

A Juridical Examination of the Israeli Attack on the USS *Liberty*

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Following the Israeli attack on the U.S.S. Liberty, there were conflicting accounts of the event. Many questions remain unanswered. In this article, LCDR Jacobsen provides an analysis of the attack in light of existing international precepts as they relate to intelligence gathering, freedom of the seas, aggression, and self-defense. Following this analysis, the author concludes that the attack was not supportable in international law and recommends a thorough, public investigation into the attack by the United States Congress.

Prologue

On June 8, 1967, Israeli jets and torpedo boats attacked the U.S.S. *Liberty* in the eastern Mediterranean, killing thirty-four Americans and wounding 171 more. The attack took place during the Six-Day War, so called because of the spectacular success that Israel had in defeating the forces of Egypt, Jordan, and Syria during that regional conflict. This is the first legal study of that attack.¹ The accepted explanation for the attack has been that it was a tragic mistake. Using this

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***The views expressed in this article are those of the author and do not reflect the official policy or position of the United States Government, the Department of Defense, the Department of the Navy, or the Naval Justice School.*

¹ There is a passing reference to the attack on the *Liberty* in Professor O'Connell's, *The Influence of Law on Seapower* (1975). It reads:

On 8 June 1967 Israeli torpedo boats and aircraft attacked the U.S.S. *Liberty*, an electronic surveillance ship which was monitoring Israeli transmissions from the high seas during the Six Day's War. (The identity of the ship appears to have been mistaken.) The fact that something is done does not make it legal and Israel is reported to have paid over \$3 million in compensation. The illegality may have lain in the attack on a neutral ship or it may have been compounded by the fact that the attack occurred on the high seas.

D. O'Connell, *The Influence of Law on Seapower* 127 (1975).

official explanation, there are really no international legal issues to discuss. Since the attack, however, several researchers have been at work digging out additional facts that shed an entirely different light on the incident. One of the researchers, Lieutenant Commander James M. Ennes, Jr., is a survivor of the attack.

A unique aspect of this study is its almost total reliance on authoritative unofficial sources² for facts. Little reliance has been placed on officially published records about the incident.³ It is only with the appearance of exhaustively researched, unofficial sources that the international legal issues raised by the attack have come to light.

I. FACTUAL SETTING

If we agreed that armed attack can properly achieve the purposes of the assailant, then I fear we will have turned back the clock of international order. – President Dwight D. Eisenhower

There is nothing so powerful as truth and often nothing so strange. – Daniel Webster

A. The Six-Day War

The Six-Day War, lasting from the 8th to the 10th of June, 1967, may have started because of the Soviet Union's efforts to unify the Arabs. The Soviets had been encouraging President Nasser of Egypt to show more support for Syria in the face of a perceived Israeli attack.⁴ The Russians intended to unify the Arabs under Soviet influence.⁵ Instead, given the military alliances between Egypt and Syria,

² The principal unofficial sources relied upon are: J. Bamford, *The Puzzle Palace: A Report on NSA, America's Most Secret Agency* (1982); J. Ennes, *Assault on the Liberty. The True Story of the Israeli Attack on an American Intelligence Ship* (1979); S. Green, *Taking Sides: America's Secret Relations With a Militant Israel* (1984); D. Neff, *Warriors for Jerusalem: The Six Days That Changed the Middle East* (1984); S. Steven, *The Spymasters of Israel: The Definitive Inside Look at the World's Best Intelligence Service* (1980); Ennes, *The U.S.S. Liberty Affair*, *The Link*, May-June 1984, at 1; *The Official Israeli Excuse*, *The Link*, May-June 1984, at 11.

³ The principal sources of the Government of Israel version of the attack may be found in: Goodman & Schiff, *The Attack on the Liberty*, *Atlantic*, Sept. 1984, at 78; M. Greenberg, *The Attack on the "Liberty" Incident* (Israeli Defense Forces History Department Monograph, June 1982); U.S. Navy Court of Inquiry to Inquire into the Circumstances Surrounding the Armed Attack on U.S.S. *Liberty* AGTR-5 on 8 June 1967 (page 3 of document 45 of exhibit 48 contains the first Israeli justification for the attack from Lieutenant Colonel Bloch), Y. Yerishalmi, *Preliminary Inquiry* (July 21, 1967) (a one-man preliminary judicial inquiry into the conduct of members of the Israeli Defense Forces during the attack on the *Liberty*).

⁴ D. Neff, *supra* note 2, at 58-60.

⁵ *Id.* at 53

and finally Egypt and Jordan, the Russians probably unintentionally drove the region to war.⁶

On the 16th of May, Egypt requested that the 3,378 members of the United Nations Emergency Force, who patrolled the Egyptian-Israeli border on the Egyptian side, be removed. The removal of the United Nations troops from the border also meant their withdrawal from the lonely outpost at Sharm el-Sheikh, where they had overseen the free transit of ships bound for Israel through the Gulf of Aqaba and the Straits of Tiran. After withdrawal of the United Nations troops, one question raised was whether the Egyptians would try to close these Straits. The Israelis let it be known that closing the Straits would be considered an act of aggression and a cause for war.⁷ During the night of May 22-23, 1967, President Nasser announced that he was, in fact, closing the Straits of Tiran to Israeli shipping. It was clear that there would be war, and Israel was ready.

The Israeli military establishment and the intelligence services were particularly anxious for a showdown with the Arabs.⁸ Israel possessed nearly perfect intelligence capabilities.⁹ One Israeli intelligence officer said, "The Arabs had no surprises for us; we knew what they had and where they had it."¹⁰

Israel's actual justification for the use of force against Egypt was its charge that, in the early hours of the 5th of June, Egyptian land and air forces had moved against Israel.¹¹

On the morning of June 5, 1967, waves of Israeli jets flew over the Sinai Peninsula from the Mediterranean Sea and proceeded to destroy the Egyptian Air Force on the ground. The jets had traveled so low over the water that they had disappeared for a time from ground-based radar stations. It was a tactic that had been practiced for the previous two years.¹² In the first minutes of the attack, precision runs destroyed every first-strike forward airfield in Egypt.¹³ At the same time, Israeli attacks of lesser magnitude were being made against targets in Jordan and Syria. After the devastating June 5th air attacks against Egypt, Jordan, and Syria, Israel completely dominated the skies over the south-eastern Mediterranean region.¹⁴

By the 6th of June, Israeli land forces were more than halfway to the Suez Canal along the Sinai Mediterranean coast. By the next day, Sharm el-Sheikh and the Egyptian side of the Straits of Tiran were in Israeli hands. With the capture of

⁶ *Id.* at 60.

⁷ *Id.* at 87.

⁸ *Id.* at 58.

⁹ S. Steven, *supra* note 2, at 28.

¹⁰ L. Velie, *Countdown in the Holy Land* 125 (1969).

¹¹ 22 U.N. SCOR (1360th mtg.) at 1, U.N. Doe. S/T. V 1347 (1967).

¹² D. Neff, *supra* note 2, at 32.

¹³ S. Steven, *supra* note 2, at 231.

¹⁴ D. Neff, *supra* note 2, at 204; J. Bamford, *supra* note 2, at 221.

Sharm el-Sheikh, Israel's originally stated war aim had been satisfied; ships could once again pass through the Straits to the Israeli port of Elath. Israeli troops continued through the Sinai, however, and reached the Suez Canal on the 8th of June. By this time, Egyptian resistance in the Sinai was effectively finished, and the airfield at El-Arish was functioning as an advanced Israeli air base.¹⁵

Prior to the Six-Day War, Jordan had made a last-minute alliance with Egypt. This was to be a costly venture. Israel was confident of victory over Jordan and wanted to fight the Kingdom. To avoid having to give back the fruits of conquest, however, Israel knew that she would have to be able to sustain the argument that she had been the victim of aggression.¹⁶ Accordingly, when Israeli intelligence intercepted radio signals from Egypt describing the crushing defeat Egypt was suffering, the Israelis broadcast untrue accounts to Jordan of an Israeli defeat by Egypt.¹⁷ King Hussein then ordered his ground forces into action against Israel.¹⁸ In some of the fiercest fighting of the war, Israeli Defense Forces attacked Jordanian East Jerusalem and the region known as the West Bank. By the time United Nations- the sponsored cease-fire was being honored by both sides, at 4:40 a.m. local time on the 8th of June, Israel had conquered the West Bank and East Jerusalem. The United States became aware of the Israeli signals deception and so informed the Israelis.¹⁹ The Israelis suspected that the United States somehow knew what they had done.²⁰

The Syrian front had been comparatively quiet. Although there had been exchanges of artillery fire and Israeli plane attacks, the Syrians had made no major moves in the war.²¹ As resistance lessened in the newly conquered Egyptian and Jordanian land, however, Israeli Defense Forces were being prepared for an offensive against Syria²² On the 8th of June, heavy air and artillery bombardment of Syria began and was reported by United Nations observers.²³ On the 9th of June, Israel had still not attacked and both Syria and Israel announced acceptance of Security Council Resolution 235, which called for a cease-fire, with the only exception being that Israel reserved the right to take defensive measure²⁴ Later that day Israel attacked, claiming a cease-fire violation by Syria²⁵ It was clear from

¹⁵ Smith, *The Violation of the Liberty*, U.S. Naval Inst. Proc., June 1978, at 62-64 (it was off the coast near El-Arish that the U.S.S. *Liberty* would arrive on the morning of the 8th of June).

¹⁶ S. Steven, *supra* note 2, at 34.

¹⁷ *Id.* at 233-34.

¹⁸ *Id.* at 34.

¹⁹ *Id.*

²⁰ *Id.* at 234.

²¹ D. Neff, *supra* note 2, at 254.

²² S. Green, *supra* note 2, at 222.

²³ *Id.*

²⁴ 22 U.N. SCOR (1352th mtg.) at 15-16, U.N. Doc. STV 1352 (1967).

²⁵ S. Green, *supra* note 2, at 223.

the start that Defense Minister Dayan ordered the attack on Syria, not because of a cease-fire violation by Syria, but because of Egypt's total defeat and the reported collapse of the Syrians.²⁶ Later, he stated that his purposes had been to put Israeli settlements out of Syrian shelling range and to teach the Syrians a lesson.²⁷ Before the next cease-fire between Syria and Israel took effect, Israel had conquered the Golan Heights and the southwest corner of Syria. Only strong diplomatic action by the Soviet Union prevented further Israeli conquest.²⁸

At the outbreak of the Six-Day War, on June 5th, a spokesman for the United States State Department declared that America's policy in that conflict was to maintain neutrality "in thought, word, and deed."²⁹ Meanwhile, an intelligence unit of the United States, the U.S.S. *Liberty*, would arrive on station off the Gaza Strip on the morning of the 8th of June 1967.

B. The U.S.S. *Liberty*

The U.S.S. *Liberty* was a commissioned ship of the U.S. Navy, manned by U.S. servicemen who were subject to military discipline. Its "passengers" were military cryptologic technicians from the U.S. Navy Department who were routinely augmented by a small number of U.S. Government civilian employees. The ship was a World War II *Victory* class cargo ship that had been taken from the national reserve fleet and reactivated as a highly sophisticated seagoing intelligence-collection platform that was capable of picking electronic communication emissions from the earth's atmosphere for research and analysis.³⁰ Her top speed was seventeen knots.³¹ The hull number of the *Liberty*, AGTR-5, was written in 10-foot high white letters on her gray sides, at the bow, and in small letters on each side of the stern. This meant that the *Liberty* was an auxiliary, noncombatant vessel of general or miscellaneous type, assigned to technical research duty and, in this case, the fifth U.S. naval vessel so classified.³² To carry out her Middle East duty, in June 1967, she carried a complement of 293 officers and crew.

²⁶ D. Neff, *supra* note 2, at 265.

²⁷ *Id.* The reason for the Syrian shelling may have been the questionable means that Israel used to obtain Arab farmland below the Golan Heights for use by Israel. See D. Hirst, *The Gun and The Olive Branch: The Roots of Violence in the Middle East* 211-13 (1977); D. Neff, *supra* note 2, at 5455.

²⁸ D. Neff, *supra* note 2, at 278-82.

²⁹ *Id.* at 213.

³⁰ For a discussion of the general background for the *Liberty* and her work, see J. Ennes, *Assault on the Liberty*, *supra* note 2, at 7-9; J. Bamford, *supra* note 2, at 212-35.

³¹ J. Bamford, *supra* note 2, at 218.

³² Ennes, *The U.S.S. Liberty Affair*, *supra* note 2, at 9.

The missions that the *Liberty* and her sister ships performed were conducted primarily for the U.S. National Security Agency (NSA).³³ The mission of NSA is to listen in on communications around the world from a variety of platforms and to acquire intelligence for the highest level of the United States Government.³⁴ To enable her to perform her listening work, the *Liberty* was equipped with a distinctive antenna array.³⁵ Admiral Thomas H. Moorer, a retired U.S. Navy Chief of Naval Operations, has said that the *Liberty* had clearly identifiable characteristics that made her the easiest ship in the U.S. Navy to identify.³⁶ One of the reasons for this ease of identification was a piece of equipment, known as TRSSCOM,³⁷ on the aft of the ship. TRSSCOM stands for Technical Research Ship Special Communication System and, when the system functioned properly, the *Liberty* was able to transmit information from her location directly back to the United States using the moon as a relay satellite.³⁸ The TRSSCOM consisted of a large, 32-foot antenna mounted on a special stand. Because of its unique appearance, the TRSSCOM array was frequently an object of curiosity to passing ships and planes.³⁹

The *Liberty's* normal listening post was along the west African coast, but, with the potential of another Middle Eastern war, she was hurriedly ordered, on May 23, 1967, to move to the eastern Mediterranean.⁴⁰ She was eventually ordered to patrol in a rough dog-leg pattern on the high seas off the Gaza Strip,⁴¹ from a point off El-Arish to a point off Port Said.⁴² This location would enable the *Liberty* to give the United States a clearer picture of what was happening in the Six-Day War.⁴³ The *Liberty* was capable of intercepting major Israeli communications, including Israeli Defense Force brigade and division level communications and movement orders, and the radar emissions and radio transmissions from aircraft that were flying in the war.⁴⁴

As the *Liberty* was moving into position, but while she was still fifty miles off Port Said, on the evening of June 7, 1967, the Israelis began reconnaissance of the ship.⁴⁵ The ship's sophisticated electronic gear detected an Israeli aircraft training

³³ J. Bamford, *supra* note 2, at 212-35.

³⁴ *Id.*

³⁵ *Id.*

³⁶ Moorer, *USS Liberty: Questions Persist*, The Washington Report on Middle East Affairs, May 27, 1985, at 1.

³⁷ Pronounced "Triss-Comm," this equipment was used for bouncing radio signals off the moon.

³⁸ Moorer, *supra* note 36, at 1.

³⁹ S. Green, *supra* note 2, at 28. 40. *Id.* at 213.

⁴⁰ *Id.* at 213

⁴¹ *Id.*

⁴² J. Bamford, *supra* note 2, at 220.

⁴³ *Id.* at 217.

⁴⁴ S. Green, *supra* note 2, at 224-25.

⁴⁵ *Id.* at 225.

its missile guidance radar on the ship as though preparing to fire.⁴⁶ Instead of being alarmed, however, the members of the ship's electronic research department played electronic "games" with the aircraft by distorting the ship's electronic image.⁴⁷

Prior to its arrival, the *Liberty's* commanding officer, Commander William L. McGonagle, U.S. Navy, had requested that a destroyer be stationed within five miles of the ship to protect it. Commander McGonagle was, no doubt, painfully aware that his ship was virtually unarmed, with only four fifty-caliber machine-guns for protection, two mounted forward and two aft. These were of little use against the modern weapons that were then in use in the Middle East. On the 6th of June, Commander McGonagle received his reply from the U.S. 6th Fleet: "Liberty is a clearly marked United States Ship in International waters, not a participant in the conflict and not a reasonable subject for attack by any nation."⁴⁸ In addition, the *Liberty* was told, U.S. jet-fighter protection was ten minutes away.⁴⁹

The *Liberty's* orders called for her to be at least 12.5 nautical miles away from Egypt, since Egypt claimed a twelve-mile territorial sea. She was to go no closer than 6.5 nautical miles to Israel, since Israel claimed a six-mile territorial sea.⁵⁰ In fact, the *Liberty* stayed in international waters and never entered the claimed territorial seas of either Egypt or Israel.⁵¹

As the intelligence ship approached its patrol area, a Notice to All Mariners (NOTMAR) was broadcast on the international distress frequency and was received by the *Liberty*. It read: "Warning: The attention of mariners is drawn to the possibility that lights along the Israeli coast may be extinguished without prior notice.* This was followed by another broadcast message: "Warning: All vessels are required to keep away from the coasts of Israel during darkness.*"⁵² With the exception of an Egyptian broadcast on May 23, 1967, that excluded Israeli ships from Egyptian territorial waters and a later British international broadcast regard

⁴⁶ *Id.* at 226.

⁴⁷ *Id.*

⁴⁸ J. Ennes, *Assault on the Liberty*, *supra* note 2, at 38-39

⁴⁹ *Id.*

⁵⁰ J. Bamford, *supra* note 2, at 220.

⁵¹ U.S. Navy Court of Inquiry, *supra* note 3, at 3-4.

⁵² *Id.* at 31-32, 137.

-ing the closing of the Suez Canal, no other hazard broadcast warnings were made and no announcements of war zones or exclusion zones were transmitted.⁵³

C. Private Warnings/Threats

On the 7th of June, as the *Liberty* was approaching its Sinai operating track, members of the staff of the Chairman of the U.S. Joint Chiefs of Staff (JCS) made a routine attempt to notify the *Liberty*, through its seniors in the chain of

⁵³ Notices of hazards to mariners or NOTMARS, such as the ones broadcast by the Israelis and picked up by the *Liberty*, may be written or broadcast by radio. There are three kinds: 1) Local warnings broadcast by a state on its own and not as part of the international notice system and generally dealing with hazards peculiar to that state; 2) coastal warnings which are virtually the same as local warnings, except that they may pertain to a larger area - they, too, are issued nationally; and 3) longrange warnings issued under an international system and pertaining to a problem affecting a greater amount of the world's navigation. Additionally, the United States issues special warnings. These are promulgated after consultation by national government agencies and generally issued in response to major political events. Although other countries may issue information concerning political events, the term "Special Warnings" is a category label only in the United States. Because of the quickness of the Six Day War, only radio broadcast warnings would have been made. Local and coastal broadcasts are not recorded, except perhaps by the broadcasting state. Broadcasts of long-range hazards to mariners are recorded and compiled by the United States and bound chronologically. This American record also includes any special warnings then in effect and British recordings of broadcasts for the Eastern Atlantic, Mediterranean, and Black Sea (NAVEAMS). This information is based on an interview with Mr. Stephen Hall, Chief of the Notice to Mariners Branch in the Navigation Division of the Hydrography and Navigation Department of the Hydrographic/ Topographic Center (HTC) of the U.S. Department of Defense Mapping Agency (June 1985). (The HTC was formerly in the U.S. Naval Oceanographic Office.)

A diligent search by the author for broadcast warnings in NOTMAR reports for the period from April 29, 1967, to July 22, 1967, revealed no special warnings and no long-range warnings that were broadcast by radio concerning any events from the Six Day War. Two British NAVEAMS were found announcing: "Cairo Radio reports Suez Canal closed to navigation." Both NAVEAMS were designated NAVEAM 8513 Mediterranean, and the broadcasts were both dated June 6, 1967. One was recorded in Notice to Mariners for the week of June 24, 1967, and the other in Notice to Mariners for the week of July 15, 1967.

Other than the local broadcasts picked up by the *Liberty* and the Cairo broadcasts published by the British, there was only one other warning published. In a December 1968 article published by the U.S. Naval Institute Proceedings, the author mentions that, on May 23, 1967, an Egyptian radio broadcast indicated that, since Egypt and Israel were still technically at war, the Egyptian government had banned the passage of Israeli ships through Egyptian waters (notably the Straits of Tiran). See Salans, *Gulf of Aqaba and Straits of Tiran-Troubled Waters*, U.S. Naval Inst. Proc., Dec. 1968, at 54, 60.

The author concludes that, while there were internationally broadcast notices warning mariners of the closure of the Suez Canal and locally broadcast warnings about: 1) Israeli ships in Egyptian territorial waters; 2) the possibility that lights might be extinguished along the Israeli coast; and 3) a warning to stay away from the coast of Israel at night, there were no international, local, or coastal declaration of announcements of a war zone, exclusion zone, or any other type of maritime security zone along the coasts of Israel or Egypt before, or during, the Six Day War.

command, to maintain a distance from the Egyptian coast of twenty nautical miles and from the Israeli coast of fifteen miles.⁵⁴ Within an hour, this distance dramatically increased to 100 miles from any southeastern Mediterranean coast.⁵⁵ To ensure speedy execution of the last position change, a telephone call was placed from the JCS in Washington, D.C., to a military staff member in the *Liberty's* chain of command to move the ship.⁵⁶ Since, by that time, Israel was the only effective military force left in the region, the only explanation for concern about the *Liberty's* safety was concern about the threat of Israeli military action. Despite the obvious urgency of the situation and the irregular action by the JCS to pass word by telephone, word did *not* reach the *Liberty* before she was attacked at 2 p.m. local time the next day.⁵⁷

What had preceded this urgent direction to get the *Liberty* away from the Egyptian coast, then controlled by Israel, was a message from the U.S. Defense Attaché Office (USDAO) in Tel Aviv, telling U.S. authorities that Israel was planning to attack the *Liberty* if she was not moved.⁵⁸ The report had come from a Central Intelligence Agency (CIA) observer at the USDAO, who advised that Israeli leaders had decided to sink the *Liberty* if it came near the war zone.⁵⁹ Former Representative Robert L. F. Sikes of Florida (who had been with the intelligence working group of the Defense subcommittee of the U.S. House of Representatives Committee on Appropriations) and other committee sources confirm that the frantic efforts by the JCS (and NSA) to move the *Liberty* on the evening of June 7, 1967, were prompted by a report from the USDAO in Tel Aviv that the Israeli Defense Forces planned to attack the ship if she continued to operate where she was. Their knowledge came directly from testimony on the subject of the *Liberty* made to the committee by a representative of the CIA.⁶⁰

There are two other accounts of threats to the *Liberty*. One was a conversation between a CIA employee and a Navy Master Chief that took place after a meeting at CIA headquarters. The CIA employee told the Master Chief:

Sending the *Liberty* to Gaza was a calculated risk from the beginning. Israel had told us long before the war to keep our intelligence ships away from her

⁵⁴ D. Neff, *supra* note 2, at 242.

⁵⁵ W. Gerhard, *Attack on (deleted) the U.S.S. Liberty*, 21 (1981) (a monograph produced by the U.S. National Security Agency); J. Bamford, *supra* note 2, at 220-21; J. Ennes, *Assault on the Liberty*, *supra* note 2, at 45.

⁵⁶ J. Bamford, *supra* note 2, at 220-21; J. Ennes, *Assault on the Liberty*, *supra* note 2, at 46-47.

⁵⁷ *Id.*

⁵⁸ S. Green, *supra* note 2, at 215, 226.

⁵⁹ *Review of Department of Defense Worldwide Communications, Phase I, Report of the Armed Services Investigating Subcommittee of the Committee on Armed Services, House of Representatives*, 92d Cong., 1st Sess. 9-10 (1971) [hereinafter cited as *Review of DOD Communications*].

⁶⁰ *Id.* at 238-39.

coast. *Liberty* was sent anyway because we just didn't think they were serious. We thought they might send a note of protest or, at most, harass the ship somehow. We didn't think they would really try to sink her.⁶¹

The other indication of a warning by Israel to the United States came from a former Israeli government official. He said that there had indeed been a note of protest. He said, "There was plenty of warning; Israel warned the United States to get that ship out of there. The United States just didn't react."⁶² This official said that his government had "protested" the ship's presence just a few hours before the attack.⁶³

In his memoirs, the former Israeli Chief of Staff at the time, General Yitzhak Rabin, says that, on the 5th of June 1967, he informed Commander Castle, the American Naval Attaché in Tel Aviv, that:

Israel intends to defend its shores from attack by the Egyptians. This will be done by combining our Air and Naval forces. If threatened, we will not be able to delay our response. We request therefore that the United States either withdraw all its vessels from our shores, or inform us of the exact location of all vessels close to our shores.⁶⁴

The U.S. Defense Attaché in Israel stated shortly after the attack that no request for information ever took place and, had the request been made, it would have been forwarded to Navy officials in Washington.⁶⁵ Regardless of the Rabin-Castle dispute, it is apparent that the Government of Israel made it clear to the

⁶¹ J. Ennes, Assault on the *Liberty*, *supra* note 2, at 206-07.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ Y. Rabin, The Rabin Memoirs 110 (1979).

⁶⁵ Both the attaché and the embassy sent messages. The embassy message reads: "NO REQUEST FOR INFO ON U.S. SHIPS OPERATING OFF SINAI WAS MADE UNTIL AFTER LIBERTY INCIDENT HAD ISRAELIS MADE SUCH AN INQUIRY IT WOULD HAVE BEEN FORWARDED IMMEDIATELY TO THE CHIEF OF NAVAL OPERATIONS AND OTHER HIGH NAVAL COMMANDS AND REPEATED TO DEPT GP-3 BARBOUR"

AMEMB Tel Aviv msg 4178 June 67

(message from American Embassy Tel Aviv to the U.S. Secretary of State).

The USDA message reads: REF A MSG (STATE DEPT 211695 DTG 11780 JUN 67) TO AMEMB TEL AVIV CITED WASH-LAQKLN 16 JUN NEWS STORY STATING ISRAEL GOVT QUERIED ALUSNA ON SINAI PENINSULA. STATE REQUESTED EMBASSY COMMENT. REF B MSG (AMEMB TEL AVIV 4178 JUN 67) TO STATE DEPT. CONTAINS DENIAL THAT SUCH REQ WAS MADE AND STATES ANY SUCH REQ WOULD HAVE BEEN FORWARDED IMMEDIATELY TO CNO AND OTHER HIGH NAVAL COMMANDERS AND REPEATED TO STATE DEPT. GP-3.

United States, before the attack, that the *Liberty's* presence would not be tolerated.

Although Israel was clearly indicating its intention to attack a U.S. warship if it were not moved from international waters off the Egyptian coast, and officials in Washington knew of this threat, word did not reach the ship at sea.⁶⁶ The ship's officers and men proceeded to carry out their last-received instructions by moving into position off Gaza, as the 8th of June dawned.

D. The Attack on the *Liberty*

Early on the morning of June 8, 1967, the *Liberty* became a center of attention. At about 6 a.m. local time, she was circled by a French-built, twin-engine Nord 2501 Noratlas. The purpose of this reconnaissance was to see if the *Liberty* had been moved as a result of the prior day's warnings.⁶⁷ The Noratlas is a medium range transport and does not carry bombs.⁶⁸ In this case, the Israeli Air Force was using it as a reconnaissance plane. The ship was beyond the limits of the claimed Egyptian territorial sea (and the narrower claimed Israeli territorial sea)⁶⁹ At 7:20 a.m., Lieutenant James Ennes, U.S. Navy, the morning officer of the deck for the *Liberty*, checked the ship's flag and found that it was not visually suitable. He had the signalman hoist a new flag that measured five by eight feet to the ship's tripod mainmast.⁷⁰ At 9 a.m., when the *Liberty* was reconnoitered by a jet, the American

USDA Tel Aviv msg 161945Z Jun 67 (message from U.S. Defense Attache Tel Aviv to the U.S. Chief of Naval Operations).

Because the movements of the *Liberty* were under the direct control of the U.S. Joint Chiefs of Staff at the time, it is the author's opinion that the local country team, including the Ambassador and the Naval Attache, might not normally have been aware of the nearby presence of an intelligence-gathering ship such as the *Liberty*. The testimony before U.S. Representative Robert Sikes, however, shows that someone in the USDAO Tel Aviv knew that the Government of Israel was threatening the *Liberty*. See *supra* notes 58-60 and accompanying text.

⁶⁶ For an account of the communications problems, see generally Review of DOD Communications, *supra* note 58.

⁶⁷ Telephone interview with Stephen Green, author of Taking Sides, *supra* note 2 (June 13, 1985). Mr. Green has been told by an Israeli present in the Israeli Defense Force war room that this was the purpose of the first daylight reconnaissance flight on the morning of June 8th. *Id.*

⁶⁸ J. Ennes, Assault on the *Liberty*, *supra* note 2, at 55 n.2.

⁶⁹ See Smith, *supra* note 15, at 62. See also U.S. Navy Court of Inquiry, *supra*, note 3.

⁷⁰ J. Ennes, Assault on the *Liberty*, *supra* note 2, at 50-51.

flag was fluttering in the wind.⁷¹ At 10 a.m., two rocket-armed, delta-winged jets circled the ship three times, close enough for the *Liberty* crewmembers to count rockets and see the pilots, yet no national identification markings were visible on the planes.⁷² The American flag had been fluttering straight out in the breeze during these passes.⁷³ At 10:30 a.m., an Israeli Noratlas made several passes at the ship and was so close to the ship that its seams and rivets were clearly visible. The ship's flag was still fluttering.⁷⁴ Again, at 11:00, 11:30, 12:15, and 12:45, an Israeli Noratlas reconnoitered the ship. At the 11:00 and 11:30 passes, Lieutenant Ennes checked the flag and found it to be flying.⁷⁵ This concern with the flag was simply an extra precaution, since Lieutenant Ennes had seen the Israeli reconnaissance pilots wave at *Liberty* crewmen,⁷⁶ and a Chief Petty Officer had come to the bridge to tell Lieutenant Ennes, "No sweat, Lieutenant, we can hear the pilots reporting by radio that we are American."⁷⁷ The last Israeli air reconnaissance of the ship was at 12:45; but, forty-five minutes earlier, three Israeli motor torpedo boats (MTBs) had left the Israeli naval port of Ashdod to intercept the *Liberty*.⁷⁸

At 2 p.m. local time, three Israeli jets attacked the *Liberty*. The first two planes, which attacked with rockets, had no national markings.⁷⁹ Soon, other jets joined the first group. The second group of jets was armed with napalm, and they proceeded to bomb the ship with the jellied gasoline and with rockets. During the assault by the initial group of jets, through either extraordinary coincidence or expert marksmanship, the second plane disabled nearly every radio antenna on the ship. As a result, the *Liberty* was temporarily unable to call for help.⁸⁰

Sometime before the attack, crewmembers of the *Liberty* had intercepted radio transmissions between the Israeli jets, the motor torpedo boats from Ashdod, and their bases.⁸¹ These intercepted conversations referred to the *Liberty* as an

⁷¹ *Id.* at 52.

⁷² *Id.* at 53.

⁷³ *Id.*

⁷⁴ *Id.* at 55.

⁷⁵ *Id.*

⁷⁶ Ennes, *The USS Liberty Affair*, *supra* note 2, at 1.

⁷⁷ *Id.* at 3.

⁷⁸ J. Ennes, *Assault on the Liberty*, *supra* note 2, at 220.

⁷⁹ *Id.* at 53. Telephone interview with Stephen Green, author of *Taking Sides*, *supra* note 2 (June 13, 1985). Mr. Green confirmed the lack of markings through interviews with three witnesses including the signalman on the signal bridge who watched the first planes through his binoculars. *Id.*

⁸⁰ J. Ennes, *Assault on the Liberty*, *supra* note 2, at 67.

⁸¹ Smyth, *Dispute is Revived Over Israeli Attack That Killed 34 on U.S. Navy Ship*, *L.A. Times*, Nov. 23, 1983, § I-A, at 3, col. 2.

American ship.⁸² During the attack, five of the six shore communications circuits on the *Liberty* were jammed, and the jammers were searching for the sixth circuit.⁸³ The *Liberty's* radio crew finally got a message out to the U.S. 6th Fleet on the sixth circuit.⁸⁴ Since the attackers did not have national markings, this call for help referred to the ship being under attack by unidentified aircraft.⁸⁵

By this time, the *Liberty* was covered with rocket holes, and napalm fires were burning everywhere. Because of the rocket holes, the burning napalm and jellied gasoline flowed into the interior parts of the ship. Many wounded were being taken to the ship's wardroom and mess decks for treatment, and a number of men were dead. After twenty-five or thirty minutes of intense air attack, by at least a dozen aircraft, the planes left and the three Israeli MTBs from Ashdod arrived. Just prior to the arrival of the MTBs, Commander McGonagle had ordered the holiday size American flag, measuring seven by thirteen feet, hoisted to replace the five by eight foot flag that had been shot down by the jets.⁸⁶ During the attack, the *Liberty's* four fifty-caliber machine guns were fired, but they were continually attacked and silenced.

The MTBs from Ashdod came on the scene at high speed with their signal lights flashing. These lights were seen by Commander McGonagle, but the small hand-held signal light that he had would not penetrate the smoke around the bridge to let him signal back.⁸⁷ Even if the ship's captain had been able to signal, however, it probably would have done no good. At a different location on the ship, a ship's signalman also spotted the signaling by the MTBs and kept signaling back, "U.S. Ship," until his signal lamp was shot out, and he was wounded.⁸⁸ The MTBs fired five torpedoes. Four of the torpedoes completely missed the ship. The fifth hit the ship directly amidships, in the ship's cryptologic spaces, leaving a forty-foot hole, killing twenty-five men, and trapping fifty more in the flooded compartment.⁸⁹ After firing the torpedoes, the MTBs circled the ship at close range, machine-gunning

⁸² *Id.* In a later conversation with an Israeli who had participated in the attack, *Liberty* survivor and author Lieutenant Commander James M. Ennes, Jr., U.S. Navy (ret.), was told that the participant knew that *Liberty* was an American ship but was told to attack anyway. Letter from James M. Ennes, Jr., to Walter L. Jacobsen (Jan. 26, 1985) (discussing the attack on the *Liberty*).

⁸³ S. Green, *supra* note 2, at 230. See also J. Ennes, Assault on the *Liberty*, *supra* note 2, at 74 (the jamming would cease when rockets were airborne).

⁸⁴ S. Green, *supra* note 2, at 230

⁸⁵ *Id.* at 229

⁸⁶ C. Salans, Memorandum for the Under Secretary of State, Subj: "The Liberty" - Discrepancies Between Israeli Inquiry and U.S. Navy Inquiry - INFORMATION MEMORANDUM (Sept. 21, 1967) (Freedom of Information Act obtained copy is in the possession of the author); U.S. Navy Court of Inquiry, *supra* note 2, at 81.

⁸⁷ J. Ennes, Assault on the *Liberty*, *supra* note 2, at 81.

⁸⁸ Smyth, *supra* note 81, at 2.

⁸⁹ Ennes, *The USS Liberty Affair*, *supra* note 2, at 4.

anyone who came on deck."⁹⁰ By this time, the *Liberty's* four machine guns had ceased firing. As the MTB Tahmass circled the *Liberty* looking for a target, one *Liberty* sailor, who had run out onto the main deck, gave a defiant sign to the boat. He then watched a 40mm cannon swing around until it came to bear squarely on his chest. The sailor did not move while the boat drifted past, and the Israeli gunner did not shoot him.⁹¹

By this time the ship was in flames, dead in the water, and sinking. The casualties were thirty-four dead or dying, and 171 wounded.⁹² Orders came from the bridge to prepare to abandon and scuttle the ship; but, no one went on deck because of the machine-gunning by the MTBs⁹³ Finally, the machine-gunning stopped as the torpedo boats withdrew, and a *Liberty* sailor went out on deck to make preparations for abandoning ship. He found three undamaged rubber life rafts in a rack on the ship's port quarter, and he put them in the water and secured them with a line to the ship.⁹⁴ Several hundred yards away from the *Liberty*, the men on the MTBs watched the orange life rafts drop into the water. Someone moved on the center boat, and it came closer to the *Liberty*. At that point, the MTB opened fire on the life rafts floating in the water. Two were deflated and the line on the third raft was cut. This raft floated away on the water, the MTB took it aboard, and then all three torpedo boats sped away toward their base at Ashdod.⁹⁵ Earlier, one *Liberty* sailor had noticed the Israelis concentrated their machine-gun fire at the life rafts stowed on deck.⁹⁶ The boats left at about 3:15 p.m. local time. Coincidentally, a few minutes before they left, the 6th Fleet had radioed the *Liberty* (wrongly, as it turned out) that planes and surface ships were on the way to help.⁹⁷

Next, two helicopters from the Israeli Defense Force arrived on the scene. They were loaded with armed combat troops that were visible through the open side doors. Each helicopter also carried a mounted machine gun.⁹⁸ The helicopters circled the ship and departed without landing.⁹⁹ Shortly after the MTBs left, the *Liberty* slowly, but steadily, started moving under its own power toward deeper water.¹⁰⁰

⁹⁰ *Id.*

⁹¹ J. Ennes, *Assault on the Liberty*, *supra* note 2, at 90.

⁹² Ennes, *The USS Liberty Affair*, *supra* note 2, at 4.

⁹³ J. Ennes, *Assault on the Liberty*, *supra* note 2, at 91, 94-95.

⁹⁴ *Id.* at 95.

⁹⁵ *Id.* at 96.

⁹⁶ S. Green, *supra* note 2, at 231

⁹⁷ *Id.*

⁹⁸ *Id.* at 232.

⁹⁹ J. Ennes, *Assault on the Liberty*, *supra* note 2, at 96. 100. *Id.* at 97.

¹⁰⁰ *Id.*, at 97.

Israelis had erroneously attacked a ship that was possibly a U.S. Navy ship. The message conveyed Israel's apologies.¹⁰¹

At 4:32 p.m., the MTBs returned to offer assistance to the *Liberty*. They were given a negative response and went away.¹⁰² Later in the afternoon, an Israeli helicopter, with the U.S. Naval Attaché aboard, hovered and inquired about casualties. Commander McGonagle, the *Liberty's* commanding officer, refused to let the helicopter land, and it left the area.¹⁰³ The *Liberty*, however, did need help; she was full of wounded, badly listing, and, although her engines gave some power, she often made no headway. The next morning, two U.S. Navy ships arrived to assist her and she stayed afloat until she pulled into the drydock at Malta, where she was repaired.¹⁰⁴

On June 10, 1967, the Commander in Chief, U.S. Naval Forces, Europe, convened a court of inquiry to inquire into the facts and circumstances surrounding the attack on the *Liberty*. In a subsequent endorsement to this inquiry, the Judge Advocate General of the Navy concluded that: "The record discloses beyond any doubt that U.S.S. *Liberty* was, at the time of the attack, engaged in peaceful operations in international waters, and that the attack of Israeli aircraft and motor torpedo boats was entirely unprovoked and unexpected.¹⁰⁵ The attack took place on a clear day,¹⁰⁶ and the *Liberty* was the only non-Israeli vessel in sight.¹⁰⁷

In response to the attack, U.S. planes had been launched to defend the *Liberty*, but the first of these planes had been personally recalled by Secretary of Defense McNamara,¹⁰⁸ possibly because they were armed with nuclear weapons."¹⁰⁹ Properly armed planes were hastily dispatched, but they were recalled before they reached the ship because, by the time they were airborne, the attack was over and Israel had already alerted the USDAO in Tel Aviv, who had then alerted Washington

¹⁰¹ *Id.* at 99. The message from the USDAO to Washington read:
ALUSNA CALLED TO (Israeli foreign liaison officer) TO RECEIVE REPORT. ISRAELI AIRCRAFT AND MTB'S ERRONEOUSLY ATTACKED U.S. SHIP AT 08/1200Z (2:00 local time), POSITION 31-25N 33-33E. MAYBE NAVY SHIP IDF HELICOPTERS IN RESCUE OPERATIONS. NO OTHER INFO. ISRAELIS SEND ABJECT APOLOGIES AND REQUEST INFO ON OTHER US SHIPS NEAR WAR ZONE COASTS.

¹⁰² J. Ennes, *Assault on the Liberty*, *supra* note 2, at 102-03.

¹⁰³ *Id.* at 105-06.

¹⁰⁴ *Id.* at 119,138-39.

¹⁰⁵ U.S. Navy Court of Inquiry, *supra* note 3, 3d Endorsement, at 1-2.

¹⁰⁶ J. Ennes, *Assault on the Liberty*, *supra* note 2, at 49.

¹⁰⁷ *Id.* at 64 (conclusions are those of the author based on information provided in the Ennes book). Note, however, that there was a report of a U.S. submarine in the area which may have witnessed the attack. *Id.*

¹⁰⁸ *Id.* at 78. ¹⁰⁹ *Id.* at 237-38

¹⁰⁹ *Id.* at 237-38

(and the U.S. 6th Fleet in the Mediterranean) that Israel had mistakenly attacked a U.S. ship and had apologized.¹¹⁰

E. Conclusion - Why The *Liberty* Was Attacked

The Israeli attack on the *Liberty* was intentional and premeditated. The question is, why? Obviously, Israel wanted to keep something hidden. Given the timing of the ship's arrival on the 8th of June, and the slightly later attack on Syria, the most likely thing that Israel wanted to conceal was something dealing with the attack on Syria.¹¹¹ One reason might be a fear on the part of Israel that, if her battlefield successes up to June 8th were known, she would be pressured not to attack Syria in the first place.¹¹² Additionally, Israel may have attacked Syria intending to keep the land that she seized. If she appeared to be the aggressor in the attack, this might not be possible.¹¹³ The *Liberty* was the only ship close enough to be able to fathom from radio traffic whether Israel or Syria had truly violated the cease-fire. If the *Liberty* were out of action, the world would only know Israel's version of events. This would leave Israel with Syrian land.¹¹⁴

Whatever the reason, the attack on the *Liberty* was not an accident. It was also not true that the Israelis, as they were to later claim, had mistaken the *Liberty* for the Egyptian horse transport El-Quseir, which was in port in Alexandria at the

¹¹⁰ See *supra* note 101.

¹¹¹ J. Ennes, Assault on the Liberty, *supra* note 2, at 209-13; S. Green, *supra* note 2, at 222-23; D. Neff, *supra* note 2, at 253-54 and 265-66.

¹¹² Z. Schiff, A History of the Israeli Army (1870-1974) 159-160 (1974). 113. S. Steven, *supra* note 2, at 194.

¹¹³ S. Steven, *supra* note 2, at 194.

¹¹⁴ For a short list of what the Liberty might have been capable of hearing, see S. Green, *supra* note 2, at 225.

time.¹¹⁵ The decision to attack the *Liberty* was a conscious one, taken by Israeli leadership in the command center.¹¹⁶

¹¹⁵ J. Ennes, *Assault on the Liberty*, *supra* note 2, at 153-54. The Government of Israel initially excused its attack in part by alleging that the *Liberty* had been mistaken for the old horse transport *El Quesir*, then in port in Alexandria about 250 miles away. *Id.*

¹¹⁶ A CIA Information Report reads:

(Source(s)) commented on the sinking (sic) of the US communications ship *Liberty*. They said that Dayan personally ordered the attack on the ship and that one of his generals adamantly opposed the action and said, 'This is pure murder.' One of the admirals who was present also disapproved the action, and it was he who ordered it stopped and not Dayan. (Source(s)) believe that the attack against the U.S. vessel is also detrimental to any political ambition Dayan may have.

CIA Information Report, Subject: (deleted)/Attack on USS *Liberty* ordered by Dayan (Nov. 9, 1967). Stewart Steven's account in *The Spymasters of Israel*, based on access to Israeli intelligence officials, discusses the events leading up to the attack and, taken together with the just-cited CIA report, leaves no doubt of Minister Dayan's involvement with the *Liberty*. *Id.*; S. Steven, *supra* note 2, at 234-35. Presumably, it was these Israeli intelligence officials who told Mr. Steven that the oral orders to the forces that attacked the *Liberty* were to disable, not sink, the ship. S. Steven, *supra* note 2, at 235. In view of the ferocity of the attack and the comprehensiveness of the efforts made to conceal the attack (e.g., jamming of radios, use of unmarked aircraft, and shooting of life rafts), however, the limited nature of the attack is open to question. Could any Israeli official ever state that Israel had attacked the *Liberty* with the intent of totally destroying her?

There is also a second CIA information report which reads:

(deleted) attack on the USS LIBERTY by Israeli airplanes and torpedo boats. He said that "you've got to remember that in this campaign there is neither time nor room for mistakes," which was intended as an obtuse reference that Israel's forces knew what flag the LIBERTY was flying and exactly what the vessel was doing off the coast. (deleted) implied that the ship's identity was known at least six hours before the attack but that Israeli headquarters was not sure as to how many people might have access to the information that LIBERTY was intercepting. He also implied that there was no certainty of control as to where the intercepted information was going and again reiterated that Israeli forces did not make mistakes in their campaign. He was emphatic in stating to me that they knew what kind of ship the USS LIBERTY was and what it was doing offshore.

CIA Information Report, Subject (deleted) Comment as Known Identity of USS *Liberty*/(deleted) (Jul. 27, 1967).

There is a third CIA document in which a Turkish General Staff informant told his American contact that the Turkish General Staff felt that the attack was deliberate, based on information supplied by the Turkish military attaché in Tel Aviv. CIA Intelligence Information Cable, Subject: Turkish General Staff Opinion Regarding the Israeli Attack on the USS *Liberty* (June 22, 1967).

All three CIA documents were obtained by this author from the CIA, using the Freedom of Information Act (FOIA). When the documents were received, so was the partial transcript of an interview with Admiral Stansfield Turner, then Director of the CIA, conducted by Steve Bell on the Good Morning America television show of September 19, 1977. During that interview, ADM Turner noted that (presumably) the three documents noted above were raw intelligence. He also noted that there was a CIA document that said that, in the CIA's considered opinion, the Israeli Government did not know about the USS *Liberty* before the attack. This apparent denial must be considered in the context of the close relation between the CIA and the Mossad, the Israeli intelligence and operational service. It is noteworthy that ADM Turner never himself said that the documents were untrue. Television interview of Admiral Stansfield Turner, Director of the CIA, conducted by Steve Bell on the Good Morning America television show (Sept.

F Reparations

The Government of Israel made several official explanations concerning the attack.¹¹⁷ Although these explanations have been cited as examples of misinformation,¹¹⁸ and America knew the explanations were untrue,¹¹⁹ they were pub

19, 1977). In a more recent development, author James Ennes indicated that, when someone recently submitted a FOIA request to the CIA on the subject of the *Liberty*, the response did not include the partial transcript of ADM Turner's television interview. Telephone interview with James M. Ennes, Jr., author of *Assault on the Liberty*, supra, note 2 (May 16, 1985). Perhaps the CIA no longer finds the denial credible.

¹¹⁷ The initial explanation by the Government of Israel for the attack came through Lieutenant Colonel Bloch of the Israeli Defense Forces and was given to the U.S. Defense Attache Office in Tel Aviv. The explanation consisted of seven points: 1) The ship was sighted and recognized as an unidentified naval ship 13 miles from the coast; 2) the presence of a ship in a fighting area is against international custom; 3) the area off El-Arish is not a common passage for ships; 4) Egypt has declared the area off her coast to be closed to neutrals; 5) the *Liberty* resembles the Egyptian supply ship El-Quesir, 6) the *Liberty* was not flying a flag when sighted and she moved at high speed westward toward the enemy coast; and 7) the Israeli Defense Forces had earlier received reports of bombardment of El-Arish from the sea. U.S. Navy Court of Inquiry, supra note 4, at page 3 of document 45 of exhibit 48.

A refinement of some of the foregoing explanations for the attack was that the *Liberty* was tracked by radar on the Israeli motor torpedo boats as proceeding at 28-30 knots. A standing Israeli naval rule of engagement in effect at the time provided that, "When there are reports of an enemy in the theater, and radar detects one or more ships sailing at a speed above 20 knots, they shall be considered hostile and no further identification shall be carried out." M. Greenberg, supra note 3, at 11 (quoting Flotilla 1, Arnsinf Operation Procedures, Order No. 50.003). Accordingly, this mistaken tracking of the ship, combined with the standing order or rule of engagement, was, according to an official Government of Israel story, a significant factor in the innocent errors that led to the attack on the ship. M. Greenberg, supra, note 4. The underlying facts recounted by the Government of Israel are of questionable value. S. Steven, supra note 2, at 235.

¹¹⁸ E. Pond, There's a Trojan Norse Built Every Minute, Parading Lies as Truth, *Christian Sci. Monitor*, Feb. 26, 1985, at 17, col. 4.

¹¹⁹ S. Steven, supra note 2, at 235.

licly accepted and written into the records to maintain the appearance of American-Israeli unity.¹²⁰

On the day of the attack, the U.S. Department of Defense announced that Israel had apologized for the attack.¹²¹ On the 10th of June, the Israeli Embassy, in Washington, D.C., sent an apology for the attack. This letter labeled the incident a tragic accident which occurred at the height of hostilities in the area.¹²² The apology also offered to make amends for the loss of life and material damage.¹²³ The American reply to the apology, dated June 10, 1967, called attention to the flag and to the identification numbers on the ship.¹²⁴ It called the attack incomprehensible and condemned it as an act of military recklessness. This reply also noted that the Secretary of State expected the Government of Israel to take disciplinary measures in the event of wrongful conduct by military personnel, and that it was expected Israel would take steps to ensure that such an incident would not happen again. The U.S. reply noted, further, that claims would be forthcoming.

The Israeli rebuttal, of June 12, 1967, rejected the U.S. references to military recklessness and the allegation that the ship might have been identified at least an hour before the attack. The rebuttal noted that an official Israeli investigation had been ordered. Finally, Israel noted that the *Liberty* was in an area of hostilities that Egypt had warned neutral vessels not to enter.¹²⁵

Death claims submitted after the attack by the U.S. Government were paid nearly one year later by the Government of Israel, on May 27, 1968. At that time, the U.S. Government was preparing claims on behalf of the men injured in the attack.¹²⁶

The claims for the wounded progressed more slowly. Author and Lieutenant Commander James Ennes, U.S. Navy (ret.), theorized that the negotiations for all the claims, including those for the dead and wounded and compensation for the ship and equipment, were linked to the new arms agreements that were then being negotiated between the U.S. and the State of Israel.¹²⁷ Finally, in February 1969, the State Department informed the survivors of the amounts that would be claimed.

¹²⁰ *Id.* See M. Greenberg, *supra* note 3, at 8 (the Israeli account of reports of the shelling of El-Arish from the sea is not true); C. Salans, *supra* note 86, at 4 (the *Liberty* was the only ship off the coast of El-Arish, and her four 50-caliber machine guns, visible by reconnaissance planes, quite obviously weren't capable of doing the shelling). See also M. Greenberg, *supra* note 3, at 22; C. Salans, *supra* note 86, at 3-4 (the "misidentification" of the *Liberty* as the horse carrier *El-Quesir* by experienced naval officers is incredible). These are but two of the intentional misstatements in the created story that were publicly accepted as authentic by both governments.

¹²¹ Department of Defense News Release No. 452-67 (June 8, 1967).

¹²² J. Ennes, Assault on the *Liberty*, *supra* note 2, at app. R.

¹²³ *Id.*

¹²⁴ *Id.* at app. S.

¹²⁵ *Id.* at app. T.

¹²⁶ 58 Dep't St. Bull. 799 (June 17, 1968).

¹²⁷ J. Ennes, Assault on the *Liberty*, *supra* note 2, at 196-99.

These claims were individually submitted on March 28, after they were reviewed by a team of American attorneys hired by the State of Israel to check the reasonableness of the claims.¹²⁸ The claims were found to be reasonable, and the full \$3,452,275 that had been requested was paid, on April 28, 1969.¹²⁹ Seven survivors filed no claim.

The only claim left unpaid was the \$7,644,146 that had been requested for damage to the *Liberty*. This was quite a bargain, considering the \$20 million that it cost to refit the ship and the \$10 million that it cost to replace the sophisticated electronic gear.¹³⁰ The Government of Israel, however, refused to pay. Her position was that the *U.S.S. Liberty* had sailed knowingly into a war zone, had spied upon the combatants, and had suffered the consequences. The responsibility for that, said the Israelis, lay fairly and squarely with the Americans.¹³¹ For a time, the United States was not inclined to press Israel because, in light of U.S. monetary aid to Israel, it was felt that the U.S. would in effect be paying itself.¹³² Finally, however, on December 18, 1980, it was announced that the Government of Israel had offered to pay \$6,000,000 in three yearly installments to settle the original \$7,644,146 claim. The U.S. accepted this plan and agreed to drop the over \$10 million in interest payments that were due.¹³³ The first of the three payments was made on January 15, 1981.¹³⁴ [In a similar incident that took place during the hostilities between Japan and China before World War II, Japanese airplanes bombed and sunk the *U.S.S. Panay*, an American gunboat lawfully operating on the Yangtze River in China, on December 12, 1937. In that case, the Japanese government apologized officially, noted to the United States the action taken against the responsible official, and made full reparation for the attack, including payment for the vessel, 4 months and 10 days after the attack.]¹³⁵

¹²⁸ *Id.* at 197-98.

¹²⁹ 60 Dep't St. Bull. 473 (June 2, 1969).

¹³⁰ J. Ennes, Assault on the *Liberty*, *supra* note 2, at 199.

¹³¹ S. Steven, *supra* note 2, at 195.

¹³² D. Neff, *supra* note 2, at 355.

¹³³ *Id.*; Dep't St. Press Release of Dec. 18, 1980.

¹³⁴ Telephone inquiry at the Israel desk of the U.S. State Department on June 10, 1985, indicated that the case file contains an entry that, on January 15, 1981, the first \$2 million installment was paid. A male desk officer (who would not reveal his name) stated that his file showed no further record of payments, but that he had no reason to doubt that the additional payments had been made. The desk officer stated that the State Department does not keep records of matters such as this and that the Treasury Department should be consulted. Telephone interview with a desk officer (name unknown) at the Israel desk of the U.S. State Department (June 10, 1985). A telephone check with an attorney at the Office of Legal Advisor of the U.S. Department of State also indicated that the Department of the Treasury was the cognizant agency to keep track of payments due. Telephone interview with A. Kreczko, Office of Legal Advisor, U.S. Department of State (June 10, 1985). The U.S. Department of the Treasury was not called.

¹³⁵ Documents on American Foreign Relations January 1938-June 1939, 194-204 (S. Jones & D. Myers ed. 1939).

G. Investigations

After the attack, the Government of Israel convened two inquiries, one by an Israeli Defense Force line officer and a later one by a military judicial official. The line officer concluded that the attack on the *Liberty* was due to an erroneous report of enemy action, the speed of the *Liberty* mistakenly reflected on radar in excess of twenty knots, the mistaken identification of the *Liberty* as an Egyptian horse transport, and the *Liberty's* intentional concealment of its presence in the area. He recommended better procedures for declaring danger zones, better pilot training in ship identification, and better staff training.¹³⁶

The judicial inquiry similarly attributed the attack to an understandable mistake because of the ship's suspicious movements and its lack of identifying markings.¹³⁷ The investigating judge stated that, from the large amount of evidence before him, he did not discover any deviation from the standard of reasonable [wartime] behavior which would justify bringing anyone to trial.¹³⁸

The U.S. Naval Court of Inquiry, that was convened to investigate the attack on the *Liberty*, found that the available evidence indicated the attack on the *Liberty* was a case of mistaken identity and, further, that no available information indicated that an intentional attack against a U.S. ship was intended.¹³⁹

II. THE ISRAELI CLAIM TO AN INTELLIGENCE GATHERING EXCLUSION ZONE

[M]y whole argument on this question 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. - Soviet U.N. Ambassador Vyshinsky during the 1954 U.N. Security Council debates on the shooting down of a U.S. patrol plane by Soviet aircraft.

A. Factual Highlights

The apparent purpose of the attack on the *Liberty* was to stop the United States from obtaining current and reliable information about the progress of the Six-Day War.¹⁴⁰ Defense Minister Dayan, and others, apparently felt that such information in the hands of the United States would hamper the war effort.¹⁴¹ The

¹³⁶ M. Greenberg, *supra* note 3, at 27-28.

¹³⁷ *Id.* at 30.

¹³⁸ *Id.* at 30 (quoting the decision of the examining judge).

¹³⁹ U.S. Navy Court of Inquiry, *supra* note 3, at 161-62.

¹⁴⁰ S. Steven, *supra* note 2, at 234-35.

¹⁴¹ *Id.*

Government of Israel made statements to the effect that the *Liberty's* presence in "a fighting area" was contrary to international custom,¹⁴² and that the *Liberty* was in an area that Egypt had declared closed to neutrals.¹⁴³ These statements implied justification for the attack based on the location of the *Liberty*. By being in close proximity (although outside of territorial waters) to an area where fighting was going on, the United States ran the risk that the *Liberty* might be *mistaken* for an Egyptian, Jordanian, or Syrian ship (however unlikely, given Israeli military intelligence prowess). Since the *Liberty* was fully identified as an American or non-hostile ship well before the attack, however, this was not a logical justification for the Government of Israel to assert. It was also illogical for Israel to claim that she had a right to enforce some sort of undefined Egyptian exclusion zone after Egypt had been defeated. Finally, while the Government of Israel had broadcast a warning for vessels to stay away from the coasts of Israel after darkness, this would not justify the attack, since the *Liberty* was attacked in broad daylight.

What Israel was claiming by implication was an exclusion zone on the high seas directed toward intelligence-gathering vessels, thus giving her the right to force them to leave by threats or to destroy them if they did not. Restated, the Israelis' implied claim was that the United States had no right to conduct electronic intelligence gathering from a maritime exclusion zone of undefined character or limits in the southeastern Mediterranean.

A study of the legality of the Israeli claim requires a twofold examination, an examination of the *activity* and an examination of the *location*.

B. The Lawfulness of the Activity

1. The Nature of Intelligence Gathering

Intelligence gathering involves obtaining information about one state for use by another state. It can be done by military attaches traveling openly as a guest to the host state's military bases, by reading another state's newspapers, or by listening to another state's radio signals from a position where the listener is legally entitled to be.

When radio signals are sent, or telephone calls are transmitted by radio waves, these signals do not travel through a relatively secure electric cable. They are sent through the atmosphere. While these signals generally reach their intended receiver, they also radiate outward in other directions. These broadcast electronic signals may be received, not only by the intended recipient, but also by any receiver that is tuned to the same radio signal frequency, whether this unintended listening post is next door, along the coast, or, more recently, in a satellite.

¹⁴² See *supra* note 117.

¹⁴³ J. Ennes, *Assault on the Liberty*, *supra* note 2, at app. T

The gathering and analyzing of radio signals by unintended listeners who are located in areas where they have a right to be, such as on the high seas, has been dubbed "spying" by the popular press. This is no more spying, however, than is subscribing to publications from foreign countries to gather political intelligence or talking to recently returned travelers to find out about the conditions in the countries they have just visited. Intelligence gathering, especially on the high seas, is often very open. An intelligence-gathering platform like the *Liberty*, its government affiliation made obvious by its haze grey color and white identifying numbers, operates without concealment; its distinctive radio antenna array clearly hints at, if not betrays, its mission.¹⁴⁴ By collecting these signals, a state is taking advantage of information that has been voluntarily put into the public domain, *i.e.*, the earth's atmosphere. Espionage or spying, on the other hand, involve obtaining information about a state that the state has not voluntarily put into the public domain. This may involve the corruption of people's integrity, the use of false pretenses, and unlawful or clandestine activities.¹⁴⁵ Ships like the *Liberty* have been called "technical research ships," Soviet listening ships have been called "trawlers," military attaches have been given diplomatic status, and no one is fooled or corrupted. On the other hand, when an espionage agent pretends to be a simple business person and uses money to break a person's national loyalties, or when a military attaché violates the host state's laws contrary to his diplomatic status by trying to corrupt a citizen of the host state to steal secrets, this is a distinctly different type of activity. Electronic intelligence gathering is more akin to scouting or reconnaissance, considering the openness of this activity.¹⁴⁶

States that send radio signals may prevent other states from intercepting these signals. Controlling the contents of conversations, the use of land lines, and the use of mail and courier services for transmitting sensitive information are some of the methods available to prevent secrets from being plucked out of the air.¹⁴⁷

2. Intelligence Gathering and International Law

¹⁴⁴ 2 L. Oppenheim, *International Law* 423 (H. Lauterpacht ed. 9th ed. 1961).

¹⁴⁵ Clandestine activity and false pretenses are concepts from Hague Convention V, *Respecting the Rights and Duties of Neutral Powers and Persons in case of War on Land of 1907*, 36 Stat. 2310, IS. No. 540. See Hague Convention IV, *Respecting the Laws and Customs of War on Land of 1907*, 36 Stat. 2277, T.S. No. 539.

¹⁴⁶ Q. Wright, *Espionage and the Doctrine of Non-Intervention in Internal Affairs, Espionage and International Law* 11-12 (R. Stanger ed. 1962). But see R. Falk, *Space Espionage and World Order: A Consideration of the Samos-Midas Program, Espionage and International Law* 54 (R. Stanger ed. 1962).

¹⁴⁷ For a recent U.S. domestic case in which it was held that there was no justifiable expectation of confidentiality in private conversations conducted over a cordless telephone, see *State v. Delaurier*, 488 A. 2d 688 (R.I. 1985).

Intelligence gathering is not specifically rendered unlawful by any treaty or international agreement and, significantly, the 1967 Outer Space Treaty¹⁴⁸ contains no prohibitions on the use of outer space for reconnaissance satellites,¹⁴⁹ even though that use of outer space was known at the time.¹⁵⁰ Intelligence gathering on the high seas and from other lawfully placed stations has been recognized as legal by general state practice, which has developed into a customary rule of international law. Thus, intelligence gathering is customarily conducted by states under the belief that it is accepted as a legal practice by a substantial majority of states.¹⁵¹

The clearest example of the custom in operation can be found in the military attache and diplomatic programs. It is widespread practice for states to send military attaches to embassies and, through this accepted practice, their open intelligence gathering about the host state's military is condoned.¹⁵² This open intelligence role is not only condoned by, but also aided by, the host state, which invites attaches on military tours and conducts briefings for them. Likewise, although not specifically mentioned in the Vienna Convention on Diplomatic Relations,¹⁵³ "open intelligence gathering" activities are accepted as a correlative purpose of diplomatic activity and tolerated with a high degree of latitude.¹⁵⁴ This does *not* mean, however, that clandestine spying by attaches, or other clandestine activity conducted by them, is tolerated by states.

The concept of open intelligence gathering by customary law is also reflected in intelligence gathering at sea. By 1967, worldwide seagoing intelligence gathering was common practice with "virtually all of the warships of all the navies carry[ing] out visual and electronic observations as a normal part of their activities."¹⁵⁵ A number of states maintain fleets of intelligence ships, and it is highly noteworthy that protests and actions against them have sought justification in claims of *penetration of the territorial sea or allegations of self-defense, but not in terms of the generic unlawfulness of intelligence gathering activities on the high*

¹⁴⁸ Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, *opened for signature* Jan. 27, 1967, 18 U.S.T. 2410, T.I.A.S. No. 6347 (entered into force on Oct. 10, 1967).

¹⁴⁹ Lissitzyn, *Electronic Reconnaissance From the High Seas and International Law*, in 61 U.S. Naval War College International Law Studies 1947-1977 at 563, 567 (R. Lillich & J. Moore ed. 1980).

¹⁵⁰ J. Bamford, *supra* note 2, at 187.

¹⁵¹ J. Brierly, *The Law of Nations* 59-61 (H. Waldock 6th ed. 1984).

¹⁵² M. McDougal, H. Lasswell & W Reisman, *The Intelligence Function and World Public Order*, M. McDougal & W Reisman, *International Law Essays* 299 (1981).

¹⁵³ Vienna Convention on Diplomatic Relations, April 18, 1961, 3 U.S.T. 3227, T.I.A.S. No. 7502, 50 U.N.T. S. 95

¹⁵⁴ M. McDougal, H. Lasswell & W Reisman, *supra* note 152, at 299

¹⁵⁵ Aldrich, *The Pueblo Seizure: Facts, Law, Policy*, 63 Am. Soc. Int'l L. Proc. 1, 5 (1969) (remarks made as part of a panel discussion during the 63rd Annual Meeting of the American Society of International Law).

seas.¹⁵⁶ Absent hostilities, intelligence gathering on the high seas is lawful; it becomes illegal only when it interferes with the activity of another lawful user of the high seas or when it infringes upon protected features of the public order in the coastal state, thereby upsetting the balance of interests.¹⁵⁷ Since intelligence gathering from the high seas is normally conducted in an unobtrusive and noninterfering manner, there is generally no support for the proposition that electronic intelligence collection from the high seas is of a nature that would justify an attack or interference, particularly when the states are at peace with each other,¹⁵⁸ and when there is no trend to the contrary.¹⁵⁹

3. Appraisal of the Israeli Implied Claim of Right to Exclude Intelligence Gathering

The *Liberty* was patrolling in a dog-leg pattern off the Gaza Strip, which Israel had just conquered. Egypt had been defeated, and a cease-fire was going into effect. The *Liberty* was in international waters and was doing no more than lawfully listening in on radio transmissions from the Six-Day War. It was not interfering with coastal fishing, oil exploration, or any other legitimate coastal state activity. It was a ship owned by a state that was at peace with Israel. There is absolutely no evidence that the *Liberty's* intelligence product was being used to aid the Arab States to Israel's detriment. By the 8th of June, Israel had reopened the Straits of Tiran and had repulsed the alleged Egyptian attack that had precipitated the outbreak of hostilities. Israel was also holding her own against Egypt's allies, Jordan and Syria, and had, in fact, conquered some Jordanian territory. There is no issue of self-defense. Under these circumstances, Israel's implied claim that the United States had no right to conduct intelligence gathering activity under the circumstances was completely unfounded.

C. The Lawfulness of the Location

¹⁵⁶ M. McDougal, H. Lasswell & W Reisman, *supra* note 152, at 309-10 (emphasis added). For a collection of examples in which electronic intelligence-gathering aircraft were shot down by the Soviet Union and North Korea after allegedly being in their airspace, see Lissitzyn, *supra* note 149, at 566-67. In these examples, the nations that shoot down the aircraft have never officially claimed a right to interfere with foreign aircraft over the high seas and, in one case, the Soviet Union specifically denied that it claimed such a right.

¹⁵⁷ M. McDougal, H. Lasswell & W Reisman, *supra* note 152, at 309. Lissitzyn, *supra* note 149, at 567.

¹⁵⁸ *Id.* at 568. Professor Lissitzyn bases this on his observations that: 1) All shootings at reconnaissance aircraft are justified on the basis of straying into territorial airspace; 2) the number of states committing acts of interference is small; 3) it is unlikely that a rule of law making electronic reconnaissance unlawful will emerge if the stronger states don't support it; and 4) there is no evidence in the international community of any sentiment for such a law.

¹⁵⁹ *Id.* at 568.

The area, over which Israel had by implication asserted her intelligence gathering exclusion zone, was an area of the high seas off Egypt.

The area was beyond the territorial sea, or the contiguous zone, of either Israel or Egypt. Thus, there is no question to be resolved of Israel's rights over the *Liberty* as a warship of a nominally neutral state in Israel's territorial waters¹⁶⁰ or in Israel's contiguous zone.¹⁶¹ The focus settles on the limited assertion of an exclusion zone over the high seas beyond the contiguous zone.

I. The General Nature of the Freedom of the Seas in 1967

"[T]he basic policy of the law of the sea is to promote the utmost use and enjoyment of the ocean for the benefit of all peoples.¹⁶² To this end, the great ocean expanses are, as a matter of policy, left as free as possible from national jurisdiction claims over them. One historical exception to this policy is limited sovereignty claims in furtherance of legitimate self-defense.

The major source of treaty law governing the high seas in 1967 was the 1958 Geneva Convention on the High Seas (hereinafter The High Seas Convention),¹⁶³ to which both Israel and the United States were parties.¹⁶⁴ The preamble of this treaty notes that it is simply a codification of international law already in existence and that its provisions are declaratory of established principles of interna

¹⁶⁰ Convention on the Territorial Sea and Contiguous Zone, Apr. 29, 1958, 15 U.S.T 1606, T.I.A.S. No. 5639, 516 U.N.T.S. 205 (entered into force Sept. 10, 1964) [hereinafter cited as Territorial Seas Convention]. The width of the territorial sea was not provided for in the treaty, but no nation could have a territorial sea wider than the contiguous zone of 12 miles. See Territorial Seas Convention, art. 24(2). This treaty gives a coastal state the right to compel warships to leave territorial waters for noncompliance with coastal state regulations. See Territorial Seas Convention, art. 23. Israel claimed a 6-mile territorial sea in 1967, Egypt a 12-mile territorial sea.

¹⁶¹ The rights of control of a coastal state would be limited to those listed in article 24(1) of the Territorial Seas Convention, which reads, in pertinent part:

1. In a zone of the high seas, contiguous to its territorial sea, the coastal State may exercise the control necessary to: (a) Prevent infringement of its customs, fiscal, immigration or sanitary regulations within its territory or territorial sea; (b) Punish infringement of the above regulations committed within its territory or territorial seas.

Territorial Seas Convention, *supra* note 160, art. 24(1).

¹⁶² McDougal, *Authority to Use Force on the High Seas*, in 61 U.S. Naval War College, International Law Studies 1947-1977 at 551, 554 (R. Lillich & J. Moore; ed. 1980).

¹⁶³ Convention on the High Seas, Apr. 29, 1958, 2 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82 (entered into force Sept. 30, 1962) [hereinafter cited as High Seas Convention].

¹⁶⁴ United Nations, Multilateral Treaties Deposited With the Secretary-General 587 (1982). The United States ratified the treaty on April 12, 1961, and Israel ratified the treaty on September 6, 1961. *Id.*

tional law.¹⁶⁵ Article 8(1) of that convention provides that warships on the high seas have complete immunity from the jurisdiction of any state other than the flag state.¹⁶⁶ Warships are defined in the treaty as ships that belong to the naval forces of a state, that bear the distinguishing external markings of a warship of its nationality, that are under the command of a commissioned officer whose name is on the state's official navy list, and that are manned by a crew under regular naval discipline.¹⁶⁷ The term high seas, as defined in article 1, means all parts of the sea, except internal waters and territorial sea of a coastal state.¹⁶⁸

The High Seas Convention provides, in article 2, that the high seas are open to all nations and no part of them may be subjected to state sovereignty.¹⁶⁹ Article 2 lays out four specific freedoms guaranteed to states *inter alia*: Freedom to navigate; freedom to fish; freedom to lay submarine cables and pipelines; and freedom to fly over the high seas. *Inter alia* freedoms include such things as the freedom to conduct scientific research and the freedom to conduct electronic intelligence gathering. The only limit on the exercise of high seas freedoms, whether the specifically named ones or the *inter alia* ones, is that these freedoms must be exercised by states with reasonable regard to the interests of other states in their exercise of these same freedoms.¹⁷⁰ This then would seem to end any question of the right of a friendly state to electronically listen on the high seas off the coast of another state. For centuries, however, states have asserted limited jurisdiction claims over portions of the high seas for such purposes as enforcement of smuggling and sanitary laws, and these have continued to be recognized.¹⁷¹ States have also asserted jurisdiction over portions of the high seas in asserting claims of self-defense. It is within this latter category that Israel's claim must be found.

2. State Claims to Jurisdiction Over the High Seas Based on Self-Defense

¹⁶⁵ High Seas Convention, *supra* note 163, at preamble. The preamble reads, in part: "*Recognizing* that the United Nations Conference on the Law of the Sea, held at Geneva from 24 February to 27 April 1958, adopted the following provisions as generally declaratory of established principles of international law" *Id.*

¹⁶⁶ *Id.* art. 8(1).

¹⁶⁷ *Id.* art. 8(2).

¹⁶⁸ *Id.* art. 1

¹⁶⁹ *Id.* art. 2.

¹⁷⁰ *Id.*

¹⁷¹ These categories have been historically recognized. See *Church v. Hubbart*, 6 U.S. (2 Cranch) 187 (1804); I L. Oppenheim, *International Law* (H. Lauterpacht ed. 7th ed. 1948). Limited jurisdiction has also been recognized for other purposes related to resources. See also U.S. Presidential Proclamation No. 2667, *Policy of the United States with Respect to the Natural Resources of the Subsoil and Sea Bed of the Continental Shelf*, Sept. 28, 1945, 3 C.F.R. 67 (1948) (extending jurisdiction and control to the natural resources of the U.S. continental shelf while still recognizing freedom of the high seas).

State claims to jurisdiction over the high seas based on self-defense have been variously titled. Some authorities discuss them under the title of contiguous zone.¹⁷² During the drafting of the 1958 Convention on the Territorial Sea and Contiguous Zone (hereinafter Territorial Seas Convention), however, references to security were deliberately left out.¹⁷³ Thus, it may cause confusion to refer to zones based on self-defense or national security as contiguous zones, especially after the 1958 treaty gave character and territorial limit to the term.¹⁷⁴ In this discussion, the term maritime security zone will be used as the generic term.¹⁷⁵

Since reference to security zones was specifically left out of the Territorial Seas Convention, and since they do not appear in the High Seas Convention, at least one author has asserted that maritime security zones are clearly unlawful,¹⁷⁶ however, they have been, and continue to be, used and recognized by states. The reason that they are not unlawful is that, when properly declared, a maritime security zone may be based on self-defense under article 51 of the United Nations Charter. The reason that maritime security zones for self-defense have been, and continue to be, recognized is that states find them useful. This does not lead to widespread abuse of these zones, however, since only those that have been reasonably declared in the face of a valid threat have been recognized. In fact, the international law commission that worked on drafts of the law of the sea articles for the 1958 Geneva Convention felt that the concept of security zones was too vague to be included in the treaties. Instead, the commission felt that the states' inherent right of self-defense would provide an adequate safeguard for their legitimate interests¹⁷⁷

Maritime security zones generally fall into four categories: (1) Peacetime zones declared by a state in the face of a limited threat or for a limited purpose, including warning areas; (2) zones declared by a neutral in the face of a widespread conflict with the intent of limiting the effects of the conflict (often called neutrality zones); (3) zones declared by states during a limited or widespread conflict and directed only at the other belligerent (often called sea defense areas or exclusion zones); and (4) zones declared by a belligerent and directed at all shipping within the declared zone (often called a total exclusion zone, operational zone, or war zone).

¹⁷² McDougal, *Authority to Use Force On the High Seas*, *supra* note 162, at 557.

¹⁷³ Lissitzyn, *supra* note 149, at 565.

¹⁷⁴ See Territorial Seas Convention, *supra* note 160, art. 24.

¹⁷⁵ The term "maritime security zones" is used in Note, *Maritime Security Zones: Prohibited Yet Perpetuated*, 24 Va. J. of Int'l L. 967 (1984). It is used by the author here as a general term to describe state zones of jurisdiction based on self-defense. The area is otherwise crowded with terms. The discussion of maritime security zones does not include a discussion of the traditional laws of blockade, searches, and contraband

¹⁷⁶ See *id.* at 967.

¹⁷⁷ Glover, International Law in *the Falkland Islands*, New Zealand L. J. 191, 192-93 (1982).

Some generalization can be made about maritime security zones. They must be announced.¹⁷⁸ This is a self-evident characteristic; the purpose of a maritime security zone is to put other nations on notice of some change in the normal high seas regime. A major purpose of maritime security zones during belligerencies is to place the political onus of escalation of the conflict on the other party, thereby clarifying hostile intent.¹⁷⁹ An unpublicized security zone amounts to nothing more than a trap. The announcement should also reasonably describe the limits of the maritime security zone. Finally, since maritime security zones are founded in self-defense, they must meet the self-defense criteria of being reasonable, necessary, and proportionate.¹⁸⁰

3. Appraisal of the Implied Israeli Claim of Right to Attack the *Liberty* in International Waters

Since the *Liberty* was not in territorial waters nor in a contiguous zone, as defined by the Territorial Seas Convention, the only basis for the Israeli hostile action against a nonbelligerent warship must be found in a claim of self-defense applied to the high seas. Applying the criteria for a maritime exclusion zone to the implied exclusion zone that the Government of Israel sought to assert against the *Liberty* reveals that this zone did not meet the basic requirements.

The zone was neither announced nor defined.¹⁸¹ The only Israeli public announcement about a maritime exclusion zone was: "Warning: All vessels are required to keep away from the coasts of Israel during darkness."¹⁸² The Israeli announcement, unlike the British announcements during the recent war in the

¹⁷⁸ See Mallison & Mallison, *A Survey of the International Law of Naval Blockade*, U.S. Naval Inst. Proc., Feb. 1976, at 45 (addressing the related area of blockades).

¹⁷⁹ 2 D. O'Connell, *International Law of the Sea* 1112 (1984).

¹⁸⁰ D. Bowett, *Self-Defense in International Law* 269 (1958).

¹⁸¹ See *supra* note 55.

¹⁸² J. Ennes, *Assault on the Liberty*, *supra* note 2, at 48.

Falklands,¹⁸³ did not define what the coasts of Israel were, nor did it state whether the maritime exclusion zone included the coasts of conquered territory or whether it included waters beyond the territorial sea. In any case, this warning applied only to

¹⁸³ During this war, three security zones were eventually declared. The first, a limited one, was declared on April 12, 1982; the second one, on the 28th of April, declared a total exclusion zone; and the third, which is still in effect today, is called a "protection zone" and runs 150 miles out from the islands and is similar to the zone declared on April 12, 1982.

The first British exclusion zone during the Falkland/Malvinas Islands War of 1982 declared:

The British Defense Secretary announced to Parliament on 7 April 1982: "Through appropriate channels the following notice is being promulgated to all shipping forthwith: `From 0400 Greenwich Mean Time on Monday, April 12, 1982, a maritime exclusion zone will be established around the Falkland Islands. The outer limits of this zone is a circle of 200 nautical miles radius from latitude 51 degrees 4 minutes south, 59 degrees 30 minutes west which is approximately the centre of the Falkland Islands. From the time indicated, any Argentine warships and Argentine naval auxiliaries found within this zone (on the high seas within 200 miles of the islands) will be treated as hostile and are liable to be attacked by British forces. This measure is without prejudice to the right of the United Kingdom to take whatever additional measures may be needed in exercise of its right of self-defense under Article 51 of the United Nations Charter."

2 D. O'Connell, *International Law of the Sea*, supra note 179, at 1111.

This declaration of a limited maritime security zone was a legitimate measure, since it was made in response to an Argentine breach of its duty of nonaggression under Article 2(4) of the United Nations Charter. U.N. Charter, art. 2(4), which reads: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

The zone limited the area of hostilities and was used to test Argentine belligerent intent. 2 D. O'Connell, *International Law of the Sea*, supra note 179, at 1111; *Maritime Security Zones*, supra note 175, at 989. As noted in the above quote, the exclusion was conspicuously limited to the naval ships of the other belligerent. In this context, this maritime security zone was clearly valid.

An example of a criticized use of a total maritime exclusion zone was the April 28, 1982, declaration of a total maritime exclusion zone around the Falklands by Great Britain. The zone applied to the same 200-mile area around the Falklands that the earlier declared lesser maritime zone had, but this proclamation stated:

The Total Exclusion Zone was announced on 28 April 1982. The British Prime Minister informed Parliament: "The latest of our military measures is the imposition of the total exclusion zone around the Falkland Islands, of which we gave forty-eight hours notice yesterday. The new zone has the same geographical boundaries as the maritime exclusion zone which took effect on 12 April. It will apply from noon London time tomorrow (30 April 1982) to all ships and aircraft, whether military or civil, operating in support of the illegal occupation of the Falkland Islands. A complete blockade will be placed on all traffic supporting the occupation forces of Argentina. Maritime and aviation authorities have been informed of the imposition of the zone, in accordance with our international obligations."

2 D. O'Connell, *International Law of the Sea*, supra note 179, at 1155.

The mere presence of any ships or aircraft in the zone, regardless of nationality, was interpreted as being hostile and justifying measures of [self-defense](#). *Id.* at 1111. The British argued that the Falklands total exclusion zone was a rightful measure of self-defense under Article 51 of the U.N. Charter, which reads in part: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations" U.N. Charter art. 51. The zone had, in fact, been declared only when Argentina failed to withdraw from the Falklands after the U.N. Security Council had called upon it to do so. 2 D. O'Connell, *International Law of the Sea*, supra note 179, at 1111. The Soviets objected to the morerestrictive British zone, saying that it violated Article 2 of the 1958 High Seas Convention. Glover, supra note 177, at 192-93. This greater zone had the effect of excluding Soviet vessels, then shadowing the British fleet, away from the scene of operations. See *N.Y. Times*, Apr. 29, 1982, at 1, col. 6. In fact, by linking this

darkness and, therefore, it did not apply to the *Liberty* at 2 p.m., local time, on the 8th of June.

The United States Government was given its own private maritime exclusion zone announcement to keep the *Liberty* away from Israeli coasts whatever the time of day. Even these private warnings, as they have been described, however, are not specific enough about the physical limits of the zone.¹⁸⁴ Since the Six-Day War was not a world war, the only type of maritime security zone that could properly

total exclusion zone to all ships and aircraft operating in support of the Argentine occupiers of the Falklands, the British have constructed a legally supportable formula for the extended zone.

During the Russo-Japanese War (1904-05), the Japanese declared a defensive sea area up to 10 miles from her coast. Foreign shipping was required to follow routes that kept it away from the main operational areas. The U.S. Naval War College International Law Situations for 1914 regarded this as precedent on the basis of reasonableness, and the U.S. followed the Japanese lead in 1917. 2 D. O'Connell, *International Law of the Sea*, supra note 179, at 1109.

It is important to note that the examples of the Japanese-declared zone and the first and third British zones in the Falklands all deal with limited war, and the maritime security zones this created were limited in their scope and minimally upset world community use of the high seas. This is not to say, however, that more extensive maritime security zones have not been declared. Mallison, *Studies in the Law of Naval Warfare*, in U.S. Naval War College International Law Studies 1966 at 87-89 (1968).

¹⁸⁴ See supra notes 54-66 and accompanying text.

have been declared would have been a limited one directed against only the other belligerent.¹⁸⁵

Most importantly, the Israeli exclusion zone does not meet the basic requirements for self-defense. The zone was not necessary. The tacit maritime security zone announced privately was specifically directed against the United States. The United States was neutral, however, and the only activity that it was conducting was electronic intelligence gathering. As has been shown in the previous discussions, intelligence gathering on the high seas by a nonbelligerent is a permissible use of the high seas. Therefore, Israel had no legitimate reason to justify a security zone against the United States.

¹⁸⁵ Maritime security zones that totally exclude *all* shipping are of questionable legality. The declaration of a maritime security zone or war zone that excludes all shipping from an area, whether neutral or belligerent, on peril of destruction, traditionally can be justified only as a reprisal for similar enemy actions. 2 L. Oppenheim, *International Law*, *supra* note 144, at 551. In the event of a war of world proportions, however, such a total zone may be arguably accepted as permissible, as were the total blockades of both world wars. Mallison & Mallison, *A Survey of the International Law of Naval Blockade*, *supra* note 178, at 48. *But see* D. O'Connell, *The Influence of Law on Seapower* 167, (1975). To argue otherwise is to argue in the face of clear state practice, and a rule of law that is not honored in state practice is no rule at all. This is not to say, however, that a limited war would justify taking the same measures. Mallison & Mallison, *A Survey of the International Law of Naval Blockade*, *supra* note 178, at 48. *But see* D. O'Connell, *The Influence of Law on Seapower* 167 (1975). Outside the extraordinary circumstance of a general world war, the clear rule is that the declaration of a maritime security zone controlled by a belligerent and entered by neutral ships at their peril is not recognized as legal. 2 L. Oppenheim, *International Law*, *supra* note 144, at 548-49. Maritime security zones that were directed against all traffic except the declarant's own have been used three times in the twentieth century; the first was in World War 1. *Id.* On November 3, 1914, Britain declared a military area in the North Sea and mined the entire area, leaving some lanes open for neutral shipping. *Id.* This extensive mining was claimed to be a reprisal to German mining. Subsequently, Germany, in reprisal for the North Sea mining by Britain, declared a total war zone around the British Isles in which every ship, regardless of nationality, would be liable to attack. 2 D. O'Connell, *International Law of the Sea*, *supra* note 179, at 1110. This was known by the German Foreign Ministry to be contrary to the international law of the time and was justified as a reprisal. O'Connell, *International Law and Contemporary Naval Operations*, 1970 *Brit. Y.B. Int'l L.* 46 (1971).

During the Second World War, Germany, the United Kingdom, and the United States all declared security zones, called war or operational zones. Germany again declared hers around the British Isles, the British theirs in the Danish Straits, and the United States in the Pacific Ocean. Mallison, *Studies in the Law of Naval Warfare*, in *U.S. Naval War College International Law Studies* 1966, at 69-91 (1968). After the war, Grand Admiral Doenitz was convicted of a war crime for authorizing the establishment of a total war zone around the British Isles. 22 *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg* 558 (1948). This was contrary to the London Naval Protocol of 1936, 173 *L.N.T.S.* 353. No punishment was awarded for this offense, however, because of the similar allied actions. W Mallison, *Studies in the Law of Naval Warfare* 1966, at 69-91 (1968).

Finally, the zone was disproportionate. The naval operational requirements of Egypt, Israel, and Syria have been coastal, and the need to extend jurisdiction over an undefined area of the high seas was disproportionate to Israel's real defense needs.¹⁸⁶

4. Conclusion

The Israeli-implied claim to a maritime exclusion zone against the *Liberty* on the high seas was not justified in international law.

D. Summary

Intelligence gathering on the high seas is not an inherently illegal activity and Israel had no grounds on which to justify asserting national authority over the high seas near her coasts, except against belligerents. The implied claim by the Government of Israel to an intelligence gathering exclusion zone on the high seas as against the United States as a cobelligerent, or against any nonbelligerent, was invalid and is not supportable in international law.

III. THE ATTACK ON THE *LIBERTY* AS ISRAELI AGGRESSION

World order, in the long run, depends not on men, but upon law,
law which embodies eternal principles of justice and morality.
- John Foster Dulles

A. The Issue

The Israeli attack on the *Liberty* raises important questions about aggression and anticipatory self-defense. Part III of this article examines these questions in the context of international law.

B. The Use of Force and International Law

1. The United Nations Charter Framework

The world legal order on the use of force is given in the U.N. Charter.¹⁸⁷ The first element of world legal order required by the Charter, and found in article 2(3), is that all members must settle their disputes peacefully and without jeopardizing

¹⁸⁶ U.N. Charter, art. 2.

¹⁸⁷ D. O'Connell, *The Influence of Law on Seapower*, 127 (1975)

international peace and security.¹⁸⁸ Article 2(4) of the Charter contains the prohibition of aggression and reads: "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."¹⁸⁹ Article 51 of the Charter provides the framework for the lawful use of force by a state by limiting the use of force to self-defense only.¹⁹⁰ Article 51 states: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. . . ."¹⁹¹ These two articles provide the limits of the lawful use of force under international law. Force may be lawfully applied only if it is in self-defense. If force is not applied in self-defense it is aggression, and illegal. As one commentator noted in 1966: "International law presently requires that the initiation of war or the use of force short of war be limited and kept within the concept of self-defense, which must be premised on a specific and immediate threat of armed attack."¹⁹² Within the United Nations framework then, the use of force is lawful only in self-defense. Any other use of force is unlawful aggression.

2. The Character of Self-Defense Under Article 51

In the past, there has been some dispute as to the extent to which article 51 incorporates the previous customary international law of self-defense. Professor Kunz espoused the narrow view. Based on the "clear and unambiguous"¹⁹³ meaning of the words "armed attack" in article 51, he felt that the only proper use of force under article 51 was in response to an actual (as opposed to an imminent) "armed attack."¹⁹⁴ In other words, Professor Kunz felt that the customary international law of self-defense was not recognized in the Charter. He said: "Article 51 prohibits 'preventive war.' The 'threat of aggression' does not justify self-defense under Art. 51. Now in municipal law self-defense is justified against an actual danger, but it is sufficient that the danger is imminent. The 'imminent' armed

¹⁸⁸ *Id.* art. 2(3).

¹⁸⁹ *Id.* art. 2(4).

¹⁹⁰ *Id.* art. 51

¹⁹¹ *Id.*

¹⁹² Harlow, *The Legal Use of Force Short of War*, U.S. Naval Inst. Proc., Nov. 1966; at 93.

¹⁹³ Kunz, *Individual and Collective Self-Defense in Article 51 of the Charter of the United Nations*, 41 Am. J. Int'l L. 872, 873 (1947).

Professor Kunz stated: "The Permanent Court of International Justice held that, where a text is clear and unambiguous, no resort should be had to *travaux préparatoires* for its interpretation." *Id.*

¹⁹⁴ *Id.* at 877-78.

attack does not suffice under Art. 51.¹⁹⁵ Professor McDougal and Mr. Feliciano take issue with the technique of interpreting documents, and especially article 51, using the "clear and unambiguous" meaning of words as a guide. In their collection of essays entitled *Law and Minimum World Public Order: The Legal Regulation of International Coercion*, they argue:

In the first place, neither Article 51, nor any other word formula can have, apart from context, any single "clear and unambiguous" or "popular, natural and ordinary" meaning that predetermines decision in infinitely varying particular controversies. The task of treaty interpretation, especially the interpretation of constitutional documents devised, as was the United Nations Charter, for the developing future, is not one of discovering and extracting from isolated words some mystical pre-existent, reified meaning but rather one of giving that meaning to both words and acts, in total context, which is required by the principal, general purposes and demands projected by the parties to the agreement. For determining these major purposes and demands, a rational process of interpretation permits recourse to all available indices of shared expectation, including, in particular . . . the preparatory work on the agreement.¹⁹⁶

Professor and Mrs. Mallison, writing later about article 51, did, in fact, try to find the context for article 51. They went back to the negotiating history of the U.N. Charter and found:

The negotiating history at the San Francisco Conference reveals that Article 51 was intended to incorporate the entire customary law or "inherent right" of self-defense. This comprehensive incorporation of the customary law includes reasonable and necessary anticipatory self-defense since this is an integral part of the customary law.¹⁹⁷

This research into the negotiating history is borne out by reference to the equally authentic French text of article 51. The French text uses the broader term "aggression armee," which encompasses the conception of "armed attack" but is not so limited and more accurately reflects the negotiating history.¹⁹⁸

¹⁹⁵ *Id.* at 878.

¹⁹⁶ M. McDougal & F. Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion* 23435 (1961) (footnotes omitted).

¹⁹⁷ S. Mallison & W. Mallison, *Armed Conflict in Lebanon, 1982: Humanitarian Law in a Real World Setting* 13 (1983).

¹⁹⁸ *Id.*

The more authentic reading of article 51, then, is that the inherent right of self-defense referred to in the article incorporates the entire customary law of self-defense, including reasonable and necessary anticipatory self-defense, since this has always been a part of the customary law.¹⁹⁹

3. The Requirements for Anticipatory Self-Defense

The requirements for anticipatory self-defense have been established through customary international law.

In an attack in 1837, the American steamer *Caroline* was destroyed by Canadian forces.²⁰⁰ During the Canadian Rebellion of 1837, the *Caroline* was used to transport supplies to rebels on several occasions. The United States appeared to the Canadian Government to be unwilling or unable to stop this action. Accordingly, Canadian militia crossed the Niagara River at night and captured the ship during a battle in which two Americans were killed. The Canadians set the ship afire and set it adrift in the river, where it was destroyed as it went over Niagara Falls. One of the claims of Great Britain was that the attack was justified as an act of self-defense. The United States did not deny that the concept of anticipatory self-defense could be invoked, but denied that it existed in the *Caroline* situation. The British ended the affair by apologizing for the incident without assuming any legal responsibility for the deaths of the two Americans, the wounding of others, and the destruction of the ship.

During the diplomatic correspondence on the case, the American Secretary of State, Daniel Webster, proposed to Lord Ashburton, the British Special Minister to Washington, a formula for anticipatory self-defense. By attempting to show that Mr. Webster's formula had, in fact, been satisfied, Lord Ashburton implicitly adopted this formula.²⁰¹ The formula required a "necessity of self-defense, instant, overwhelming, leaving no choice of means, and no moment for deliberation."²⁰² According to the Mallisons, the more correct formulation of the rule under international law is that the state invoking anticipatory self-defense must go through a process of deliberation that results in the choice of a lawfully proportionate means of responding coercion.²⁰³ In any case, they feel that the British response was proportional to the threat posed by the *Caroline*.²⁰⁴ This view is more in harmony with article 2(3) of the U.N. Charter.

¹⁹⁹ Mallison & Mallison, *The Israeli Aerial Attack on June 7, 1981, Upon the Iraqi Nuclear Reactor: Aggression or Self-Defense?* 15 Vand. J. Int'l L. 417, 420 (1982).

²⁰⁰ 2 J. Moore, *Digest of International Law* 409-414 (1906); Jennings, *The Caroline and McLeod Cases*, 32 Am. J. Int'l L. 82 (1938).

²⁰¹ Jennings, *supra* note 200, at 89-90.

²⁰² *Id.* at 89 (citing 61 Parliamentary Papers (1983)).

²⁰³ Mallison & Mallison, *supra* note 199, at 422.

²⁰⁴ *Id.*

An example of the use of peaceful procedures was the British action toward the French fleet following the Vichy French Government armistice with Nazi Germany in June 1940.²⁰⁵ At that time, Germany had control of most of the continent of Europe. It was a bleak time for Britain, with German bombing a regular feature of British life and a German invasion of England expected. The French fleet had taken refuge in Alexandria, Egypt; Oran, French North Africa (Algeria); and Martinique, in the West Indies. The British feared that the Germans would take control of the French fleet through the Vichy Government. If the French fleet had joined with the German Navy, things would have been very grim indeed, since Britain's major lifelines were all by sea and the French Navy could have helped cut off British sea commerce and facilitated the threatened German invasion of England. In response to this grave threat to its very existence, the British served on the French naval commanders in each of the refuge locations a list of alternatives. The preferred choice was for the French fleet elements to join the British against Germany. The second choice was to make the French fleet useless to the Germans by the French themselves. The third choice, failing the other two, was that the British would attack and sink the vessels. In Alexandria and Martinique, the French accepted the second choice. In Oran, the choices were rejected; and, after further efforts at reaching agreement failed, the British attacked and sunk the fleet at Oran. The British conduct has been viewed as appropriate.²⁰⁶

A more recent use of anticipatory self-defense was the Cuban Missile Crisis of 1962.²⁰⁷ At the time, the Soviet Union was secretly installing strategic missiles with nuclear capability in Cuba. At the same time, the Soviets were publicly denying the installment of these intercontinental missiles. If the installed missiles had become operational, they could have posed grave danger to the balance of power. Because the Soviets refused to acknowledge the actions they were taking, diplomatic efforts to end the crisis failed, and the United States imposed a limited naval blockade around Cuba for the purpose of halting the further introduction of strategic missiles. At the same time, the United States worked through the United Nations to reach a diplomatic settlement that would result in the removal of the missiles that were already in Cuba. The result was an agreement that led to the withdrawal of the missiles from Cuba.

The Cuban Missile Crisis is noteworthy in two respects. First, the Crisis illustrates appropriate proportionality. The United States used the least amount of

²⁰⁵ 1 L. Oppenheim, *International Law*, *supra* note 171, at 270-71.

²⁰⁶ Mallison & Mallison, *supra* note 199, at 423 (citing 1 L. Oppenheim, *International Law* 303 (H. Lauterpacht ed. 8th ed. 1955)). Oppenheim calls the act one of self-preservation.

²⁰⁷ See S. Mallison & W. Mallison, *Studies in the International Humanitarian Law of Armed Conflict*, 42 (revised preliminary edition 1985); this text may also be found at Mallison, *Limited Naval Blockade or Quarantine-Interdiction: National and Collective Defense Claims Valid Under International Law*, 31 *Geo. Wash. L. Rev.* 335 (1962).

force necessary to contain the aggression that the missile placement and the threat to the balance of power represented. Second, the Crisis shows the simultaneous use of peaceful means for resolving the situation.

These cases illustrate the legal criteria of anticipatory self-defense: 1) The use of peaceful procedures if available; 2) actual necessity, as opposed to sham or pretense, for the use of force in the responding coercion; and 3) proportionality in the responding coercion.²⁰⁸ Anticipatory self-defense is regarded as a highly unusual and exceptional action that may be employed only when the evidence of the threat is compelling and the necessity to act is overwhelming,²⁰⁹ that is, the danger is instant.

C. Assessment of the Israeli Attack

1. Peaceful Procedures

Prior to ordering the attack on the *Liberty*, officials of the Israeli Government attempted to peacefully get the United States to move the ship. By notifying the United States that the ship had to be moved or it would be attacked, the Government of Israel was arguably giving the United States a peaceful alternative to the use of force. This, it may be said, constituted a resort to peaceful procedures prior to the attack. This argument fails, however, because the Government of Israel had no right to make the demand to move. The unsuccessful attempt by United States Government officials to move the ship was a gratuitous response. The United States was not an enemy, nor a potential enemy- state. The United States had every right to be in international waters listening in on atmospheric radio transmissions.²¹⁰ The notifications by the Government of Israel to the United States would have constituted peaceful procedures only if the threatened Israeli attack was directed toward an enemy or potential enemy who was immediately, specifically, and directly threatening with military force.²¹¹ Since the Government of Israel was asking the Government of the United States to do something that the United States was not obligated to do under international law, the procedures by Israel were not justified by any necessity in the situation.

2. Necessity

²⁰⁸ Mallison & Mallison, *supra* note 199, at 423.

²⁰⁹ *Id.* at 419

²¹⁰ See *supra* notes 140-86 and accompanying text.

²¹¹ McDougal, *supra* note 162, at 556.

To be in harmony with the United Nations framework for the use of force, the Israeli attack must be shown to have been based on necessity. The Israeli military leaders were concerned about the *Liberty* because they felt that the information being heard by the *Liberty's* radio receivers had already revealed one Israeli secret to United States officials and they did not want any more revealed.²¹² According to one commentator, Israel wanted the world to think that she was the victim of an attack so that she would be justified in retaining conquered land.²¹³ Israeli military leaders also feared that battlefield intelligence broadcast over Israeli radios and intercepted by the *Liberty* would end up in enemy hands via Arab sympathizers in the U.S. State Department and the Pentagon.²¹⁴

It is also speculated, and there is much circumstantial evidence to confirm, that Israel did not want the United States or the world to know that it would soon be attacking Syria, U.N. cease-fire notwithstanding.²¹⁵ These concerns of the Israeli military leadership must be examined in view of Israel's lawful military objectives in the Six-Day War.

Israel had made preparation for war in response to Egypt's removal of the United Nations Emergency Force, the movement of Egyptian troops into the Sinai, and the Egyptian closure of the Straits of Tiran. Israel alleges, however, that she attacked Egypt in what Israel alleged was a response to an offensive thrust by Egyptian armor and planes.²¹⁶ The only lawful war aims Israel had were to repulse any Egyptian, Jordanian, and Syrian attacks and to reopen the Straits of Tiran. Israel's insistence that the United States move the *Liberty* or it would be attacked could have been prompted only by Israel's need to hide its forthcoming breach of a cease-fire to seize Syrian lands, and the reason to hide this move into Syria was to make keeping Syrian land after the war easier to justify.²¹⁷ By the time the decision was made to attack the *Liberty*, Israel had won the war. Egypt had been defeated, the Straits of Tiran had been captured by Israel, and a cease-fire was in effect. Jordan had been defeated, and a cease-fire was in effect. Syria had not seriously fought Israel, and a cease-fire was in effect. The belief that any leaks from the United States would have jeopardized the legitimate war aims of an already victorious Israel was a highly speculative and ill-founded one.

²¹² See supra notes 19 & 20 and accompanying text. See also S. Steven, supra note 2, at 234.

²¹³ Id.

²¹⁴ Id.

²¹⁵ J. Ennes, supra note 2, at 209-13.

²¹⁶ 22 U.N. SCOR (1347th mtg.) at 1 [U.N. Doc. S/P.V. 1347](#) (1967). Contradicting the claim at the Security Council was the fact that the Israeli Air Force had caught the Egyptian Air Force on the ground in a complete surprise. S. Steven, supra note 2, at 230-31.

²¹⁷ See D. Neff, supra note 2, at 265; S. Steven, supra note 2, at 234. Israel annexed Jerusalem on June 28, 1967, started settlement colonies on the West Bank on Sept. 27, 1967, and annexed the Golan Heights on Dec. 14, 1981. See D. Neff, supra note 2, at 323

The case of the destruction of the French fleet at Oran, described earlier, is instructive on this point. In that case, the attack was ultimately justified because the Government of France had just fallen under the sway of England's deadly enemy - an enemy that had not only talked of England's destruction, but that had also just demonstrated its willingness to use force by conquering most of continental Europe. If the French ships in question had not been neutralized or destroyed, there was little doubt at the time that they would have been used against England, either on the high seas or to invade her. Thus, the use of violence was justified by the dire necessity of the situation. The posture of the United States toward Israel in 1967 simply did not equate to that of Vichy France toward Great Britain in 1940.

The *Liberty* was the warship of an ally of Israel. The ship did not represent any threat to the territorial integrity or political independence of Israel. The attack was not founded in actual necessity. The actual reason for attacking the *Liberty* was to hide an Israeli attack on Syria for the purpose of territorial expansion.

3. Proportionality

The military leadership of Israel not only chose to confront the *Liberty*, but also chose the means of dealing with her. They were confronted with a warship that was a lumbering, converted merchant ship incapable of going over seventeen knots. Was the killing of thirty-four men, and the wounding of 171 others, a proportional response? Proportionality is judged according to the character of the initial coercion.²¹⁸ In this case, there was no coercion by the United States and no specific or immediate danger posed by the ship. Accordingly, any use of armed force against the *Liberty* would have been, and was, unjustified.

D. Conclusion

The attack on the *U.S.S. Liberty* was not a justifiable act of anticipatory self-defense. The *Liberty* committed no aggression against Israel. The Israeli attack was not preceded by justifiable peaceful procedures. The attack was unnecessary because it was based only on a speculative threat and conducted after Israel's legitimate war aims had been achieved. Any coercion against the ship would have been unjustified. Since there was no justification for the attack as an act of self-defense under article 51 of the U. N. Charter, and since the attack was not committed as part of a decision of the U.N. Security Council, it was an unlawful use of force by a member of the United Nations.

The decision by the Government of Israel, acting through its military leadership, to attack the *U.S.S. Liberty* was a decision to commit aggression under

²¹⁸ Mallison & Mallison, *supra* note 199, at 420

Article 2(4) of the United Nations Charter. The attack itself was an act of unlawful aggression. The deaths and injuries suffered cannot be lawfully justified.

IV THE WRONGFUL USE OF UNMARKED MILITARY AIRCRAFT

[O]ne of the "morals" of the first great war was the demonstration of the need for nationality marks upon aircraft. . . . - J. M. Spaight

A. Factual Highlights

On the day of the attack, the *Liberty* was being heavily scrutinized by Israeli Defense Force aircraft. Most of the flights were made by a twin-engined transport, marked with the Israeli Star of David, that was being used as a reconnaissance plane. At 10 a.m., however, two rocket-armed, delta-winged jets circled the ship three times at very close range. These planes had no external, visible national markings.²¹⁹ Later, at 2 p.m., during the attack, the first two planes that attacked the *Liberty* were also delta-winged jets, and witnesses again saw no external national markings on them.²²⁰ The calls for help that got out from the *Liberty* referred to the attacking forces only as unidentified aircraft.²²¹ If the ship had gone down with all hands, the only thing that the United States would have known was that the *Liberty* had been attacked by unidentified aircraft and, had the jamming of the *Liberty's* radios been totally successful, the United States might not have even known that.²²² These disturbing facts raise the question of whether the use of unmarked aircraft is proper under international law.

B. The International Law Criteria

International efforts to codify rules concerning the conduct of war on land and at sea have been moderately successful, but there is virtually no treaty law on air warfare.²²³ In 1922, however, a special committee of jurists from six powers was appointed to study and prepare rules for air warfare. Their product was a draft code entitled, Rules of Air Warfare.²²⁴ Although never adopted in legally binding form, it is nevertheless an authoritative attempt to promulgate rules governing air warfare,

²¹⁹ J. Ennes, *supra* note 2, at 53.

²²⁰ See *supra* note 79

²²¹ S. Green, *supra* note 2, at 229

²²² Author Steven Green's speculation on this point may be found at S. Green, *supra* note 2, at 229-30.

²²³ The Laws of Armed Conflicts ix. See *generally*, The Laws of Armed Conflicts 133-39 (D. Schindler & J. Toman ed. 1973).

²²⁴ The Laws of Armed Conflicts 139 (D. Schindler & J. Toman ed. 1973).

and it reflects customary rules and general principles of law that underlie the conventions on the conduct of war on land and on the sea.²²⁵

These important draft rules provide, in part:

Art. 3: A military aircraft shall bear an external mark indicating its nationality and military character.

Art. 7: The external marks required by the above articles shall be so affixed that they cannot be altered in flight. They shall be as large as practicable and shall be visible from below and from each side.

Art 19: The use of false external marks is forbidden.²²⁶

It is important to note the timing of the drafting of these rules. They followed the extensive experiences with the heavier-than-air craft that were used in the First World War. Following that experience, it was deemed so important to have aircraft marked with their nationality that it was mentioned in several places in the rules.²²⁷ In article 19, the prohibition against the use of false marks emphasizes the importance that the drafters put on clear, authentic national markings.

In emphasizing clear national markings, the drafters of the Rules of Air Warfare were simply reflecting the emphasis that other codifications of rules of war have put on authentic national markings. In spite of the failure of the draft Rules of Air Warfare to be ratified, international custom requires operational combat aircraft that are engaged in hostilities be distinctively marked with a national marking.

The trend toward requiring markings in combat started in the aftermath of the Franco-Prussian War. During that conflict, it was the practice of the Prussian Government to execute, upon capture, irregular French soldiers who could not produce identification showing that they were authorized to fight on behalf of France.²²⁸ Subsequently, at the Brussels Conference of 1874, the Russian Government proposed, in article 9 of the original draft of the agreement from that conference, a series of requirements that would entitle irregular combatants to be treated as regular soldiers. One of these four important requirements was that the person claiming regular soldier combatant status must "wear some settled distinctive badge recognizable at a distance".²²⁹ While the Declaration of the Brussels

²²⁵ *Id.*

²²⁶ *Id.* at 140-42 (discussing the Hague Rules of Air Warfare 1922-1923, arts. 3, 7, & 19).

²²⁷ In fact, articles 1-10 of the draft rules are devoted exclusively to classification and marking of aircraft.

²²⁸ S. Mallison & W. Mallison, *Studies in the International Humanitarian Law of Armed Conflict*, *supra* note 207, at 167-68.

²²⁹ *Id.* at 168

Conference (including the listing of requirements for claiming combatant status) went unratified, it nevertheless comprises the foundation upon which the modern law of land warfare has been built.²³⁰ The importance of combatants possessing a distinctive badge or marking is reflected in the Hague Conventions of 1899 and 1907,²³¹ and in the more recent Geneva Convention of 1949.²³² Without distinctive identification, the combatant does not come within the protection of the laws of war and may be in danger of being viewed as an outlaw. The result has been that, in land warfare, soldiers must wear a uniform and "irregulars," if they are to be accorded the privileges of combatants, must bear some fixed, recognizable emblem to indicate their character as fighting men and to separate them from the civilian population.²³³

The customary law is also reflected in the treatment of warships. Article 8(2), of the 1958 Convention on the High Seas, requires that warships bear distinguishing external marks denoting them as warships of their state.²³⁴ This treatment of warships is important because requiring a warship to be distinctively marked is more analogous to requiring a combat aircraft to be marked than the requirement for a soldier to be distinctively marked.

The world community also requires distinctive markings on civil aircraft. The 1944 Convention on International Civil Aviation provides: "Every aircraft engaged in international air navigation shall bear its appropriate nationality and registration marks."²³⁵

The established policy of the world community is to require that combat personnel be distinctively attired or marked, that warships be distinctively marked,

²³⁰ *Id.* at 167

²³¹ See, e.g., Hague Regulations of Hague Convention IV Respecting the Laws and Customs of War on Land, 36 Stat. 2277, T.S. No. 539 (Oct. 1907). The regulations read, in pertinent part: "The laws, rights and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions ... 2. To have a fixed distinctive emblem recognizable at a distance; ..." *Id.*

²³² See, e.g., Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363 [hereinafter cited as Geneva Maritime Convention]. The Geneva Maritime Convention provides, in part:

The present Convention shall apply to the wounded, sick and shipwrecked at sea belonging to the following categories: ... (2) Members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions: ... (b) that of having a fixed distinctive sign recognizable at a distance;

Id. art. 13(2)(b).

²³³ J. Spaight, *Air Power and War Rights* 76 (1947).

²³⁴ High Seas Convention, *supra* note 163, art. 8(2), which provides in pertinent part: "For the purposes of these articles, the term 'warship' means a ship belonging to the naval forces of a State and bearing the external marks distinguishing warships of its nationality...."

²³⁵ Convention on International Civil Aviation, art. 20, Dec. 7, 1944, T.I.A.S. No. 1591, 15 U.N.T.S. 295.

and that civil aircraft be distinctively marked. There is no reason for a different policy, as reflected in customary law, to regulate operating combat aircraft. The underlying policy is the same, and so is the reflective customary law. In 1947, the English commentator, J. M. Spaight, in his definitive book, *Air Power and War Rights*, stated: "The determination of combatant status is a necessity of civilized warfare on land, on sea, or in the air. The distinction between the combatant and the non-combatant elements of a community is the essential condition precedent of the humanizing of warfare."²³⁶ The importance of distinctive markings on combat elements noted by Mr. Spaight has, since the days of the Franco-Prussian War, become recognized by the world community as significant and necessary, and this recognition has been reflected in world practice that is today accepted as law.

The customary rule in effect in 1967 is evidenced by the practice of the United States. Article 500 d. of the Law of Naval Warfare, as reprinted in 1955, required military aircraft to bear the military markings of their state.²³⁷

That Israel was aware of the importance of this customary rule is shown by the care taken to mark the U.S. Air Force tactical reconnaissance jets with the Star of David and authentic Israeli stock numbers (which required Israeli participation) before they were sent to Israel and into combat.²³⁸ The collusion of Israel in the use of false exterior markings shows their awareness that such markings were required.

C. Resolution of the Issue

The Government of Israel sent unmarked military aircraft to attack the *U.S.S. Liberty*. There is a customary rule of international law that military aircraft, when operational, must be distinctively marked with their nationality and military character. Israel violated this customary rule of international law. No injury is attributable solely to the fact that the aircraft were unmarked, however, the act of using unmarked aircraft is evidence of the maliciousness of the attack on the *Liberty* by the Government of Israel.

²³⁶ J. Spaight, *supra* note 233, at 76.

²³⁷ The Department of the Navy, Law of Naval Warfare (NWIP 10-2) may be found as the appendix to Tucker, *The Law of War and Neutrality at Sea* in XIX U.S. Naval War College International Law Studies 1955 at 394 (1957). Warships in time of war may sail under a false flag or in disguise, providing that their true colors are hoisted before they open fire. H. Smith, *The Law and Custom of the Sea* 91 (1954). The higher speed and smaller size of aircraft, however, justify the more restrictive rule.

²³⁸ S. Green, *supra* note 2, at 206.

V QUESTIONS OF HUMANITARIAN LAW RAISED BY THE ATTACK

Men who take up arms against one another in public do not cease on this account to be moral beings, responsible to one another and to God.
- Francis Lieber

A. Brief Factual Summary

While the *Liberty* was under attack by the Israeli MTBs, the torpedo boatmen were spraying the ship with machine-gun fire. Witnesses noted that they were directing their machine-gun fire particularly at the stowed inflatable life rafts on the deck of the *Liberty*. After torpedoing and then machine-gunning the *Liberty*, the MTBs pulled off to one side away from the ship and idled as the *Liberty* sat helpless in the water. When the *Liberty* appeared to be sinking and the crew had been ordered to abandon ship, one *Liberty* seaman braved going out on deck to look for serviceable life rafts. He found three, inflated them, put them in the water, and tied them to the ship. At that point, one MTB came closer to the *Liberty* and shot at the three good life rafts. This deflated two of the boats, and the third was shot free of its line to the *Liberty* and was taken aboard the MTB. After destroying or seizing the remaining life rafts, the MTBs left the scene, possibly believing that U.S. planes and surface ships were on the way. The MTBs provided no other life rafts or supplies to *Liberty* personnel. This conduct by Israeli naval personnel requires examination, in light of the humanitarian law of war at sea established by convention and post-World War II war crimes trials.

B. The Maritime Convention

1. General

In 1967, both Israel and the United States were parties to the 1949 Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea.²³⁹ The only reservation made by Israel was that the Red Shield of David be used as a distinctive sign for medical personnel

²³⁹ Geneva Maritime Convention, *supra*, note 232. This convention establishes the basic principle that members of the armed forces and those assimilated to them who are at sea and who are wounded, sick, or shipwrecked must be respected and protected in all circumstances. Draper, *Rules Governing the Conduct of Hostilities-The Laws of War and Their Enforcement*, in 62 U.S. Naval War College International Law Studies 1947-1977 at 257 (R. Lillich & J. Moore ed. 1980).

Although a large part of the law of war may be found in conventions, substantial areas are also found in the customary law and especially in the numerous judicial precedents furnished by the international and national war crimes tribunals operating at the end of World War II. Draper, *Rules Governing the Conduct of Hostilities-The Laws of War and Their Enforcement*, in 62 U.S. Naval War College International Law Studies 1947-1977 at 249-50 (R. Lillich & J. Moore ed. 1980).

instead of the Red Cross.²⁴⁰ Article 2 of the Convention provides that it applies in all cases of armed conflict between two or more parties to the Convention, even if a state of war is not recognized by one of them.²⁴¹ The use of the words "armed conflict" means that the treaty applies to any difference arising between two states that leads to an involvement of the armed forces, regardless of how long the incident lasts.²⁴² There is no need for a state of war to be recognized for the Maritime Convention to apply; the occurrence of *de facto* hostilities is sufficient.²⁴³ The Convention protects members of the armed forces of a state and persons who accompany these armed forces without being a member of them.²⁴⁴ The Convention applies on the high seas or in territorial waters.²⁴⁵

2. Article 18 - After an Engagement

The duty of belligerents toward survivors after a conflict at sea is particularly important. Article 18 covers conduct after an engagement. Paragraph one reads: "After each engagement, Parties to the conflict shall, without delay, take all possible measures to search for and collect the shipwrecked, wounded and sick, to protect them against pillage and ill-treatment, to ensure their adequate care, and to search for the dead and prevent their being despoiled."²⁴⁶ This requirement may also be found in article 16 of the 10th Hague Convention of 1907, which states: "[A]fter every engagement, the two belligerents, so far as military interests permit, shall take steps to look for the shipwrecked, sick, and wounded, and to protect them, as well as the dead, against pillage and ill-treatment. . . ."²⁴⁷

Wounded and sick persons are combatants who, by reason of a wound or sickness, have ceased to fight.²⁴⁸ A shipwrecked person is one whose vessel has been destroyed or lost at sea, those persons who are in a disabled ship, and those who are cast away on the coast or on an island as a result of an accident at sea.²⁴⁹ These people must be in need of assistance and care, and they must refrain from any hostile act.²⁵⁰

²⁴⁰ This reservation may be found in *The Laws of Armed Conflicts*, *supra* note 224, at 494.

²⁴¹ Geneva Maritime Convention, *supra* note 232, art. 2.

²⁴² 1. Pictet, *Commentary: Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea* 28 (1960).

²⁴³ *Id.*

²⁴⁴ Geneva Maritime Convention, *supra* note 232, art. 13(4).

²⁴⁵ 1. Pictet, *supra* note 243, at 88-89.

²⁴⁶ Geneva Maritime Convention, *supra* note 232, art. 18.

²⁴⁷ Convention X for the Adaption to Maritime Warfare of the Principles of the Geneva Convention, art. 16, 1907, 36 Stat. 2388.

²⁴⁸ *Id.*

²⁴⁹ I. Pictet, *supra* note 242, at 89.

²⁵⁰ *Id.*

The obligation in article 18, to take all possible measures without delay, is a strict requirement, subject only to the operational capacity of the units at the scene.²⁵¹ Thus, a motor torpedo boat or submarine may not have the capability to see to the wounded or to ensure the safety of the shipwrecked. Both of these types of war vessels have peculiar vulnerabilities, and their continued presence on the scene of a battle may jeopardize their safety. In that case, humanity yields to military necessity and torpedo boats and submarines may hastily leave the scene of a battle.²⁵² Even these types of vessels must radio nearby hospital ships or other neutral ships, however, and must at least try to supply such materials as lifeboats, food, and water.²⁵³

3. Articles 50 to 53 - Grave Breaches

Article 50 outlines the procedures and duties with regard to war crimes or grave breaches committed against persons protected by the Maritime Convention.²⁵⁴ The grave breaches detailed in article 51 include the destruction of property not justified by military necessity and carried out unlawfully and wantonly.²⁵⁵ This particularly covers hospital ships, rescue craft, medical installations, and medical aircraft.²⁵⁶ The object of this part is to protect the lives of survivors at sea by protecting that property designed to care for and preserve their lives and, thereby, prevent the great suffering, injury, and death that virtually always follow the destruction of such humanitarian property.²⁵⁷

The grave breaches section ends with articles 52 and 53.²⁵⁸ Article 52 prohibits one party to the Convention from absolving itself or another party from grave breaches that may have been committed. Article 53 provides for investigations of abuses and infractions of the Convention.

E. The War Crimes Trials

²⁵¹

Id. at 130

²⁵²

Id. at 131

²⁵³

Id. at 130-31.

²⁵⁴

Geneva Maritime Convention, *supra* note 232, art. 50.

²⁵⁵

Id. art. 51. Article 51 provides:

Grave breaches to which the preceding Article (Article 50 relating to the suppression of grave breaches) relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

Id., art. 51.

²⁵⁶

J. Pictet, *supra* note 242, at 269-70

²⁵⁷

Id.

²⁵⁸

Geneva Maritime Convention, *supra* note 232, arts. 52 & 53

There are two World War II war crimes trials that bear these facts. The first trial, known as The Peleus Trial, was tried before a British military court in Hamburg, Germany, in 1945.²⁵⁹ The captain of U-852, Lieutenant Commander Heinz Eck, and others, were tried for shooting and throwing grenades at the life rafts and wreckage from the S.S. Peleus, which had just sunk in the South Atlantic. Lieutenant Commander Eck stated in his defense that he did not fire at the survivors themselves, but intended only to destroy the flotsam and rafts to ensure that there would be no telltale trace of the sinking that would endanger his U-boat and crew, although he knew that his actions would also result in the Peleus survivors being unable to save themselves.²⁶⁰ Lieutenant Commander Eck was convicted and sentenced to death for the deaths of the Peleus survivors who died as a result of the shooting and grenading of the rafts and wreckage.

In the trial of Helmuth von Ruchteschell, tried before a British courtmartial in Hamburg in 1947, the defendant, a captain of German armed raiders in the North Atlantic between 1940 and 1942, was convicted *inter alia* of sinking merchant vessels without making any provision for the safety of the survivors.²⁶¹ The court held that the defendant had a duty to search for, and protect, survivors. Significantly, the court held that the defendant had a *high* duty to the survivors if his method of attack intimidated the crew.²⁶² Two propositions came from the case:

(1) if the raider is aware of survivors who have taken to their lifeboats, he must make reasonable efforts to rescue them; (2) it is no defense that the survivors did not draw attention to their boats if they had reasonable grounds to believe that no quarter was being given.²⁶³

The conduct that the court found intimidating to the crew was the continuous stream of fire with tracer ammunition that the German raider fired on the defending ship, which was an armed British merchantman. The fact that the continuous fire might have been accidental was not significant in relieving the raider of looking after survivors.

E Appraisal of the Israeli Conduct

1. Appraisal Under Article 18

²⁵⁹ Trial of Heinz Eck, August Hoffmann, Walter Weisspfennig, Hans Richard Lenz and Wolfgang Schwender (The Peleus Trial) (J. Cameron ed. 1948) [hereinafter cited as the Peleus Trial].

²⁶⁰ *Id.* at 51-52.

²⁶¹ Trial of Helmuth Von Ruchteschell, 9 U.N. War Crime Commission Law Reports of Trials of War Criminals 92 (1949).

²⁶² *Id.* at 88.

²⁶³ *Id.*

At the time the MTBs stopped firing their machine guns at the *Liberty*, the ship was sitting helplessly in the water. The officers and crewmen on the Israeli MTBs could only have concluded that the *Liberty* was a ship in distress and that she had wounded on board. The fact that they chose to stop machine-gunning the ship, and pull off to the side, shows that the ship was no longer an effective basis of "enemy" power. Under article 18, these MTBs had a clear duty to try to provide for the sick and the wounded. They made no attempt, however, to communicate with the ship. The authoritative commentary on article 18 clearly states that, while relatively frail craft like submarines and MTBs may not have a duty to remain with a distressed craft or wounded combatants, they must radio an alert for help and try to supply food, water, and lifeboats. Instead, when one of the MTBs saw U.S. life rafts go into the water, the clearest sign of distress and an impending abandonment of ship, it moved closer, shot two of the life rafts, and seized the third one. Instead of offering help or throwing out its own life rafts or supplies, the MTB deprived apparently shipwrecked and distressed seamen of their own life rafts and left the scene. Again, while the MTB crews had the right under the principle of military necessity to leave the scene of the battle, they still had the duty to ensure care. Under the circumstances, the return of the boats an hour later has the appearance of being part of an attempt to buttress a public display of conduct consistent with the Government of Israel's "tragic accident" explanation for the attack rather than being a genuine attempt to save lives, since the boats knew that the ship was American before they attacked it. The MTB crews owed their humanitarian duty before they left the first time, not an hour later.

2. Appraisal of Grave Breaches

The destruction of the *Liberty's* last life rafts meant that the *Liberty* crewmembers lost the means to save the lives of the wounded who could not have survived overboard on their own. This wanton destruction of property by the Israeli torpedo boat crew is far removed from any act of military necessity.

The purpose behind the destruction of property prohibition of article 51 in the Maritime Convention is to prevent the destruction of hospital ships, rescue craft, and other property that is intended to alleviate human suffering after battle and thereby to prevent or minimize suffering, injury, and death. While a life raft is not a hospital ship, the underlying value served by each is the same: the preservation of human life. The destruction of the life rafts by the Israeli MTB, while not a grave breach of the magnitude of the torpedoing of a hospital ship, nevertheless remains a wrongful destruction of property not justified by military necessity and is therefore a grave breach prohibited by article 51.

3. Aspects From War Crimes Trials

The *Peleus* trial sheds additional perspective on the conduct of the Israeli MTB crews. In that proceeding, the court was instructed that, "[t]o fire so as to kill helpless survivors of a torpedoed ship is a grave breach against the law of nations."²⁶⁴ In this case, the Israelis did not shoot at life rafts which had people on them, as in the *Peleus* trial. They did, however, by their conduct, seem to be specifically bent on depriving the *Liberty* crewmembers of the ability to survive the sinking of their ship, both by destroying the three remaining life rafts that the *Liberty* had and by their earlier noticed concentration of fire on towed life rafts. Similarly, Lieutenant Commander Eck had taken action that deprived the *Peleus* survivors of being able to survive the sinking of their ship. Of course, the *Liberty* did not sink, however, at the time the order to prepare to abandon ship was given, it appeared she would, either as a direct result of the attack or by being scuttled.²⁶⁵ The conduct of the Israeli MTB crews is analogous to the conduct for which Lieutenant Commander Eck was punished. The fact that the *Liberty* escaped sinking does not lessen the serious misconduct of the MTB crews toward the survivors.

The trial of Von Ruchteschell also emphasizes the duty of a belligerent toward survivors at sea. The second point made by this military tribunal hints at the intimidation of the survivors of warfare at sea by the victorious belligerent.

The circumstances that the *Liberty's* surviving crewmembers found themselves in were similar to those of one of the ships destroyed by Von Ruchteschell. The incoming fire was so fierce that crewmembers did not feel safe about going out on deck to save themselves.²⁶⁶ On the *Liberty*, the call to demolish and prepare to abandon ship went out some time before the crew dared go out on deck, due to the constant machine-gunning of the ship. The *Liberty's* own machine gun had been abandoned. Since machine guns, as found on the MTBs themselves, generally would not sink a ship the size of the *Liberty*, a question is raised about the purpose of the constant machine-gunning by the MTBs. The use of radio jamming to prevent communication by the *Liberty* with the outside world, the shooting out of the signal lamp at the beginning of the attack, and the hail of gunfire at the ship while the ship was helpless in the water could easily have led *Liberty* crewmembers to feel that the attackers did not want any survivors. In circumstances such as this, the law of the Von Ruchteschell case is that the victorious belligerent must be especially careful to ensure that the survivors are not intimidated by a feeling that no quarter will be given. An attack as fierce as the Israeli attack on the *Liberty*, like the one in the Von Ruchteschell case, requires extra care on the part of the

²⁶⁴ The *Peleus* Trial, *supra* note 259, at 122.

²⁶⁵ Lieutenant Golden in the engineroom had even received an order to scuttle the ship. He chose to ignore the order and stay at his post working on the engine. J. Ennes, *Assault on the Liberty*, *supra* note 2, at 94.

²⁶⁶ *Id.* at 95.

victorious belligerent.²⁶⁷ The time that the MTBs spent idling off of the side of the disabled ship should have been time that they spent trying to open communication with the *Liberty* or with other American units for the benefit of survivors.

G. Conclusion

The crewmembers of the MTBs violated their duty under the Maritime Convention and the customary law of war recognized by the post-World War II war crimes trials to adequately care for survivors of battles at sea, and they committed a grave breach of the Maritime Convention by intentionally and wantonly destroying the ship's life rafts.

VI. CONCLUSIONS

On June 8, 1967, an electronic intelligence-gathering ship, the U.S.S. *Liberty*, was in international waters off the coast of the Sinai Peninsula listening to the events of the Six-Day War, then nearly finished. The Government of the United States, as a nominally neutral nation, was legally entitled to conduct this activity, since intelligence gathering on the high seas is lawful.

Later that day, the Government of Israel intentionally attacked the ship, severely crippling it and killing thirty-four U.S. citizens. The attack was not legally justified and constituted an act of aggression under the United Nations Charter. The attack itself identified two further violations of international law. First, the use of unmarked military aircraft, contrary to the customary international law of air warfare. Second, the wanton destruction and seizure of life rafts being put over the side by *Liberty* crewmen. To speculate on the motives of an attack group that uses unmarked planes and deprives helpless survivors of life rafts raises disturbing possibilities, including the one that the *Liberty* crew was not meant to survive the attack, and would not have, but for the incorrect 6th Fleet radio broadcast that help was on the way - which had the effect of chasing off the MTBs.

There is still a shroud of mystery surrounding the Israeli attack on the U.S.S. *Liberty*. What is needed is a thorough, honest, public investigation by the United States Congress, similar to the Watergate Hearings. This is not a novel idea, and the list of proponents includes two former Chiefs of Naval Operations, Admirals Arleigh Burke and Thomas Moorer.²⁶⁸ Only by thoroughly and publicly examining this incident will all the facts be known and all the lessons be learned.

²⁶⁷ *Trial of Helmuth Von Ruchteschell*, *supra* note 261, at 88

²⁶⁸ . Fraser, U.S.S. *Liberty*: A Symbol of Government Secrecy, *Navy Times*, Dec. 9, 1985, at 27, col. 1-4. See Burgess, Moorer Wants Probe of Attack on *Liberty*, *Navy Times*, Dec. 30, 1985, at 8, col. 1-5. See also Matthews, Group Wants Probe Of *Liberty* Attack, *Navy Times*, Oct. 13, 1986, at 8, col. 1-5.

