

## UNITED STATES RECONNAISSANCE AIRCRAFT COLLISION WITH CHINESE JET

By Frederic L. Kirgis  
April 2001

On April 1, 2001, a U.S. reconnaissance turboprop aircraft flying over the ocean at least 50 miles southeast of China's Hainan Island collided with a Chinese jet fighter that had been tracking its movements. The U.S. aircraft made an emergency landing in China, while the Chinese jet crashed. Apparently the pilot of the U.S. aircraft did not obtain verbal permission from China to land. All crew members on board the U.S. aircraft survived the incident in good condition. The Chinese pilot has not been found and is presumed dead at sea.

Apparently the U.S. aircraft was on a routine surveillance mission. It was capable not only of surveillance, but also of intercepting electronic signals from Chinese land-based military units. Chinese authorities asserted that the U.S. aircraft swerved and hit the Chinese jet. American authorities asserted that Chinese jets that track the movements of U.S. surveillance planes fly too close to them for safe aerial operations, and that the jet in this incident was at fault.

The Convention on International Civil Aviation (the Chicago Convention), [1] to which the United States and China are parties, authorizes the International Civil Aviation Organization to establish rules of the air for international civil aircraft, but not for noncommercial state aircraft. The Convention does say in article 3(c), however, "No state aircraft of a contracting State shall fly over the territory of another State or land thereon without authorization by special agreement or otherwise, and in accordance with the terms thereof." Since the U.S. aircraft was flying over the ocean beyond the recognized 12-mile limit of a coastal state's territorial seas, it could not be said to have been flying over the territory of China even if it was within an air defense zone claimed by China. Although the U.S. aircraft then landed on Chinese territory without verbal clearance, it did so in distress. Customary international law recognizes that ships at sea have a right to enter another state's port in distress. By analogy a similar right probably extends to aircraft in distress, including state aircraft, although the Chicago Convention does not contain an express exception to article 3(c) for state aircraft in distress. Article 25, which applies to civil aircraft rather than to noncommercial state aircraft, says that "Each contracting State undertakes to provide such measures of assistance to aircraft in distress as it may find practicable . . . ."

China apparently claims a right to control or prohibit aerial surveillance over the South China sea area where the collision occurred. The United States at times has itself claimed special control areas ("defensive sea areas") extending beyond its territorial sea in time of war or declared national emergency. [2] But the exact nature of the Chinese claim over the South China sea area is unclear, and in any event it appears not to have been recognized by other governments. Aerial surveillance conducted without using the airspace of the country being observed is a common practice for the United States and other countries with the technology and equipment to do so. Although the use of aircraft for surveillance is regarded by observed countries as an unfriendly act, and it probably would be in violation of international law if done over the observed country's territorial sea, such surveillance is not an armed attack or an act of aggression that would trigger a right of self defense to prevent it by armed force.

Chinese officials boarded the aircraft after it landed. According to news reports, it is probable that they examined its equipment. They removed the crew members and they may have removed some of the equipment. Eleven days later, after the United States said that it was very sorry for the loss suffered by the Chinese pilot's family and for entering Chinese airspace and landing without verbal clearance, China agreed to release the crew.

The aircraft would not be entitled to diplomatic immunity in the same sense as the U.S. embassy in China would. Consequently the World Court's judgment against Iran in the case arising out of the 1979 occupation of the U.S. embassy in Tehran would not be directly relevant. [3] Nevertheless, the aircraft is the equipment of the United

States Navy and was on official duty when the accident and the landing occurred. The United States has a reasonably strong claim that the aircraft was entitled to immunity from acts of dominion over it by Chinese authorities under the customary international law doctrine of sovereign immunity (which is similar in some respects to diplomatic immunity)---at least if the landing at the Chinese air field was permissible under international law, as it would be if it was an emergency landing in distress. An old United States Supreme Court case, *The Schooner Exchange*,<sup>[4]</sup> decided in 1812, has been thought to reflect the international law standard that a foreign military vessel in port is immune from the jurisdiction of the port state. In that case two Americans filed a libel (a proceeding) in admiralty against a French naval vessel that had come into a U.S. port in distress as a result of a storm at sea. The Supreme Court held the vessel immune under principles of international law. The same principles should apply in the case of aircraft, and they would extend to immunity from any exercise of dominion over the equipment aboard the aircraft.

The U.S. claim of sovereign immunity for the aircraft and its equipment is strengthened somewhat by some provisions in the 1982 U.N. Convention on the Law of the Sea.<sup>[5]</sup> The United States is not a party to the Convention, but most of its provisions are thought to represent customary international law. Under article 95 of the Convention, a warship on the high seas has complete immunity from the jurisdiction of any state other than the flag state. Under article 32 of the Convention, a warship is entitled to immunity from boarding even if it is within the territorial sea of another country. These articles are thought to reflect customary international law. Accordingly, in 1968 when North Korea seized the USS Pueblo about 15 miles at sea, the United States protested on the ground that the Pueblo was immune from seizure under international law.<sup>[6]</sup>

A ship need not be armed to be classified as a warship. A military aircraft, even if unarmed, would be like a warship. But the Chinese authorities boarded the aircraft at an airport on Chinese territory. They have asserted that the aircraft had no right to be there, and thus would not be immune. The question then would come down to whether the aircraft did have a right to be there under the doctrine of permissible entry into foreign territory in distress, mentioned above.