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COSMIC TOP SECRET

Copy No 1 of 7 copies

18th February, 1963.

To : Secretary-General

From : Legal Adviser

cc : - Deputy Secretary General
- Deputy Secretary General, Assistant Secretary General for Economics and Finance
- Assistant Secretary General for Political Affairs
- Executive Secretary
- Standing Group Representative

SUBJECT : Berlin Contingency Plans.-

1 - By note SG(62)584 you asked me to study the legal problems which would arise in the event that the MARCON and BERCON DELTA plans were implemented. During your absence I prepared a paper which was sent unofficially to the Permanent Representatives by note PO/62/637. In this note, Mr. Colonna asked the Permanent Representatives to transmit my paper to their authorities in order to have their views as soon as possible and to enable me to finalize a document which could be submitted to the Council later on.

2 - At the time the Berlin contingency plans were discussed, only one Delegation had made comments on my initial study. As a consequence, it was specified in paragraph 1 of Annex to C-R(62)53 that the Council could revert to the legal problems involved by the plans when it knew more of the reactions of the Member Governments and my final paper had been circulated. The Council could then take note of this paper, and thus be in a position, in the event that the MARCON and BERCON DELTA plans were implemented, to weigh not only political and military advantages or disadvantages, but "also the legal considerations which would have to be taken into account in deciding to execute any particular action".

3 - For the time being, we have received comments from six Delegations : Netherlands, United Kingdom, Denmark Greece, Turkey and Canada. Taking into account those comments, I have prepared a PO/62/637 (revised) which you will find herewith at Annex I. Changes to the initial text have been underlined. Most of the modifications are very minor ones. Most of the time their aim is to stress some

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specific points suggested by certain delegations (for instance provisions on the North Pacific Fur Seals Convention, of the Montreux Agreement or of the Geneva Convention on territorial waters).

4 - Two problems of some importance where however raised by the Delegations :

a) Some of them, and especially Denmark, Greece and the Netherlands, underlined that the right to enforce the laws of the coastal state in its territorial waters cannot be abused to suspend, by a measure of retorsion, the passage of foreign ships on motives of another character, without abuse of right or "détournement de pouvoir". Canada is of a contrary opinion. This is a very complex legal problem on which you will find here enclosed in Annex II a complete study. In the revised text of the PO, I have avoided to answer the question by leaving it to the competence of each coastal State.

b) On another hand, the Canadian paper stressed that it is only the reaction of the Soviet bloc, to the "Live Oak" plan, either to resist it or not, which will determine the character of the MARCON and BERCON DELTA plans as either reprisals or measures of self-defence. It is of course true that the nature of the measures taken by the Three or the Four Powers will be of some importance in qualifying the nature of the Soviet action, but the analysis of this point changes very quickly from the legal to the political field. I have thus tried to avoid this problem by the foot-note that I added in page 1, the purpose of which is to reserve the judgment of each Government in the future.

5 - This being said, there are two possible solutions :

a) to issue the paper attached at Annex I as an official Council memorandum. The Council could take note of thi document as a legal paper which may be useful for the future implementation of the MARCON and BERCON DELTA plans.

b) to keep this paper in our files and to wait for the answer of the nine Governments who have still not commented on PO/62/637. In this respect, you will note that neither France, nor Germany or the United States have replied.

I have had on this point a conversation with M. Colonna. His feeling is that the best is to do nothing at the time being in order to avoid to reopen the discussion on the Berlin Contingency plans and to wait until an answer is received from all major NATO countries.

G. Guillaume

G. GUILLAUME

[redacted] No 1.
ANNEX to
PO/62/637 (revised)

ANNEX I to C-M(63)43

Draft

18th February, 1963.

NOTE BY THE LEGAL ADVISER

To : Secretary-General

From : Legal Adviser

LEGAL PROBLEMS INVOLVED IN THE IMPLEMENTATION OF THE MARCON AND BERCON DELTA PLANS

1. Pursuant to document PO/62/581 dated 11th September 1962, you instructed me in Note SG/62/584 to study the legal problems which would arise in the event of implementation of the MARCON and BERCON DELTA plans. These problems differ with the circumstances assumed to attend the execution of the plans. In this context, three possibilities may be considered :

(a) The Soviet Union, the "German Democratic Republic" or their allies commit acts which, although annoying for the occupying powers or the population of the Federal Republic, cannot be regarded as inconsistent with international law.

(b) The Soviet Union, the "German Democratic Republic" or their allies commit illegal acts vis-à-vis the three occupying powers, the Federal Republic or their allies without, however, delivering an armed attack, and in the absence of any imminent threat of attack.

(c) The Soviet Union, the "German Democratic Republic" or their allies deliver an armed attack on the three occupying powers, the Federal Republic or their allies, or there is an imminent threat of such an attack (1).

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(1) The sole purpose of this proposed classification is to provide a convenient legal framework for the study in question. It will of course be for the NATO member governments to decide in each specific case which situation has, in fact, arisen. This decision will have to be taken when execution of the plans is contemplated, in the light of all the preceding events, especially measures taken by the four powers or by NATO during Phases I and II, which are dealt with in PO/62/593.

2. In the first case, the MARCON and BERCON DELTA plans should be examined from the standpoint of their consonance with international maritime law ; in the second, from the standpoint of the right to resort to reprisals ; in the third, from the standpoint of the right to self-defence.

SECTION I

THE MARCON AND BERCON DELTA PLANS AND INTERNATIONAL MARITIME LAW

3. The rules of international maritime law applicable in peacetime would differ according to whether the proposed measures were to be taken :

(a) on the high seas,

(b) in the territorial waters of member states of the Alliance,

(c) in the interior waters of these States.

1 - On the high seas

4. The position in regard to the high seas is governed by two very widely accepted principles :

(a) The high seas are freely open to the shipping of all countries.

(b) Ships on the high seas are subject to no authority other than that of the State under whose flag they are sailing.

These principles, which derive from the practices of the 18th and 19th centuries, were explicitly upheld by the Permanent Court of International Justice in its Judgment of 7th September, 1927, on the affair of the Lotus (Publications of the Court, Series A, Recueil des arrêts - No. 10, page 25). They are, moreover, recognised by all Western writers (e.g. Hackworth, Volume II, page 653 et seq. ; Higgins and Colombos "International Law of the Sea", paragraphs 70 and 270 ; Rousseau "Traité de Droit International Public" page 418 ; Guggenheim "Traité de Droit International Public", Volume I, page 446) and Soviet authors (see, in particular, Keiline "Soviet Maritime Law"). They are, moreover, clearly enunciated in the Convention on the High Seas signed in Geneva on 30th October, 1958.

5. The foregoing principles are liable to only three exceptions which must be examined in order to determine whether there would be legal sanction for introducing the MARCON and BERCON DELTA Plans on the high seas :

(a) exercise of the right of approach ;

(b) exercise of the right of self defence ;

(c) exercise of certain treaty rights.

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6. The right of approach permits a warship sailing on the high seas to ascertain the nationality of a merchant ship held in suspicion. By virtue of this right, the warship may pursue the suspect and, after hoisting its flag, order the latter to do likewise. If the merchant ship complies and if the warship has no reasonable ground for believing that it is engaged in piracy or in the slave trade or that it is sailinf under a false flag and is, in reality, the same nationality as the warship, the investigation must go no further (see Oppenheim-Lauterpacht, Volume I - 553 et seq. ; Gidel "Droit International Public de la Mer", Volume I, page 289 et seq. ; see also Article 22 of the Convention on the High Saes, dated 30th October, 1958).

Only if the behaviour of the merchant ship is suspicious may the warship order it to stop for a visit which, in most cases, consists in sending an officer on board the marchant ship to examine its papers and, if this proves inadequate to conduct a search of the ship. It should, however, be noted that a warship which approaches a merchant ship with a view to identifying, boarding or searching it does so at its own risk (see the decision of the United States Supreme Court in the case of the "Marianna Flora" reported, inter alia, by Higgins, paragraph 272), that the merchant ship consequently has the right, in certain circumstances, to defend itself and that in any case, boarding or searching without a well-founded reason involves the responsability of the State whose warship has taken unwarranted action.

7. Apart from the right of approach, certain jurists, mainly British (see, in particular, Higgins - paragraph 274) recognise a right of self defence extending as far as the search and even the seizure of a ship held in suspicion, whatever flag it may be flying, in the event of imminent danger to the security of the country concerned ; other writers cite this practice without comment (Hackworth, Volume II, page 709) ; others, however, challenge it (Gidel, Volume I, page 348 ; de Hartingh "Soviet concepts of the Law of the Sea", page 82). At all events, as this theoretical right was not accepted by the drafters of the Convention on the High Seas and has, in the whole of maritime history, been exercised in only few exceptional situations, it could hardly justify the execution of the MARCON and BERCON DELTA plans."

8. Furthermore, a State with merchant ships sailing under its flag may, by agreement, authorise the warships of other States to check their identity in specified circumstances. No provision of this kind appears in the Convention of 1946 for the Regulation of Whaling or in the Convention of 1949 for the North West Atlantic Fisheries. On the contrary, the Soviet Union has partially followed this course in certain agreements and, in particular, in the North Pacific Ocean Fur Seals Convention of 1957. However, the information obtained from the countries concerned seems to indicate that it would in actual fact be extremely difficult to invoke the provisions of this Convention to justify any boarding or searching.

9. In view of this, the relevant rules of international maritime law would seem to lead to the following findings with respect to the implementation of the MARCON Plans for the high seas.

.../...

(a) Plans MARCON 1 and MARCON 2 are not in conflict with the principles of international law.

(b) It is difficult to assess the legal implications of Plan MARCON 3 which is rather loosely worded. At all events, this plan would have to be carried out in compliance with the provisions of the "regulations for preventing collision at Sea" appended to the Convention signed in London on 10th May 1948 to which the Soviet Union acceded on 19th April 1954.

(c) Plans MARCON 4 and MARCON 5 are inconsistent with the principles referred to in paragraph 6 above. Boarding, searching and, with still greater reason, seizing a foreign ship on the high seas, are bfeaches of international law which involve the responsibility of the State whose Navy commits them (see, in connection with French practice during the Algerian war - Annuaire français de droit international 1959, page 833 ; see also the case of the Soviet tanker "Touapsé" seized in the Formosa Straits by a Chinese warship - Annuaire français de droit international 1955, page 80).

(d) Plan MARCON 6 is at variance with the principle of freedom of the seas.

2 - Territorial Waters

10. The position in regard to territorial waters is governed by two main principles which are set out, in particular, in Articles 14 et seq. of the Geneva Convention on the Territorial Sea and the Contiguous Zone, dated 29th April 1958 :

(a) The coastal State exercises its sovereignty in these waters and may take steps to enforce the observance there of the legislation and regulations it deems appropriate ;

(b) its action must nevertheless comply with the rules of international law and, in particular, respect the right of "innocent passage" of certain foreign ships.

11. In these circumstances, Plans MARCON 1 and MARCON 2 could be carried out in territorial waters in the same way as in international waters, and the implementation there of Plan MARCON 3 would create the same problems.

12. The execution of plan MARCON 4 would raise more difficult issues. Under the legislation and regulations of each country in regard to customs, police and sometimes health requirements (see Rousseau, page 443 ; Gidel, Volume II, page 99 ; Guggenheim Volume I, page 420) Soviet bloc merchant ships in the territorial waters of member States of the Alliance can unquestionably be boarded and searched.

There are even cases in which, under municipal law, the right to board and search might be exercised beyond the limits of territorial waters, in waters contiguous to the latter (see in Higgins, paragraphs 112 and 113, the comparison of United States and United Kingdom regulations in this respect). Furthermore the right of hot pursuit might, in certain circumstances, be pleaded to justify the boarding on the high seas of merchant ships already pursued in territorial waters.

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Whether the member States of the Alliance could avail themselves of the rights they thus enjoy to proceed systematically to board and search Soviet bloc ships in pursuance of Plan MARCON 4 is, however, more problematical. Should they do so, the States concerned would be making use of the powers they possess for a purpose other than the one initially intended. Certain NATO member States, when consulted, have expressed the view that such action might render them guilty of abuse of rights or "détournement de pouvoir" liable to involve their responsibility. Other States, on the other hand, have felt that as international law stands at present they would merely be exercising a discretionnary power which is theirs by right.

The theory of abuse of rights has given rise to many doctrinal disputes (Politis, Recueil des Cours de l'Académie de Droit International, 1925, Volume I, pages 1 to 106 ; Schwarzenberger, Recueil des Cours de l'Académie de Droit International, 1955, Volume I, page 309 ; Oppenheim, International Law, Volume I, paragraph 155) and to too much uncertainty regarding precedents, mainly in the field of maritime law, for it to be possible to take an objective stand in this matter. In the present state of international law it would seem that it must be left to each member State to determine whether it can rightfully apply Plan MARCON 4 in its territorial waters as a retaliatory measure.

13. On the other hand, there would be serious objections to the seizure, in these waters, of certain merchant ships in implementation of Plan MARCON 5. Generally speaking, such action can be taken only if damage has been caused or offenses committed by the crew or owner of the ship concerned if a decision to that effect has been taken by the administrative or legal authorities empowered to order such action. Moreover, the fleet of each of the Soviet bloc Socialist States in question enjoys a considerable degree of immunity from jurisdiction in a great many countries, in particular with respect to means of enforcement. (On this difficult problem see Higgins, paragraphs 227 to 229 ; Guggenheim, Volume I, pages 515 to 517 ; Gidel, Volume II, pages 350 to 357).

14. Plan MARCON 6 could not rightfully be applied to Soviet bloc merchant ships in the territorial waters of member States of the Alliance. Under international law, these ships enjoy a right of "innocent passage" which allows them to enter and to leave without hindrance all territorial waters (Higgins, paragraphes 108 and 275 ; Rousseau, page 143 ; Gidel, Volume III, pages 195 et seq.). It is only if the passage of these ships is "prejudicial to the peace, good order or security of the coastal State" that, under the terms of Section 4 of Article 14 of the Convention of 29th April 1958, some of the provisions of Plan MARCON 6 could be applied to these ships.

With regard to fishing vessels, however, its application could be considered under the provisions of Section 5 of Article 14 of the same Convention, should these vessels not observe the laws and regulations brought into force by a coastal State to prevent them from fishing in its territorial sea.

15. Whether warships enjoy the same right of "innocent passage" is a much disputed doctrinal point (Higgins, paragraphs 109 and 215 ; Gidel, Volume III, page 277 et seq. ; Rousseau, page 443) which has not been settled by the courts (see the cautiously worded judgement of the International Court

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of Justice in the Corfu Straits case - Records, 1949, page 4). Nevertheless, during the discussions at the first conference on the law of the sea in Geneva in 1958, the Western maritime powers maintained that such a right existed and a provision to this effect was inserted in the Convention of 29th April, 1958. When they ratified this Convention, certain countries, including the Soviet Union and its allies did, however, make a reservation to the effect that they should be permitted to make access by foreign warships to their territorial waters subject to the system of prior authorisation.

In the light of all these considerations, it would seem that each country will have to decide for itself whether it can or cannot apply Plan MARCON 6 in its territorial waters, to Soviet bloc warships as a retaliatory measure.

16. At all events, the provisions of Section 4 of Article 16 of the Convention of 29th April, 1958 prohibit the suspension of the "innocent passage" of foreign merchant ships or warships "through straits which are used for international navigation between one part of the high seas and another part of the high seas or the territorial sea of a foreign State". Consequently, Plan MARCON 6 could never be applied as a retaliatory measure in such straits and, in particular, in the Baltic Straits.

17. In executing these various plans it is desirable, lastly, that account be taken of bilateral or multilateral agreements in respect of certain specific fields. In particular it would be necessary, with regard to the Turkish Straits, to observe the provisions laid down in the Montreux Convention, both in peacetime and in the event of a threat or imminent danger of war for Turkey.

3 - Interior Waters

18. Plans MARCON 1 and MARCON 2 could be implemented in the interior waters of members of the Alliance in the same circumstances as in territorial waters. The implementation of Plans MARCON 3, MARCON 4 and MARCON 5 there would create the same problems.

However, certain additional possibilities would be open to the States concerned for Plan MARCON 6 to both merchant ships and warships. Whereas no State can prohibit the "innocent passage" of certain ships in its territorial waters, it can on the other hand close its ports to foreign warships and, in certain specific circumstances, to foreign merchant ships. Although there is little agreement on the circumstances between the authors consulted, it is nonetheless true that these circumstances might conceivably arise in the event of a serious international crisis (Rousseau, page 431 ; Higgins, paragraph 141 ; Gidel, Volume II, page 55, Guggenheim, Volume II, page 419, note 5).

4 - The International Artificial Canals

19. Since the possibility of a blockade of the Kiel and Panama Canals was raised at the meeting of the North Atlantic Council on 19th September, 1962, and since such a blockade is envisaged in Plans MARCON 6 and BERCON DELTA, it should be clearly understood :

(a) that under the terms of Articles 380 to 388 of the Treaty of Versailles, the Kiel Canal must remain open to the merchant ships and warships of all nations at peace with Germany ;

(b) that free passage through the Panama Canal is guaranteed under the HAY-PAUNCEFOTE Treaty of 18th November, 1901 and the HAY-BUNAU-VARILLA Treaty of 18th November, 1903(Rousseau, page 409 ; Higgins, paragraph 167 et seq.).

From the peacetime legal standpoint, the blockade of these canals would therefore be unlawful.

20. To sum up, it is apparent that, under international maritime law :

(a) Plans MARCON 1 and 2 do not present any difficulties

(b) A few additional particulars would be needed for an evaluation of the applicability of Plan MARCON 3;

(c) Plan MARCON 4 cannot be applied on the high seas ; each member State of the Alliance will have to decide for itself whether it can or cannot apply this plan in its territorial and interior waters ;

(d) Plan MARCON 5 cannot rightfully be implemented on the high seas ; it cannot be implemented in the territorial or interior waters except in fairly exceptional and isolated cases ;

(e) Where there are no bilateral or multilateral agreements to the contrary, Plan MARCON 6 could be applied partially :

- to warships in certain territorial or interior waters ;

- to merchant ships in certain interior waters.

The same remarks can be made in respect of the corresponding BERCON DELTA plans.

SECTION II

THE MARCON AND BERCON DELTA PLANS AND THE RIGHT OF REPRISAL

21. Should the Soviet Union and its Allies commit illegal acts without, however, delivering an armed attack and in the absence of the threat of any imminent attack, it would be possible to find legal sanction for some of the MARCON and BERCON DELTA plans, pursuant to the theory of reprisals. The application of that theory in the present case would, however, present real difficulties.

22. In response to an infringement of rights committed to its detriment, a State may take retaliatory measures or resort to reprisals. The latter are in themselves illicit, but can exceptionally be justified by the fact that they are

provoked by an earlier illicit measure of which they frequently tend to obtain withdrawal. They are subject, however, to various rules which must be noted before applying them to the MARCON and BERCON DELTA plans.

23. The traditional distinction is between armed reprisals (such as pacific blockade or naval bombardment) and unarmed reprisals (such as use of the embargo, sequestration or the blocking of funds). The former are explicitly prohibited to members of the United Nations by Article 2, paragraph 4 of the Charter which stipulates :

> "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 most eminent writers have unanimously deduced from this text that, apart from self-defence or the application of any enforcement measures decided by the Security Council, members of the United Nations could henceforth not resort to armed reprisals (Guggenheim, Volume II, page 59 ; Oppenheim-Lauterpacht, Volume II, page 153 ; Higgins, paragraph 399 in fine ; Rousseau, page 467).

This view, moreover was upheld by the International Court of Justice in the judgment delivered on 9th April, 1949 in the Corfu Straits case (Reports 1949, page 35). In this case, the Court ruled that the United Kingdom in proceeding with mine-sweeping operations, under naval and air protection in Albanian territorial waters, had violated Albania's sovereignty. Refuting the United Kingdom claim to a right of reprisal leased on the alleged repeated breaches of international law committed by Albania, the Court stated that it could not accept such a line of defence. "The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects of the International Organization, find a place in international law."

In the present state of law and jurisprudence, it is therefore apparent that the United Nations Charter prohibits United Nations member States from having recourse to armed reprisals should unlawful action be taken by the Soviet Union and its Allies.

Furthermore, under the terms of Article 2, paragraph 6 of the Charter, this prohibition would also appear to cover states which are not members of the United Nations (on this point see Oppenheim-Lauterpacht, Volume II, page 155 - Note 2). In any event, it concerns all the NATO member States, since the only one not to have been admitted to the United Nations accepted, on 3rd October, 1954, the obligations set forth in Article 2 of the Charter (see the statement of the German Federal Republic at Annex A to the Council Resolution of 22nd October, 1954).

24. Since armed reprisals at present constitute breaches of international law, it would seem that, in the event of unlawful

action in Berlin by the Soviet Union and its Allies, the only measures which might be legally justified would be :

(a) the retaliatory measures referred to in paragraph 20 above ;

(b) unarmed reprisals.

Plan MARCON 3 might fall into this category, as would Plans MARCON 4, 5 and 6, in so far as they could be implemented without the use of force. For instance :

- Plan MARCON 4 might perhaps be applied on the high seas, if the Soviet bloc merchant ships accepted without resistance, boarding and search ;

- seizures might be possible on interior waters, in application of Plan MARCON 5 ;

- an embargo might be decreed under the same conditions within the context of Plan MARCON 6.

On the high seas these measures might be put into effect by the ships of any member of the Alliance which considers itself entitled to do so. In the territorial or interior waters of a NATO member State, they should normally be carried out by the State concerned or, by agreement with the latter, with the help of other members of the Alliance who consent to do so.

25. However, though armed reprisals are prohibited under international law, it does not follow that unarmed reprisals are necessarily lawful. They must comply with various conditions established by doctrine and jurisprudence (see the arbitral award of 31st July, 1928, in connection with the dispute between Germany and Portugal over damage caused in the Portuguese colonies in Southern Africa - United Nations Report of Arbitral Awards, Volume II, pp. 1014, 1027 and 1028).

(a) The right of reprisal is, in principle, a bilateral one. Reprisals ordered by the injured State alone, must be directed only against the State having violated a right, not against other States (see, for instance, Guggenheim, Volume II, page 85) ;

(b) such reprisals as have been decided must not be out of proportion to the unlawful action having motivated them ;

(c) The culpable State must previously have been called upon to cease the unlawful action.

Though the last-mentioned of these conditions would appear to be fairly easy to comply with in this particular case, the first two on the other hand, involve difficult problems it would be well to examine.

26. The traditional theory of reprisals is unquestionably a theory concerning relations between one State and another (see, on this point, the Report by the Sub-Group of Legal Experts on the legal aspects of possible economic counter-measures - C-M(61)99, paragraph 6). Should a crisis develop

in Berlin, it could, in principle only justify reprisals directed at the Soviet Union and possibly the "German Democratic Republic", by the three occupying powers and, possibly, by the German Federal Republic.

The members of the Sub-Group stressed, however, in paragraph 7 of the above-mentioned report, that the members of NATO could invoke two arguments in favour of collective reprisals :

(a) unlawful action by the Soviet Union might, in certain circumstances, be equivalent to an immanent threat of armed attack justifying the exercise of the right of self-defence ;

(b) the machinery for taking decisions and the military structure of NATO and of the Warsaw Pact Organization are such that the unlawful actions envisaged would affect all the member States of both the Alliances.

The Sub-Group recognised, however, that the latter theory "might not be considered to be an uncontroversial expression of existing principles of international law, but could only be based on considerations of what represents the progressive development of the law in contemporary conditions of international affairs".

This conclusion left each government free to judge whether it considered it lawful or not :

(a) to join in unarmed reprisals decided in response to a crisis arising in Berlin ;

(b) to direct such reprisals not only at the Soviet Union and the GDR, but also at the other members of the Warsaw Pact, or even the Chinese Popular Republic, Outer Mongolia, North Korea and North Vietnam.

In view of the divergent opinions held by the experts, it is difficult for me to take a stand on this matter. I wish, however, to draw the Council's attention to the fact that reprisals are normally bilateral in character and that it is therefore with caution that measures which are themselves unlawful should be envisaged against the ships of Soviet bloc countries other than the Soviet Union and the "German Democratic Republic".

27. It should also be noted that reprisals must not be out of proportion to the unlawful action which has motivated them. It is difficult to judge whether, in this respect, the MARCON and BERCON DELTA plans are in order. They appear to be mere adjuncts of the BERCON ALPHA, BRAVO and CHARLIE plans. It is the nature of the action taken in Berlin by the Soviet Union or the "German Democratic Republic" and the objectives of the BERCON plans applied which would be the deciding factor, from this point of view in assessing the regularity of the maritime plans.

28. In conclusion, it would seem that the reprisals theory might, in the event of the commission of unlawful actions in Berlin by the Soviet Union or the "German Democratic Republic",

justify the application of the measures set out in paragraph 24 above to ships flying the Soviet and "German Democratic Republic" flags. Serious doubt, however, subsists as to whether such measures could lawfully be applied to other Soviet bloc ships. In any event, these measures, if accompanied by implementation of the BERCON plans, would have to form an aggregate in keeping with the faults committed or the damage inflicted in Berlin.

SECTION III

THE MARCON AND BERCON DELTA PLANS AND THE RIGHT OF SELF-DEFENCE

29. If the Soviet Union and its Allies delivered an armed attack on Berlin or the approaches to Berlin, the NATO member countries might justify their own action by invoking the right of individual and collective self-defence recognised by Article 51 of the United Nations Charter. This right could, it would seem, be invoked not only by the NATO member countries belonging to the United Nations, but also by the German Federal Republic (see Oppenheim, Volume II - 155 - Note 2). This would authorise counter-action which, in such circumstances, might take the form of armed reprisal.

30. The point at issue, however, is whether the same reasoning might be applied to an imminent threat of Soviet armed attack. Some writers, on the authority of Article 51 of the Charter, seem to rule out the plea of self-defence in such an eventuality (Oppenheim, Volume II - 155). Others, on the authority of Article 2 paragraph 4, seem to accept it (Aronéanu "The Definition of Aggression", page 94). The report of the Sub-Group already mentioned, supported the latter view (CM(61)99 - paragraph 4). It is indeed, acceptable on the understanding that in every case an assessment must be made of the imminence and effectiveness of the threat invoked.

31. Although the right of self-defence, in the circumstances referred to in the two preceding paragraphs, may afford legal justification for implementing the MARCON and BERCON DELTA plans, certain rules must nevertheless be followed :

(a) the measures taken by the NATO member countries should be "immediately reported to the Security Council" (Article 51 of the Charter and Resolution of the General Assembly of 17th November, 1950) ;

(b) the armed reprisals ordered should remain within the limits set in Article 51 of the Charter. In particular they should normally only be applied to the "aggressor" States, i.e. the Soviet Union and the "German Democratic Republic". It would be desirable only to extend them to ships of other Soviet bloc countries with caution.

(c) the MARCON plans should be put into effect in such a way as to respect the rights of countries not belonging either to NATO or to the Soviet bloc. Until there was a declaration of war, the peacetime rules of international maritime law would, in

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particular, remain applicable to the ships of these countries (see Higgins, paragraph 395, on the subject of pacific blockade) ;

(d) the rules of the laws of war should be observed in the conduct of the operations carried out against the Soviet bloc countries.

CONCLUSION

32. In conclusion, it is apparent :

(a) that, in the event of Soviet action which though annoying is in no respect contrary to international law, only the retaliatory measures listed in paragraph 20 above could lawfully be applied ;

(b) that, in the event of unlawful action of a character other than that of armed attack or of an imminent threat of armed attack, only the retaliatory measures referred to in paragraph 20 and the measures of reprisal listed in paragraph 24 could lawfully be applied within the limits set in paragraph 28 ;

(c) that, in the event of armed attack or the imminent threat of armed attack, the MARCON and BERCON DELTA plans could be applied under the conditions set out in paragraph 31.

G. GUILLAUME