SOME LEGAL IMPLICATIONS OF THE U-2 AND RB-47 INCIDENTS

The purpose of this comment is not to pass legal or political judgment on the actions of the governments involved in the U-2 and the RB-47 incidents of 1960,[1] but to note and analyze, now that the passions aroused by the incidents have subsided, some of the legal implications of the positions taken by these and other governments in connection with these incidents, particularly with respect to sovereignty and jurisdiction in space. Among the questions of international law on which these incidents have a bearing are the following: What is the legal basis of national sovereignty in airspace? How far up does such sovereignty extend? What action may a state lawfully take against a foreign aircraft which intrudes into its national airspace? Is deliberate intrusion of aircraft into foreign airspace for military reconnaissance purposes an act of aggression? Is a state entitled to interfere with flights of foreign aircraft over the high seas in close proximity to its territorial sea ("contiguous zone")? By analogy, is a state entitled to control the passage of foreign space vehicles in a zone immediately above its national airspace?

On May 1, 1960, Francis Gary Powers, a citizen of the United States, was arrested on Soviet territory near Sverdlovsk after he had descended by parachute from a United States aircraft. According to public Soviet statements, this aircraft, a high-altitude plane of the Lockheed U-2 type, had been shot down by a Soviet rocket, apparently without warning, while flying over the Soviet Union at an altitude of approximately 60,000 to 68,000 feet. Powers was subsequently convicted of espionage by the Military Division of the Supreme Court of the Soviet Union and sentenced to ten years of confinement.[2]

The United States Government did not protest against the shooting down of the U-2 plane flown by Powers or against the imprisonment, trial and conviction of Powers. It eventually admitted that the U-2 flight had been deliberately undertaken for military intelligence purposes pursuant to a policy approved by the President, and that similar flights over Soviet territory had been conducted for approximately four years. Shortly thereafter, President Eisenhower ordered the suspension of further U-2 flights over the U.S.S.R. and President Kennedy subsequently ordered that they not be resumed.[3]

The absence of protest by the United States against the actions of the

[1] *Cf.* Wright, "Legal Aspects of the U-2 Incident," 54 A.J.I.L. 836 (1960).

[2] For English translations of Soviet statements and documents on the U-2 incident and the Powers trial, see Events Incident to the Summit Conference, Hearings before the Committee on Foreign Relations, U. S. Senate, 86th Cong., 2d Sess., May 27–June 2, 1960 (hereinafter cited as Senate Hearings, 1960), pp. 175, 181, 188, 195, 203, 220, 235; and The Trial of the U 2 (Translation World Publishers, Chicago, 1960). The record of the Powers trial has been published in Russian as Sudebnyi Protsess po Ugolovnomu Delu Amerikanskogo Letchika-Shpiona Frensisa G. Pauersa (1960).

[3] Senate Hearings, 1960, cited above, and documents there printed; and transcript of President Kennedy's first news conference, New York Times, Jan. 26, 1961. See, further, 42 Dept. of State Bulletin 816–818, 851–853, 900, 905 (1960); 43 *ibid.* 276–277, 350, 361 (1960).

Soviet authorities toward Powers and his plane is in sharp contrast with the strong remonstrances invariably made by the United States against the shooting down by the Soviets of American military aircraft over the high seas and the imprisonment of crew members of the aircraft so shot down. Such remonstrances were made, for example, in the case of the United States Air Force RB-47 plane shot down by Soviet aircraft on July 1, 1960, in which the United States denied that the aircraft had been flying above Soviet territory.

There are two differences which might account for the contrast—differences in the nature of the missions of the aircraft and in the location of the incidents. The admitted purpose of the U-2 flight was military reconnaissance of Soviet territory. The United States, however, has never admitted that an American aircraft over the high seas could be lawfully attacked and shot down by Soviet forces, and its crew tried in Soviet courts for espionage, merely because it was observing Soviet territory. Furthermore, the Soviet Union itself does not appear to have ever protested on legal grounds against the observation of its territory by foreign aircraft flying over the high seas. In both the U-2 and the RB-47 incidents, its complaints were based on the real or alleged "violation" of its "frontiers" or airspace by American aircraft.[4] As President Kennedy has said, the significant difference between the U-2 and the RB-47 flights was that "one was an overflight and the other was a flight of a different nature."[5] The difference, then, that accounts for the contrast in the American attitudes toward the two incidents is the difference in the location of the incidents.

The Soviet Union is not a party to the Chicago Convention of 1944[6] or to any other general treaty which expressly recognizes national sovereignty in airspace. Nevertheless, the validity of the Soviet Union's claim of sovereignty over the airspace above its territory does not appear to have been ever challenged by any state. Conversely, the Soviet Union has not challenged the sovereignty of other states over the airspace above their respective territories. Soviet spokesmen, in fact, often dwell on the respect accorded by the Soviet Union to the airspace sovereignty of other states.[7] The Soviet claim of sovereignty and jurisdiction in airspace, asserted diplomatically on numberless occasions, is explicitly made in the Soviet Air Code of 1935[8] in the following terms:

> 1. To the Union of S.S.R. belongs the full and exclusive sovereignty over the airspace of the Union of S.S.R. The airspace of the Union of S.S.R. means the airspace above the land and water territory of the

[4] See below.

[5] New York Times, Jan. 26, 1961.

[6] 61 Stat. 1180; T.I.A.S., No. 1591.

[7] See, *e.g.*, Premier Khrushchev's remarks, May 11, 1960, Senate Hearings, 1960, cited note 2 above, at 208. At a news conference on the same day, President Eisenhower said that as far as he knew there had never been any Soviet reconnaissance flights over the United States. *Ibid.* at 201. On Dec. 14, 1960, the U.S.S.R. apologized to Finland for intrusion of a Soviet aircraft into Finland due to bad weather. New York Times, Dec. 15, 1960.

[8] Vozdushnyi Kodeks SSSR (2d ed., 1936). Translation.

Union of S.S.R. and over the coastal maritime zone established by the laws of the Union of S.S.R.

66. The laws and regulations in force in the Union of S.S.R. extend to foreign civil aircraft, their crews and passengers in flight in the airspace of the Union of S.S.R.

The failure of the United States to protest against the action of the Soviet authorities toward Powers and the plane he was flying provides additional evidence that national sovereignty in airspace is a rule of customary international law and that it applies to the Soviet Union.[9]

But how far up does such sovereignty extend? Soviet law, like the legislation of other countries[10] and the Chicago Convention, contains no definition of "airspace" or of the upward limit, if any, of national sovereignty. Many space vehicles launched by the United States Government have passed directly above Soviet territory at heights of more than 100 miles both during and after the International Geophysical Year without objection on the part of the Soviet Government; similarly, space vehicles launched by the Soviet Union have passed over the United States and many other nations, also without protest. Since the launching of Sputnik I in October, 1957, Soviet writers have been virtually unanimous in expressing the view that state sovereignty has or should have an upward limit and should not extend infinitely into space, but have not suggested any specific boundary between airspace which is under national sovereignty and outer space which is not.[11] In these circumstances, Powers, as an individual on trial before a Soviet court, might well have pleaded ignorance of the upward extent of Soviet sovereignty in extenuation of his guilt;[12] but the failure of the United States to rely on altitude in justification of the flight and to protest against the Soviet action in the U-2 incident suggests recognition that Soviet sovereignty extends upward to at least the altitude of the U-2 flights. Such recognition is implicit in President Kennedy's language in announcing his order against the resumption of U-2 flights: "Flights of American aircraft penetrating the air space of the Soviet Union have been suspended since May, 1960. I have ordered that they not

[9] For a contrary view, see Beresford, "Surveillance Aircraft and Satellites: A Problem in International Law," 27 Journal of Air Law and Commerce 107, at 112 (1960).

[10] *Cf.* for example, U. S. Federal Aviation Act of 1958, sec. 1108, 72 Stat. 798, 49 U.S.C. 1508.

[11] See, *e.g.*, translations of articles by Zadorozhnyi and Galina in U. S. Senate, Committee on Aeronautical and Space Sciences, Legal Problems of Space Exploration: A Symposium, Sen. Doc. No. 26, 87th Cong., 1st Sess., at 1047, 1050 (1961); Kovalev and Cheprov, "Artificial Satellites and International Law," 1958 Soviet Year Book of International Law 128 (with English summary); Korovin, "International Status of Cosmic Space," International Affairs (Moscow), No. 1 (1959), p. 53; "Conquest of Outer Space and Some Problems of International Relations," International Affairs (Moscow), No. 11 (1959), p. 88; Osnitsky, "International Law Problems of the Conquest of Space," 1959 Soviet Year Book of International Law 51 (with English summary); Kovalev and Cheprov, "O Razrabotke Pravovykh Problem Kosmicheskogo Prostranstva," Sovetskoye Gosudarstvo i Pravo, No. 7 (1960), p. 130.

[12] But at the trial Powers made no such plea.

be resumed."[13] It is also apparent, explicitly or by implication, in the remarks of representatives of five states other than the U.S.S.R. in the U.N. Security Council debates concerning the two incidents. These states include Ceylon, Ecuador, Poland, Tunisia and, somewhat less clearly, Argentina.[14] The representatives of only three states (China, France and Italy) sought to minimize the importance of sovereignty in airspace by pointing to the launchings of space vehicles which pass over the territories of other states.[15] Thus, if the United States and the U.S.S.R. are included, not less than seven out of the eleven members of the Security Council appear to have recognized that Soviet sovereignty extends upward at least to the altitude of the U-2 flights.

The U-2 incident—and particularly the absence of a United States protest against the shooting down of the plane—further suggests that in some circumstances no previous warning or order to land is required by international law before an intruding foreign aircraft is shot down, even if the intruder does not itself attack or is likely to attack. On most occasions of real or alleged intrusion, including the RB-47 incident, the Soviet Union has asserted that the intruder was ordered to land or to turn away before it was shot down, or that the intruder opened fire first.[16] The ostensible Soviet practice—whether or not actually followed—in previous instances of "intrusion" was described by Soviet Foreign Minister Gromyko as follows: "Soviet fighter planes never opened fire on invading United States aircraft first, and only when such aircraft themselves opened fire were our airmen compelled to return their fire."[17] Following the U-2 and RB-47 incidents, however, this alleged policy of "restraint" on the part of the Soviet Union—if it ever existed in fact—was apparently given up. During the debate on the RB-47 incident, the Soviet representative stated:

> The Soviet Government is known to have given the order to its armed forces to shoot down American military aircraft, and any other aircraft, forthwith in the event of their violation of the airspace of the Soviet Union . . .[18]

[13] New York Times, Jan. 26, 1961. During the Presidential campaign of 1960, Senator Kennedy said that the U-2 flights "were not in accordance with international law." *Ibid.*, Oct. 8, 1960. The U. S. Senate Committee on Foreign Relations, in its report on the events relating to the Summit Conference, made no attempt to defend the U-2 flights as having been conducted above the airspace subject to the sovereignty of the Soviet Union, but suggested that "the U-2 incident has pointed up the need for international agreement on the question of how high sovereignty extends skyward." Events Relating to the Summit Conference, Sen. Rep. No. 1761, 86th Cong., 2d Sess., June 28, 1960, at p. 26; to the same effect, testimony of Secretary of State Herter, Senate Hearings, 1960, cited note 2 above, pp. 3–107. Senator Fulbright, chairman of the Senate committee, suggested in a speech that the U-2 flights violated Soviet sovereignty. 106 Cong. Rec. 14734–14737 (June 28, 1960).

[14] U. N. Security Council, 15th Year, Official Records, 858th, 859th, 861st, 863rd and 883rd Meetings (May 24–27 and July 26, 1960), Docs. S/P.V. 858, 859, 861, 863, 883.

[15] *Ibid.*, 858th Meeting (May 24, 1960), Doc. S/P.V.858.

[16] *Cf.* Lissitzyn, "The Treatment of Aerial Intruders in Recent Practice and International Law," 47 A.J.I.L. 559 (1953).

[17] U.N. Security Council, 15th Year, Official Records, 857th Meeting (May 23, 1960), Doc. S/P.V.857.

[18] *Ibid.*, 880th Meeting (July 22, 1960), Doc. S/P.V.880.

It thus appears that the Soviet Union does not recognize any duty, at least under the conditions of a "cold war," to give warning or an order to land or turn away to an aerial intruder before shooting him down.

In its complaint to the Security Council, the Soviet Union alleged that the U-2 flights were "aggressive acts" by the United States and offered a draft resolution to that effect.[19] This draft resolution was rejected by a vote of 7 to 2 (Poland and U.S.S.R.), with 2 abstentions (Ceylon and Tunisia).[20] Instead, the Security Council, on May 27, 1960, adopted by 9 votes to 0, with 2 abstentions (Poland and U.S.S.R.),[21] a resolution [22] in which, *inter alia,* it expressed conviction "of the necessity to make every effort to restore and strengthen international good will and confidence, based on the established principles of international law," and appealed to all Member Governments "to respect each other's sovereignty, territorial integrity and political independence." In the course of the debate,[23] many representatives pointed out that the Security Council had to take into account the political aspects of the situation and not merely the legal merits of the dispute. In rebutting the Soviet charge of aggression, the United States cited Soviet secrecy, the danger of surprise attack, and the need to protect the non-Communist world against such attack. It also pointed to the numerous acts of espionage committed by Soviet agents in the United States and elsewhere. Nevertheless, it refrained from claiming a legal right to overfly the Soviet Union for reconnaissance purposes, and some representatives attached importance to the announcement of the United States that the U-2 flights over the U.S.S.R. had been discontinued. In these circumstances, the rejection by the Security Council of the Soviet charge against the United States does not warrant the drawing of any general legal conclusions, but it does suggest that deliberate intrusions of single unarmed aircraft for reconnaissance purposes need not be regarded in all cases as aggressive acts.

In the RB-47 incident, unlike the U-2 affair, the dispute between the United States and the Soviet Union was primarily about the facts. The Soviet Union alleged that the American plane, a United States Air Force patrol aircraft similar in type to a bomber, was shot down over Soviet territorial waters off the northern coast of the U.S.S.R. after it had deliberately intruded into Soviet airspace and disobeyed an order to land. The two surviving members of the crew were imprisoned in Soviet jails, apparently with a view to being brought to trial before a Soviet court, until January 1961, when they were released and returned to the United States. The United States denied that the plane had at any time been closer than thirty miles to the Soviet coast, denounced the attack on it by Soviet forces as illegal, and demanded the release of the two survivors. It asserted that the plane had been engaged in electromagnetic observations

[19] U.N. Docs. S/4314 and S/4315; U.N. Security Council, 15th Year, Official Records, 857th Meeting (May 23, 1960), Doc. S/P.V.857.

[20] *Ibid.*, 860th Meeting (May 26, 1960), Doc. S/P.V.860.

[21] *Ibid.*, 863rd Meeting (May 27, 1960), Doc. S/P.V.863.

[22] U.N. Doc. S/4328.

[23] U.N. Security Council, 15th Year, Official Records, 857th to 863rd Meetings (May 23–27, 1960), Docs. S/P.V.857–863.

over the Barents Sea, and that a Soviet fighter had tried to force it to enter Soviet airspace before shooting it down over the high seas.[24]

As in the U-2 affair, the Soviet Union complained to the Security Council of "aggressive acts" by the United States and offered a draft resolution condemning such acts.[25] This draft resolution failed of adoption by 2 votes (Poland and U.S.S.R.) to 9. A resolution proposed by the United States, recommending that the Soviet Union and the United States submit their differences arising out of the incident either to a fact-finding commission or to the International Court of Justice,[26] obtained 9 favorable votes, but the negative vote of the U.S.S.R., operating as a veto, prevented its adoption.[27]

From the legal point of view, the most striking feature of the RB-47 incident is that none of the nations involved—the U.S.S.R., the United States, and the members of the U.N. Security Council which discussed the incident—either claimed or admitted the right of a state to shoot down a foreign aircraft over the high seas, even if it flies within close proximity of the state's territory and even if it is a military aircraft which may be engaged in military reconnaissance. In the course of the debates,[28] the representatives of several states, including the U.S.S.R., Argentina, Tunisia and Ceylon, suggested that flights close to the territorial sea of another country may be undesirable as possibly leading to incidents, but none asserted that this is a sufficient justification for shooting down the aircraft engaged in such flights. The representative of the United Kingdom expressly upheld the right to conduct such flights for reconnaissance purposes, and said that Soviet aircraft had engaged in such flights without being shot down. Most of the other representatives upheld the freedom of flight over the high seas without express reference to reconnaissance.

The 1960 debate was in many respects similar to another debate which took place in the Security Council in September, 1954, after an American patrol plane had been apparently shot down by the Soviets over the Sea of Japan. On that occasion, too, no participant in the debate asserted or admitted the right to shoot down foreign reconnaissance aircraft over the high seas, no matter how closely it approached to the territorial sea. Vyshinsky, the Soviet representative, stated:

> Mr. Lodge said that the Soviet Union representative was apparently defending the right of the Soviet Union to shoot aircraft down over the high seas. If he had not made his speech in haste then I am sure Mr. Lodge would not have said that, for my whole argument on this ques-

[24] New York Times, July 13, 1960, Jan. 26, and March 4, 1961; 43 Dept. of State Bulletin 163–165, 209–212, 274–276 (1960); U.N. Security Council, 15th Year, Official Records, 880th to 883rd Meetings (July 22–26, 1960), Docs. S/P.V.880–883.

[25] U.N. Docs. S/4384, S/4385 and S/4406. [26] U.N. Doc. S/4409/Rev.1.

[27] U.N. Security Council, 15th Year, Official Records, 883rd Meeting (July 26, 1960), Doc. S/P.V.883. Poland also voted against the U. S. draft resolution. The Soviet Union also vetoed a resolution proposed by Italy which would have expressed the hope that the International Committee of the Red Cross would be permitted to fulfill its tasks with respect to the members of the RB-47 crew.

[28] U.N. Security Council, 15th Year, Official Records, *loc. cit.* note 24 above.

> tion was concentrated on proving that the incident involving the Soviet and United States aircraft occurred over Soviet territory and not over the high seas. It is therefore absurd to suggest that I could be defending the right of any State to shoot aircraft down over the high seas.
>
> It is others who wish to defend this right. We are opposed to it. . . .[29]

Occasional non-compliance in fact by the Soviet Union or other states with the principle of freedom of flight over the high seas does not weaken the legal force of the principle unless such non-compliance is claimed to be lawful.

Significantly, the existence or non-existence of publicly proclaimed Air Defense Identification Zones (ADIZ), such as have been established over the high seas off the United States and Canada,[30] does not appear to have been regarded as affecting the rights of a coastal state with respect to the freedom of flight over the high seas. In the debate on the RB-47 incident, only the Polish representative alluded to the existence of such zones off the United States, but even he refrained from suggesting that within such zones foreign aircraft could be lawfully shot down. The United States presented maps plainly showing that on several occasions in 1959 and 1960 Soviet military aircraft penetrated the Alaskan Coastal ADIZ and flew considerable distances within the zone. According to the uncontradicted statement of the American representative, no attempt was made by the United States forces to shoot down these aircraft. The Soviet Union does not appear to have ever publicly proclaimed any ADIZ's over the high seas.

That the Soviet Union purports to uphold the freedom of flight over the high seas was further made evident in February, 1961, after a Soviet transport plane carrying the Chairman of the Presidium of the Supreme Soviet and other Soviet officials to Morocco had been intercepted by a French fighter over the Mediterranean Sea some eighty miles off the coast of Algeria, within what the French apparently call "the French zone of responsibility" or "zone of identification."[31] The French fighter fired some warning shots, apparently in the belief that the Soviet plane had deviated from its flight plan and was flying too close to Algeria. The French also alleged that the plane had failed to reply to the fighter's request for identification. The Soviet Government sharply protested against the French action. It asserted that the plane had established radio contact with Algiers and was on course, but added:

> But first of all it is permissible to ask: Who gave the French authorities the right to engage in "identification" of other states' aircraft flying

[29] U.N. Security Council, 9th Year, Official Records, 679th and 680th Meetings (Sept. 10, 1954), Docs. S/P.V.679, 680. Freedom of flight over the high seas is affirmed in Art. 2 of the 1958 Geneva Convention on the High Seas, 52 A.J.I.L. 842 (1958); 38 Dept. of State Bulletin 1115 (1958).

[30] See U. S. Naval War College, International Law Situation and Documents, 1956, pp. 577–600; Murchison, The Contiguous Air Space Zone in International Law (1957). *Cf.* Brock, "Hot Pursuit and the Right of Pursuit," 13 JAG Journal 18 at 20 (1960); and Pender, "Jurisdictional Approaches to Maritime Environments: A Space Age Perspective," 15 *ibid.* 155 (1961).

[31] See New York Times, Feb. 10–13, 1961; Pravda (Moscow), Feb. 11–13, 1961.

> in airspace over the high seas? It should be well known to the French Government that the generally accepted norms of international law provide for the freedom of flight in the airspace over the high seas, and no state, if it does not wish to be a violator of international laws, has the right to limit this freedom and to dictate arbitrarily for the aircraft of other states any routes over international waters.[32]

The French Government expressed regret over the incident.

The seemingly wide consensus, shared by the United States, the United Kingdom and the Soviet Union, as well as by smaller Powers, that a nation is not entitled to interfere with the movements of foreign aircraft (except, of course, in self-defense against an armed attack) over the high seas, even in a "contiguous zone" adjacent to its territorial sea, has interesting implications for the nascent law of outer space. If, as some have suggested, space beyond the airspace subject to national sovereignty should be regarded as analogous to the high seas, it would seem that subjacent states would not be entitled to interfere with the movements of foreign space vehicles in the space immediately above their national airspace on any theory of "contiguous zones." In this connection, it may be well to note that some Soviet writers, perhaps mindful of the reconnaissance potentialities of space vehicles, reject the analogy between outer space and the high seas.[33]

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[32] Pravda (Moscow), Feb. 12, 1961. Translation.

[33] See, *e.g.*, the articles by Kovalev and Cheprov and by Osnitsky, cited note 11 above. *Cf.* also Zhukov, "Space Espionage Plans and International Law," International Affairs (Moscow), No. 10 (1960), p. 53.