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April 6, 2001

MEMORANDUM FOR SECRETARY OF DEFENSE
DEPUTY SECRETARY OF DEFENSE (copy furnished)

SUBJECT: EP-3 Incident -- Guidance on Legal Issues

For your information, I am providing the following papers, developed this week by the Offices of the General Counsel and the Chairman's Legal Counsel in consultation with the Department of State Legal Adviser's Office:

Tab A - Talking Points

Tab B - Outline of Legal Issues

Tab C - State Press Guidance - Aircraft Immunity

Tab D - State Press Guidance - 6 April (with DoD/JCS comments)

Daniel J. Dell'Orto
Acting

Talking Points

– The U.S. aircraft was operating in international airspace. It was exercising the internationally recognized freedom of overflight guaranteed in the Law of the Sea Convention -- to which China is a party -- and under customary international law. Under international law, this freedom of overflight applies equally to the 200-nautical mile (NM) Exclusive Economic Zone (EEZ)(outside the 12 NM territorial sea). There was no violation whatsoever of China's sovereignty or international law by the aircraft's flight or its activities during this entire incident.

– If it is in fact true that the Chinese fighter flew underneath and very close to the U.S. aircraft, then it violated the principle of "due regard" owed to the U.S. aircraft in this situation. This is a fundamental principle of international law -- also memorialized in the Law of the Sea Convention -- that would be violated by flying unnecessarily close to an aircraft and thus endangering both aircraft. Recognized interception procedures emphasize the safety of both aircraft at all times. Violation of the "due regard" standard in this instance was provocative and dangerous, and most probably r[redacted]d in the collision.

– While we sincerely regret the loss of the Chinese aircraft and pilot, we do not understand why the Chinese aircraft would intentionally harass a U.S. aircraft exercising the high seas freedom of overflight in international airspace in an area of the ocean where the U.S. aircraft had the right to be operating. China has no valid claim to sovereignty over the South China Sea beyond the 12-nautical-mile limit seaward of China's land territory.

– The evidence is clear to all that the U.S. aircraft was severely damaged in a mid-air collision. Because of this distress, the entry of the U.S. aircraft into Chinese airspace for an emergency landing was fully permissible under international law pertaining to distressed airmen and mariners, and in no manner violated Chinese sovereignty or international law.

– The U.S. aircraft is a sovereign instrumentality of the United States entitled under international law to sovereign immunity. It did not relinquish that immunity by entering into Chinese sovereign airspace in distress, and any boarding and inspection of the aircraft by Chinese authorities under these circumstances was itself a violation of U.S. sovereignty and international law. Under international law and practice, the integrity of the U.S. aircraft must be respected and it must be released at once.

– Furthermore, under long-standing international custom and practice, Chinese authorities are obliged to respect the dignity and integrity of the U.S. aircrew, and are constrained not to mistreat or subject the aircrew members to interrogation or public display. They are also obliged under international law to return the aircrew members as soon as possible. By detaining the aircrew members for over five days and interrogating them, the Chinese authorities are violating fundamental principles of international law and custom pertaining in general to military personnel, and in particular to airmen and mariners in distress. Under these circumstances, there is no justification for any investigation or detention of the U.S. aircraft or its crew.

Prepared by: Charles A. Allen
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6 April 2001

PRC Incident - Outline of Legal Issues

International Air Space

-- Aircraft enjoy high seas freedom of overflight and other lawful uses of international airspace beyond the territorial sea (which, consistent with customary international law, may not exceed 12 nautical miles (NM) from properly drawn baselines of the coastal state).

-- As we understand it, the collision occurred 28.8 NM from the Paracel islands (the closest islands claimed by China) and 81.1 NM from Hainan Island. The U.S. aircraft was operating in international airspace, thus entitled to exercise high seas freedoms in this location.

-- Military aircraft flight operations, including surveillance and intelligence gathering flights, are recognized historic high seas uses (as reflected in article 87.2 of the Law of the Sea (LOS) Convention) that are preserved under article 58 of the LOS Convention. Under article 58, all States have the right to conduct military activities within the EEZ.

-- When conducting such activities, military aircraft are only obligated to operate with "due regard" for the limited, resource-related rights of coastal states with respect to the EEZ (such as those concerning natural resources and the marine environment) and for the interests of other states (article 58.3 of the Law of the Sea Convention). Indeed, if anything, China failed to act consistent with its own duty to operate with due regard for our right to navigate freely in international airspace.

-- The U.S. aircraft's action in no way exhibited lack of due regard for China's rights and duties with respect to its EEZ. Finally, the United States does not recognize any coastal State authority to restrict foreign military activities in the EEZ.

Right of Aircraft to Land in Chinese territory.

-- Longstanding customary international law obligations exist to assist airmen and mariners in distress and have been codified for civil aircraft under the Chicago Convention.

--In most cases, aircraft may only enter the airspace of a foreign nation with its permission. However, aircraft, including military aircraft, in distress are entitled to special consideration and should be allowed entry and emergency landing rights. The facts show that the EP-3 was truly in distress and had no alternative to landing on Hainan Island.

-- A right to enter in distress for military aircraft is consistent with customary international law (established by long-standing state practice), and, in addition, is clearly inferable both from analogous situations in which such a right exists (e.g., for civil aircraft under the Chicago Convention) and from basic humanitarian considerations.

-- Furthermore, Chinese failure to operate with due regard by approaching the EP-3 in an unsafe manner was the proximate cause of the distress, and the Chinese were thus obliged to ameliorate the consequences of their actions by allowing the aircraft to land.

-- In addition, based on the facts as now known, Chinese consent to the aircraft's landing may be inferred in that Chinese authorities took no action to prevent or divert this entry.

Status of Aircraft

-- The longstanding U.S. position has been that under customary international law, military aircraft legally present in a foreign country in peacetime are accorded sovereign immunity.

> -- Note: It has been sometimes said in the press that military aircraft are the "territory" of the flag state. Such formulations have no basis in international law. Indeed, even Embassies are not considered to be the "territory" of the sending state. Rather, such assets are sovereign U.S. assets and sovereign U.S. property, and are subject to the sovereign immunity historically accorded by nations to the warships and military aircraft of other nations.

-- USG's long-held position has been that military aircraft are entitled to the same privileges and immunities as

warships and are immune from boarding, search, seizure and inspection. In fact, when a similar issue arose with China in 1983, this position was communicated to Embassy Beijing in a State Department cable that clearly articulated the legal rationale in support of the immunity of military aircraft from search, seizure and inspection.

-- This long-standing position is supported by Article 32 of the Paris Convention of 1919 on the Regulation of Aerial Navigation (Paris Convention), the only treaty to address specifically the immunity of military aircraft while in the territory of a foreign state. Article 32 provides, in part, that "military aircraft shall enjoy … the privileges which are customarily accorded to foreign ships of war." Although the Paris Convention has been superseded by the Chicago Convention on Civil Aviation of 1944, the principle expressed in the Paris Convention was not renounced by the Chicago Convention and therefore remains a valid principle of customary international law.

-- This position is further supported by some of the world's most noted authorities on international law, including Professors McDougal and Oppenheim.

-- The USG has accepted that a host government may condition its consent to enter its territory on compliance with customs and other regulatory functions, thus forcing the United States to comply or forgo landing rights. Accordingly, in 1988, we instructed Embassy Beijing that we must maintain the integrity of the international law principles that military aircraft are sovereign instrumentalities immune from search and inspection without consent.

-- In 1996, the USG informed the Russians via diplomatic note that "the United States takes the position that U.S. state aircraft are not subject to boarding and inspection (such as agriculture, customs, immigration and safety inspections) by Russian authorities unless explicit consent is provided by the United States Government." This is consistent with the statement by the U.S. Customs Bureau in its 1967 response to an Air Force request for a restatement of the U.S. position on the question of immunity of military aircraft: "[U]nder well-established international practice, foreign military aircraft present in a country with its permission are exempt from search, seizure or inspection by that country's authorities."

-- Our position that military aircraft are immune from all boarding and searches is particularly strong in the circumstances of this case where the PRC placed our aircraft in distress, which required an emergency landing on their territory. The PRC cannot now take advantage of the situation caused by its wrongful actions to gain access to the aircraft.

Status of Crew

-- Our aircraft had a right under international law and under basic humanitarian considerations to make an emergency landing on Chinese territory. Moreover, the aircraft did not conduct any unlawful activities in Chinese territorial airspace. The aircraft and crew are , therefore, legally present in China. For this reason, and under principles of customary international law, neither the aircraft nor its occupants may be subjected to penalties or detention under such circumstances. The presence of the crew members on PRC territory does not subject them to the criminal jurisdiction of the PRC for any actions attributable to the air incident or for their entry and presence in China.

-- Clearly the crew members are not voluntarily present on Chinese territory, and in fact the Chinese bear responsibility for the events (e.g., by not taking sufficient care when shadowing our plane). Failure of the aircrew to obtain entry visas, as required by Chinese law, was occasioned by the in-flight emergency. Even if the Chinese pilot is not at fault and the incident is an "accident", then the aircraft and crew's presence in Chin is as a result of force majeure. In any circumstances, there is no basis whatsoever for any Chinese action to continue their detention, arrest, or prosecute them.

-- Military personnel having landed in a foreign state due to emergency conditions remain active members of their nation's armed forces and subject to their nation's military discipline. Based on longstanding custom and practice, and as reflected consistently in the military manuals of the United States and other civilized countries, such persons are to be treated humanely and are not to be

taken hostage or otherwise subjected to torture or other indignities. They are entitled to be treated in a manner equivalent to the armed forces of comparable rank of the host nation, and are to be returned to their home country as soon as practicable.

-- The imperative that the crew must be treated humanely and be allowed to return immediately to their country of origin is grounded in longstanding principles of international law providing the right of mariners to enter a safe harbor without prejudice.

-- The Convention on the Safety of United Nations and Associated Personnel (adopted by the UN General Assembly qr 9 December 1994 and entered into force on 15 January 1999) is an analogous international agreement concerning the status of persons when the law of armed conflict does not apply and military personnel are being held against their will. Under this Convention, personnel should not be subject to interrogation and must be immediately released, and pending their release they must be treated in accordance with universally recognized standards of human rights and the principles and spirit of the Geneva Conventions of 1949.

L PRESS GUIDANCE
April 6, 2001

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CHINA: AIRCRAFT IMMUNITY

Q. Can you tell us more about your view that the aircraft has immunity.

A:

. OUR AIRCRAFT IN CHINA IS ENTITLED TO SOVEREIGN IMMUNITY UNDER PRINCIPLES OF CUSTOMARY INTERNATIONAL LAW.

. THE PRINCIPLE THAT MILITARY AIRCRAFT ENJOY SPECIAL STATUS GOES BACK AT LEAST TO THE CONVENTION RELATING TO THE REGULATION OF AERIAL NAVIGATION OF 1919, 11 L.N.T.S. 173 (PARIS CONVENTION). ARTICLE 32 OF THAT CONVENTION PROVIDES THAT "MILITARY AIRCRAFT SHALL ENJOY . . . THE PRIVILEGES WHICH ARE CUSTOMARILY ACCORDED TO FOREIGN SHIPS OF WAR." ALTHOUGH THE PARIS CONVENTION HAS BEEN SUPERSEDED BY THE CONVENTION ON INTERNATIONAL CIVIL AVIATION OF 1944, T.I.A.S. 1591, 15 U.N.T.S. 295 (CHICAGO CONVENTION) WHICH COVERS ONLY CIVIL AVIATION, THE PRINCIPLE REMAINS A VALID PART OF CUSTOMARY INTERNATIONAL LAW.

- INDEED, THE CHAIRMAN OF THE COMMITTEE THAT DRAFTED THE RELEVANT PROVISIONS OF THE CHICAGO CONVENTION STATED:

DUE TO THE FACT THAT THE CONVENTION IS PRIMARILY CONCERNED WITH INTERNATIONAL CIVIL AIR TRANSPORT, NO PROVISION IS MADE IN IT (AS WAS IN THE PARIS CONVENTION) TC DEFINE THE PRIVILEGES TO BE ACCORDED IN FOREIGN TERRITOR TO MILITARY AIRCRAFT AS DISTINGUISHED FROM OTHER STATE AIRCRAFT.

THE PARIS CONVENTION . . . PROVIDED THAT IN THE ABSENCE OF SPECIAL STIPULATION, MILITARY AIRCRAFT, WHEN AUTHORIZEC TO FLY OVER THE TERRITORY OF ANOTHER CONTRACTING STAT1 OR TO LAND THEREIN, SHOULD ENJOY "PRIVILEGES WHICH ARE CUSTOMARILY ACCORDED TO FOREIGN SHIPS OF WAR. . .."

THE POSITION TAKEN AT THAT TIME WAS THAT MILITARY AIRCRAFT.. . HAD THE SAME CHARACTER OF A POLITICAL ORGAN REMOVED FROM EVERY INTERVENTION BY ANOTHER SOVEREIGN POWER AS HAD A FOREIGN WARSHIP IN A NATIONAL PORT.

THE RULE STATED IN THE PARIS CONVENTION-THAT AIRCRAFT ENGAGED IN MILITARY SERVICES SHOULD, IN ABSENCE OF STIPULATION TO THE CONTRARY, BE GIVEN THE PRIVILEGES OF FOREIGN WARSHIPS WHEN IN A NATIONAL PORT-IS SOUND AND

MAY BE CONSIDERED AS STILL PART OF INTERNATIONAL AIR LAW EVEN THOUGH NOT RESTATED IN THE CHICAGO CONVENTION. COOPER, EXPLORATIONS IN AEROSPACE LAW, 242-43 (1968).

- THE SOVEREIGN IMMUNITY OF STATE AIRCRAFT WITHIN ANOTHER STATE'S TERRITORIAL AIRSPACE WAS MOST RECENTLY RECOGNIZED IN THE 1982 UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, UN DOC. A/CONF. 62/122 (1982), WHERE THE CONVENTION SPECIFICALLY REFERS TO AIRCRAFT ENTITLED TO SOVEREIGN IMMUNITY WHILE ENGAGED IN TRANSIT PASSAGE (BY DEFINITION WITHIN ANOTHER STATE'S TERRITORIAL SEA.)

- THIS POSITION IS REAFFIRMED BY LEADING INTERNATIONAL LEGAL AUTHORITIES. FOR EXAMPLE, IN THE TREATISE LAW AND PUBLIC ORDER IN SPACE:

> THE COMPETENCE OF A TERRITORIAL STATE TO APPLY POLICY TO FOREIGN MILITARY AIRCRAFT LAWFULLY WITHIN ITS DOMAIN IS NO GREATER THAN THAT WITH RESPECT TO WARSHIPS. SUCH AIRCRAFT ARE UNIVERSALLY REGARDED AS NO LESS A PART OF THE MILITARY FORCE OF THEIR STATE THAN WARSHIPS, AND COMMON INTEREST REQUIRES THAT THEY BE ACCORDED A COMPARABLE IMMUNITY FROM THE APPLICATION OF THE

TERRITORIAL AUTHORITY. IN HIS TREATISE ON THE STATUS OF MILITARY AIRCRAFT, PROFESSOR PENG, AFTER AN EXTENSIVE REVIEW OF RELEVANT EXPERIENCE, CONCLUDES THAT THE IMMUNITY OF MILITARY AIRCRAFT FROM LOCAL JURISDICTION IS SO WELL ESTABLISHED IN INTERNATIONAL LAW THAT NO NEED IS FELT TO PUT IT IN FORMALIZED AGREEMENT.

McDOUGAL, LASSWELL, AND VALSIC, LAW AND PUBLIC ORDER IN SPACE, 716 (1963).

- THIS IS NOT A POSITION THAT IS NEW TO THIS INCIDENT. IT IS REFLECTED IN THE STANDARD US MILITARY TEXTS AND PUBLICATIONS. AS AN EXAMPLE, I CAN REFER YOU TO SECTION 2.2.2 OF THE COMMANDER'S HANDBOOK ON THE LAW OF NAVAL OPERATIONS, WHICH STATES:

MILITARY AIRCRAFT ARE 'STATE AIRCRAFT' WITHIN THE MEANING OF THE CONVENTION ON INTERNATIONAL CIVIL AVIATION OF 1944 (THE 'CHICAGO CONVENTION'), AND, LIKE WARSHIPS, ENJOY SOVEREIGN IMMUNITY FROM FOREIGN SEARCH AND INSPECTION.

SEE 73 US. NAVAL WAR COLLEGE, INTERNATIONAL LAW STUDIES, 114 (1999).

WE WOULD NOTE ALSO THAT THE CHINESE APPEAR TO HAVE AN EVEN MORE ABSOLUTE VIEW OF THE IMMUNITY OF THEIR AIRCRAFT. AN OXFORD MONOGRAPH ON CHINA'S PRACTICE IN THE LAW OF THE SEA REPORTS THAT CHINESE WARSHIPS OR MILITARY AIRCRAFT SAILING ON OR FLYING OVER THE HIGH SEAS OR ANCHORED IN A FOREIGN PORT "ARE CONSIDERED TO BE PART OF CHINESE TERRITORY." GREENFIELD, OXFORD MONOGRAPHS IN INTERNATIONAL LAW, CHINA'S PRACTICE IN THE LAW OF THE SEA, 114 (1992).

DRAFTED:L/PM:TFBUCHWALD - OK

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L/DL:LJACOBSON - OK

CLEARED:L:JTHESSIN -OK

DOD/DG:CALLEN - OK

JCS/L:MBOOCK - OK

EAP/CM:DSEDNEY - OK

L PRESS GUIDANCE
April 6, 2001

CHINA AIRCRAFT: SOVEREIGN IMMUNITY/ASSERTED VIOLATION OF INTERNATIONAL LAW

Q: How do you respond to the Chinese claims that our aircraft has no immunity and that the U.S. violated international law?

A:

-- OUR AIRCRAFT IS LEGALLY PRESENT IN CHINA AND IS ENTITLED TO SOVEREIGN IMMUNITY UNDER PRINCIPLES OF CUSTOMARY INTERNATIONAL LAW AS A "STATE AIRCRAFT." THE CHINESE APPEAR TO BE CLAIMING THAT THE NORMAL RULES OF SOVEREIGN IMMUNITY DON'T APPLY HERE ON THE THEORY THAT THE ACTIONS OF THE US AIRCRAFT WERE SOMEHOW ILLEGAL. WE OBVIOUSLY DON'T AGREE WITH THAT. THE NORMAL RULES OF IMMUNITY DO APPLY HERE BECAUSE OUR AIRCRAFT, CLEARLY IN DISTRESS, ACTED LEGALLY IN MAKING ITS EMERGENCY LANDING.

-- THE NORMAL RULES OF IMMUNITY PROVIDE THAT MILITARY AIRCRAFT ARE ENTITLED TO THE SAME PRIVILEGES AND IMMUNITIES AS WARSHIPS AND ARE IMMUNE FROM BOARDING, SEARCH, SEIZURE AND INSPECTION.

-- FIRST OF ALL, THE US AIRCRAFT WAS OPERATING IN INTERNATIONAL AIRSPACE, I.E., BEYOND 12 NAUTICAL MILES FROM THE COASTLINE, WHEN THE COLLISION OCCURRED. UNDER CUSTOMARY INTERNATIONAL LAW, AS REFLECTED IN THE LAW OF THE SEA CONVENTION, OUR AIRCRAFT WAS ENTITLED TO OPERATE IN THE LOCATION OF THE COLLISION OVER INTERNATIONAL WATERS AND WE WERE ENGAGING IN TRADITIONAL MILITARY ACTIVITIES – ROUTINE SURVEILLANCE AND INFORMATION GATHERING- WHICH ARE LEGALLY PERMISSIBLE IN INTERNATIONAL AIRSPACE.

-- INTERNATIONAL LAW REQUIRES THAT, IN THE EXCLUSIVE ECONOMIC ZONE ("EEZ") (I.E., BEYOND 12, BUT WITHIN 200, MILES OF THE COASTLINE), ACTIVITIES ARE CONDUCTED WITH DUE REGARD TO CHINA'S RIGHTS AND DUTIES IN THE EXCLUSIVE ECONOMIC ZONE AS A COASTAL STATE (FOR EXAMPLE, ITS RIGHTS WITH RESPECT TO MARINE RESOURCES.). THE ACTIVITIES OF OUR AIRCRAFT DID NOT INTERFERE WITH ANY SUCH CHINESE RIGHTS AND DUTIES. WE WERE DOING WHAT WE WERE ENTITLED TO DO IN INTERNATIONAL AIRSPACE.

-- CHINA HAD A SIMILAR OBLIGATION. OUR AIRCRAFT WAS OPERATING IN ACCORDANCE WITH NORMAL FLIGHT PROCEDURES WHEN THE COLLISION OCCURRED. WHILE THE CHINESE HAD A RIGHT TO OPERATE IN THIS AIRSPACE AS WELL, WHEN THEY APPROACHED OUR

AIRCRAFT THEY HAD THEIR OWN OBLIGATION TO FLY WITH DUE REGARD FOR THE SAFETY OF OUR AIRCRAFT.

-- NOW ON TO THE ISSUE OF OUR RIGHT TO LAND ON CHINESE TERRITORY. WE HAD AN AIRCRAFT THAT WAS CLEARLY IN DISTRESS. ONCE THE COLLISION OCCURRED, IT FOLLOWED STANDARD INTERNATIONAL PROCEDURE. IT BROADCAST A MAYDAY CALL OVER 121.5 MHZ, THE INTERNATIONAL AIR DISTRESS FREQUENCY THAT IS MONITORED AROUND THE WORLD, AND THEN IT DIVERTED TO THE NEAREST AIRFIELD TO SAVE OUR CREWMEN'S LIVES. OUR AIRCRAFT HAD A RIGHT UNDER INTERNATIONAL LAW AND UNDER BASIC HUMANITARIAN CONSIDERATIONS TO MAKE AN EMERGENCY LANDING ON CHINESE TERRITORY.

-- THE NORMAL RULES PROHIBITING ENTRY INTO A FOREIGN COUNTRY'S AIRSPACE WITHOUT ITS CONSENT DON'T APPLY IN THIS CASE. IN INTERNATIONAL PRACTICE, DISTRESS HAS BEEN INVOKED AND RECOGNIZED AS A CIRCUMSTANCE IN WHICH THESE NORMAL RULES DON'T APPLY WHEN A STATE AIRCRAFT ENTERS THE AIRSPACE OR TERRITORY OF ANOTHER STATE. THE INTEREST OF SAVING LIVES IN THIS CASE WAS CLEARLY SUPERIOR TO THE INTEREST IN REQUIRING PRIOR PERMISSION TO ENTER A COUNTRY'S AIRSPACE. COUNTRIES TRADITIONALLY HAVE AN OBLIGATION TO ASSIST AIRMEN AND

MARINERS IN DISTRESS, AND WE ARE GRATEFUL TO THE CHINESE FOR THEIR ASSISTANCE WITH THE SAFE LANDING OF OUR AIRCRAFT IN DISTRESS.

L PRESS GUIDANCE
April 6, 2001

CHINA: LAW OF THE SEA PROVISIONS

Q: Can you give some additional background on the international law basis for the U.S.Government's right to fly in the area where the collision occurred?

A:

- CHINA DOES NOT APPEAR TO BE CONTESTING THAT THE COLLISION OCCURRED MORE THAN TWELVE NAUTICAL MILES FROM ITS COASTAL BASELINES: NOR THAT THIS IS INTERNATIONAL AIRSPACE.

- LONGSTANDING CUSTOMARY INTERNATIONAL LAW, AS REFLECTED IN ARTICLE 1, PARAGRAPH 2, OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA (HEREINAFTER, "LOS CONVENTION"), CLEARLY LIMITS SOVEREIGN RIGHTS TO CONTROL OVERFLIGHT OF FOREIGN AIRCRAFT TO THE AIRSPACE OVER A COUNTRY'S TERRITORIAL SEA. THIS AREA, PURSUANT TO ARTICLE 3 OF THE LOS CONVENTION, MAY NOT EXCEED TWELVE NAUTICAL MILES FROM EACH COUNTRY'S PROPERLY DRAWN COASTAL BASELINES.

- CUSTOMARY INTERNATIONAL LAW, AS REFLECTED IN ARTICLE 58, PARAGRAPH 1, AND ARTICLE 87, PARAGRAPH 1, OF THE LOS CONVENTION, RECOGNIZES THE LONGSTANDING RIGHT OF AIRCRAFT TO OPERATE IN AREAS SEAWARD OF THE TERRITORIAL SEA. PRIOR TO THE ENTRY INTO FORCE OF THE LOS CONVENTION, THESE PRINCIPLES

HAD BEEN INCORPORATED INTO PREVIOUS MULTILATERAL TREATIES. INCLUDING ARTICLE 2 OF THE 1958 CONVENTION ON THE HIGH SEAS AND ARTICLE 2 OF THE CONVENTION ON THE TERRITORIAL SEA AND THE CONTIGUOUS ZONE. AND ARE CONSIDERED TO BE REFLECTIVE OF CUSTOMARY INTERNATIONAL LAW, BINDING ON ALL STATES.

Q: How do you respond to China's argument that the United States' aircraft violated the LOS Convention because it "exceeded the bounds of 'free overflight' that inter-national law permits and because it failed to respect China's rights as a coastal state and threatened Chinese national security?

A:

- THE CHINESE ARGUMENT IS INCORRECT. BEYOND THE TERRITORIAL SEA THERE IS FREEDOM OF OVERFLIGHT. MILITARY ACTIVITIES, SUCH AS INTELLIGENCE COLLECTION, ARE HISTORIC HIGH SEAS USES THAT ARE PRESERVED UNDER INTERNATIONAL LAW AS REFLECTED IN ARTICLE 58 OF THE LOS CONVENTION.

- THE CHINESE CORRECTLY POINT OUT THAT CUSTOMARY INTERNATIONAL LAW, AS REFLECTED IN ARTICLE 58, PARAGRAPH 3, OF THE LOS CONVENTION IMPOSES A DUTY ON A STATE TO EXERCISE ITS OVERFLIGHT RIGHTS OVER THE EXCLUSIVE ECONOMIC ZONE ("EEZ") WITH "DUE REGARD" TO THE "RIGHTS AND DUTIES OF THE COASTAL STATE."

HOWEVER, THESE RIGHTS AND DUTIES OF THE COASTAL STATE IN THE EEZ ARE THOSE THAT RELATE TO A VERY LIMITED CATEGORY OF COASTAL STATE RIGHTS AND DUTIES IN THE EEZ ELABORATED IN THE LOS CONVENTION (SUCH AS THOSE RELATING TO THE EXPLOITATION OF MARINE RESOURCES.) THE U.S. PLANE'S ACTION IN NO WAY EXHIBITED A LACK OF DUE REGARD FOR CHINA'S RIGHTS AND DUTIES WITH RESPECT TO ITS EEZ, AND, IN FACT, HAD NO IMPACT ON THE MARINE RESOURCE OR ENVIRONMENTAL INTERESTS ACCORDED TO CHINA UNDER THE LOS TREATY IN THE CHINESE EXCLUSIVE ECONOMIC ZONE. MOREOVER CHINA HAD A DUTY TO EXERCISE ITS FREEDOM OF OVERFLIGHT WITH DUE REGARD FOR THE INTERESTS OF THE UNITED STATES IN FREELY NAVIGATING IN INTERNATIONAL AIRSPACE.