

# The Gulf of Sidra Incident of 1981: A Study of the Lawfulness of Peacetime Aerial Engagements

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## I. Problem

On August 19, 1981, U.S. F-14 fighter aircraft engaged in combat with two Libyan Sukhoi-22 fighters above the Gulf of Sidra, approximately sixty miles off the coast of Libya.<sup>1</sup> By the end of the encounter, both Libyan planes had been destroyed and one Libyan pilot killed. According to Libyan assertions, one of its fighters destroyed one of the U.S. F-14s, but this contention was denied by the United States. Although Libyan aircraft had on previous occasions fired upon U.S. military planes,<sup>2</sup> the Gulf of Sidra incident marked the first time that U.S. aircraft returned fire.

The Gulf of Sidra incident indicates that aerial rules of engagement formulated by individual states are subject to an identifiable and widely accepted norm. This norm requires that, in peacetime, military aircraft attempt to avoid the first use of force during potentially hostile encounters with the aircraft of another state. The norm permits a first use of force only when necessary for immediate unit or national self-defense, and then usually only after giving warning.

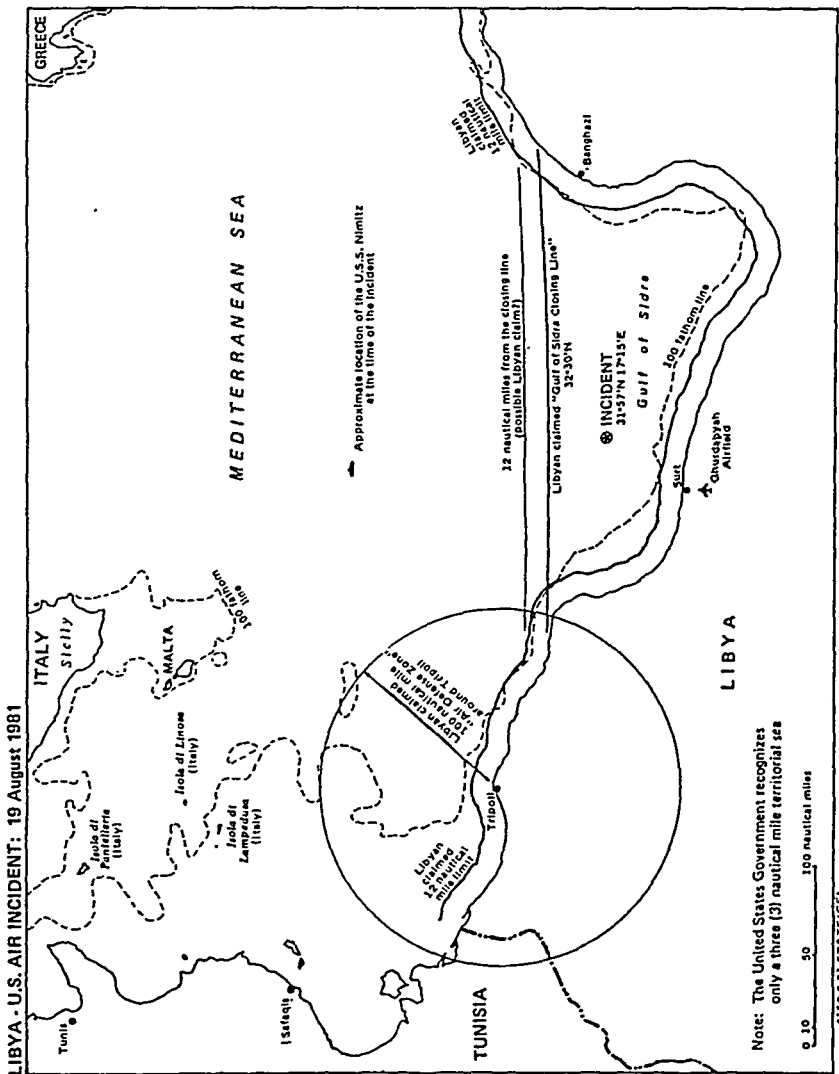
Rules of engagement (ROE) is the general term used to describe the "directives that a government may establish to delineate the circumstances and limitations under which its own naval, ground, and air forces will initiate and/or continue combat engagement with enemy forces."<sup>3</sup> With reference to the particular form of ROE to be discussed in this Study, the practice followed by most states appears to have consisted in

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1. The F-14, or Tomcat, is one of the United States's main tactical fighter aircraft. It can reach a maximum speed of Mach 2.4 (approximately 1850 miles per hour). The SU-22, or Fitter, is the export version of the Soviet SU-17 fighter. It can reach a maximum speed of Mach 2.17 (approximately 1540 miles per hour). *Le F-14 et le SU-22: Deux avions à flèche variable*, *Le Monde*, Aug. 21, 1981, at 4, col. 1.

2. See *infra* notes 6-9 and accompanying text.

3. Roach, *Rules of Engagement*, *NAVAL WAR C. REV.*, Jan.-Feb. 1983, at 46 (quoting DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 298 (1978)). Roach also notes that ROE reflect the influence of military, political, and diplomatic factors. *Id.* at 46-49.



Map 1. The Coast of Libya at the Time of the August 19, 1981 Incident.

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ordering the intruder to identify itself, turning back or landing at a prescribed place, and, only as a last resort, failing compliance with such orders, attacking.<sup>4</sup> Although ROE are formulated by individual States to govern their own military operations, it may be assumed that national ROE are derived with reference to international expectations regarding appropriate behavior.<sup>5</sup>

As will be seen in the following discussion of the Gulf of Sidra incident, the tacit acceptance by international elites of the U.S. application of its aerial ROE, coupled with an apparent refusal to support the ROE demonstrated by the Libyans, resulted in a reinforcement of international normative expectations concerning the appropriate use of force in peacetime aerial encounters.

## II. Facts

The 1981 incident over the Gulf of Sidra was not the first time that Libyan and U.S. military aircraft had confronted one another in the airspace near or above the Gulf. On March 21, 1973, Libyan interceptors fired missiles at a C-130 cargo plane after the latter flew inside a "restricted area" which Libya had created within a one hundred-mile radius of Tripoli.<sup>6</sup> Some seven years later, on September 16, 1980, Libyan planes attacked a U.S. reconnaissance aircraft.<sup>7</sup> In neither of these cases

4. MCDUGAL, LASSWELL, & VLASIC, *LAW AND PUBLIC ORDER IN SPACE* 272 (1983). Yet, as the authors caution, "[t]he practice of states is not, however, uniform and the lack of an unequivocal community policy affords states a very considerable discretion with respect to intruders." *Id.*

5. See, e.g., Lissitzyn, *The Treatment of Aerial Intruders in Recent Practice and International Law*, 47 AM. J. INT'L L. 559 (1953). Lissitzyn identifies "certain standards of international law with respect to the treatment of intruding aircraft [into a state's territory] which may be regarded as established or in the process of being established." *Id.* at 586. These standards include the following:

(1) Intruding aircraft must obey all reasonable orders of the territorial sovereign, including orders to land, to turn back, or to fly on a certain course . . . .

(2) The territorial sovereign must not expose the aircraft and its occupants to unnecessary or unreasonably great danger—unreasonably great, that is, in relation to the reasonably apprehended harmfulness of the intrusion . . . . In times of peace, intruding aircraft whose intentions are known to be harmless must not be attacked even if they disobey orders to land, to turn back, or to fly on a certain course . . . . In cases where there is reason to believe that the intruder's intentions may be hostile or illicit, a warning or order to land should normally be first given and the intruder may be attacked if it disobeys."

*Id.* at 586-89.

6. The United States had previously communicated its objections to Libya over the creation of this zone. See Letter Dated June 18, 1973 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, June 20, 1973, U.N. Doc. S/10956 (citing protests made in November 1972 and February and April 1973). See also DIG. U.S. PRAC. INT'L L. 302-03 (1973).

7. *Libyan Fighters Suspected of Firing on U.S. Aircraft*, Wash. Post, Sept. 18, 1980, at A17, col. 1. See also Safire, *Looking for Trouble*, N.Y. Times, Sept. 25, 1980, at A27, col. 1.

did the Libyan missiles hit their apparent targets, and in neither case did the U.S. aircraft return fire.<sup>8</sup> In addition, the Libyan government has documented numerous instances of what it termed “[a]ir-space violations and American terror and spying missions.”<sup>9</sup> In none of these claimed instances, however, did either side resort to the use of force.<sup>10</sup>

Although Libya and the U.S. disagree over many of the facts regarding the August 19, 1981 incident,<sup>11</sup> a rough reconstruction of the incident can be drawn from those facts agreed upon by both sides. On August 12 and 14, the United States issued warnings to mariners and pilots that it would hold naval maneuvers and missile tests in the Gulf of Sidra on August 18 and 19.<sup>12</sup> The Gulf had been claimed by Libya since 1973 as territorial waters, a claim which the United States had expressly refused to recognize.<sup>13</sup>

The maneuvers took place in a hexagonal region, the lower portion of which crossed the line that Libya claims as the beginning of its territorial waters (the 32 degrees 30 minutes line of latitude—demarcating the area where the Gulf meets the Mediterranean—plus a twelve-mile band of territorial sea).<sup>14</sup> The military vessels assigned to participate in the maneuvers were a powerful force, comprising the aircraft carriers Nimitz and Forrestal, four cruisers, four frigates, four destroyers, and two destroyer escorts.<sup>15</sup> During the first day of the maneuvers, Libyan planes conducted a number of sorties<sup>16</sup> to observe the area of the exercises. In

8. See *supra* notes 6-7.

9. Letter Dated Aug. 1, 1980 from the Chargé d’Affaires A.I. of the Permanent Mission of the Libyan Arab Jamahiriya to the United Nations Addressed to the President of the Security Council, Aug. 6, 1980, U.N. Doc. S/14094 Annex, at 3-4.

10. *Id.*

11. The two sides disagreed on the extent of U.S. losses. The United States government stated that it incurred no loss of life or aircraft during the encounter. See *U.S. Planes Attacked by Libyan Aircraft, News Briefing*, DEP’T ST. BULL., Oct. 1981, at 58. The Libyan government claimed that it shot down one U.S. fighter, and that the American plane crashed about ten miles west of Poisanò, Sardinia. See *Downed U.S. F-14 Reportedly Fell Near Sardinia*, Foreign Broadcast Information Service [hereinafter cited as FBIS] (No. Africa), Aug. 26, 1981, at Q1 (text from Tripoli, Voice of the Arab Homeland). According to U.S. reports, one of the two Libyan pilots was killed in the encounter. See *To the Shores of Tripoli*, Newsweek, Aug. 31, 1981, at 14, 17 (hereinafter cited as *To the Shores*). The Libyans reported that both pilots survived. See S. YUSSEF, ARAB-AMERICAN CONFRONTATION OVER SIRT GULF 201 (1981) (distributed by the Libyan mission to the United Nations).

12. These announcements were made through the official channels of the International Hydrographic Organization and International Maritime Organization and broadcast over a designated frequency from Madrid in English and Spanish. Interview, U.S. Department of Defense Official C, Mar. 29, 1984 (notes on file with the *Yale Journal of International Law*).

13. See *infra* notes 26-27 and accompanying text.

14. See *infra* map no. 1.

15. *To the Shores*, *supra* note 11, at 15.

16. Official and unofficial estimates vary. See Crowell, *45 Libya Incidents Detailed by Navy*, N.Y. Times, Aug. 25, 1981, at A10 (45 sorties); *To the Shores*, *supra* note 11 at 15 (72 sorties).

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each case, carrier-based U.S. aircraft intercepted the Libyan fighters, which then turned away.<sup>17</sup>

On the morning of August 19, the U.S.S. Nimitz was sailing outside the Gulf. At the same time, and as they had done the previous day, two American destroyers cruised below the 32 degrees 30 minutes line, i.e. within the disputed waters of the Gulf, to patrol the southern perimeter of the missile testing area. As in previous sorties, two Libyan SU-22s took off from their land base and set course toward the testing area. U.S. F-14s, already in the air, proceeded due south and met the Libyan planes, then approaching due north, at a point approximately sixty miles from the Libyan coast.<sup>18</sup>

At this point, one Libyan SU-22, heading directly toward one of the F-14s, fired a heat-seeking missile which, according to the U.S. reports of the incident, missed its target. A Libyan account, however, says that this missile hit the F-14.<sup>19</sup> Both countries agree that the F-14s (numbering two according to U.S. officials, eight according to at least some Libyan accounts) after being shot at, maneuvered behind the SU-22s and fired upon the Libyan planes.<sup>20</sup> Both Libyan planes were destroyed. The entire encounter had lasted about one minute. Immediately thereafter, the F-14s returned to the carrier Nimitz. The maneuvers ended as scheduled at 5:00 P.M. G.M.T. on August 19, without further incident.<sup>21</sup>

Later that day, the United States filed a protest with the United Nations Security Council, claiming that the incident constituted an unprovoked attack by Libya upon aircraft participating in previously announced exercises in international airspace.<sup>22</sup> Libya formally responded on August 20, claiming that the U.S. attack on Libyan aircraft that had been conducting reconnaissance duties in Libyan airspace was a "provocative terrorist act."<sup>23</sup>

17. *To the Shores*, *supra* note 11 at 16.

18. *See id.*; Neutze, *The Gulf of Sidra Incident: A Legal Perspective*, 108 PROC. U.S. NAVAL INST. 26 (1982).

19. *See* S. YUSSEF, *supra* note 11, at 198-99.

20. *See Department Statement*, Aug. 19, 1981, DEP'T ST. BULL., Oct. 1981, at 58 (two F-14s); Letter Dated 20 August 1981 from the Chargé d'Affaires A.I. of the Permanent Mission of the Libyan Arab Jamahiriya to the United Nations Addressed to the President of the Security Council, Aug. 20, 1981, U.N. Doc. S/14636 Annex, at 1 (eight F-14s).

21. *U.S. Downs Libyan Fighters Over Mediterranean in Latest Round of Political and Military Hostility*, Wall St. J., Aug. 20, 1981, at 3, col. 1; *To the Shores*, *supra* note 11 at 18.

22. Letter Dated Aug. 19, 1981 from the Acting Representative of the United States of America to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/14632.

23. U.N. Doc. S/14636, *supra* note 20.

### III. Conflicting Claims

Not only did Libya and the United States adopt conflicting versions of the actual engagement, but they also differed concerning the contextual issues and norms which constituted the factual background out of which the incident arose. The two primary background norms involved the following issues: 1) the legitimacy of Libya's claim to sovereignty over the Gulf of Sidra; and 2) the purpose and lawfulness of U.S. maneuvers conducted in the Gulf of Sidra. A brief discussion of each of these background, or contextual, norms is necessary for a complete understanding of each side's justification for its use of force in response to actions taken by the other.<sup>24</sup>

#### A. *Background Disputes over Norms*

##### 1. Dispute over the Sovereignty of the Gulf of Sidra

In October 1973, representatives of the Libyan Arab Republic<sup>25</sup> submitted notes to the United Nations and to the United States and other nations, officially declaring, for the first time in any international forum, that the Gulf of Sidra formed "an integral part" of Libyan territory and was therefore completely subject to Libyan sovereignty as "internal waters."<sup>26</sup>

24. The Gulf of Sidra incident thus involved norms concerning not only aerial engagements, but also territorial waters, the law of the sea, and naval maneuvers. Such an agglomeration of expectations of appropriate behavior will occur in many studies of incidents. Since space will not allow full treatment of each of these norms, however, this Study confines its analysis to the rules of aerial engagement.

25. On March 2, 1977, the Libyan government issued the Declaration on the Establishment of the Authority of the People, which changed the name of the state to the Socialist People's Libyan Arab Jamahiriyah.

26. The complete text of the Libyan declaration reads as follows:

The Gulf of Surt located within the territory of the Libyan Arab Republic and surrounded by land boundaries on its East, South, and West sides, and extending North offshore to Latitude 32 degrees 30 minutes, constitutes an integral part of the Libyan Arab Republic and is under its complete sovereignty.

As the Gulf penetrates Libyan territory and forms a part thereof, it constitutes internal waters, beyond which the territorial waters of the Libyan Arab Republic start.

Through history and without any dispute, the Libyan Arab Republic has exercised its sovereignty over the Gulf. Because of the Gulf's geographical location commanding a view of the Southern part of the country, it is, therefore, crucial to the security of the Libyan Arab Republic. Consequently, complete surveillance over its area is necessary to insure the security and safety of the State.

In view of the aforementioned facts, the Libyan Arab Republic declares that the Gulf of Surt, defined within the borders stated above, is under its complete national sovereignty and jurisdiction in regard to legislative, judicial, administrative and other aspects related to ships and persons that may be present within its limits.

Private and public foreign ships are not allowed to enter the Gulf without prior permission from the authorities of the Libyan Arab Republic and in accordance with the regulations established by it in this regard.

The Libyan Arab Republic reserves the sovereign rights over the Gulf for its nationals.

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The United States government responded to the Libyan claim in February 1974. The U.S. found Libya's claim "unacceptable as a violation of international law," and declared that it "reserve[d] its rights and the rights of its nationals in the area of the Gulf of [Sidra]."<sup>27</sup>

If the Gulf were internal waters, Libya would be able, under international law, to forbid the conduct of naval maneuvers.<sup>28</sup> On the other hand, if, as the United States claimed, the Gulf were international waters, international law would permit overflight and the exercise of other high seas freedoms, so long as they were carried out "with reasonable regard to the interests of other states."<sup>29</sup>

### 2. Dispute over the Legitimacy and Purpose of U.S. Maneuvers in the Gulf

Among the rights which the United States asserted in accordance with its rejection of the Libyan claim of sovereignty over the Gulf was the right of its military vessels to enter the area and, in particular, to conduct naval maneuvers there. For several decades, the Sixth Fleet had sailed in and out of the Gulf.<sup>30</sup> According to a State Department official, the United States had also conducted naval maneuvers and missile tests in the Gulf for many years.<sup>31</sup> Between 1977 and 1981, the U.S. Navy conducted eight large-scale maneuvers there.<sup>32</sup>

After the August 1981 incident, the United States justified its use of the Gulf for maneuvers on two principal grounds. First, it noted that international law permits states to use the high seas to conduct naval maneuvers.<sup>33</sup> Second, U.S. officials defended the maneuvers as "routine," and thus implicitly legitimate. Not only had exercises been con-

In general, the Libyan Arab Republic exercises complete rights of sovereignty over the Gulf of Surt as it does over any part of the territory of the State.

Libyan Arab Republic Declaration Regarding the Jurisdiction of the Gulf of Surt, Oct. 1973.

27. DIG. U.S. PRAC. INT'L L. 293-94 (1974) (quoting U.S. reply, dated Feb. 11, 1974).

28. Indeed, if this were the case, Libya could, under international law, deny even innocent passage to vessels sailing in the Gulf. See United Nations Convention on the Law of the Sea, Dec. 10, 1982 [hereinafter cited as 1982 Law of the Sea Treaty], at art. 17.

29. Convention on the High Seas, Apr. 29, 1958, art. 2, 13 U.S.T. 2312, 2314 T.I.A.S. No. 5200, at 10, 450 U.N.T.S. 82, 84. [hereinafter cited as 1958 High Seas Treaty]. The 1982 Law of the Sea Treaty, *supra* note 28, still in negotiation at the time of the incident, has a similar provision in Article 87 for high seas freedoms. In a statement made on the day of the incident, the State Department explicitly relied on these freedoms in asserting:

The oceans beyond the territorial sea are high seas on which all nations enjoy freedom of navigation and overflight, including the right to engage in naval maneuvers such as those recently concluded in the Mediterranean.

*Department Statement*, Aug. 19, 1981, DEP'T ST. BULL., Oct. 1981, at 59.

30. Interview, U.S. Department of State Official A, Mar. 27, 1981 (notes on file with the *Yale Journal of International Law*).

31. *Id.*

32. Neutze, *supra* note 18, at 29.

33. See *supra* note 29 and accompanying text.

ducted in the Gulf many times in the past,<sup>34</sup> but also, U.S. officials claimed, the Gulf was selected primarily on the basis of logistical factors.<sup>35</sup>

Other circumstances, however, cast doubt on the purportedly routine, non-political nature of the 1981 Gulf exercises. The presence of U.S. vessels in the Gulf is consistent with a longstanding U.S. policy of directly challenging territorial waters claims that the U.S. refuses to recognize, by sailing American military ships into the claimed areas.<sup>36</sup>

Moreover, the U.S. decision in the summer of 1981 to conduct maneuvers sixty miles off the Libyan coast was also consistent with the open anti-Qadhafi policy of the Reagan Administration.<sup>37</sup> President Reagan had been quoted in the press on the need to demonstrate U.S. military might to potential "trouble makers,"<sup>38</sup> and Secretary of State Alexander Haig had made it clear that any proposal by the President to "get tough" with Qadhafi would meet with great favor at the State Department.<sup>39</sup>

Furthermore, the U.S. characterization of the maneuvers as strictly routine is belied by the circumstances under which the decision to hold them was made. Although such exercises were conducted in the Gulf by the U.S. in years past, all maneuvers in that area had been suspended by President Carter during the Iranian hostage crisis, in an effort to avoid provoking a military response from Libya.<sup>40</sup> While the exercises may once have been routine, the choice to reinstate them after this hiatus was

34. U.S. Secretary of Defense Caspar Weinberger stated, "We've had naval and air exercises there before. This one was scheduled for some time, and the notification went out in the perfectly normal fashion . . . and the exercises took place as scheduled." *U.S. Planes Attacked by Libyan Aircraft: News Briefing*, Aug. 16, 1981, DEP'T ST. BULL., Oct. 1981, at 58.

35. According to U.S. officials, the low level of civilian air traffic over the Gulf made it "an ideal location for safe conduct of such an exercise in the Mediterranean." See Neutze, *supra* note 18, at 26.

36. This policy was formalized in the late 1970s as the Freedom of Navigation Program. Interview with Department of State Official A, *supra* note 30. See also *Those Maritime Exercises*, Letter to the Editor, Wash. Post, Aug. 4, 1984, at A22, col. 3 (stating that "the U.S. Freedom of Navigation Program is nothing more than a routine exercise of generally accepted maritime rights;" also, referring to Libya's claim to the Gulf of Sidra as "one of the most egregious maritime claims existing in the world today") (written by Hugh O'Neill, Representative for Ocean Policy Affairs, Office of the Secretary of Defense).

37. In spring 1981, the Reagan Administration ordered the closure of the Libyan Embassy in Washington. See *U.S. Expels Libyans and Closes Mission, Charging Terrorism*, N.Y. Times, May 7, 1981, at 1, col. 3.

38. *Transcript of Remarks by President and Laingen at White House*, N.Y. Times, Jan. 28, 1981, at A14, col. 1, 3 (promising "swift and effective retribution to those who violate the rules of international behavior").

39. See *U.S. Pledges to Aid Countries in Africa that Resist Libyans*, N.Y. Times, June 3, 1981, at A1, col. 4, A4, col. 4.

40. See *U.S. Downs Libyan fighters over Mediterranean in Latest Round of Political and Military Hostility*, Wall St. J., *supra* note 21, at 3, col. 1. See also *Shootout Over the Med*, Time, Aug. 31, 1981, at 24, 25. (hereinafter cited as *Shootout*) (noting that in December 1979, one month after the hostages were taken in Iran, a Libyan mob attacked and burned the U.S. embassy in Tripoli).



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not. The Reagan Administration itself treated the resumption of the maneuvers as a matter of great political sensitivity, with final approval of the exercises given by the President himself.<sup>41</sup> After the 1981 incident, the Libyans challenged the American assertions that the maneuvers were routine. Libya characterized the exercises as a manifestation by the United States of its "aggressive intentions against the people of the Libyan Arab Jamahiriya."<sup>42</sup> Furthermore, Libya linked the U.S. maneuvers to Egyptian war games allegedly being held along the Libyan-Egyptian border.<sup>43</sup>

### B. *Factual Disputes*

According to Libya, the events of August 19 constituted part of a pattern of foreign military threats which had recently been made against it. Libya claimed that U.S. and Egyptian aircraft had conducted extensive troop exercises near the Libyan border on the days immediately prior to the incident.<sup>44</sup> On the day of the incident itself:

[f]rom the very early hours of the morning, the Libyan Air Force discovered an unusual density of aircraft in the air space just in the vicinity of the Libyan Arab Jamahiriya. These appeared to be 36 planes in the operational zone of Tripoli. Another 36 planes were flying in the operational area of Benghazi. A further 12 aircraft were flying over Libyan territorial waters, right in front of the Gulf of Syrte. These were no farther than 100 kms. from the city of Syrte.<sup>45</sup>

Libya thus rejected the U.S. claim that the F-14s were performing a routine intercept, claiming instead that they were part of a large force of aircraft on a mission of aggression against Libyan territory.

Furthermore, Libya's account of the facts of the aerial incident in the

41. The proposal to reinstitute maneuvers in the Gulf was brought to the National Security Council (NSC) by Defense Secretary Caspar Weinberger in June 1981. The NSC discussed the implications of the maneuvers and strongly recommended their approval to the President. *See Why Reagan Set the Tomcats on "The World's Dangerous Man,"* Sunday Times (London), Aug. 23, 1981, at 6, col. 2. For normal maneuvers, the final authorization would come from the Director of the State Department's Bureau of Politico-Military Affairs and the Defense Department's Undersecretary of Defense for Policy. Interview, U.S. Department of State Official A, *supra* note 30.

42. Letter Dated August 20, 1981 from the Chargé d'Affaires A.I. of the Permanent Mission of the Libyan Arab Jamahiriya to the United Nations Addressed to the President of the Security Council, Aug. 20, 1981, U.N. Doc. S/14646 Annex, at 1. *See also* Interview with Mr. Rajab Azzarouk, Minister Plenipotentiary and Legal Advisor, Libyan Mission to the United Nations, Apr. 3, 1984 (noting that, if the U.S. had intended only to conduct routine maneuvers, it could easily have chosen a less sensitive location) (notes on file with the *Yale Journal of International Law*).

43. Kifner, *Tripoli in a Protest Note Accuses U.S. of "International Terrorism,"* N.Y. Times, Aug. 20, 1981, at A12, col. 1.

44. *Id.*

45. S. YUSSEF, *supra* note 11, at 198 (1982).

Gulf diverges sharply from that of the United States. According to the most complete Libyan account available,<sup>46</sup> events unfolded as follows. At 7 A.M. on August 19, two Libyan fighters were sent to intercept a formation of eight U.S. aircraft headed for the Libyan city of Sidra. The Libyan planes encountered two planes from the U.S. formation "at a relatively close distance from the city of Syrte."<sup>47</sup> The Libyan pilots were surprised to find the U.S. aircraft "fully prepared for an attack."<sup>48</sup> After the U.S. aircraft attempted to maneuver behind the Libyan fighters, one Libyan pilot fired a missile which succeeded in destroying one of the U.S. planes. Then finding themselves surrounded by the six other aircraft of the U.S. formation, the Libyan pilots ejected. Libya asserts that both survived.<sup>49</sup>

#### IV. Conflicting Conceptions of Lawfulness

Both the Libyan and American governments justified the actions of their pilots in terms comporting with general principles governing the appropriate use of force in peacetime aerial encounters. Each side characterized its pilots' actions as defensive. The United States claimed that its use of force was a justified response to being fired upon.<sup>50</sup> Libya at first asserted that its pilot fired only as a matter of unit self-defence after first being fired upon by the U.S. planes.<sup>51</sup> Later, Libya claimed that its pilots' initiation of force was a necessary act of national self-defense against a clear threat to Libyan territory.<sup>52</sup> While each side sought to characterize its own actions as purely defensive and therefore lawful, each labelled the actions of the other as unlawful aggression.

The conflicting conceptions of lawfulness demonstrated in the Gulf of Sidra incident do not appear to have involved a dispute as to the general content of the international norms which govern the ROE practiced by individual states. Rather, the legal dispute seems to have centered on what behavior constitutes a communication of hostile intent sufficient to justify a defensive use of force.

46. See S. YUSSEF, *supra* note 11.

47. *Id.* at 199-200.

48. *Id.* at 200.

49. *Id.* at 200-01.

50. See *U.S. Planes Attacked by Libyan Aircraft, News Briefing*, *supra* note 11, at 57-58.

51. *Shootout*, *supra* note 40, at 25.

52. *Le colonel Kadhafi reconnaît que les avions libyens ont tiré les premiers*, *Le Monde*, Aug. 25, 1981, at 4, col. 1 (hereinafter cited as *Le colonel Kadhafi*). This article also reported the Libyan leader's statement that a warning was given before the Libyan pilot fired. This prior warning claim was not, however, repeated in later Libyan accounts. See, e.g., S. YUSSEF, *supra* note 11.

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### A. *American Conceptions of the Right of Peacetime Self-Defense*

The specific content of U.S. ROE for peacetime aerial encounters is classified; nevertheless, its general contours may be ascertained from known U.S. practice. The appropriate initial response for a U.S. fighter encountering a foreign aircraft on an apparently hostile mission would be to approach the aircraft, ask it to identify itself, and order it to leave the area. The U.S. plane would then wiggle its wings in an international signal to move off. If, after receiving warning, the foreign craft did not comply, and if its apparent mission threatened a U.S. target, the U.S. plane would be authorized to shoot it down. U.S. peacetime ROE thus contemplate a first use of force against an apparently hostile foreign aircraft which refuses, after being warned, to turn away from a U.S. target.<sup>53</sup>

The ROE used during the Gulf incident would therefore have included provisions allowing the initiation of the use of force when attempts at peaceful communication had failed to eliminate an imminent physical threat to U.S. vessels. Furthermore, under U.S. ROE, if a foreign aircraft fires at a U.S. aircraft, U.S. pilots may be authorized to return fire and take the measures necessary to eliminate the immediate threat posed, including destroying the attacking aircraft.<sup>54</sup>

53. See Roach, *supra* note 3, at 49. In formulating its current ROE, the United States may also have relied on normative expectations derived from the practice followed in previous encounters with Soviet or East European fighters. For example, during the early 1950s, Soviet or East European military aircraft shot at U.S. fighters at least six times. See Lissitzyn, *supra* note 5, at 574-85. The United States claimed in each instance that the aircraft had not violated Warsaw Pact airspace and that the planes had been attacked for no reason: The Soviet Union, on the other hand, claimed that U.S. aircraft had entered Warsaw Pact airspace. Most important, the Soviets always claimed that the U.S. pilots had fired first:

The striking fact is that the Soviet Government has in no case claimed the right to open fire on an intruding aircraft without warning, but alleged in most of these cases that the intruders had been the first to open fire. In some cases where this was not alleged, the Soviet fighter was said to have opened fire *by way of warning only*. The Soviet Government, moreover, has sought to emphasize its contention that the instructions to Soviet airmen on the treatment of intruders are similar to those in force in other countries.

*Id.* at 580 (emphasis added).

While the frequency of hostile encounters between Soviet and U.S. aircraft has greatly decreased since that time, the basic norms against firing first appear to have endured. Thus, Soviet and American military pilots today habitually observe one another over certain areas above the high seas, following a peculiar form of etiquette to ensure the other side that its intentions are not hostile. See Honan, *The Games Pilots Play Over the Mediterranean*, N.Y. Times, Aug. 23, 1981, at D2, col. 3. See also Agreement on the Prevention of Incidents On and Over the High Seas [U.S. - U.S.S.R.], 23 U.S.T. 1168, T.I.A.S. No. 7379 (1972) (requiring non-interference by aircraft of one state with naval maneuvers conducted by the other).

54. In addition to the self-defense requirement, U.S. peacetime ROE is further moderated by requirements that any use of force in a peacetime military encounter be governed by the principles of necessity and proportionality. Necessity implies the use of force only when other methods cannot defuse a threat; proportionality requires a military decision-maker to respond

In other circumstances U.S. officials could have instructed their pilots to follow an "escape at all costs" rule. Although such an instruction would have decreased the possibility of a combat encounter between Libyan and American forces, U.S. officials believed that a refusal to allow forcible unit self-defense would have signalled acquiescence in Qadhafi's claims over the Gulf.<sup>55</sup>

Thus, in justifying the behavior of its military personnel during the incident, the U.S. relied upon its conception of a peacetime self-defense norm which would allow pilots flying over international waters to fire when fired upon by aircraft from a potentially hostile state. U.S. officials also appeared to acknowledge implicitly the legal force of a claim that the presence of their naval forces in the Gulf did not comport with international norms of non-aggressiveness. In their statements after the incident, U.S. officials were careful to emphasize the routine nature of the maneuvers, to state that they were held in international waters, and to omit any reference to political motivations or an intent to make a symbolic demonstration of force. In other words, the U.S. officials sought to say nothing that might lend credence to a Libyan assertion that the presence of American air and naval vessels presented a real threat to Libyan sovereign territory.

The United States, both in its actions during the incident and in its later justifications, indicated its conception of an international norm of self-defense relating to peacetime aerial encounters that would allow the use of force only as a response to the actual use of force by the other side or to a threat of imminent attack, but not as a response, particularly if made without warning, to a symbolic threat.

### B. *Libyan Conceptions of the Right of Peacetime Self-Defense*

After studying the incident, many U.S. officials came to believe that the firing of the first shot by the Libyan pilot was the result of simple pilot error, rather than a manifestation of Libyan ROE.<sup>56</sup> Nonetheless,

with no more than that amount of force needed to eliminate the threat. See Roach, *supra* note 3, at 49.

55. Interview, U.S. Department of Defense Official A, *supra* note 30.

56. The "pilot error" theory is based on three facts. First, the Libyans had not fired during previous sorties. Second, the SU-22, an old Soviet warplane, is not Libya's ideal interceptor aircraft. Had the Libyan high command intended to shoot down an F-14, it should have sent a more sophisticated craft, such as a MIG-23, to perform the mission. Finally, if the Libyans had instructed their pilot to shoot down the U.S. plane, he must have been grossly incompetent, since the missile was fired from the wrong direction. The missile fired from the Libyan plane was a heat-seeking missile, which must be directed toward the rear of an aircraft in order to home in on the plane's heat source, its exhaust. Thus, the pilot's firing at the front of an aircraft would seem to indicate either tactical incompetence, or that the shot was fired in panic or through some other error. See Interview, Department of Defense Official D, Mar. 30,

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the Libyans themselves refused to characterize the attack upon the U.S. aircraft as a mistake, and consistently justified the event as necessary for national self-defense. Therefore, no matter what the actual motivations of the Libyan pilot may have been, the official justifications given for his action may be evaluated as assertions by Libya of a right of self-defense under the circumstances as Libya believed them to be.

One of the self-defense claims advanced by Libya was based on its claim of sovereignty over the Gulf,<sup>57</sup> and thus implied an assertion that the right of first use of force may be triggered by any breach of territorial space by foreign craft. According to an American military authority, however, Libya had no right under international law to use force without first attempting to escort the intruding forces from claimed territory or requesting the United Nations Security Council to effect such removal.<sup>58</sup>

Libya did not, however, rely exclusively on the claim of territorial breach as justification for its first use of force, but rather used that argument primarily as support for its larger claim that the U.S. fleet and planes were in position for an imminent raid upon the northern parts of its country.<sup>59</sup> With this assertion, Libya could justify any failure to use warning maneuvers,<sup>60</sup> to escort U.S. craft out of claimed areas, or to apply to the Security Council for their removal, on the basis of the need to act immediately to defend its territory against an impending attack.

According to the most detailed Libyan account available of the incident, their belief that U.S. forces were prepared for immediate attack was based on the American forces having breached a pre-determined Libyan "Line of Engagement," set at the boundary of Libya's claimed territorial waters.<sup>61</sup> Once foreign forces entered this area, they would be warned to proceed no further. Should the warning not be heeded, the local military commander was authorized shoot down the intruder. In addition, should the foreign craft proceed within the Gulf and enter a zone designated as the "Confrontation Area," military personnel would be required

1984 (notes on file with the *Yale Journal of International Law*). *But see* Sunday Times (London), *supra* note 41, at 6 (concluding that the pilot's firing in the wrong direction indicated not pilot error, but rather that the U.S. planes had lured the Libyans into a trap).

57. *See supra* note 26 and accompanying text.

58. *See* Neutze, *supra* note 18, at 30. According to a U.S. military source, Algeria once escorted U. S. warships out of claimed Algerian waters and the U.S. did not resist. Interview, Department of State Official A, *supra* note 30.

59. *See supra* notes 44-49 and accompanying text.

60. Some earlier Libyan accounts did contend that a warning was given before firing. *See, e.g., Le colonel Kadhafi, supra* note 52, at 4, col 1. However, the U.S. disputes this contention, which was omitted from later accounts. *See U.S. Planes Attacked by Libyan Aircraft: News Briefing, supra* note 11 (no warning given); S. YUSSEF, *supra* note 11.

61. S. YUSSEF, *supra* note 11, at 189-90.

to act immediately to destroy the intruder. The "Confrontation Area" concept appears to be based on the belief that once this point was reached, Libya's national security would require the presumption that any intruding aircraft was on an attack mission, since it would be traveling so quickly that any delay—including attempts to ascertain intent, or to peaceably warn off the aircraft—would allow a hostile craft to reach and destroy its target unhindered.<sup>62</sup>

Such pre-determined security lines, located within a specified distance of a country's shores, are used by a number of states, including the United States and the Soviet Union. However, unlike Libya, these states give notice to the international community of the existence of lines beyond which the state will presume the existence of a threat to its security.<sup>63</sup> The general practice of states appears to be to warn foreign forces of the intent which will be attributed to their actions should they breach these lines.

The practice of maintaining a predetermined and publicized coastal security line appears more consistent than the Libyan practice with the general norm governing the use of peacetime ROE, which emphasizes attempts at peaceful resolution of incidents, reserving the use of force as a last resort of immediate defensive necessity. Libya's actions in the incident over the Gulf of Sidra demonstrated a readiness to use force at an earlier point than either the U.S. or the U.S.S.R., and may be viewed as asserting a broader conception of the right to the defensive use of force than that apparently held by either superpower.<sup>64</sup>

## V. International Appraisal

The international community responded quickly to the Gulf of Sidra aerial incident. A number of international commentators criticized the U.S. presence in the area, characterizing the maneuvers and exercises as a dangerously provocative show of strength.<sup>65</sup> On the whole, however,

62. *Id.* at 197.

63. See, e.g., Security Control of Air Traffic, 14 C.F.R. § 99 (1984) (describing U.S. air defense zones); Jet Navigation Chart J.N.C.-5 (Defense Mapping Agency, 1973) (showing Soviet Union's "Asian Coastal Buffer Zone").

64. See *supra* note 63 and accompanying text. See also discussion of U.S.-U.S.S.R. aerial ROE, *supra* note 53.

65. With respect to the legitimacy of the U.S. exercises, most international commentators took the view that the U.S. acted unwisely in provoking the incident. See, e.g., *FRG: Papers View Effects of U.S. Libyan Air Clash*, FBIS (W. Eur.), Aug. 21, 1981, at J3 (text from the Frankfurter Rundschau) ("One can surely contest [unreasonable claims over international waters] without hesitation [sic]. It is more than questionable, however, whether it must be done as [the U.S.] did [by holding] maneuvers off Libya's coast."); Rattner, *Western Europeans Expressing Favor and Unease*, N.Y. Times, Aug. 21, 1981, at A10 (officials in the U.K., France, Germany, and Italy expressing the belief that the U.S. had deliberately invited the incident);

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the international community accepted the legality of the U.S. pilots' return of force during the incident itself, and most of those commentators who were critical of the maneuvers offered no criticism of the pilots' actions in firing back.<sup>66</sup> This international reaction indicates the separability of the norms relating to the right of a superpower to conduct naval maneuvers in or near the disputed territory of a hostile state, and the norms regulating the defensive use of force by a military aircraft which is being fired upon.

On the other hand, the international community generally supported neither Libya's claim to the Gulf as internal waters<sup>67</sup> nor its attempt to

*Turkey: Press Reaction to U.S.-Libyan Incident*, FBIS (No. Africa), Aug. 28, 1981, at T5 (asking how the U.S. would react to Soviet exercises in the Gulf of Mexico). Many Third World states also strongly condemned the U.S. See *Daily Report: Middle East and South Asia Review, Libyan-U.S. Clash*, FBIS (Mid-East), Aug. 24, 1981, at 1 (Organization of African Unity denounced U.S. for promoting the "policy of cowboys" in a "wanton act of aggression" constituting a "provocative act of undeclared war."); *Pravda Comments on Sidra Incident, Views Reaction*, FBIS (USSR), Aug. 26, 1981, at N6 (excerpted by Pravda from La Presse de Tunisie) (The Islamic Conference stated that "the U.S. 'muscle-flexing' policy jeopardiz[ed] peace . . . throughout the world," and was a policy based on disregard for the norms of international law.) No state other than Libya, however, see *supra* note 23, lodged any formal protest challenging the maneuvers' legality. A distinct minority of commentators unreservedly praised the U.S. show of force in the maneuvers. See, e.g., *U.K.: Telegraph Praises U.S. Response to Libyans*, FBIS (W. Eur.), Aug. 27, 1981, at Q1 (excerpt from the Daily Telegraph (London)).

66. See, e.g., Rattner, *supra* note 65; *But see Libya's Larger Meaning*, Christian Sci. Monitor, Aug. 21, 1981, at 24 (editorial questioning whether the U.S. pilots could have taken evasive action, especially in light of previous non-violent episodes); *FRG: Papers View Effects of U.S.-Libyan Air Crash*, FBIS (W. Eur.), Aug. 21, 1981, at 3 (text from Frankfurter Rundschau) ("It is also feasible that the attacked American pilots fired their rockets too quickly to tell [the Libyan pilots] what is what in the American way."). A few commentators characterized the return of fire by the U.S. as unlawful. See *Bahrain: Paper Scorns Reagan Justification of Libyan Clash*, FBIS (No. Africa), Aug. 24, 1981, at C1 (describing the U.S. attack as indicating that "the only law Reagan respects is the law of the jungle and the law of the gun"); *Turkey: Press Reaction to U.S.-Libyan Incident*, FBIS (No. Africa), Aug. 28, 1981, at T5 (text from Hurriyet) ("it is impossible to justify the shooting down of planes"); *Pravda Comments on Sidra Incident, Views Reaction*, FBIS (USSR) Aug. 24, 1981, at N6 (denouncing the "U.S. Air Force's piratical attack on Libyan aircraft"). See also *Letter to the Editor*, PROC. U.S. NAVAL INST., May 1982, at 42 (written by Lieutenant Joseph R. McFaul, U.S. Coast Guard, arguing that even if the U.S. fleet was in international waters at the time of the incident, the U.S. may have violated international law by firing upon the Libyan planes: "The United States cannot claim self-defense if the Libyan attack had no chance of success. Considering [the technological superiority of the F-14s over the export version SU-22s] U.S. action was only retaliation, not self-defense . . . [In addition, because this was] a peacetime incident, there [was] no justification for shooting down the second plane").

67. Only a few international actors supported Libya's claim to sovereignty over the Gulf. See *World Peace Council Denounces U.S. Aggression*, FBIS (No. Africa), Aug. 21, 1981, at A1 (text from Tripoli Domestic Service) (denouncing U.S. aggression against Libyan aircraft within Libyan airspace and territorial waters as part of an imperialist plot aimed against the Libyan Arab People); *Palestinian Reaction to U.S.-Libyan Dogfight: As-Sa'iqah Support*, FBIS (No. Africa), Aug. 21, 1981, at A2 (text from Tripoli JANA) (condemnation by Palestinian organization of U.S. actions against Libyan planes within Libyan airspace and territorial waters). The League of Arab States skirted the issue by noting only that the maneuvers occurred "near Libyan shores." News Release, League of Arab States, Office of the Permanent

characterize its first-use position as a necessary defensive response to the situation.<sup>68</sup>

The failure of international elites to condemn the American response constitutes an enforcement of the normative expectations concerning peacetime ROE. The failure to condemn directly Libya's attack does not, however, imply approval of the Libyan ROE as being consistent with international norms. The United States, in returning fire, asserted its view of acceptable behavior. The encounter ended at that point, without any further retaliatory assertion of Libyan norms. By accepting the outcome of the incident, i.e. the American "victory," international elites reinforced the norm as applied by the United States but not as applied by Libya. This acceptance may be seen as reflecting a consensus among states that the norms governing ROE include both the right to return fire if attacked and the duty to warn intruders before firing upon them.

## VI. Outcome

The decision of the international community in response to the incident was, in effect, to treat the matter as closed. There were no attempts to characterize the incident as an ongoing dispute in need of resolution, nor did any elites make efforts to censure either actor, or otherwise change their behavior toward either party. Elites may have decided that their best response lay simply in hoping that the two adversaries would

Observer to the United Nations, Aug. 19, 1981. Comments by the Soviet government used similarly tentative language. *See, e.g., U.S. Naval Maneuvers, Libyan Incident Condemned*, FBIS (USSR), Aug. 21, 1981, at H1 ("in the immediate vicinity of the Libyan coast"); *id.* at H2 ("according to Tripoli radio, this attack occurred in the airspace over Libyan territorial waters"); *Pravda Comments on Sidra Incident, Views Reaction*, FBIS (USSR), Aug. 26, 1981, at H6 ("on the approaches to Libya's shores"). *See also FRG: Papers View Effects of U.S.-Libyan Air Crash*, FBIS (W. Eur.), Aug. 21, 1981, at J3 (text from Frankfurter Rundschau) (noting that "most people did not take [Libya's 1973 claim of a 200-mile territorial waters zone along its coast] very seriously" since it "would include the Greek island of Crete as well as independent Malta").

68. While many commentators criticized the maneuvers by the U.S. as unwise or instigatory, they did not argue that Libya was therefore justified in asserting as a necessary defensive measure an initiation of force in response to a symbolic show of strength. *But cf. Turkey: Press Reaction to U.S.-Libyan Incident*, FBIS (No. Africa), Aug. 28, 1981, at T4 (commenting that Libya was justified in considering the maneuvers to be provocative, implying that therefore the U.S. should not have been surprised at the Libyan response). *See also Palestinian Reaction to U.S.-Libyan Dogfight: Arafat Message*, FBIS (No. Africa) Aug. 21, 1981, at A1 (text from Tripoli Voice of Arab Homeland) (PLO leader praising shooting at "American forces, enemies of the people"). A few commentators directly condemned the Libyan resort to force as a violation of international law. *See Gunfight*, Wash. Post, Aug. 20, 1981, at A28, col. 1 (characterizing the act as typical of a lawless regime); *Daily Report: Middle East and South Asia Review, Libyan-U.S. Clash*, FBIS (No. Africa), Aug. 24, 1981, at 2 (Egyptian President Anwar el-Sadat criticizes Qadhafi for causing the incident, saying that the Libyan leader deserved to be executed for the "foolish act" in which heavy and unwieldy Sukhois took on the U.S. planes).



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work out their differences and create an atmosphere in which such an incident would not recur. The decision by international elites not to take more assertive action to resolve the dispute indicates that they concluded that their public pronouncements constituted sufficient means to enforce the norms governing ROE. Further action to support those norms, such as strong countermeasures against one side, or sorties into the Gulf to see what would happen in another case, would clearly have been counter-productive, particularly in light of Libya's decision to limit its losses and not to seek a continuation of the hostilities.

Furthermore, after making their initial formal representations to the UN Security Council,<sup>69</sup> neither Libya nor the United States requested any further action.<sup>70</sup> The United States has continued to hold maneuvers in waters near the coasts of both friendly and hostile states and to challenge, through the presence of U.S. vessels or aircraft, other states' territorial claims to waters which it regards as international.<sup>71</sup>

It is not known to what extent, if any, Libya has modified its ROE to redefine the point at which it will presume that its territory is in such imminent danger of attack as to require the immediate defensive use of force. Since the incident, however, Libya has not attempted any similar actions against any aircraft, including those of the United States, flying over the Gulf of Sidra.<sup>72</sup>

In sum, insofar as the norms governing the application of ROE in aerial encounters are concerned, the lack of further action implies that elites in the United States, Libya, and the international community decided that their public pronouncements, coupled with the actual outcome of the incident, were sufficient means of enforcing these norms. Resort to action may simply not have been perceived as either necessary or productive under the circumstances.

## VII. Writer's Appraisal

The reinforcement by the United States and other international actors of existing norms governing the peacetime application of ROE for military aircraft, coupled with the apparent acquiescence of Libya, has ramifications for the stability and predictability of peacetime military behavior. Thus, regardless of which side's version of the facts one adopts—

69. See *supra* notes 22-23.

70. The United States may have declined to do so both because of the probability of a Soviet veto and out of a desire to avoid a protracted discussion of U.S. military policy.

71. See *supra* note 36.

72. *Flights Over the Gulf of Sidra: U.S. Navy Jets Challenge Libyan Sovereignty Claim*, Wash. Post, July 27, 1984, at A1, col. 2.

both with respect to background facts and the facts of the incident itself—certain conclusions emerge.

The acceptance of a norm setting strict defensive limits upon the peacetime use of force against potentially hostile aircraft promotes world public order by discouraging unwarranted deployments of force. The reaction to the incident indicates both that the use of force will be seen as justifying a limited return of force, and that states should be cautious about initiating defensive attacks against foreign aircraft — even if those aircraft are located over disputed waters over which a coastal state believes itself to have a strong claim. The tacit reinforcement by international elites of the norms regarding the appropriate and inappropriate defensive uses of force in peacetime promotes the basic norms of both Articles 2(4)<sup>73</sup> and 51<sup>74</sup> of the United Nations Charter, by reinforcing expectations that military aircraft may initiate a limited defensive use of force, but only when confronted with a bona fide danger either to themselves or to their national territory.

Yet, the reinforcement of this general norm governing aerial engagement may also have negative consequences for public order by demonstrating a possible flaw in the norm itself. The Gulf of Sidra incident shows that, while certain states with well-established air forces have formulated sophisticated ROE which they are able to apply in a manner consistent with international norms, other states may not fully understand the norms, or be capable of assuring their consistent application. These newcomers to the “game” of peaceful military encounters may lack the requisite experience to distinguish between symbolic and actual threats to national security, or to appreciate the possibilities for apparently peaceful maneuvers adequately to convey a “force” intention. The change in Libya’s account of the incident, for example, may indicate its uncertainty as to appropriate invocations of the general norms concerning aerial rules of engagement. The enforcement of a norm which certain states may not easily grasp may prove counterproductive to world order if it fails to secure a uniformity of expectations regarding appropriate actions and responses.

It is to be hoped, instead, that such reinforcement will function as a catalyst to encourage all states to accept the international norms and for-

73. “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.” U.N. Charter art. 2, para. 4.

74. “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 the measures necessary to maintain international peace and security. . . .” U.N. Charter art. 2, para. 4.

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multate ROE consistent with them. Although the norms governing application of ROE may appear complex to certain actors, they clearly offer greater stability than such alternatives as allowing states to fire at will on nearby foreign aircraft, or disallowing the use of self-defense in hostile encounters. While the incident which occurred in the Gulf of Sidra may have caused increased tension, at least temporarily, between the United States and Libya, the reinforcement of the norms governing rules of engagement should contribute to an atmosphere of greater stability for future military exercises.