Chapter Twenty

Non Consensual Aerial Surveillance in the Airspace over the Exclusive Economic Zone for Military and Defence Purposes

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Aerial surveillance in the airspace over the exclusive economic zone of a coastal State will usually have a variety of distinguishing characteristics. In the first place, aerial surveillance can be conducted by the coastal State itself or by another State, and secondly, where it is carried out by a Party other than the coastal State, such surveillance may either be consensual or non consensual. Limited financial and technological resources may compel a coastal State to invite another to undertake such surveillance on its behalf. In the third place, aerial surveillance may be carried out for a variety of purposes. Of interest here is aerial surveillance which has as its objective the collection of defence related intelligence by military aircraft; and accordingly aerial surveillance for the control of fisheries, human trafficking, illicit drugs and the arms trade is not of interest to this study. Fourthly, while some States carry out aerial surveillance openly and as a matter of right, others do so in a clandestine manner and are not open to either denying or commenting upon the existence of such operations. Finally, aerial surveillance may be authorised, directly or otherwise, by way of a resolution of the Security Council under Chapter VII of the Charter of the United Nations, a resolution which seeks to impart formal validity to non consensual aerial surveillance by maritime States in the airspace.

* Professor of International Law, Brunel University. For many years, Colin and I shared at Durham the teaching of Current Problems of International Law, a series of lectures and seminars we ran at the postgraduate level, and one of the topics which I introduced from time to time was concerned with the issue which forms the subject matter of this chapter. I know that he will recall this and in a sense, then, this contribution is a reminder of those halcyon days.
over the economic zone of coastal States. Surveillance operations lacking such formal validity would have to be justified under other provisions of international law. This investigation is limited to a study of aerial surveillance conducted in the airspace of the exclusive economic zone of a coastal State by maritime States which is (a) non consensual in character and (b) is concerned with the surveillance of defence and military assets of the coastal State or for any other kind of military objective or both.

Aerial surveillance of the kind under consideration here does not normally attract the attention of States members of the international community but this, like many other activities, ceases to be the case if and when an international incident takes place, especially where there is loss of human life. In most cases, the crucial issue is concerned with whether or not such aerial surveillance is a lawful activity, that is, whether it is consistent with the principles of the United Nations Convention on the Law of the Sea\(^1\) and/or international law in general. The fact that there is still some disagreement between States parties and non parties to the Convention on this issue provides an opportunity to examine the reasons for and against such legality. This study, which takes up this opportunity, is distinguished somewhat by the emphasis it places on adopting a textual approach to the matter in terms of examining the *travaux preparatoires* which, it is believed, play a central role in understanding the problem under consideration and indeed its solution. It is obvious, then, that reference must be made to the relevant provisions of the Convention, but before this is done some fundamental principles and arguments relative to overflight in general and to aerial navigation in the airspace over the exclusive economic zone of coastal States may be useful.

### 1. The Law Relative to Overflight in General

The fundamental principles of flight are to be found in the Chicago Convention on International Civil Aviation concluded in 1944,\(^2\) the successor treaty to the Paris Convention for the Regulation of Air Navigation of 1919.\(^3\) For present purposes, Articles 1 to 3 are relevant. In Article 1, contracting States recognise that every State has complete and exclusive sovereignty over the airspace above its territory, and in Article 2 the territory of a State is deemed for purposes of the Chicago Convention ‘to be the land areas [of a signatory State] and territorial waters adjacent thereto which are under the sovereignty, suzerainty,