 (reporting that confidential Pentagon strategy review casts Pacific as most important region for military planning).

207 The build-up of the Chinese military has caught the attention of the *New York Times* Editorial Desk, for example. Editorial, China Viewed Narrowly, N.Y. Times, June 10, 2001, § 4, at 14 (commenting on steady increase in China's military budget but noting that annual spending is less than fifteen percent of what Washington spends); Delicate Passage with China, supra note 16 ("In recent months China has extended its air defense operations farther from its coastline . . . ."); see John Pomfret, China Raises Defense Budget Again, Push to Increase Regional Influence Hampered by Army's Struggle to Modernize, Wash. Post, Mar. 5, 2002, at A10 (reporting seventeen percent rise in defense spending and detailing recent "shopping spree for weapons"); see also Steven Lee Myers, U.S. Seeks to Curb Israeli Arms Sale to China Air Force, N.Y. Times, Nov. 11, 1999, at A1 (noting sale of airborne radar system which would allow Chinese to collect intelligence and direct aircraft from distance of 250 miles); Patrick E. Tyler, China to Buy 72 Advanced Fighter Planes from Russia, N.Y. Times, Feb. 7, 1996, at A3 (stating sale of planes that "dramatically extend[ ] the combat range of the Chinese Air Force").

208 See, e.g., ILC Commentaries, supra note 3 (noting that ILC began its study of state responsibility in 1955); Churchill & Lowe, supra note 59, at 15 ("Agreement on the breadth of the territorial sea had to await the preparation of [UNCLOS], more than half a century after the first attempt at The Hague."). But see Malanczuk, supra note 4, at 45-46 (discussing possibility of "instant customary international law" which relies solely on *opinio juris* without regard to state practice and relevance of time).

209 Some guidelines already exist for ships. Compare supra note 132 (noting lack of codification of flight procedures) with the International Regulations for Preventing Collisions at Sea, Oct. 20, 1972, 28 U.S.T. 3459 [hereinafter COLREGS], which apply to all "vessels" on the high seas and waters connected therewith. Id. pt. A, R. 1(a). However, the only aircrafts to which COLREGS apply are seaplanes. Id. at R. 3(a) & (e). See generally Winford W. Barrow, Consideration of the New International Rules for Preventing Collisions at Sea, 51 Tul. L. Rev. 1182 (1977).

210 See supra notes 126-29 and accompanying text.

communication channels that could be used in the event of a repeat incident.[211]

Precedent for such bilateral "rules of the road" is found in executive agreements—the Agreement on the Prevention of Dangerous Military Activities (DMAA) and the Agreement on the Prevention of Incidents on and over the High Seas (INCSEA)[212]—concluded between the United States and Soviet Union during the 1970s and 80s to diffuse tension following similar military confrontations.[213] These agreements, particularly the DMAA, set forth detailed procedures to prevent and "expeditiously and peacefully" resolve military incidents.[214] While recognizing the limits of the analogy between Cold War relations and current U.S.-China relations, the fact that the earlier of the two agreements, the INCSEA, was signed despite "strong

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211 See Bates Gill, China Policy, Without Regrets, N.Y. Times, Apr. 12, 2001, at A29 (advocating use of bilateral talks "to set 'rules of the road' to govern interactions between our naval forces"). But see Rosenthal, supra note 120 (reporting that China and United States support mutually incompatible views of how to prevent future incidents); Rosenthal & Sanger, supra note 137 (explaining China's reluctance to negotiate rules of road because it could be seen as acknowledging United States's right to conduct surveillance near China).

The goal of increased communication has also been hindered by the United States's defense policies. See Michael R. Gordon, Rumsfeld Limiting Military Contacts with the Chinese, N.Y. Times, June 4, 2001, at A1 (reporting decision by Pentagon to conduct case-by-case review of military contacts with China); China Viewed Narrowly, supra note 207 (criticizing decision to curtail contacts). But see Blair Statement, supra note 39 (stating that "[m]ilitary to military relations [with China] are resuming slowly"); Pentagon Official Heading to China, Associated Press, June 21, 2002 (reporting that Pentagon official was scheduled to meet with Chinese defense officials to discuss renewing some military contacts).

212 Agreement on the Prevention of Dangerous Military Activities, U.S.-U.S.S.R., June 12, 1989, 28 I.L.M. 877 [hereinafter DMAA]; Agreement on the Prevention of Incidents on and over the High Seas, U.S.-U.S.S.R., May 25, 1972, 11 I.L.M. 778 [hereinafter INCSEA].

These "rules of the road" could take the form of a treaty. See Vienna Convention, supra note 69, art. 2(1)(a) (defining "treaty"); see also Julian Schofield, We Can't Let This Happen Again, U.S. Naval Inst. Proc., June 1, 2001, at 58, 2001 WL 10684529 ("What the two countries need, however, is a naval treaty . . . to outline a formal set of standards by which ships and aircraft of both sides are expected to behave."). Although the MMCA was negotiated between military professionals, it might be advantageous to involve civilian leadership. See Perlex & Sanger, supra note 128 (noting concern that MMCA takes negotiations partially out of hands of more United-States-friendly Chinese Foreign Ministry); see also China's Generals, N.Y. Times, Apr. 11, 2001, at A22 (noting China's military commanders' more distrustful attitude towards United States).

213 See Francis X. Clines, U.S.-Soviet Accord Cuts Risk of War, N.Y. Times, June 13, 1989, at A12 (explaining one main area addressed by DMAA as "crossing of national boundaries by military aircraft or troops because of accident or emergency"); Schofield, supra note 212 (explaining INCSEA's significant effects). See generally Timothy J. Nagle, Note, The Dangerous Military Activities Agreement: Minimum Order and Superpower Relations on the World's Oceans, 31 Va. J. Int'l L. 125 (1990).

214 DMAA, supra note 212, Sec. III (detailing communication methods, e.g., signal and phrase for "request landing," and procedures for incident resolution).

mutual suspicions"[215]—but led to regular annual meetings and a significant reduction in incidents[216]—gives reason for optimism that closer military cooperation between the United States and China can be achieved. Moreover, the conclusion of the DMAA a year after Soviet and American ships "bumped" during a United States Navy FON exercise in the Black Sea demonstrates that progress is possible despite enduring tensions.[217]

CONCLUSION

Ultimately, the need to move forward in bilateral relations was deemed more important than the uncertain gains which might result from a protracted battle over ambiguities in international law.[218] This Note concludes that these ambiguities come down in favor of the United States: The April 1 Incident did not give rise to any legal responsibility.

What the incident did do was to underscore the dangerous game that is regularly played out over the oceans. The military acronym "Snafu"[219] humorously accepts mishandled situations as the status quo, but that is not to say that China and the United States need accept future incidents as inevitable. Measures can and must be taken to decrease the probability that the April 1 Incident will become one in a line of similar snafus. Maybe next time "very sorry" will not be enough to mend strained relations.

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215 Anatoly Dobrynin, In Confidence 258 (1995) (noting in memoir of Soviet ambassador to United States that summit at which INCSEA was signed encouraged more constructive relationship).

216 Leslie H. Gelb, U.S.-Soviet Session on '72 Naval Accord Canceled, N.Y. Times, June 19, 1985, at A1 (reporting failure to hold annual talks for first time in fourteen-year life of INCSEA); id. (quoting U.S. Secretary of Navy that INCSEA "worked very successfully" in reducing serious incidents to only one or two per year, "way down from what it was in the 1960's and early 1970's").

217 See John H. Cushman, Jr., 2 Soviet Warships Reportedly Bump U.S. Navy Vessels, N.Y. Times, Feb. 13, 1988, § 1, at 1 (describing incident); Susan F. Rasky, Senators Say Black Sea Affair Casts Doubts on Soviet Aims, N.Y. Times, Feb. 15, 1988, at A3 (reporting Congress's skepticism of Soviet goals).

218 See Beyond Hainan, supra note 173 (quoting President Bush as saying, "[T]he longer it goes on, there's a point at which our relations with China could become damaged."); Lacey, supra note 16 (noting unlikelihood of case being brought before ICJ); id. (quoting law professor at George Washington University as saying, "Like most legal questions involving nations, this will be resolved politically.").

219 See, e.g., Ken Ringle, Them's Fightin' Words: War Lingo Rushes to the Front, Wash. Post, Nov. 10, 2001, at C1 (explaining World War II origin of "Snafu (Situation normal all, uh, fouled up)").